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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 31853-2

**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

v.

PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,

Appellant,

# RESPONSE BRIEF OF STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES

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## I. INTRODUCTION

This interlocutory appeal arises under the Forest Protection Act (the Act), RCW 76.04, enacted to protect public and private forest lands in the state from the ravages caused by forest fires. The Public Utility District No.1 of Klickitat County (KPUD) argues the Legislature intended to exclude it from one of the Act's key provisions – the fire cost recovery statute at RCW 76.04.495 which requires reimbursement to the State for the costs of suppressing fires negligently started by "any person, firm, or corporation." The 90-year-old fire cost recovery statute was correctly interpreted by the trial court, consistent with the Department of Natural Resources' historical application, as applying to municipal corporations. The statute is not ambiguous.

A plain meaning analysis of the Forest Protection Act, including its fire cost recovery provisions, leads to the inevitable conclusion that the entire Act applies to municipal corporations as well as other public entities. Any other interpretation would thwart the purposes of the Act to prevent forest fires and hold accountable, without exception, those who fail to do so through their negligence. If the Court finds the statute is subject to more than one reasonable interpretation, the Court should find the statute applies to municipal corporations, consistent with the State's

implementing rules, to effectuate the legislative intent, and to avoid a strained reading or absurd results.

KPUD argues it has no obligation to reimburse the people of the State for the costs of fire suppression incurred when the KPUD negligently starts uncontrolled forest fires because the Legislature intended to exempt municipal corporations from liability under the cost recovery statute. To reach this dubious conclusion, KPUD ignores the plain meaning of the statute and otherwise misapplies the rules of statutory construction. KPUD mischaracterizes the statute as a lien statute that should be strictly construed against the Department of Natural Resources (DNR) rather than a statute to recover costs for negligently caused fires that permits a lien on property as a discretionary enforcement option. KPUD's arguments are without merit given the purpose of the Act and the cost recovery statute – to deter the negligent start of forest fires and hold responsible those who start such fires. It is axiomatic that both municipal and private corporations can negligently start fires. The Legislature never intended to exempt municipal corporations from liability for their negligently caused fires.

The trial court correctly denied the KPUD motion to dismiss under CR 12(b)(6) by finding municipal corporations are "persons" under the fire cost recovery statute and therefore responsible for the suppression

costs of forest fires they negligently start. DNR respectfully requests that this Court affirm the trial court's 12(b)(6) ruling and find that the fire cost recovery statute applies to KPUD as a municipal corporation.

## II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The Forest Protection Act was enacted to prevent forest fires from destroying privately and publicly owned forest lands within the state. Integral to the Act is RCW 76.04.495, a fire cost recovery statute requiring those who negligently start such fires to reimburse the State for fire suppression costs. Does the plain meaning of the fire cost recovery statute, when read in conjunction with the Forest Protection Act as a whole, reveal an unambiguous legislative intent to apply the fire cost recovery statute to municipal corporations?

a. The fire cost recovery statute authorizes the State to collect its reasonable firefighting expenses and investigative costs from "any person, firm or corporation" whose negligence is responsible for the starting or existence of a fire which spreads on forest land. Does the term "any person" include municipal corporations such as the KPUD for purposes of fire cost recovery actions under the statute when the statutory definition of "person" under RCW 1.16.080(1) includes municipal corporations and the Legislature did not otherwise define "person" in the Act?

b. The fire cost recovery statute allows DNR to claim a lien on the property of a liable party as an enforcement option. Is this discretionary enforcement option, never used by DNR against public entities, consistent with the plain meaning of the statute to subject municipal corporations and other public entities that negligently start forest fires to liability for the resulting fire suppression costs?

2. The term "person" is used throughout the entire Forest Protection Act. Did the Legislature intend the word "person" to mean municipal corporations and other public entities everywhere it is used in the Act, including the fire cost recovery statute, thus making these public entities responsible for all requirements of the Act including reimbursing the public when they negligently start forest fires?

3. If the Court finds there is more than one reasonable interpretation of the fire cost recovery statute, is finding the statute applies to municipal corporations, consistent with DNR's historical application of the statute, the interpretation which better advances the overall legislative purpose and avoids unlikely, absurd, or strained consequences?

## III. STANDARD OF REVIEW

A trial court's decision on a CR 12(b)(6) motion to dismiss is a question of law which is reviewed de novo. *Rimov v. Schultz*, 162 Wn. App. 274, 278, 253 P.3d 462 (2011) (citing *San Juan County v.*

*No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). The meaning of a statute is a question of law a court reviews de novo. *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).

## IV. COUNTERSTATEMENT OF CASE

### A. DNR Fire Cost Recovery Complaint Against KPUD.

DNR alleged the following in its fire cost recovery complaint against the KPUD. CP 80-86. KPUD is a municipal corporation under the laws of the State of Washington. CP 81. KPUD owned, operated, and maintained the overhead electrical distribution lines which are the subject of the litigation. CP 81. KPUD had a duty to operate and maintain its overhead electrical lines in a safe and responsible manner. CP 82. Among KPUD's duties is its duty to properly manage vegetation growth and to timely identify and remove hazard trees that threaten its electrical lines. CP 82. On August 26, 2010, a large wildfire originated near power lines owned by KPUD near Lyle, Washington. CP 83. The fire burned approximately 2,100 acres of grass and forest land and damaged or destroyed several structures. CP 83. The fire was caused by a hazardous double-topped ponderosa pine tree that failed, causing one of the tree's stems to collapse onto KPUD's electrical lines. CP 83-84. KPUD negligently failed to identify and remove the defective hazard tree before the fire despite

the fact that it knew, or through the exercise of reasonable diligence, should have known, of the tree's existence and the hazard it posed to KPUD's power lines.[1] CP 84-86. DNR responded to the fire pursuant to RCW 76.04 and ultimately suppressed it. CP 85. As a consequence, the State incurred expenses for fire suppression and investigation in excess of $1.6 million. CP 85. The action was initiated under RCW 76.04.495 (also referred to as "fire cost recovery statute," "cost recovery statute," or "statute") when KPUD refused to pay any portion of the costs claimed.[2] CP 85.

**B. Superior Court Proceedings.**

KPUD brought a CR 12(b)(6) motion to dismiss the DNR statutory fire cost recovery claim in April 2013. CP 21-23; 24-45. The trial court denied the motion but certified the question whether DNR had statutory authority to proceed with a fire suppression cost recovery claim against KPUD under RCW 76.04.495. CP 72-73.

**C. Discretionary Review Granted.**

This Court granted review on September 26, 2013.

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[1] DNR objects to KPUD's characterization of the cause of the fire, without citation to the record, in its Statement of the Case and Description of the Fire in an apparent attempt to mitigate fault. Appellant's Br. at 5-6. DNR moves to strike these portions of KPUD's brief on the bases of relevance and lack of support in the record.

[2] *See* Appendix 1 for RCW 76.04.495 and RCW 1.16.080 in their entirety.

## V. ARGUMENT

### A. The Plain Meaning of the Fire Cost Recovery Statute Is That the Legislature Intended the Cost Recovery Provisions to Apply to the KPUD, as a Municipal Corporation, for Negligently Caused Fires.

When the fire cost recovery statute is read in conjunction with the rest of the Forest Protection Act, there can be no doubt the Legislature intended that the entire Act, including the fire cost recovery statute, applies to municipal corporations. The primary purpose of the Forest Protection Act is to protect, through prevention and suppression, private and public forest lands from damages caused by uncontrolled forest fires. *See* RCW 76.04, in general, and RCW 76.04.015-.035, .075-.167, in particular. Forest wild fires threaten public health and safety and can cause catastrophic damage to public and private resources. RCW 76.04.167(1)(a). Forest landowners and the public have an interest in protecting forests and forest resources by preventing and suppressing forest wild fires. RCW 76.04.167(1)(b).

Simply put, the underlying purposes of the Forest Protection Act are achievable only if the Act applies to municipal corporations, and by inference, all state agencies and political subdivisions. Although KPUD attempts to limit its argument to the inapplicability of the fire cost recovery statute to municipal corporations, those same arguments would also apply to state agencies and other political subdivisions. If the term

"any person" in the cost recovery statute does not include municipal corporations, state agencies and other political subdivisions would also be excluded from the term. Public corporations, like private corporations, have the capacity to prevent or negligently start forest fires.[3] If prevention fails, the fire cost recovery statute is intended to hold all public and private corporations accountable for the costs to suppress fires resulting from their negligence.

### 1. The Plain Meaning of the Fire Cost Recovery Statute Is Analyzed in the Context of the Fire Protection Act as a Whole and Other Related Statutes.

The court's objective when interpreting a statute is to ascertain and carry out the Legislature's intent. *Jongeward*, 174 Wn.2d at 592 (citing *Dep't of Ecology,* 146 Wn.2d at 9). If a statute's meaning is plain on its face, courts must give effect to that plain meaning. *Jongeward*, 174 Wn.2d at 592. The plain meaning is discerned from all that the Legislature has said in the statute. *Id.* Plain meaning may also be

[3] Unless otherwise indicated, public corporations and municipal corporations are used interchangeably in this response brief. DNR requests the Court take judicial notice of the forest fires caused by utilities. The instant case is but one example of the forest land damages caused by utilities because of their failure to properly remove hazard trees in close proximity to their power lines. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (Background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the Legislature also was familiar with them when it passed the statute.).

discerned from related statutes which disclose legislative intent about the provision in question. *Id.* An examination of related statutes aids the plain meaning analysis because legislatures enact legislation in light of existing statutes. *Id.*

Statutory provisions must be read in their entirety and construed together, not by piecemeal. *Dep't of Ecology*, 146 Wn.2d at 11. Under the plain meaning rule, a court should:

> construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute.

*Id.* So defined, the plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context. *Id.*

**2. The Legislature Intended to Make Municipal Corporations Liable to the State for Fire Suppression Expenses Resulting From Fires Negligently Caused by Such Corporations.**

As the trial court correctly concluded in denying KPUD's CR 12(b)(6) motion to dismiss, municipal corporations such as KPUD are subject to the fire cost recovery statute based upon the plain meaning of RCW 76.04.495(1) and RCW 1.16.080(1), the pertinent parts of which are cited below.

> RCW 76.04.495(1)
> Any person, firm, or corporation: (a) Whose negligence is responsible for the starting or existence of a fire which spreads on forest land . . . shall be liable for any reasonable expenses made necessary by (a) . . . of this subsection.
>
> RCW 1.16.080(1)
> The term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual.

The fire cost recovery statute has existed in substantially the same form since 1923 without a successful challenge in 90 years.[4] In the absence of a definition for "person" within the Forest Protection Act and the use of the all-inclusive term "any" preceding "person," it is appropriate to apply the RCW 1.16.080 definition of "person" as a related statute to give meaning and effect to "person" wherever that term appears in the Act. There is nothing in the Act, including the fire cost recovery statute, to indicate the Legislature intended to limit its application to only private or natural persons and private corporations.

"Person" is defined in statute as a term that may be construed to include the state or any public or private corporation, as well as an individual." RCW 1.16.080(1). This definition of "person" should be construed to include any public corporation when the nature and the

[4] Laws of 1923, ch. 184, § 11; Rem. Rev. Stat. § 5806-1 was later codified as RCW 76.04.390 and currently exists as RCW 76.04.495.

purpose of the statute indicate the Legislature's intent to do so. *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 474, 238 P.3d 1107 (2010). Here, there is clear legislative intent to make municipal corporations subject to the Forest Protection Act in general, and the fire cost recovery statute in particular. If the Legislature had intended to exempt municipal corporations or any other governmental entities from the Forest Protection Act, it could easily have done so in the Act itself. *Segaline*, 169 Wn.2d at 483. The Legislature did not make such an exception for any public entity.

The Legislature is presumed to know the general definition of "person" under RCW 1.16.080. *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 371, 85 P.3d 926 (2004) ("city" is a "person" under RCW 4.24.510, a statute that gives immunity from civil liability to persons who provide information to a governmental entity). If the Legislature intended to employ a limited definition of "person," the normal and expected practice would be for it to expressly do so. *Id.* As in *Gontmakher,* there is no evidence that the Legislature intended to exclude municipal corporations and other public entities from liability under the fire cost recovery statute.

In denying KPUD's motion to dismiss, the trial court noted:

> Contrary to PUD's assertion, in my opinion, there's no authority to support the contention that the legislature intended to carve out special political subdivisions from negligence claims for fire suppression. . . . The plain meaning of the statutes [RCW 76.04.495 and RCW 1.16.080], then, read together, in my view, compel this result.

VRP at 7, lines 8-12, 17-18.

The Court could also find the Legislature intended for the term "any corporation" to include both public and private corporations, absent any legislative expression to limit the term to private corporations. When the Legislature wanted to limit corporations to "private corporations" in the context of the Forest Protection Act, it knew how to do so. *See* RCW 76.04.105-.125. "The department may enter into contracts and undertakings with *private corporations* for the protection and development of the forest lands within the state, subject to the provisions of this chapter." (Emphasis added.) RCW 76.04.105. Municipal corporations arguably fall under the broad term any "person" as well as the unqualified term any "corporation." The superior court thus properly denied KPUD's 12(b)(6) motion.

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### 3. The Fire Cost Recovery Statute Does Not Require, But Allows, DNR to Have a Lien Against Private Property as an Enforcement Option.

KPUD's arguments regarding the interpretation of the fire cost recovery statute are based on the notion that the statute should be strictly construed because it is a lien statute. This result-oriented analysis is based on a false premise. The statute is not a lien statute; it is a cost recovery statute. The statute authorizes liens as one remedy to be used only in the appropriate situation. DNR does not argue that liens are an appropriate remedy against public corporations.

Because public property is not subject to a lien and the lien portion of the fire cost recovery statute is "the enforcement mechanism" for the cost recovery, KPUD argues it cannot, as a public entity, ever be a liable party under the statute. Appellant's Br. at 1, 14-15. This argument is tenuous at best, arbitrarily limiting fire suppression recovery by a factor entirely unrelated to a party's liability, i.e., the fact that the liable party owns public property. KPUD's reasoning is flawed. RCW 76.04.495(2) of the fire cost recovery statute allows, but does not compel, DNR to file a lien for its fire suppression and investigative expenses against property of the person, firm, or corporation liable under the statute:

> The department or agency incurring such expense shall have a lien for the same against any property of the person, firm, or corporation liable under subsection (1) of this

> section by filing a claim of lien naming the person, firm, or corporation, describing the property against which the lien is claimed . . . . No claim of lien is valid unless filed, with the county auditor of the county in which the property sought to be charged is located, within a period of ninety days after the expenses of the claimant are incurred. . . .

RCW 76.04.495(2).

RCW 76.04.495(1) and (2) must be read in their entirety and in harmony. RCW 76.04.495(1) identifies who is potentially liable for a fire cost recovery action, and (2) provides DNR with discretionary authority to file a lien to facilitate DNR's ability to collect such costs from the liable party. Here, the term "shall" in the lien portion of the fire cost recovery statute does not require DNR to claim a lien on property in order to recover its fire cost suppression expenses as KPUD argues. *See, e.g., State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) ("In determining the meaning of the word "shall" we traditionally have considered the legislative intent as evidenced by all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another").

The lien portion of the cost recovery statute is not "a mandatory enforcement mechanism" that DNR must use, as KPUD contends, but is simply an option for DNR to use at its discretion. The language of the

statute "shall have a lien for the same against any property of the person, firm, or corporation liable under subsection (1) of this section" is followed by the condition that "[n]o claim of lien is valid unless filed, with the county auditor of the county in which the property sought to be charged is located . . . ." If the State was required to file a lien as its sole enforcement mechanism for fire cost recovery under the statute, DNR would be required to complete its investigation, identify the liable party or parties, and know the amount of costs incurred within 90 days of incurring such costs – impractical requirements for large fires. The State would also have to force a sale of the liable party's property, probably at a significant discount, in order to recover its costs in whole or in part. DNR prefers to pursue direct payment from the liable party and its insurer when there is one. When construed together, the two subsections of the statute provide DNR with an option to claim a lien on private property of parties liable under the statute.

The fire cost recovery statute is not the only provision of the Forest Protection Act that allows DNR to claim a lien on the land of a "person." Under RCW 76.04.660(5), a person responsible for the existence of an extreme fire hazard is required to abate, isolate, or reduce the hazard. If the person fails to do so, DNR may abate, isolate, or reduce the hazard, recover twice the actual cost thereof from the responsible person and "[a]ll such

costs shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien." RCW 76.04.660(6), (7). Following KPUD's logic, KPUD could never be responsible for the existence of an extreme fire hazard, nor could it be required to abate the hazard. According to the KPUD, the term "person" must exclude municipal corporations because the statute requires a lien upon the land of a "person" who fails to meet the regulatory requirements and DNR cannot claim a lien on public land.

KPUD's statutory analysis is inapposite to the purposes of the Forest Protection Act and its cost recovery provisions. For example, KPUD argues that the Legislature's specific exclusion of public entities from the lien mechanism in RCW 76.04.610 indicates intent to exclude public entities from accountability under the fire cost recovery statute. Appellant's Br. at 17. The referenced statute requires any non-federal forest landowner, private or public, that neglects or fails to provide adequate fire protection as required by statute, to pay a forest fire protection assessment. RCW 76.04.610(1). The statute goes on to read that unpaid assessments by non-federal public bodies are not a lien against the non-federal publicly owned land. RCW 76.04.610(7). The referenced statute makes public bodies responsible for costs of fire suppression incurred by the State if the public body fails to pay the forest protection assessment and fails to suppress

a fire on or originating from forest lands owned or administered by the public body. RCW 76.04.610(8). Contrary to the KPUD argument, this statute expresses a legislative intent to hold public bodies accountable to the State for fire suppression costs incurred by the State, regardless of fault, if the public body fails to pay the assessment and fails to suppress a fire on or originating from forest lands owned or administered by the public body. The statute reinforces, and is consistent with, the legislative intent to make the fire cost recovery statute applicable to public bodies, including municipal corporations.

Another result contrary to the Act's purposes is apparent when KPUD's logic is applied to RCW 76.04.750, which requires any "person" engaged in any activity on land where a fire threatens forest land through uncontrolled burning to take action to prevent the spread of the fire regardless of where the fire originates. The statute provides that if the person fails to make a reasonable effort to suppress the fire, DNR is required to suppress the fire and the "cost of the work shall also constitute a lien upon the real property or chattels under the person's ownership." Again, following KPUD's logic, a municipal corporation would have no obligation to prevent the spread of such an uncontrolled fire because DNR could not claim a lien on the real property or chattels of a municipal corporation. In reviewing the various lien provisions of the Forest Protection Act, it is

readily apparent the Legislature never intended to allow municipal corporations and other public entities to escape the requirements of the Act by authorizing liens against [private] property that is subject to a lien.

### B. The Legislature Intended the Forest Protection Act as a Whole, Including the Fire Cost Recovery Statute, to Apply to Municipal Corporations.

The Forest Protection Act applies to all public or private forest land in the state.[5] RCW 76.04.005(9), (10). DNR is required to "[i]nvestigate the origin and cause of *all forest fires* to determine whether either a criminal act or negligence by *any person, firm, or corporation* caused the starting, spreading, or existence of the fire." (Emphasis added.) RCW 76.04.015(3)(c)(i). The requirement for DNR to investigate "all forest fires" necessarily includes those negligently started by municipal corporations. Otherwise, these public entities would escape accountability. The Legislature did not limit or qualify the nature or type of corporation DNR is required to investigate for negligently caused fires. To the contrary, the Legislature used the all-inclusive word "any" preceding "person, firm, or corporation."

The term "person" or "person, firm, or corporation" is used throughout RCW 76.04 without further qualification or definition, yet

[5] Limited exceptions include forest lands owned by the Federal Government and Tribes in Washington.

KPUD argues the term "person" does not encompass municipal corporations.[6] *See, e.g.*, RCW 76.04.075 ("[a]ny person who violates any of the orders or rules adopted under this chapter for the protection of forests from fires . . . ."); RCW 76.04.205(1) ("a person shall have a valid written burning permit obtained from the department to burn"); RCW 76.04.415(1) (persons must cease operations when notified by the department that such person has or is violating any of the provisions of RCW 76.04.215, 76.04.305, 76.04.405, or 76.04.650); and RCW 76.04.750 ("Any person engaged in any activity on such [forest] lands, having knowledge of the fire . . . shall make every reasonable effort to suppress the fire."). The definition of "forest landowner" includes "any person" in possession of any public or private forest land. RCW 76.04.005(10). Person, as used in the definition of "forest landowner," would necessarily have to include municipal corporations that own or possess forest lands in the state.

Under the plain meaning rule, the meaning of words in a statute is not gleaned from those words alone but from "all the terms and provisions

[6] With the single exception of RCW 76.04.475, distinguished below, "person" is used one or more times in 26 of the 50 sections of the Forest Protection Act without qualification or definition. *See* RCW 76.04.005-.016, .055-.075, .125, .205, .235, .325-.415, .435-.455, .475-.495, .630-.660, .700-.730 and .750. "Person" is used in conjunction with "firm" and "corporation" in three of the 26 sections, i.e., RCW 76.04.015, .475, and .495.

of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (without citations). Here, where the primary purpose of the Act is to prevent forest fires on both private and public forest lands, it is inconceivable the Legislature did not intend to include municipal corporations within its regulatory and cost recovery requirements.

Limiting the construction of the term "person" in the Forest Protection Act to private entities and individuals would undermine the Act's purpose. Such an interpretation would mean that state agencies and political subdivisions such as cities, towns, counties, water-sewer districts, school districts, port districts, and public utility districts would not be required to obtain burn permits; abate, isolate, or reduce fire hazards they created; reimburse the State for fire suppression costs arising from their negligence; or comply with other obligations under the Act. This construction would lead to an absurd result, given one of the primary purposes of the Act is to prevent and limit forest fires on both public and private forest lands. State agencies and municipal corporations can start fires as readily as any other "person" if they are negligent.

Analogous to determining the meaning of "person" in the context of the Forest Protection Act is how our state Supreme Court dealt with confusion around the term "municipal corporation" in *Roza Irrig. Dist. v. State,* 80 Wn.2d 633, 497 P.2d 166 (1972). In acknowledging the designation of municipal corporation is susceptible of more than one meaning, the court went on to state: "The proposition that the legislature may use the term in some contexts with the intent that it should be broader in its scope than when used in other contexts has been clearly recognized by this court." *Roza Irrig. Dist.,* 80 Wn.2d at 635. The court then unanimously ruled that while the term "municipal corporation" may be used in the constitution or a statute "in either a broad or a limited sense, . . . in each case the meaning of the term must be ascertained by an examination of the statute to determine the legislative intent." *Roza Irrig. Dist.,* 80 Wn.2d at 635. In other words, an undefined term, such as person, should make sense when it is applied. Here, it makes sense to define "person," consistent with RCW 1.16.080(1), to include municipal corporations for purposes of the Forest Protection Act. It makes no sense to exclude municipal corporations from the Act and its cost recovery provisions.

### 1. The Forest Protection Act Obligates DNR to Hold All Utilities Accountable.

In the section of the Forest Protection Act that addresses DNR's duty to investigate every person, firm, or corporation for negligently caused fires, the Legislature directed DNR to work cooperatively with utilities to identify and preserve evidence. RCW 76.04.015(3)(c). The Legislature also addressed the authority of DNR to take evidence from electric utilities. *Id.* The Act makes no distinction between privately owned utilities, such as Avista, and publicly held utilities, such as the KPUD, because all utilities are capable of negligently starting fires, and the Legislature intended the Act to apply to all utilities. Consistent with its statutory mandate, DNR investigated the origin and cause of the uncontrolled forest fire caused by the KPUD and brought this action against the KPUD to hold it accountable for its negligence under the fire cost recovery statute.

### 2. KPUD Fails to Conduct a Plain Meaning Analysis of the Fire Cost Recovery Statute and Erroneously Relies on Canons of Construction to Support Its Argument.

Although KPUD cites to *Jongeward* multiple times in its brief, KPUD fails to follow the plain meaning analysis set forth by our state Supreme Court in that case. Appellant's Br. at 10-11. In *Jongeward*, the Court held that it is *not appropriate* to resort to interpretive aids, including

canons of construction and case law, *unless the statute remains ambiguous after a plain meaning analysis* (emphasis added). *Jongeward,* 174 Wn.2d at 600 (citing *Campbell & Gwinn,* 146 Wn.2d at 12). Yet that is exactly what KPUD did. KPUD's argument bypasses the plain meaning analysis, does not address why the cost recovery statute is ambiguous, and begins by citing to canons of statutory construction. Appellant's Br. at 9. KPUD then conflates the plain meaning analysis of a statute with the use and application of interpretive aids that are reserved only for the interpretation of an ambiguous statute. Appellant's Br. at 11. A statute is ambiguous only if it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. *Burton v. Lehman,* 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). Rules of statutory construction should not be used if the language is deemed plain on its face. *See also, e.g., Cerrillo v. Esparza,* 158 Wn.2d 194, 204, 142 P.3d 155 (2006) (It was *error* for the Court of Appeals to rely entirely on tools of statutory construction as a basis for finding a statute is ambiguous.) (Emphasis added.) Statutory provisions must be read in their entirety and construed together.

Contrary to the principles of statutory construction prescribed by Washington courts, KPUD fails to analyze the plain meaning of the fire cost recovery statute by not reading it within the context of the Forest

Protection Act as a whole while taking into account the nature of the Act, the general object to be accomplished by the Act, and the consequences that would result from construing the statute in one way or another. Instead, KPUD analyzes the Act on a piecemeal basis to support its argument without regard to legislative intent. KPUD argues that the "any person, firm, or corporation" language of the fire cost recovery statute has remained unchanged since its enactment in 1923 and that this somehow means the Legislature never intended to hold public corporations liable under the fire cost recovery statute. Appellant's Br. at 17-19. KPUD jumps to an illogical conclusion. The plain meaning of the words has consistently included municipal corporations for 90 years. There was no need for the Legislature to modify the language.

KPUD's arguments have a narrow, result-oriented focus, failing to explain why the Legislature would exempt municipal corporations from only the fire cost recovery provision of the Act. KPUD limits its argument to the meaning of "person" solely within the fire cost recovery statute because it has no plausible explanation as to why "person" would exclude municipal corporations for purposes of fire cost recovery but include municipal corporations for purposes of the rest of the Act. According to the KPUD argument, KPUD employees who negligently cause fires while acting within the scope of their employment are not "persons" for

purposes of the fire cost recovery statute because the KPUD would be liable for their actions. This absurd result is contrary to the prevention, deterrence, and accountability objectives of the Act and the cost recovery statute.

### C. If the Court Finds the Fire Cost Recovery Statute Is Ambiguous, Determining the Statute Applies to Municipal Corporations, Consistent With DNR's Historical Interpretation, Is the Interpretation Which Better Advances the Overall Legislative Purpose and Avoids Unlikely, Absurd, or Strained Consequences.

Where there are two reasonable interpretations of statutory language, the interpretation which better advances the overall legislative purpose should be adopted. *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976). The court must also avoid constructions that yield unlikely, absurd, or strained consequences. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Courts are bound to avoid interpretations of statutes that could lead to absurd results when courts can do so without doing violence to the words of the statute. *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010). In construing statutes in one context, the state Supreme Court has stated that the spirit and intent of the statute should prevail over the literal letter of the law and the court should select the interpretation which best advances the perceived legislative purpose. *Dumas v. Gagner,* 137 Wn.2d 268, 286, 971 P.2d 17

(1999). An interpretation of the fire cost recovery statute that would exempt municipal corporations from its reach would hinder, not further, the legislative purpose to hold those who negligently start fires accountable for the costs to suppress such fires.

KPUD relies on the federal case of *United States v. Burlington Northern, Inc.*, 500 F.2d 637 (9th Cir. 1974), to argue the fire cost recovery statute should be strictly construed. The *Burlington Northern* case is distinguishable factually and legally. In *Burlington Northern*, the Ninth Circuit Court of Appeals held that the United States could not use RCW 76.04.370 as the basis for its fire suppression claim because the statute expressly limits a cause of action to the State of Washington.[7] *Burlington Northern*, 500 F.2d at 638-39. In other words, the United States could not rely on a statute giving authority to the state agency

[7] RCW 76.04.370 allowed the State to recover its fire suppression costs resulting from landowners who fail to abate fire hazards and is significantly different from the fire cost recovery statute at issue. It reads, in relevant part, as follows:

> Abatement of fire hazards—Recovery of cost. Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from firefighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

responsible for fire suppression to pursue claims of the United States. Because the statute was clear on its face that it applied to the State only, there was no need for the court to go beyond a plain meaning analysis to determine who may bring an action under the statute.

KPUD wrongly encourages this Court to narrowly construe the cost recovery statute when it should be broadly construed. The statute clearly provides a remedy to the State that broadly covers anyone who starts a fire, i.e., when "any person, firm, or corporation" negligently starts an uncontrolled forest fire. Appellant's Br. at 1, 9-10. Remedial statutes should be liberally construed. *Gesa Fed. Credit Union v. Mutual Life Ins. Co. of N.Y.*, 105 Wn.2d 248, 255, 713 P.2d 728 (1986). A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. *Tellier v. Edwards*, 56 Wn.2d 652, 653, 354 P.2d 925 (1960). The KPUD does not have a substantive or vested right to negligently start uncontrolled forest fires without accountability. *See also Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991) (The spirit and intent of the statute should prevail over the literal letter of the law.).

If the Court chooses not to construe the cost recovery statute liberally, DNR urges the Court to follow the modern trend to give the statute a fair reading, one that is neither strict nor liberal, to effectuate the

Legislature's intent. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). Neither a liberal construction nor a strict construction may be employed to defeat the intent of the Legislature, as discerned through traditional processes of statutory interpretation. *Estate of Bunch*, 174 Wn.2d at 432-33. Strict construction is simply a requirement that, where two interpretations are equally consistent with legislative intent, the court opts for the narrower interpretation of the statute. *Id.* Here, there is only one interpretation of the cost recovery statute consistent with the legislative intent to protect forest lands from negligently caused fires. That interpretation is to construe the State's fire cost recovery authority broadly to enable the State to recover from any individual or entity who negligently caused a fire.

### 1. The Court Should Give Deference to DNR's Fire Protection Act Implementing Rule That Defines "Person" to Include Municipal Corporations.

The Department of Natural Resources is authorized to issue orders and adopt rules under the Forest Protection Act to protect forests from fires. *See* RCW 76.04.075. DNR adopted forest protection rules in WAC 332-24. They are organized by subject matter to parallel the Forest Protection Act. The rules broadly define "person" to include "any individual, partnership, private, ***public, or municipal corporation***, county, the department or other state or local governmental entity, or association

of individuals of whatever nature." (Emphasis added.)[8] DNR's rules must be treated as valid unless invalidated through a formal rule challenge in court under the Administrative Procedure Act. RCW 34.05.570(2) (superior court rule review). The DNR rule defining a person to include a municipal corporation for purposes of implementing the Forest Protection Act has not been successfully challenged in the courts or repudiated by the Legislature since its adoption in 1987.[9]

WAC 332-24-005(23) is a legislative rule entitled to deference by a court. *Ass'n of Wash. Bus. v. Dep't. of Revenue*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005). The Forest Protection Act rules clearly apply to municipal corporations. Although an agency does not have the power to promulgate rules which amend or change legislative enactments, the agency may adopt rules which fill in the gaps if those rules are necessary for implementing a general statutory scheme. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). Here,

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[8] WAC 332-24-005
Definitions.
Items defined herein have reference to chapter 76.04 RCW and all other provisions of law relating to forest protection and have the meanings indicated unless the context clearly requires otherwise.
...
(23) "Person" shall mean any individual, partnership, private, public, or municipal corporation, county, the department or other state or local governmental entity, or association of individuals of whatever nature.

[9] Wash. St. Reg. 87-11-005.

DNR concluded that a plain reading of the fire cost recovery statute, in conjunction with the Forest Protection Act as a whole, includes the KPUD as a "person." If the Court finds there is ambiguity or a gap in the statute, the DNR rule definition of "person" clarifies and fills in the gap so there can be no mistake as to the applicability of the cost recovery statute to the KPUD. As the agency tasked with implementing the Forest Protection Act, the Court should give deference to DNR's definition of "person," a definition that is consistent with the RCW 1.16.080(1) definition of "person." *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989) (An agency's definition of a statutory term should be given great weight where that agency has the duty to administer the statutory provisions). Here, the purpose of DNR's broad definition of "person" is simple. Forests cannot be fully protected from fire if public entities are exempt from the Forest Protection Act.

**2. There Is a Compelling Policy Reason to Include Municipal Corporations Within the Scope of the Fire Cost Recovery Statute - Prevention and Accountability.**

Municipal corporations, such as KPUD, are in the best position to prevent fires that might be caused through the negligence of their employees and practices. If municipal corporations fail to do so, they should be held to the same standard of accountability as private actors. The KPUD provides no policy argument to the contrary. The KPUD

provides no policy argument to support its position, much less a compelling one.

### D. The Remaining KPUD Arguments to Exclude Municipal Corporations From Accountability for Negligently Caused Fires Under the Fire Cost Recovery Statute Are Without Merit.

KPUD resorts to a number of strained arguments to support its untenable position that the Legislature did not intend to hold public corporations accountable under the fire cost recovery statute even when those public corporations negligently start fires. Such arguments are irrelevant, misapplied, or distinguishable based upon the facts or the law as discussed below.

#### 1. The Legislature's Pending Consideration of a Proposed Bill Is Not Relevant Here.

Without citation to legal authority, KPUD argues that a proposed bill pending the next legislative session to amend the Forest Protection Act by addressing fire damages on forest lands be used by this Court to determine the meaning of the Forest Protection Act and its cost recovery statute.[10] Appellant's Br. at 21. There is no legal or rational basis to suggest a pending bill has any use in a plain meaning or other statutory construction analysis.

[10] At the time of the KPUD briefing, the Legislature was not yet in session.

### 2. The Use of Differing Terms in One Other Section of the Forest Protection Act Enacted 63 Years Later Does Not Indicate a Legislative Intent to Exclude Municipal Corporations From the Fire Cost Recovery Statute.

KPUD erroneously relies upon canons of statutory construction to argue where the Legislature intended a statute to apply to both public and private corporations it used the phrase, "any person, firm, or corporation, public or private." Appellant's Br. at 16. The statute that addresses reimbursement for costs of suppression action, RCW 76.04.475, is the only place in the Forest Protection Act where that language is used. It reads in pertinent part:

> Any person, firm, or corporation, public or private, obligated to take suppression action on any forest fire is entitled to reimbursement for reasonable costs incurred, subject to the following:
>
> (1) No reimbursement is allowed under this section to a person, firm, or corporation whose negligence is responsible for the starting or existence of any fire for which costs may be recoverable pursuant to law. Reimbursement for fires resulting from slash burns are subject to RCW 76.04.486.
>
> (2) If the fire is started in the course of or as a result of land clearing operations, right-of-way clearing, or a landowner operation, the person, firm, or corporation conducting the operation shall supply:
>
> . . . .

The above-cited section of the Forest Protection Act is consistent with the plain meaning of the fire cost recovery statute to include

municipal corporations within its scope. Here, there is a simple acknowledgment that a person, firm, or corporation could be "public or private" for purposes of reimbursement under the statute. Presumably, the public or private distinction was made to ensure there was no question that public entities were entitled to be reimbursed when they were obligated to take suppression action on any forest fire as prescribed in the statute. For example, fire protection districts are municipal corporations. *See* RCW 52.12.011. The remainder of the statute uses the phrase "person, firm, or corporation" six more times without the "public or private" qualifying language because it is no longer needed. When different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word. *Simpson Inv. Co. v Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000). Based on KPUD's argument, the State would be required to reimburse KPUD for any fire suppression action the KPUD is obligated to take under the statute, even if the KPUD negligently starts the fire. There is no evidence the Legislature intended to reward municipal corporations for their negligence.

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### 3. How Municipal Corporations Are Treated for Purposes of Different and Unrelated Statutory Schemes Is Irrelevant to Their Obligations Under the Fire Cost Recovery Statute.

Rather than focusing on the applicability of the fire cost recovery statute within the context of the Forest Protection Act, KPUD argues the Legislature did not intend to include municipal corporations in the cost recovery statute by addressing unrelated statutes with disparate language as if they were analogous. Appellant's Br. at 22-27. None of the statutes KPUD references in this portion of its argument remotely relates to the Forest Protection Act where the fire cost recovery statute is found.[11]

Here, KPUD wants the Court to ignore the context of the very Act containing the fire cost recovery statute. Instead, KPUD asks the Court to consider unrelated provisions in unrelated statutory schemes. There is no basis for inferring a legislative intent to import the definition of the term from one statutory scheme into the Forest Protection Act if the differing statutes using the same terms are not related. *Auto Value Lease Plan, Inc., v. Am. Auto Lease Brokerage, Ltd.*, 57 Wn. App. 420, 423, 788 P.2d 601

[11] KPUD cites to statutes from Titles 47 (Public Highways and Transportation, 50 (Unemployment Compensation), 43 (State Government–Executive), 28C (Vocational Education), 39 (Public Contracts and Indebtedness), 36 (Counties), and 84 (Property Taxes).

(1990). As our state's highest court said in *Glaubach v. Regence BlueShield,* 149 Wn.2d 827, 832, 74 P.3d 115 (2003), other agencies' definitions of a term in the context of different statutes are not helpful to this Court's analysis of statutory meaning.

The KPUD fails to address a related set of statutes in RCW 52.12 that addresses the authority of fire protection districts to issue burning permits to "a person, firm, or corporation." RCW 52.12.101. If a "person" starts a fire without a permit, and as a result of that failure the district is required to suppress a fire, the person is liable to reimburse the district for the costs of the fire suppression. RCW 52.12.108. Similar to the DNR cost recovery statute, the Legislature intended for these local fire protection district requirements to apply to municipal corporations. If the Court accepts KPUD's position, KPUD would arguably be exempt from both state and local burn permit requirements and their associated cost recovery statutes.

The only related statute outside of the Forest Protection Act the Court should consider to determine the legislative intent of the fire cost recovery statute is the RCW 1.16.080(1) definition of "person." If the Court is inclined to consider other tangentially related statutes to assist in the interpretation of the cost recovery statute, DNR requests the Court consider the RCW 43.52.250 definition of "public utility" as "*any person,*

*firm or corporation* . . . engaged in or authorized to engage in the business of generating, transmitting or distributing electric energy." (Emphasis added.)

#### 4. The Title 1 Definition of "Person" Is Applicable to the Interpretation of the Fire Cost Recovery Statute.

KPUD argues that the RCW 1.16.080(1) definition of person cannot be used to interpret the meaning of "person" in the context of the fire cost recovery statute because the definition would render the terms "firm" and "corporation" superfluous. Appellant's Br. at 28-32. The statutory definition of "person" does not render the term "corporation" superfluous. The definition both clarifies and provides an expression of legislative intent that both public and private corporations are included within the words "any person, firm, or corporation" as those words are used in the cost recovery statute. Alternatively, surplus language in a statute may be ignored in order to carry out legislative intent. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 859, 774 P.2d 1199 (1989).

KPUD argues it is somehow impermissible for the Court to rely on the statutory definition of "person" because KPUD could find no reported case where the statute was used for the term "person" in conjunction with "firm" and "corporation." Appellant's Br. at 30-32. A plain reading of

RCW 1.16.080(1) rebuts this argument. There is no qualifying language in the statutory definition of "person" limiting the application of the definition to only those places in the Revised Code of Washington where "person" appears by itself. Courts should broadly interpret the term "person" when to do so would further the legislative purpose of the statute. *Segaline*, 169 Wn.2d at 475. "Person" is used repeatedly throughout the Forest Protection Act. As a related statute, the RCW 1.16.080(1) definition of "person" was intended by the Legislature to define the term in the absence of a definition within the Act itself. KPUD's argument to the contrary lacks merit. Its 12(b)(6) motion was properly denied.

## VI. CONCLUSION

For the reasons cited above, under a plain meaning analysis, or one resorting to interpretive aids, the Legislature intended the fire cost recovery statute to apply to municipal corporations. DNR respectfully

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requests the Court to uphold the judgment of the trial court and deny KPUD's appeal.

RESPECTFULLY SUBMITTED this 12th day of February, 2014.

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## CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on February 13, 2014, as follows:

| | |
|---|---|
| Donald G. Stone<br>Daniel W. Short<br>Gregory S. Johnson<br>William J. Schroeder<br>PAINE HAMBLEN, LLP<br>717 W. Sprague Ave., Suite 1200<br>Spokane, WA 99201-3505<br><br>*Attorneys for Petitioner* | [X] U.S. Mail Postage Prepaid<br>[ ] State Campus Mail<br>[ ] Hand Delivered<br>[ ] ABC Legal Messenger<br>[ ] FedEx Overnight<br>[ ] Fax: |

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

DATED this 13th day of February, 2014, at Olympia, Washington.

Kim L. Kessler

KIM L. KESSLER
Legal Assistant
Natural Resources Division

# APPENDIX 1

# RCW 76.04.495
# Negligent starting of fires or allowance of extreme fire hazard or debris — Liability — Recovery of reasonable expenses — Lien.

(1) Any person, firm, or corporation: (a) Whose negligence is responsible for the starting or existence of a fire which spreads on forest land; or (b) who creates or allows an extreme fire hazard under RCW 76.04.660 to exist and which hazard contributes to the spread of a fire; or (c) who allows forest debris subject to RCW 76.04.650 to exist and which debris contributes to the spread of fire, shall be liable for any reasonable expenses made necessary by (a), (b), or (c) of this subsection. The state, a municipality, a forest protective association, or any fire protection agency of the United States may recover such reasonable expenses in fighting the fire, together with costs of investigation and litigation including reasonable attorneys' fees and taxable court costs, if the expense was authorized or subsequently approved by the department. The authority granted under this subsection allowing the recovery of reasonable expenses incurred by fire protection agencies of the United States shall apply only to such expenses incurred after June 30, 1993.

(2) The department or agency incurring such expense shall have a lien for the same against any property of the person, firm, or corporation liable under subsection (1) of this section by filing a claim of lien naming the person, firm, or corporation, describing the property against which the lien is claimed, specifying the amount expended on the lands on which the firefighting took place and the period during which the expenses were incurred, and signing the claim with post office address. No claim of lien is valid unless filed, with the county auditor of the county in which the property sought to be charged is located, within a period of ninety days after the expenses of the claimant are incurred. The lien may be foreclosed in the same manner as a mechanic's lien is foreclosed under the statutes of the state of Washington.

[1993 c 196 § 2; 1986 c 100 § 33.]

# RCW 1.16.080
# "Person" — Construction of "association," "unincorporated association," and "person, firm, or corporation" to include a limited liability company.

(1) The term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual.

(2) Unless the context clearly indicates otherwise, the terms "association," "unincorporated association," and "person, firm, or corporation" or substantially identical terms shall, without limiting the application of any term to any other type of legal entity, be construed to include a limited liability company.

[1996 c 231 § 1; 1891 c 23 § 1, part; Code 1881 § 964; 1857 p 46 § 1; 1854 p 99 § 134; RRS § 146.]

## Notes:

**Reviser's note:** This section is a part of 1891 c 23 § 1. The introductory phrase of that section provides: "The following provisions relative to the construction of statutes shall be rules of construction and shall constitute a part of the code of procedure of this state:".

Criminal proceedings, person defined: RCW 9A.04.110.

Declaratory judgments, person defined: RCW 7.24.130.

Eminent domain by cities, person defined: RCW 8.12.020.

Notice to alien property custodian, person defined: RCW 4.28.340.

Wrongful death, person defined: RCW 4.20.005.