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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 318532

**IN THE 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 KLINKITAT COUNTY, a
Washington municipal corporation,

Petitioner.

PETITIONER'S BRIEF

PAINE HAMBLER, LLP

Donald G. Stone, WSBA #7547

Daniel W. Short, WSBA #7945

Gregory S. Johnson, WSBA #13782

William C. Schroeder, WSBA #41986

717 W. Sprague Avenue, Suite 1200

Spokane, WA 99201-3505

(509) 455-6000

Attorneys for Appellant

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I. INTRODUCTION

Superior Court Judge Brian P. Altman's oral decision in this matter encapsulates the issue before this Court:

Gentlemen, I have been back and forth through the various statutes many times since the argument and I've read your briefs several times, and I am left with the impression that the legislature has left us with a muddle.

(VRP 5).

This case involves the interpretation of the phrase "person, firm, or corporation" as used in RCW 76.04.495. By its express terms, the statute authorizes a cause of action for Respondent, the Washington State Department of Natural Resources ("DNR") to pursue recovery of the costs it expends in fire suppression from "[a]ny person, firm, or corporation whose negligence is responsible for the starting or existence of a fire which spreads on forest land[.]" RCW 76.04.495(1). Because RCW 76.04.495 is in derogation of common law, it should be strictly construed.

The stated enforcement mechanism of RCW 76.04.495 is a property lien. Specifically, RCW 76.04.495(2) states that DNR "shall have a lien...against any property of the person, firm, or corporation liable under subsection 1 of this section..." For the purposes of this statute, a "person, firm, or corporation" must be an entity which is legally capable of having

a lien placed upon its property. As RCW 76.04.495 creates a lien right and is in derogation of common law, it should be strictly construed.

In the present case, DNR alleges that Appellant, Public Utility District No. 1 of Klickitat County (“KPUD”), failed to identify and remove a green tree that was located outside of KPUD’s right of way before high winds caused part of the tree to fall onto a power line, causing the Highway 8 Fire. DNR brought suit against KPUD pursuant to RCW 76.04.495, seeking the costs of fire suppression it alleges it incurred.

KPUD is a municipal corporation, organized under RCW 54.04.020. As a municipal corporation, KPUD’s property is public property, which, under Washington law, is not subject to liens.

Since, under RCW 76.04.495 a “person, firm, or corporation” must be an entity legally capable of having liens placed upon its property, this phrase should not be construed to include municipal corporations, because public entities are not capable of having liens placed upon their property. Under the Forest Protection Act, RCW 76.04 *et seq.*, when the Legislature intended to include municipal / public corporations and political subdivisions within the ambit of the statute, those entities were specifically named in the statute.

Moreover, the legislative history of the Forest Protection Act demonstrates that the Legislature has not intended to include municipal

corporations and political subdivisions under RCW 76.04.495. The pertinent language of RCW 76.04.495 has been in place for approximately ninety years. Less than ten (10) years after the statute was enacted, the Legislature authorized and created public utility districts. Over the next eighty years, the Legislature revisited and revised the language of RCW 76.04.495 a number of times, and each time has not modified the “person, firm, or corporation” language. In that same period of time, the Legislature has enacted and modified other statutes within the Forest Protection Act which either include other modifiers to the phrase “person, firm, or corporation,” or which demonstrate the Legislature’s awareness and intent that the provisions of the Forest Protection Act which involve liens do not apply to municipal corporations and political subdivisions.

Pursuant to strict construction, the phrase “person, firm, or corporation” in RCW 76.04.495 should not be construed to include municipal / public corporations. Municipal / public corporations not being within the ambit of the statute, DNR lacks statutory authority to proceed with an RCW 76.04.495 claim against KPUD. The issue before the Court is not whether a municipal corporation such as KPUD can be sued under any circumstances, but rather whether KPUD can be sued under the narrowly construed terms of RCW 76.04.495.

Because the statutory language of RCW 76.04.495 does not explicitly authorize suit against a municipal corporation or political subdivision, it does not provide a cause of action for DNR against KPUD under the facts alleged in DNR's complaint.

KPUD respectfully requests that the Court reverse the trial court's denial of KPUD's CR 12(b)(6) motion, and dismiss DNR's complaint against KPUD.

II. CERTIFIED QUESTION

This matter comes before the Court pursuant to the trial court's RAP 2.3(b)(4) certification of the following question:

[T]his Court certifies, pursuant to RAP 2.3(b)(4), that this order involves a controlling question of law as to which there is substantial ground for difference of opinion. The question is as follows:

Whether Plaintiff State of Washington Department of Natural Resources has the statutory authority to proceed with a fire suppression cost recovery claim against Defendant Public Utility District No. 1 of Klickitat County under RCW 76.04.495.

An immediate appeal from this order may materially advance the ultimate termination of this litigation. If the Court's ruling with respect to Plaintiff's authority to pursue a fire suppression cost recovery claim against Defendant is ultimately overturned, the claim must be dismissed. Any further proceedings before this Court may be useless.

(CP 72-73).

III. STATEMENT OF THE CASE

This case involves a fire which DNR alleges started when a high-wind event caused part of a green tree located outside of KPUD's right of way to fall onto an overhead electrical line. DNR commenced suit against KPUD pursuant to RCW 76.04.495, seeking costs alleged to have been incurred in fire suppression.

KPUD moved to dismiss, arguing that RCW 76.04.495 does not provide statutory authority for DNR to proceed with a fire suppression cost recovery action against a public utility district.

The trial court denied KPUD's motion, but also certified the proper interpretation of the statute to this Court. No Washington cases of record interpret the relevant portions of RCW 76.04.495.¹

A. The Parties

1. The Department of Natural Resources

Respondent DNR is an agency of the State of Washington. DNR, among other activities, provides the control and suppression of forest fires which occur on forest lands in the State of Washington. (CP 81).

¹ One Washington court of record has considered the statute in the context of jury rights and evidentiary damages issues, which are inapplicable here. *DNR v. Littlejohn*, 60 Wn. App. 671, 806 P.2d 779 (1991). One federal court has considered RCW 76.04.495 sitting in diversity under Washington law, and noted that as the statute is in derogation of the common law, it should be strictly construed. *United States v. Burlington Northern, Inc.*, 500 F.2d 637, 639 (9th Cir. 1974).

2. KPUD

Appellant KPUD is a municipal corporation organized and existing under the laws of the State of Washington, with its principal place of business in Goldendale, Washington. (CP 81). KPUD provides electrical power through electrical utility lines to approximately 12,000 constituents located throughout Klickitat County, Washington. (CP 81). KPUD owned, operated, and maintained the overhead electrical distribution lines which are the subject of this litigation. (CP 81).

B. The Fire

On August 26, 2010, the Highway 8 Fire started when part of a green ponderosa pine tree located outside of KPUD's right of way broke off during a high-wind event and fell across a power line owned by KPUD. (CP 83-84) The stump of the tree stood about 30 feet from the power lines. (*Id.*)

C. DNR's Complaint

DNR brought suit against KPUD on July 2, 2012. (CP 80-87). The sole stated cause of action is for "Fire Suppression Cost Recovery under RCW 76.04.495." (*Id.*). DNR seeks a money judgment against KPUD for the recovery of fire suppression costs. (*Id.*).

D. KPUD's Motion to Dismiss was Denied

KPUD brought a CR 12(b)(6) motion to dismiss DNR's RCW 76.04.495 claim for fire suppression costs on April 18, 2013. (CP 21-23; CP 24-45)

DNR opposed the motion (CP 46-56); a reply was filed (CP 57-71); a hearing was conducted; and the trial court issued its oral ruling on June 6, 2013. (VRP, *passim*). The trial court denied KPUD's motion, but certified the question of statutory interpretation to this Court. (CP 72-73).

E. Discretionary Review was Granted

This Court granted review on September 26, 2013.

IV. ARGUMENT

A. Standards of Review

1. The standard of review for a trial court's denial of a CR 12(b)(6) motion is *de novo*

This matter came before the trial court on KPUD's CR 12(b)(6) motion to dismiss. (CP 21-23; CP 24-45). Under CR 12(b)(6), "a defendant may move to dismiss where a plaintiff's pleadings do not state a claim for which relief can be granted." *Mueller v. Miller*, 82 Wn. App. 236, 245-46, 917 P.2d 604 (1996) (citing *Danzig v. Danzig*, 79 Wn. App. 612, 616, 904 P.2d 312 (1995)); *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *adhered to on reconsideration*, 113 Wn.2d 148, 776 P.2d 963 (1989). A CR 12(b)(6) order of dismissal is appropriate if "it appears

beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986) (quoting *Bowman v. John Doe Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)).

A trial court’s decision on a CR 12(b)(6) motion which concerns a matter of statutory interpretation is a question of law, which is reviewed *de novo*. See *Rimov v. Schultz, CI*, 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) and *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009)).

2. Matters of statutory interpretation are reviewed *de novo*

The matter before the Court is one of first impression and addresses the interpretation of RCW 76.04.495. The meaning of a statute is a question of law reviewed *de novo*. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)); *In re Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013) (citing *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012)); *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002).

B. Canons of Statutory Construction

1. Statutes in derogation of the common law, and statutes which create new lien rights are strictly construed

Statutes which create a new cause of action or a lien right are in derogation of the common law and are strictly construed. *See United States v. Burlington Northern, Inc.*, 500 F.2d at 639 (pursuant to strict construction of RCW 76.04.495, the U.S. has no standing to bring suit); *Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn. App. 283, 286, 949 P.2d 382 (1997) (statutory rights to liens are strictly construed).

In *United States v. Burlington Northern, Inc.*, the United States brought an action under RCW 76.04 to recover fire suppression costs for a forest fire that occurred on Burlington Northern land. The United States argued that it could bring the action because it had been subrogated to the State's statutory claim either by virtue of a cooperative fire suppression agreement with Washington State or by operation of law. The Ninth Circuit Court of Appeals disagreed, stating:

. . . we start by noting that the statute expressly grants a cause of action only to the State of Washington. Appellant asserts the right to sue in place of the State of Washington where appellant incurs fire suppression expenses under its cooperative agreement with the State. However, **we perceive the rule in Washington, as well as the general rule, to be that when a statute creates a cause of action not recognized at common law, and when, as here, the statute expressly states who is entitled to bring the action, then that statute is to be read narrowly as**

to who may sue, and a plaintiff must bring itself within the terms of the statute.

Id. at 639 (emphasis added) (internal citations omitted). Consequently, the Ninth Circuit strictly construed RCW 76.04 and held that the United States could not sue under the statute, because it was not the State.²

2. Statutory interpretation

In interpreting a statute, the court's objective is to ascertain and carry out the Legislature's intent. *Jongward*, 174 Wn.2d at 592 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)).

If a statute's meaning is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. The plain meaning is discerned from all that the Legislature has said in the statute. Plain meaning may also be discerned from related statutes which disclose legislative intent about the provision in question. An examination of related statutes aids our plain meaning analysis because legislators enact legislation in light of existing statutes.

Jongward, 174 Wn.2d at 595 (internal citations and quotations omitted)

If a "statute is 'susceptible to two or more reasonable interpretations,' the statute is ambiguous." *Flight Options, LLC v. Dep't of Revenue*, 174 Wn.2d 487, 500, 259 P.3d 234 (2011) (quoting *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005)).

² RCW 76.04.495 was amended after the Ninth Circuit's holding to include any fire protection agency of the United States.

“If a statute remains ambiguous after a plain meaning analysis, it is appropriate to resort to interpretive aids, including canons of construction and case law.” *Jongeward*, 174 Wn.2d at 600.

Where a statute contains multiple provisions, the court should interpret the statute so as to assign meaning to each provision. *State v. Merritt*, 91 Wn. App. 969, 973, 961 P.2d 958 (1998). Statutes relating to the same subject matter should be construed together. *See Jongeward*, 174 Wn.2d at 593 (*citing Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001)).

Under the principle of *noscitur a sociis*, “a single word in a statute should not be read in isolation.” *Jongeward* at 601 (*citing State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)). Instead, “the meaning of words may be indicated or controlled by those with which they are associated.” *Id.* (*quoting State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)).

“Further, a court must not interpret a statute in any way that renders any portion meaningless or superfluous.” *Jongeward* at 602 (*citing Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001)). The Legislature is presumed not to include unnecessary language when it enacts legislation. *See Davis v. State ex rel. Dep’t of Licensing*, 137 Wn.2d 957, 969, 977 P.2d 554 (1999) (“A fundamental canon of construction

holds a statute should not be interpreted so as to render one part inoperative.”); *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004) (no portion of a statute shall be rendered meaningless or superfluous through interpretation).

C. The Phrase ‘Person, Firm, or Corporation’ in RCW 76.04.495 Does Not Include Municipal / Public Corporations

The primary issue before the Court is whether the statutory phrase “person, firm, or corporation” includes a municipal corporation. KPUD submits that RCW 76.04.495 does not apply to municipal corporations for two reasons. First, the statute does not explicitly name “municipal corporations” or “public corporations,” as do other statutes within RCW 76.04 *et seq.* Second, since the statutory enforcement mechanism of a lien as provided in RCW 76.04.495(2) cannot be levied against public property, the Legislature did not intend to abrogate the long-standing rule that no lien may lie against public property. Therefore, the statute cannot apply to municipal corporations.

1. The terms of the statute

The fire suppression cost recovery statute, RCW 76.04.495, provides:

(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 ... The state, a municipality, a forest protective association, or any fire

protection agency of the United States may recover such reasonable expenses ...

(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[.] (emphasis added).

2. KPUD, as a Public Utility District, is a political subdivision of the State of Washington, and a municipal / public corporation

RCW 54.04.020 provides that “[m]unicipal corporations, to be known as public utility districts, are hereby authorized for the purposes of chapter 1, Laws of 1931, and may be established within the limits of the State of Washington, as provided herein.” Under RCW 54.12.010, “[a] public utility district that is created as provided in RCW 54.08.010 shall be a municipal corporation of the state of Washington, and the name of such public utility district shall be Public Utility District No _ of _ County.” *See also, Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 97, 459 P.2d 633 (1969).

In *P.U.D. No. 2 v. State Power Comm.*, 46 Wn.2d 233, 234, 280 P.2d 264 (1955), the Washington Supreme Court, sitting *en banc*, compared the authority of the Washington State Power Commission (“WSPC”) and that of PUDs and found that the WSPC did not have the power to supersede PUDs in pending projects or to impair their existing rights therein. *P.U.D. No. 2*, 46 Wn.2d at 234. In support, the Court quoted, in part, RCW 4.53.450:

The provisions of this act shall be cumulative and shall not impair or supersede the powers or rights of **any person, firm or corporation or political subdivision** of the state of Washington under any other law...

Id. (emphasis added).

The Court concluded that “[a] public utility district is, of course, a political subdivision of the state within the contemplation of the act.” *Id.* Notably, in the statutory context of “any person, firm or corporation or political subdivision,” the Washington Supreme Court found that a PUD was a political subdivision. As a result, a PUD is a municipal corporation and it is also a political subdivision of the State.

3. Applying RCW 76.04.495 to municipal corporations requires the establishment of lien rights in public property -- a result disallowed under Washington law

DNR’s enforcement mechanism under RCW 76.04.495 is the creation of a lien against the property of the negligent “person, firm, or corporation.” This lien right, employing the term “shall,” is mandatory. *Cf. Emwright v. King Cy.*, 96 Wn.2d 538, 544, 637 P.2d 656 (1981) (“shall” in a statute is imperative).

The Washington Supreme Court has long held that public property is not subject to liens. *Hazelwood v. Bremerton*, 137 Wn. App. 872, 884, 155 P.3d 952 (2007) (quoting *Hall & Olswang v. Aetna Cas. & Sur. Co.*, 161 Wash. 38, 47, 296 P. 162 (1931)). “Our Supreme Court has held, without

exception, that public property is not subject to any lien.” *Id.* “Washington courts continue to follow this precedent.” *Id.* (citing *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 828-29, 685 P.2d 1062 (1984); *3A Indus., Inc. v. Turner Constr. Co.*, 71 Wn. App. 407, 411, 869 P.2d 65 (1993); and *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 729, 741 P.2d 58 (1987)).

“The Legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of the common law absent express legislative intent to change the law.” *Wynn v. Earwin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

Regarding RCW 76.04.495, it is presumed that the Legislature knew that public property cannot be subject to a lien. Further, the Legislature articulated no intent to change Washington lien law within RCW 76.04 *et seq.*

As a lien cannot be had against public property and as the enforcement mechanism within RCW 76.04.495(2) is a lien “against any property of the person, firm, or corporation liable under subsection (1) of this section,” it is reasonable to interpret the phrase “person, firm, or corporation” as used in RCW 76.04.495(1) and RCW 76.04.495(2) as not including a municipal corporation, since to interpret the phrase otherwise

would be to create a new right to place a lien on public property, something never before authorized under Washington law.

4. The use of differing terms within RCW 76.04 indicates a legislative intent to not include municipal corporations under RCW 76.04.495

Throughout RCW 76.04, the Legislature employed a variety of terms to convey different meanings. When the Legislature intended for a statute to apply only to individuals, such as where criminal penalties are imposed, the Legislature only used the term “person.” *See* RCW 76.04.075.

Similarly, where the Legislature intended a statute to apply to both public corporations and private corporations, it used the phrase: “Any person, firm, or corporation, public or private...” RCW 76.04.475.

The Legislature included public corporations in RCW 76.04.475, and since, under the canons of construction, different terms must be given different effect, the phrase “person, firm, or corporation, public or private” must be interpreted as being distinct from the phrase “person, firm, or corporation.” The Legislature’s explicit inclusion of public corporations in RCW 76.04.475 indicates that the use of the different phrase “person, firm, or corporation” in RCW 76.04.495 does not include public corporations.

The Legislature's specific exclusion of public entities from the lien mechanism in RCW 76.04.610³ further indicates its intent not to include them within the categories of liable parties under RCW 76.04.495. RCW 76.04.610 (7) and (8), discuss "nonfederal public bodies." Demonstrating the Legislature's awareness of existing law and that no liens may be had against public property, RCW 76.04.610 (7) provides that "[u]npaid assessments are not a lien against the nonfederal publicly owned land[.]" The Legislature's exclusion of public entities from specific statutes which provide for liens within RCW 76.04 *et seq.* is further evidence that RCW 76.04.495 (1) and (2) should not be interpreted to include municipal corporations, as the Legislature declined to include within RCW 76.04.495 a similar statutory clarification and exception.

5. The legislative history of the Forest Protection Act indicates the Legislature has not intended to include municipal corporations and political subdivisions under RCW 76.04.495

RCW 76.04.495 has been in place for approximately ninety years. About ten years after the statute was enacted, the Legislature first authorized and created public utility districts. Over the next eighty years, the Legislature revisited and revised the language of what is now codified at RCW 76.04.495 and each time, it has not modified the "person, firm, or corporation" language.

³RCW 76.04.610 concerns assessments on owners of forest lands for costs of fire protection.

In that same period of time, the Legislature enacted and modified other statutes within the Forest Protection Act which either include other modifiers to the phrase “person, firm, or corporation,” or which demonstrate the Legislature’s awareness and intent that the provisions of the Forest Protection Act which involve liens do not apply to municipal corporations and political subdivisions.

a) *The history of RCW 76.04.495*

The statutory language of RCW 76.04.495 was first enacted in the Laws of 1923, Chapter 184, § 11, section 5806-1. That statute provided, in pertinent part:

Any person, firm, or corporation negligently responsible for the starting or existence of a fire which spreads on forest land shall be liable for any expense incurred by the state, a municipality or forest protective association in fighting such fire provided that such expense was, at the time incurred, authorized by the state supervisor of forestry or by one of his duly appointed and acting district or state fire wardens. The agency incurring such expense shall have a lien for the same against any property of said person, firm or corporation liable as above provided by filing a claim of lien naming said person, firm or corporation describing the property against which the lien is claimed, specifying the amount expended on the lands on which the fire fighting took place and the period during which the expenses were incurred, and signed by the claimant with post office address. (emphasis added).

The statute was revisited by the Legislature in the 1970s, but was not substantially revised. *See* former RCW 76.04.390. The statute was

codified in its present location at RCW 76.04.495 in 1986, and was revised one further time in 1993. The first line of the present iteration of the statute is substantially similar to the 1923 version, and provides: “Any person, firm, or corporation: (a) Whose negligence is responsible for the starting or existence of a fire which spreads on forest land...”

b) Public Utility Districts were created in the 1930s, a decade after the enactment of the fire suppression cost recovery statute.

Public Utilities Districts were created by the Legislature in 1931. RCW 54.04.020 provides that “[m]unicipal corporations, to be known as public utility districts, are hereby authorized for the purposes of chapter 1, Laws of 1931, and may be established within the limits of the State of Washington, as provided herein.”

c) The Legislature has since enacted and modified other provisions of the Forest Protection Act to include or exclude municipal corporations and political subdivisions.

Since the enactment in 1923 of the fire suppression cost recovery statute, and the 1931 enactment of RCW 54.04.020 creating public utility districts, the Legislature has enacted and/or revised other statutes within RCW 76.04 *et seq.* which evidence the Legislature’s intent that municipal corporations and public corporations be treated separately from entities encompassed within the phrase “person, firm, or corporation.”

RCW 76.04.475 authorizes the recovery by private landowners of reasonable costs incurred when they are obligated to take suppression action on a forest fire. That statute, by its terms, addresses any “person, firm, or corporation, **public or private**[.]”

Similarly, RCW 76.04.610 speaks to assessments upon owners of forest lands. Within that statute, the enforcement mechanism is a lien placed upon the property of owners of forest lands for unpaid assessments. RCW 76.04.610 was first enacted in 1917, and the statute has been revised by the Legislature at least twelve times since its enactment. In 1977, the statute was revised to include language within subsections (7) and (8) concerning liens. Demonstrating the Legislature’s awareness that liens may not be placed upon public property, the Legislature revised RCW 76.04.610 in 1977 to exclude public entities and public property from the lien enforcement mechanism.⁴

The Legislature has, on multiple occasions,⁵ revisited the language of RCW 76.04.495, and did not modify the phrase “person, firm, or corporation.” The Legislature has also subsequently enacted and modified RCW 76.04.475 and RCW 76.04.610 that do specifically include municipal corporations and political subdivisions. That the Legislature: 1) is aware that in its other statutes the phrase “person, firm, or corporation”

⁴ Laws of 1977, Chapter 102 § 1.

⁵ Laws of 1986, Chapter 100 § 33; Laws of 1993, Chapter 196 § 2.

does not include municipal corporations; and 2) has not revised the language of RCW 76.04.495, despite multiple other revisions to that statute; indicates that the Legislature does not intend that municipal corporations be within the ambit of the phrase “person, firm, or corporation” in RCW 76.04.495.

d) Pending proposed amendments to the Forest Protection Act further indicate that the current statutory language does not encompass municipal corporations or political subdivisions.

Pending before the Legislature in the 2014 Regular Session is Senate Bill 5972, which was proposed by request of the Commissioner of Public Lands.⁶ The proposed new section of the Forest Protection Act, RCW 76.04 *et seq.*, would create a new exclusive statutory cause of action for, *inter alia*, the recovery of fire suppression costs. The proposed new section does not employ the phrase “person, firm, or corporation.” Instead, it uses the phrases “owner of public...forested lands” and “person,” and contains a subsection which specifically defines these terms. Under the proposed section, the term “person” would include public entities and governmental entities. The Legislature’s pending consideration of SB 5972 is further indication that the phrase “person, firm, or corporation,” as used in the current statute, does not encompass public corporations and political subdivisions.

⁶ Prefiled December 16, 2013. Available at: <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Senate%20Bills/5972.pdf>.

6. In other areas of Washington law, when the Legislature has intended a statute to apply to municipal / public corporations or political subdivisions, it has expressly stated its intent

In other sections of the Revised Code of Washington, where the Legislature has intended that the statutory phrase “person, firm, or corporation” apply to public entities, it has added additional language to the statutes. Examples include: “person, firm, or corporation, **public or private**” (See, RCW 28C.04.540, RCW 43.43.940, and RCW 39.42.070); “person, firm, or corporation, **private or municipal**” (See, RCW 47.52.041); and “person, firm, corporation, **political subdivision, or department of the state**” (See, RCW 50.24.110(4) and RCW 43.52.450) (emphasis added).

(a) Municipal Corporations

RCW 47.52.041 addresses claims against the state, city, or county, and provides in part:

[n]o **person, firm or corporation, *private or municipal***, shall have any claim against the state, city or county by reason of the closing of such streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways.

The Legislature intended that RCW 47.52.041 include both private *and* municipal corporations by stating the same. RCW 76.04.495, on the other hand, is limited to a “person, firm or corporation.” If, as in RCW

47.52.041, the Legislature intended that RCW 76.04.495 should apply to a person, firm or corporation, *private or municipal*, it would have so stated.

(b) Political Subdivisions

RCW 50.24.110 covers unemployment compensation and states: “[t]he commissioner is hereby authorized to issue to any **person, firm, corporation, political subdivision, or department of the state**, a notice and order to withhold and deliver property of any kind whatsoever . . .”

RCW 43.52, *et seq.*, covers operating agreements. RCW 43.52.300(4) provides that an operating agency has the authority to: “negotiate and enter into contracts for the purchase, sale, exchange, transmission or use of electric energy or falling water with any **person, firm or corporation, including political subdivisions and agencies of any state** or Canada, or of the United States.”

RCW 43.52.450 states that the “provisions of this chapter shall be cumulative and shall not impair or supersede the powers or rights of **any person, firm or corporation or political subdivision** of the state of Washington under any other law.”

The language of these three statutes indicates that the phrase “person, firm, or corporation” does not generally include municipal corporations or political subdivisions.

As noted above, the “Legislature is presumed to know the existing state of the case law in those areas in which it is legislating.” *Woodson v. State*, 22. Wn. App. 499, 262, 589 P.2d. 828 (1979) (citing *State v. Fenter*, 89 Wn.2d 57, 62, 569 P.2d 67 (1977)). If the Legislature intended to include political subdivisions or municipal corporations within the phrase “person, firm, or corporation” in RCW 76.04.495, it would have added the phrase “public or private,” “political subdivision,” or “private or municipal” to the statute. The lack of said language is evidence that the phrase “person, firm, or corporation” is not meant to include political subdivisions and municipal corporations.

(c) Corporations Public and Private

RCW 28C.04.540 discusses donations and grants that are to be used for the Washington award for vocational excellence and provides that:

[t]he workforce training and education coordinating board may accept any and all donations, grants, bequests, and devises, conditional or otherwise, . . . which may be received from any federal, state, or local agency, any institution, **person, firm, or corporation, public and private** . . .

Likewise, pursuant to RCW 43.43.940, the Washington State Patrol

may accept any and all donations, grants, bequests, and devises, conditional or otherwise, . . . from the United States or any agency thereof, any governmental agency, any institution, **person, firm, or corporation, public and private**, to be held, used,

or applied for the purposes of the fire service training program.

RCW 39.42.070 addresses state bonds, notes and other evidences of indebtedness and provides that in determining the amount of general state revenues,

the treasurer shall include all state money received in the treasury from each and every source whatsoever except: . . . (2) moneys received as gifts, grants, donations, aid or assistance or otherwise from the United States or any department, bureau or corporation thereof, or any **person, firm or corporation, public or private.**

If the Legislature intended to include a “public corporation,” such as a PUD, in RCW 76.04.495, it would have added the words “public or private” following “corporation,” as indicated in the statutes referenced above.

(d) Multiple Public Entities

RCW 36.94.190 provides:

Every county in furtherance of the powers granted by this chapter shall be authorized to contract with the federal government, the state of Washington, or any city or town, within or without the county, and with any other county, and with any municipal corporation as defined herein or with any other municipal corporation created under the laws of the state of Washington and not limited as defined in RCW 36.94.010, or political subdivision, and with any person, firm or corporation in and for the establishment, maintenance and operation of all or a portion of a system or systems of sewerage and/or water supply.

Importantly, in addition to “person[s], firm[s], or corporation[s],” RCW 36.94.190 extends its statutory coverage to include the “federal government, the state of Washington, or any city or town, within or without the county, and with any other county, and with any municipal corporation as defined herein or with any other municipal corporation created under the laws of the state of Washington and not limited as defined in RCW 36.94.010, or political subdivision.” The phrase “municipal corporation” was included within the statute because the term “corporation” does not itself include municipal corporations.

Because RCW 76.04.495 is limited to any “person, firm or corporation” and does not expressly include municipal corporations, political subdivisions, or corporations public and private, the phrase “person, firm, or corporation” in RCW 76.04.495 should not be construed as including political subdivisions or municipal corporations.

7. Where the Legislature has intended that a statute address certain entities, it has defined those entities in the statutory definitions

When the Legislature intends that a statute address specific entities, it includes statutory definitions. Examples include: “‘Person’ or ‘company,’ herein used interchangeably, means any...municipal corporation[.]” See *Kennewick v. State*, 67 Wn.2d 589, 594, 409 P.2d 138 (1965). Pursuant to RCW 84.04.075 a “person” is defined to include any

“firm, company, association, or corporation.” See *Hoppe & Assocs. v. King County*, 162 Wn. App. 40, 56, 255 P.3d 819 (2011). The fire suppression cost recovery statute does not define the terms “person,” “firm,” or “corporation”, nor does it contain language which expands the meaning of those terms. Had the Legislature intended special meanings for the terms it used, it would have drafted the statute accordingly or provided definitions that extend the statute’s scope. As the Legislature did not, the phrase “person, firm, or corporation” should be interpreted consistently with the remainder of the Forest Protection Act, RCW 76.04 *et seq.*, as well as with other similar sections of the Revised Code of Washington.

D. RCW 1.16.080(1) is Inapplicable to the Interpretation of RCW 76.04.495

Before the trial court, DNR contended that the phrase “person, firm, or corporation” within RCW 76.04.495(1) includes municipal corporations and public entities. (CP 46-56). DNR did not argue that the term “corporation” includes public entities or municipal corporations. Rather, DNR’s liberal interpretation is based upon the term “person” in RCW 76.04.495(1), and upon RCW 1.16.080(1).

RCW 1.16.080(1) provides: “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.” Therefore, DNR argued, because RCW 76.04.495 uses the term “person,” and because under RCW 1.16.080(1) the term “person” “may be construed to include...any public...corporation,” DNR contended that the “plain terms” of RCW 76.04.495 apply to municipal corporations such as KPUD. (CP 53-54).

1. Application of RCW 1.16.080(1) improperly renders the terms ‘firm’ and ‘corporation’ superfluous

RCW 76.04.495 should not be read in light of RCW 1.16.080(1), which expands the definition of the term “person” to include municipal corporations, because to do so would render the terms “firm” and “corporation” within RCW 76.04.495(1) superfluous or moot, as “firm” and “corporation” are included within RCW 1.16.080(1)’s definition of “person.”

RCW 1.16.080 provides:

- (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.

In *Jongeward v. BNSF*, the Supreme Court considered an analogous attempt to expand the interpretation of a particular statute. *Jongeward*

discussed RCW 64.12.030 (the timber trespass statute). That statute provides, in pertinent part: “Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person...” *Jongeward*, 174 Wn.2d at 592 (quoting RCW 64.12.030). The *Jongeward* court explained that the phrase “otherwise injure” must both be read in conjunction with the other terms in the statute (i.e. “cut down, girdle”), and must be read to give the phrase “otherwise injure” a separate meaning which does not encompass “cut down” or “girdle.” *Id.* at 601. To interpret “otherwise injure” as encompassing “cut down” and “girdle” would render those terms superfluous, and is therefore an improper interpretation. *Id.*

Here, DNR’s reliance upon RCW 1.16.080(1) to interpret the phrase “person, firm, or corporation” creates the same flaw as the interpretation urged in *Jongeward*. In order to expansively interpret the term “person” by way of reference to RCW 1.16.080(1), the other terms – “firm” and “corporation” – would be encompassed within the term “person.” This renders the terms “firm” and “corporation” superfluous, which is an impermissible result, and therefore an inappropriate interpretation.

2. RCW 1.16.080(1) has only been used to define “person” where that term appears in isolation within a statute

In the cases of record which employ or refer to RCW 1.16.080(1), the statute is used to supplement or interpret the use of the term “person” where the term “person” appears in isolation within a statute and without an accompanying definition. RCW 1.16.080(1) has not been applied to situations where a statute uses a collection of terms to define the subjects to which it applies, such as the phrase “person, firm, or corporation” as contained in RCW 76.04. KPUD could not locate a case of record where a Washington court has used RCW 1.16.080(1) to expand the statutory meaning of the phrase “person, firm, or corporation” to include a municipal corporation.

In *Segaline v. Dep’t of Labor & Indus.*, 169 Wn.2d 467, 238 P3d 1107 (2010), the Washington Supreme Court rejected the application of RCW 1.16.080 to expand the scope of the statutory term “person.” The issue in *Segaline* was “whether a government agency that reports information to another government agency is a ‘person’ under RCW 4.24.510.” *Segaline*, 169 Wn.2d at 474. The *Segaline* court noted that “person” is ambiguous in the statute and its meaning varies within the RCW. *Id.* The Court held: “here, a government agency is not a ‘person’ under RCW 4.24.510.” *Id.* Although the State argued that RCW

1.16.080(1) required state agencies to be included as a “person” under RCW 4.24.510, the Washington Supreme Court disagreed, holding:

[RCW 1.16.080 (1)] does not compel the court to broadly construe “person,” but rather the use of “may” permits the court to interpret “person” to include such entities. This permissive language demonstrates the Legislature intended “person” to be defined in specific provisions of the RCW in accordance with the nature and purpose of those provisions. If RCW 1.16.080(1) compelled a broad interpretation of “person” throughout the RCW, it would produce absurd results. For instance, government agencies or corporations could be charged with murder.

Segaline, 169 Wn.2d at 475 (internal citation omitted).

Similarly, in *Liquor Control Bd. v. Personnel Bd.*, 88 Wn.2d 368, 374, 561 P.2d 195 (1977), the court held that when the Legislature does not define the term ‘person’ within an Act, and also uses other terms (e.g. agency, person, party) non-interchangeably throughout that Act, the Legislature did not intend the term ‘person’ to be read broadly vis-à-vis RCW 1.16.080.⁷

Where a statute does not define the term ‘person’ and that statute also uses other terms within the statute (e.g. ‘agency,’ ‘person,’ ‘party’); and

⁷ See also *In re Eaton*, 48 Wn. App. 806, 740 P.2d 907 (1987). The *Eaton* court, citing RCW 1.16.080, read into a statute specific authority for an agency to take action, and noted that RCW 1.16.080 included ‘public or private corporations’ in its definition of ‘person.’ *Id.* at 811. The Supreme Court reversed, explaining that “[t]he Legislature could have granted...this authority, but it did not.” *In re Eaton*, 110 Wn.2d 982, 898-99, 757 P.2d 961 (1988).

those other terms are used non-interchangeably; it is indicative of a legislative intent that the broad term ‘person’ in RCW 1.16.080 does not apply, and that the Legislature did not intend a broad reading of the term ‘person’ which redundantly includes the other terms specified in the statute. *See Liquor Control Bd.* at 374. Here, the interpretation urged by DNR is equally expansive, and requires improperly rendering the terms “firm” and “corporation” superfluous or redundant.

3. Use of RCW 1.16.080(1) to broaden the scope of RCW 76.04.495 is contrary to strict construction

Statutes which create lien rights and which are in derogation of common law are to be strictly construed. *See Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 695-97, 261 P.3d 109 (2011). The expansion of RCW 76.04.495 via RCW 1.16.080 as urged by DNR, is contrary to strict construction.

E. Discrepancies Between Perceived Legislative Intent and the Text of the Statute Must Be Resolved by the Legislature

DNR argues that the intent of the Legislature was to include municipal corporations within the liable parties enumerated in RCW 76.04.495, and that the statute should be construed to give effect to this Legislative intent.

Were the Court to assume the Legislature’s intent was to include public entities and municipal corporations within the phrase “person, firm,

or corporation” in RCW 76.04.495, the statute as written, does not permit the Court to interpret it to give effect to this intent, and the onus is on the Legislature, rather than the Judiciary, to correct inconsistencies in the text.⁸

By way of analogy, in *Cummins v. Guardianship Servs.*, 128 Wn. App. 742, 110 P.3d 796 (2005), a vulnerable adult died as a result of the negligence of her caretakers. The personal representative of the estate commenced suit against the caretakers under the vulnerable adult statute, RCW 74.34 *et seq.* The *Cummins* court acknowledged that the purpose of the vulnerable adult statute was to protect frail elders, and to award damages for harm caused by caretakers, particularly when the caretakers caused the vulnerable adult’s death. *Id.* at 753. However, the statute was written so only certain statutory heirs had standing to maintain suit, and the party-representative in *Cummins* was not a statutory heir. The *Cummins* court concluded that the “effect of the provision, therefore, is that those without statutory heirs may be neglected with impunity so long as the result is death. Once again, we hope the legislature will resolve this discord. Under the present statute, however, dismissal of these claims was required.” *Id.* at 753.

⁸ See, e.g., *Tait v. Wahl*, 97 Wn. App. 765, 776, 987 P.2d 127 (1999) (Ellington, J. concurring) (“I thus urge the legislature to reexamine the statutory scheme in light of the injustice represented by this case.”).

Here, as well, even if the Court assumed that the Legislature intended that municipal corporations be liable under RCW 76.04.495(1), the statute does not so provide. Furthermore, under the canons of construction, the statute cannot include municipal corporations without also violating another precept of Washington law; that public property cannot be subject to liens, which would be the mandatory outcome of such an interpretation under RCW 76.04.495(2). Under the present statute, DNR's claim against KPUD must be dismissed, and any change to the statute to permit claims to be brought against municipal corporations must be made by the Legislature.

V. CONCLUSION

Washington law requires that the phrase "person, firm, or corporation" as used within RCW 76.04.495 be strictly construed. It cannot be broadly construed to include municipal or public corporations such as KPUD, without creating a new right to place liens on public property. Since a lien on public property is disallowed as a matter of law, that construction must be rejected. Instead, to avoid a result disallowed at law, the phrase "person, firm, or corporation" in RCW 76.04.495 must be strictly construed as not including municipal / public corporations, such as KPUD.

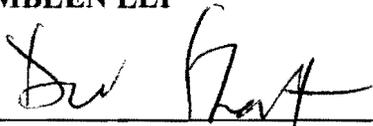
Moreover, the legislative history of RCW 76.04.495, as well as that of other statutes within the Forest Protection Act and the Revised Code of Washington, indicate that the Legislature is aware that the phrase “person, firm, or corporation,” does not include municipal corporations or political subdivisions. The Legislature has had the opportunity to revise the pertinent language in RCW 76.04.495 and has not done so, while the Legislature has, during the same time period, enacted or revised other statutes within the Forest Protection Act to specifically include municipal corporations and political subdivisions. This indicates that the Legislature does not intend the phrase “person, firm, or corporation” in RCW 76.04.495 to include municipal corporations and political subdivisions.

Public entities such as KPUD, not being within the statute’s ambit, the DNR lacks authority under the statute to pursue its fire suppression cost recovery claim against KPUD. KPUD therefore requests that the Court reverse the trial court’s denial of its CR 12(b)(6) motion, and dismiss KPUD from the present action.

RESPECTFULLY SUBMITTED this 18th day of December, 2013.

PAINE HAMBLEN LLP

By: _____


Donald G. Stone, WSBA #7547
Daniel W. Short, WSBA #7945
Gregory S. Johnson, WSBA #13782

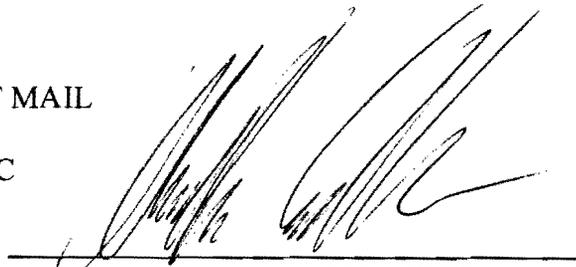
William C. Schroeder, WSBA #41986
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2013, I caused to be served a true and correct copy of the foregoing document, by the method indicated below and addressed to the following:

Michael J. Rollinger
Assistant Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

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WILLIAM C. SCHROEDER

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