

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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NO.

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PETER GOLDMARK, AS CHIEF EXECUTIVE OFFICER OF THE  
DEPARTMENT OF NATURAL RESOURCES AND COMMISSIONER  
OF PUBLIC LANDS,

Petitioner,

v.

ROBERT M. McKENNA, ATTORNEY GENERAL,

Respondent.

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PETITION AGAINST STATE OFFICER

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Petitioner Peter Goldmark alleges:

I. INTRODUCTION AND STATEMENT  
OF RELIEF REQUESTED

The Public Utility District No. 1 of Okanogan County filed a condemnation action seeking to condemn State lands managed by the Department of Natural Resources in Okanogan County. The Superior Court entered summary judgment in favor of the Okanogan County PUD. The Commissioner of Public Lands, petitioner Peter Goldmark, requested the Attorney General to file an appeal. Two days before the appeal deadline, the Attorney General advised the Commissioner of Public Lands that the Attorney General would not file the appeal.

Another party in the Superior Court action (Conservation Northwest) filed an appeal. That served to extend the time for filing an appeal by other parties. RAP 5.2(f). The deadline for filing an appeal pursuant to that provision is this Thursday, June 24, 2010.

On Monday, June 21, 2010, the undersigned notified the Office of the Attorney General that this Petition was about to be filed and requested concurrence on an accelerated briefing schedule that would allow for a decision on the petition before the appeal deadline. In response, the Office of the Attorney General advised that it would file a notice of appeal after all,

though it would do so “contingently.” If the writ of mandamus requested by this Petition is not issued, the Attorney General will withdraw the appeal.

This Petition is filed to obtain a writ of mandamus directing the Attorney General to maintain and vigorously prosecute the appeal it now plans to file before the June 24, 2010 deadline (or to appoint a Special Assistant Attorney General to do so, if the Attorney General cannot do so on its own).

The opening brief in the appeal filed by Conservation Northwest likely will be due near the end of August, 2010. If at all possible, this Petition should be decided within the next thirty days to allow time for an appropriate opening brief to be written on behalf of Petitioner consistent with the likely briefing schedule in the underlying appeal. Petitioner hopes to provide the Court with a mutually agreed briefing schedule in the next day or two.

## II. FACTS<sup>1</sup>

On or about November 30, 2009, the Okanogan PUD No. 1 filed an action in Okanogan County Superior Court seeking to condemn various parcels of land, including some parcels owned by the State of Washington

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<sup>1</sup> All of the factual statements in this Petition are based on the Declaration of the Commissioner of Public Lands, Peter Goldmark, filed herewith.

and managed by the Commissioner of Public Lands, Peter Goldmark. One issue in the Superior Court proceeding was whether the Okanogan County PUD has the legal authority to condemn State trust lands. On cross-motions for summary judgment, the Superior Court ruled that the Okanogan PUD does have jurisdiction to condemn the State trust lands at issue.

The Attorney General of Washington represented the Commissioner of Public Lands in the Superior Court proceeding through the efforts of Assistant Attorney General Pamela Krueger.

The Superior Court entered an Order Adjudicating Public Use and Necessity on May 11, 2010. That order explicitly incorporated by reference the summary judgment order on the PUD's condemnation authority.

An Order of Public Use and Necessity is subject to appeal pursuant to RAP 2.2(a)(4). The appeal must be filed within 30 days (RAP 5.2(a)), *i.e.*, by June 10, 2010.

On June 1, 2010, the Commissioner of Public Lands wrote the Attorney General requesting that the Attorney General's Office file an appeal of the summary judgment decision. The Commissioner of Public Lands requested a response by June 4, 2010. The Attorney General did not respond

by June 4, 2010 and the Commissioner of Public Lands wrote another letter requesting a response by Monday, June 7, 2010 "at the latest."

On June 8, 2010, two days before the appeal deadline, the Attorney General wrote a letter to the Commissioner of Public Lands advising that the Attorney General would not file the appeal.

The next day, on June 9, 2010, the Commissioner of Public Lands requested the Attorney General to appoint a "Special Assistant Attorney General" to represent his agency. The Commissioner of Public Lands emphasized the urgency of the situation: "As you may know, a Notice of Appeal must be filed with Okanogan Superior Court by close of business tomorrow. Accordingly, it is imperative that you either appoint the SAAG [Special Assistant Attorney General] in time for her/him to take this action, or that you file the Notice to preserve DNR's right to appeal. Please respond to me in writing by 5:00 p.m. today, stating your intentions."

Later on June 9, 2010, the Attorney General again wrote to the Commissioner of Public Lands declining to file an appeal and, now, also declining to appoint a Special Assistant Attorney General to do so.

On June 10, 2010, another party to the Superior Court proceeding, Conservation Northwest, filed a Notice of Appeal. Pursuant to RAP 5.2(f),

this had the effect of extending by 14 days the period of time for the Commissioner of Public Lands to file his appeal. The new deadline is June 24, 2010.

On June 15, 2010, the Commissioner of Public Lands again wrote to the Attorney General: "I plead with you to reconsider your decision to not represent DNR in an appeal of the Court's ruling." The Commissioner of Public Lands went on to state: "If you stand firm that you will not undertake the appeal, I plead with you to reconsider your decision to not appoint an SAAG to represent DNR's interests. Finally, if you remain adamant that you will neither represent DNR nor appoint an SAAG to do so, I request that you appoint an SAAG to advise me on how to proceed in light of your decisions."

The Commissioner of Public Lands requested a response by 5:00 p.m. the next day (June 16, 2010).

The Attorney General responded in a letter the next day. But the letter reiterated the Attorney General's refusal to file the appeal or to appoint a SAAG for the purpose of doing so. Further, the Attorney General now stated he also would not appoint a SAAG for the purpose of advising the Commissioner of Public Lands on how to proceed.

On June 18, 2010, the Commissioner of Public Lands contacted the undersigned to request that he represent the Commissioner of Public Lands for the purpose of obtaining a writ of mandamus ordering the Attorney General to file the appeal or to take such other action as is necessary to preserve the rights of his agency to prosecute the appeal.

On Monday morning, June 21, 2010, the undersigned contacted the Attorney General's Office and advised two Assistant Attorney Generals that this action would be commenced in the Supreme Court later this day. The undersigned requested that the Attorney General agree to expedite a briefing schedule that would treat this Petition as a motion and that would call for the Attorney General's response to be served and filed by midnight on Tuesday, June 22, 2010; with a reply brief by the petitioner to be filed and served no later than noon on Wednesday, June 23, 2010; and with a hearing before the Court Commissioner or Clerk the afternoon of June 23, 2010, if possible.

Later that morning, the Attorney General's Office advised that they would file the appeal in the PUD case after all, but would do so contingently. If this Petition is denied, the Attorney General will dismiss its appeal. If this Petition is granted and the writ of mandamus is issued, the appeal will be pursued.

### III. JURISDICTION

Pursuant to Article IV, Section 4 of the Washington Constitution, the Supreme Court has non-exclusive and discretionary jurisdiction for actions seeking a writ of mandamus against a state officer.

### IV. THIS COURT SHOULD NOT TRANSFER THIS CASE TO SUPERIOR COURT

The constitutional provision and the implementing Supreme Court Rule (RAP 16.2) provides the Supreme Court with the authority to transfer this petition to a Superior Court for determination on the merits. This Court should not transfer this case to a Superior Court for several reasons.

First, this case does not hinge on the resolution of factual disputes. This case presents a pure issue of law: Whether the Attorney General is required to file the appeal as requested by the Commissioner of Public Lands (or appoint a Special Assistant Attorney General to do so). Transferring original actions to Superior Court is appropriate where fact finding is required. *State ex. rel. Malmo v. Case*, 25 Wn.2d 118, 169 P.2d 623 (1946); *State ex. rel. Otteson v. Clausen*, 124 Wash. 389, 214 P. 635 (1923). That is not the case here.



Second, the issues raised here require immediate resolution. The Commissioner of Public Lands seeks to participate in an appeal where opening briefs will be due near the end of August. Transferring this matter to a Superior Court would not allow these issues to be resolved in time to provide effective relief. The Supreme Court should retain jurisdiction where “there is no other adequate remedy and the exercise of such jurisdiction is necessary to prevent a failure of justice . . .” *Malmo, supra*, 25 Wn.2d at 123 (quoting 18 R.C.L. 103, Mandamus § 18). Such is the case here.

Third, the Supreme Court should exercise its discretion to retain jurisdiction where the issues presented involve the “rights [and] interests of the State and “the performance of high official duties affecting the public at large, as opposed to matters generally concerning only private rights.” *Id.* That is decidedly the case here. This case presents a question of fundamental and constitutional importance regarding the constitutional duties of the Attorney General and the correlative right of the Commissioner of Public Lands to obtain effective representation by the Attorney General. This is an appropriate case for the Supreme Court to retain jurisdiction. *See, e.g., Washington State Labor Council v. Reed*, 149 Wn.2d 48, 65 P.3d 1203 (2003); *Department of Ecology v. State Finance Committee*, 116 Wn.2d 246,

804 P.2d 1241 (1991); *State ex. rel. O'Connell v. Meyers*, 51 Wn.2d 454, 319 P.2d 828 (1957).

#### V. PROCEDURAL ISSUES

RAP 16.2(c) provides that this Petition is "treated by the Supreme Court as a motion to a Commissioner or Clerk. Title 17 relating to motions governs the response to the petition, oral argument, decisions by ruling, and the means of objecting to the ruling of the Commissioner or Clerk."

Because the rule provides that the Petition is treated as a motion, we are including in this Petition our argument in support of the relief we seek. Further, pursuant to the time shortening provisions of Title 17 (RAP 17.4(b)), we are requesting the Clerk or Commissioner to establish an emergency briefing and hearing schedule that will allow the Supreme Court to decide this case within the next thirty days.

#### VI. THE ATTORNEY GENERAL HAS A STATUTORY MANDATE TO REPRESENT THE COMMISSIONER OF PUBLIC LANDS AND TO FILE THE APPEAL AT HIS BEHEST

Article III, Section 21 of the Constitution states:

The attorney general shall be the legal advisor of the state officers and shall perform such other duties as may be prescribed by law.

(Emphasis supplied.)

The “other duties” “prescribed by law” include those in RCW

43.12.075:

**It shall be the duty of the Attorney General**, to institute, or defend, any action or proceeding to which the state, or the Commissioner or the Board [of Natural Resources], is or may be a party, or in which the interests of the state are involved, in any court of this state, or any other state, or of the United States, or in any department of the United States, or before any board or tribunal **when requested to do so by the Commissioner**, or the Board, or upon the Attorney General’s own initiative.

The Commissioner is authorized to represent the state in any such action or proceeding relating to any public lands of the state.

(Emphasis supplied.) *See also* RCW 43.10.040 (the Attorney General “shall . . . represent” the State and all of its agencies “in the courts . . . in all legal . . . matters, hearings, or proceedings . . .”).

Issuance of a writ of mandamus is appropriate where a public official refuses to take an action which is non-discretionary. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 805, 982 P.2d 611 (1999). The Attorney General has no discretion in this matter. “[W]hen requested so to do by the Commissioner,” it “shall be the duty of the Attorney General” to “defend any action or proceeding” to which the State or the Commissioner of Public Lands is a party. As stated in another direct action mandamus case, “the use

of the word 'shall' makes it clear that [the state officer] is charged with a mandatory duty. *Id.*

Apparently, the Attorney General believes he has discretion to ignore the request of the Commissioner of Public Lands based on his view of what will serve the public interest. The Attorney General lacks the authority to make policy decisions or to decide, unilaterally, what is in the "public interest." In this State, the Attorney General only has such authority as is prescribed to that office by the Constitution and the statutes implementing the Constitution. Unlike some other states, the Attorney General has no "common law" authority. He only has such authority as is prescribed to him by statute. *State ex rel. Winston v. Seattle Gas and Electric Company*, 28 Wash. 488, 497, 68 P. 946 (1902), *petition for rehearing denied*, 70 P. 114 (1902).

As was stated by the West Virginia Supreme Court in a case arising under virtually identical constitutional and statutory provisions:

In summary, the Attorney General's statutory authority to prosecute and defend all actions brought by or against any state officer simply provides such officer with access to his legal services and does not authorize the Attorney General "to assert his vision of State interests." The Attorney General stands in a traditional attorney-client relationship to a State officer he is required by statute to defend. His authority to manage and control litigation on behalf of the State officer is

limited to his professional discretion to organize legal arguments and to develop the case in the areas of practice and procedure so as to reflect and vindicate the lawful public policy of the officer he represents. The Attorney General is not authorized in such circumstances to place himself in the position of a litigant so as to represent his concept of the public interest, but he must defer to the decisions of the officer who he represents concerning the merits and the conduct of the litigation and advocate zealously those determinations in Court.

*Manchin v. Browning*, 170 W. Va. 779, 790-91, 296 S.E.2d 90 (1982)

(footnote omitted which distinguishes cases from jurisdictions where the Attorney General has "common law" powers and duties). *See also Deukmejian v. Brown*, 29 Cal. 3d 150, 624 P.2d 1206 (1981).

The Attorney General, like every other lawyer in the State, is bound by the Rules of Professional Conduct. RPC 1.2(a) provides (with exceptions not relevant here) that a "lawyer shall abide by a client's decisions concerning the objectives of representation" and "shall abide by a client's decisions whether to settle a matter." Thus, the Attorney General not only has a constitutional and statutory duty to represent the Commissioner of Public Lands, but an ethical duty, too. *See also Deukmejian v. Brown, supra.*

If the Attorney General feels that he is unable to represent the interests of the Commissioner of Public Lands, the Attorney General is authorized to

appoint a Special Assistant Attorney General to do so. RCW 43.10.065. *See also* RCW 43.10.125. The Attorney General has refused to use that authority.

In sum, the Attorney General has a non-discretionary duty to represent the Commissioner of Public Lands and to file and vigorously prosecute the appeal as requested by the Commissioner of Public Lands. This Court should issue a writ of mandamus directing the Attorney General to do so or, in the alternative, ordering the Attorney General to appoint a Special Assistant Attorney General to do so.

#### VII. REQUEST FOR REIMBURSEMENT OF ATTORNEYS' FEES

Petitioner seeks reimbursement of attorneys' fees. RCW 4.84.185 allows a prevailing party to recover attorneys' fees and other litigation expenses if the defense to the action was "frivolous and advanced without reasonable cause." We have not yet seen the Attorney General's defense to this Petition, but if it is the same as has been advanced by the Attorney General in the run up to this litigation, we believe an award of litigation fees and costs under RCW 4.84.185 will be justified. The constitutional and statutory provisions at issue here are unambiguous. The duty of the Attorney General to represent the petitioner and his agency is unqualified. The

Attorney General has no reasonable basis for contending otherwise.

Reasonable attorneys' fees and costs should be awarded.

#### VIII. CONCLUSION

For the foregoing reasons, petitioner requests that the Court retain jurisdiction of this matter, issue the writ of mandamus, and direct the Attorney General to provide the petitioner with full and vigorous representation of the petitioner's interests in the appeal in the PUD Superior Court matter. The Court should provide for a briefing schedule which allows this matter to be resolved on an expedited basis so as to allow the Attorney General to fully participate in the underlying appeal and to enter an award of attorneys' fees and litigation costs if the Court determines that the Attorney General's defense of this action is frivolous and advanced without reasonable cause.

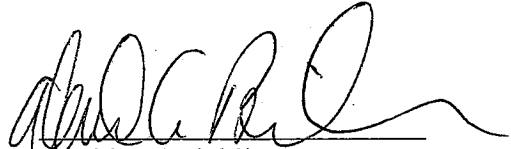
The undersigned declares that the petitioner has read the Petition for  
Review and believes the contents to be true.

Dated this 21 day of June, 2010.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:

A handwritten signature in black ink, appearing to read 'David A. Bricklin', written over a horizontal line.

David A. Bricklin

WSBA No. 7583

Attorneys for Peter Goldmark

Goldmark\Petition Against State Officer