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GENDLER & MANN, LLP

Rob McKenna

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April 23, 2010

Jackie L. Bradley, Clerk
Okanogan County Superior Court
149 Third N
Okanogan, WA 98840

RE: *PUD No. 1 of Okanogan County v. Davis, et al.*
Okanogan County Superior Court No. 09-2-00679-4

Dear Ms. Bradley:

Enclosed please find the following documents for filing in the above-referenced case:

1. REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT;
2. DECLARATION OF STEPHEN SAUNDERS;
3. CERTIFICATE OF SERVICE.

Please conform the enclosed face sheets and return them to me in the self-addressed, stamped envelope provided. Also enclosed are bench copies. Please forward the bench copies to Judge Jack Burchard or his assistant.

If you have any questions, please feel free to contact me at (360) 586-3690. Thank you for your assistance.

Sincerely,

BARBARA TOMFORD
Legal Assistant
Natural Resources Division

:bt

Enclosures

cc (w/encls.): Michael D. Howe, Attorney for Petitioner
P. Stephen Dijulio, Attorney for Petitioner
Michael T. Zoretic, Attorney for Trevor Kelpman
Jay A. Johnson, Attorney for Dan & Reba Gebbers
Richard W. Pierson, Attorney for Dan & Reba Gebbers and Christine Davis
David S. Mann, Attorney for Intervenor Conservation Northwest
William C. Weaver, Respondent

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The Honorable Jack Burchard
Hearing Date: 4/30/2010
Hearing Time: 2:00 PM

GENDLER & MANN, LLP

STATE OF WASHINGTON
OKANOGAN COUNTY SUPERIOR COURT

PUBLIC UTILITY DISTRICT NO. 1
OF OKANOGAN COUNTY, a
municipal corporation of the State of
Washington,

Petitioner,

v.

CHRISTINE DAVIS, a single person;
and TREVOR KELPMAN, a single
person; and DAN GEBBERS and
REBA GEBBERS, Husband and wife;
and WILLIAM C. WEAVER,
Custodian for Christopher C. Weaver, a
minor; and STATE OF
WASHINGTON, and PETER
GOLDMARK, Commissioner of Public
Lands,

Respondents.

NO. 09-2-00679-4

REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT

COMES NOW the State of Washington, Department of Natural Resources and Peter Goldmark, Commissioner of Public Lands (DNR) and submits this reply to Petitioner Public Utility District No. 1 of Okanogan County (PUD)'s Opposition to State of Washington and Peter Goldmark's Motion for Summary Judgment.

1 **I. DNR’S DISCRETION TO GRANT AN EASEMENT IS NOT**
2 **DETERMINATIVE OF THE PUD’S AUTHORITY TO CONDEMN**

3 PUD’s opposition to summary judgment is based largely upon matters related to DNR’s
4 easement discretion, rather than its authority to condemn in the first instance. Somehow, the
5 PUD perceives the existence of DNR’s easement discretion to be a material fact. Their theory
6 is that if DNR has the authority to grant an easement—poof—the PUD has the authority to
7 condemn an easement. DNR is the exclusive entity charged by the Legislature with the
8 management of state trust lands in the interests of the current and future beneficiaries. DNR is
9 the steward of these lands and charged with their protection, careful management, and
10 safekeeping for future generations of school children. So, yes, the State is the entity that
11 should decide whether an easement should be granted over these trust lands. *See* State’s
12 Motion for Summary Judgment at 3, 25.¹ Just because the State can decide whether an
13 easement should be granted² does not expand the PUD’s authority to condemn.

14 **II. THE PUD’S RELIANCE ON PRIOR CASE LAW IS MISPLACED—NO**
15 **COURT HAS DECIDED WHETHER STATE TRUST LAND THAT IS**
16 **PRODUCTIVELY USED IS “DEVOTED TO A PUBLIC USE”**

17 Contrary to the PUD’s argument, DNR has not asserted that all state trust land is
18 “per se” devoted to a public use. DNR’s argument is that the specific state trust lands that the
19 PUD seeks to condemn in this matter are devoted to and, for a smaller subset of the lands
20 involved, reserved for, a particular use by law. This Court need not apply the analysis to all
21 state trust lands because whether state land is “devoted to” a public use is a fact-intensive
22 question that must turn on the actual uses to which the land is being put.

23 ¹ Much ado has been made of the State “stipulating” to its authority to grant easements. *See* PUD’s
24 Opposition to State’s Motion for Summary Judgment at 3:18, 10 n.4, 16:4. A simple review of the easement
25 statute entitled “Easements over public lands” was all that was necessary to discern DNR’s legal discretion to
26 issue easements. RCW 79.36.510 (authorizing DNR to grant easement over “any state lands or state forest
 lands”).

² It is as if the potential of DNR denying the easement is perceived by the PUD to provide them with the
 ability to condemn because they have assessed their determination of the use of the lands to be controlling.

1 The PUD's reliance on *Seattle v. State* is misplaced because the capital building lands
2 in question there were not being used at all. *City of Seattle v. State*, 54 Wn.2d 139, 141, 338
3 P.2d 126 (1959). Moreover, the capital building trust purpose is specifically to provide for
4 "public buildings at the capital" for "legislative, executive and judicial purposes." Enabling
5 Act, ch. 180, 25 Stat. 676, § 12 (1889); RCW 79.24.020, .650. This means that, by definition of
6 the trust purpose, these lands are to be used for physical occupation by structures and other
7 improvements. Hence, there would not normally be any question concerning whether these
8 lands were indeed devoted to a public use because the public use is the physical occupation of
9 structures by state entities. Thus, there is not an equivalent trust management obligation with
10 respect to these lands that requires the State to generate revenue for the capital building trust in
11 the management of the lands.³ The PUD's reliance on *Seattle v. State* as being applicable to
12 the trust lands at issue here is a red herring.

13 The PUD also seems to rely on recent failed legislation related to the condemnation of
14 trust lands. It is axiomatic that a bill that does not pass cannot be evidence of legislative
15 intent.⁴ More to the point, the bill the PUD references did not relate to the question at issue
16 here—the bill did not include any language regarding state lands already "devoted to or
17 reserved for" a public use by law.⁵ Instead, it involved eliminating condemnation authority
18 over all state trust lands irrespective of whether or not they were devoted to a public use by
19 law. The Legislature's failure to adopt the bill, which was not legislation requested by DNR,⁶
20 only indicates that if an entity has the authority to condemn state lands, they still have that
21 authority. If, on the other hand, the entity does not have authority because of the current
22

23 ³ Proceeds from the sale of capital building lands is deposited for the purpose of capital building
24 construction purposes, hence, the trust obligation in a sale situation is to obtain the fair market value.

24 ⁴ *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694 (1996) ("As a general principle, we are loathe to
25 ascribe any meaning to the Legislature's failure to pass a bill into law....").

25 ⁵ See Exh. 2 to Declaration of Michael D. Howe in Support of Petitioner's Opposition to State and
26 Intervenor Motions for Summary Judgment.

⁶ See Declaration of Stephen Saunders, filed herewith (Saunders Second Decl.).

1 judicial interpretation of the limits of that authority, which the Legislature has acquiesced to by
2 not amending the applicable statutes, that entity still does not have authority. The status quo
3 has not changed. The PUD's assertion that this bill is somehow relevant to this case ignores
4 the body of condemnation law that has focused very precisely on state land already "devoted to
5 a public use" as a matter of factual inquiry.

6 **III. THE COMPATIBILITY OF THE PUD'S PROPOSED USE WITH THE**
7 **EXISTING PUBLIC USE IS NOT A QUESTION BEFORE THIS COURT**

8 The PUD urges this Court to consider whether or not their proposed use is compatible
9 with the existing grazing uses, and, if so, to authorize the PUD to condemn. They have failed
10 to cite to any authority to support this assertion, but instead have drawn the Court's attention to
11 inferences they have drawn from statute and the language of existing leases.

12 The limited scope of the statutory reservation from sale does not undermine its
13 applicability; what is relevant about the legislative reservation is the fact of the reservation
14 from sale, not its scope. The cases that have analyzed the question of statutory reservations
15 from sale have not focused on the length of the reservation. In *Fransen v. Bd. of Natural*
16 *Resources*, the court noted that the state forest land statutes authorized the State to grant
17 easements over state forest lands, but not to authorize the sale of the lands. 66 Wn.2d 672, 675,
18 404 P.2d 432 (1965). Its articulation of the sale reservation was merely a factual one, i.e., that
19 the Legislature had "forever" reserved these lands from sale. *Id.* (citing RCW 76.12.120 (now
20 RCW 79.22.050)). There was no analysis to suggest that the Legislature did not have the
21 discretion to reserve lands from sale for a shorter period of time, and hence not subject them to
22 condemnation. Merely because the Legislature chose to reserve grazing leased lands from sale
23 only for the term of the lease does not negate the reservation, its scope is simply narrower than
24 for state forest lands. RCW 79.11.290.

1 Because DNR utilizes standard lease provisions for all of its agricultural leases,⁷ the
2 lease reservation allowing for sale must be construed in the context of the limits of DNR's
3 authority because DNR is an entity created by statute and has only the authority given to it by
4 statute. *See* Ch. 43.30 RCW. Hence, the Section 4.08 clauses would need to be read in
5 conjunction with the limits of DNR's sale authority in RCW 79.11.290. This statute authorizes
6 DNR to terminate the lease as to a grazing lessee only if that lessee is the purchaser of the
7 lands involved. The grazing lease provision does not, and could not, affect the sale restrictions
8 contained in statute. The PUD's reliance on the inference it seeks this Court draw because of
9 this lease language is another red herring.

10 The PUD also cites to a provision of the grazing leases that relate to condemnation,
11 Section 10.05, which describes what is to occur as between lessee and lessor if condemnation
12 occurs. Again, this is a boilerplate provision in all of DNR's agricultural leases of the same
13 vintage. *See* Saunders Second Decl. It is not evidence of the State's position on whether the
14 land is subject to condemnation, nor does it provide the PUD with condemnation authority it
15 does not have. The PUD apparently wants this Court to draw an inference that because the
16 clause is included, it is evidence of an expectation of condemnation by the State. It is not a
17 reasonable inference because it requires this Court to assume that the State intended to subject
18 lands not otherwise subject to condemnation to be taken irrespective of the condemning
19 entities' authority. A procedural lease provision cannot cloak the PUD in authority and this
20 Court should resist the invitation to do so.

21 The PUD also cites to the Multiple Use Act to support its position that it can condemn
22 grazing leased lands. As the Multiple Use Act authorizes multiple uses by the public of the
23 leased lands, it is difficult to discern the PUD's point here. Indeed, the fact that additional
24 public uses may be allowed under the Multiple Use Act appears to support DNR's assertion

25 ⁷ Saunders Second Decl.
26

1 that the land is devoted to public use. Because the State has not asserted that land can be
2 devoted to a public use on a “per se” basis, DNR did not rely on the Multiple Use Act.
3 Nonetheless, the PUD asks this Court to draw an inference that because DNR can authorize
4 others to enter the land that the PUD should have the authority to condemn. What the PUD
5 fails to point out, of course, is that DNR’s trust obligations are recognized in the Multiple Use
6 Act. RCW 79.10.120 authorizes multiple uses that are “compatible with those basic activities
7 necessary to fulfill the financial obligations of trust management...” Again, the Legislature
8 vests DNR with the discretion to determine when and if other uses may be allowed when state
9 trust lands are involved. This is not consistent with a municipal entity making a determination
10 as to how and which state trust lands should be, or can be, used.

11 The PUD also encourages this Court to engage in rank speculation when it asserts that
12 DNR’s argument would result in the exclusion of state trust lands in a manner that would
13 “swallow the rule” that state trust lands can be condemned (in instances where the condemning
14 entity has been given express authority to condemn state lands). DNR has avoided asserting in
15 this case that all state trust land management activities will preclude condemnation because
16 they will result in the active dedication of the land to a public use. If this Court determines that
17 it is necessary to make this broader ruling to support its decision based on the PUD’s
18 argument, then DNR requests the opportunity for additional briefing on this issue as DNR’s
19 efforts have focused on the active uses to which the trust lands at issue have been put. DNR
20 would need to do significant research to reliably analyze how many of its trust lands (of the 3
21 million acres it manages) are actively devoted to a public use based on the nature of their
22 management. *See Saunders Second Decl.* And this would not be consistent with prior cases
23 that analyze – on a case by case basis – whether the lands at issue are already devoted to a
24 public use.⁸

25 ⁸ The analysis of cases is not repeated here, as it is set forth in full in DNR’s Motion for Summary
26 Judgment and Memorandum in Support.

1 Finally, it is worth noting that the PUD's reliance on the line of cases relating to an
2 analysis of a superior public use is misplaced because the Washington Supreme Court has
3 found them not to be applicable when a municipal entity is attempting to condemn state land,
4 as is the case here; the PUD's reliance on *Tacoma* and *Roberts* is misplaced and overstates
5 their reach and scope. *Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922); *Roberts v. City of*
6 *Seattle*, 63 Wash. 573, 575-76, 116 P. 25 (1911). In *Tacoma v. State*, the city sought state land
7 for development of a hydropower plant. *Id.* at 449. The land it sought to acquire was a 250
8 feet strip of land straddling a stream, and its related water rights, and to divert water from one
9 acre of land owned by the state that had, in the past, been used as an eyeing station but was
10 then not in use. *Id.* at 450-51. It also sought – not land – but the right to damage a state fish
11 hatchery if the dewatering that occurred as a result of the hydropower diversion damaged the
12 fish hatchery. *Id.* at 451.

13 With respect to the land held by the state where it operated an eyeing station, the court
14 found that use had been abandoned and there was no intention to use that tract for more than 20
15 years, holding it was subject to condemnation because “the mere fact that the state owns
16 property and has the right and power to devote it to a public use is not sufficient to prevent the
17 city from diverting the water therefrom.” *Id.* at 452. Hence, this aspect of the case is not
18 relevant here because the land was clearly not being devoted to a public use.

19 With respect to the diversion of water away from the fish hatchery, the court essentially
20 found there would be no taking because the evidence showed that the diversion away from the
21 hatchery would actually benefit the existing public use related to the fish hatchery. *Id.* at 453.
22 It is important to note that the land itself was not being sought by the city, but the right to divert
23 water away from the land. Essentially, the court found that allowing the diversion would not
24 affect the use of the land and therefore would not result in a taking, which is why the court
25 closely analyzed the evidence about what affect the loss of the water on the land would have.
26 The PUD's reliance on this case is misplaced because it does not involve an actual taking of

1 land – it is almost akin to an inverse condemnation case where the state asserted that because
2 of what the city was doing on adjacent land, the land would be damaged. However, the state
3 could not make its case and the court’s language about the inquiry ending if the public use was
4 destroyed had to do with the fact that the land itself was not being taken. *Id.* at 453. Thus, the
5 court had to look at the use on the land to see if there was anything that amounted to a taking
6 there. This case is inapposite to the case here, where the PUD is actually trying to take the
7 land itself.

8 Finally, the 250 strip straddling the stream was not being used by the state and the state
9 asserted the use of the stream by fish was a public use, which the court rejected as not being a
10 demonstration of the state putting the water to a public use. *Id.* at 454.

11 The PUD’s reliance on *Roberts v. Seattle* is also misplaced because this case merely
12 stands for the same proposition as its more recent counterpart, *Seattle v. State*, both of which
13 merely confirm that state lands that are not devoted to a public use and expressly subject to
14 condemnation may be condemned. *Roberts*, 63 Wash. 573, at 575–76; *Seattle v. State*, 54
15 Wn.2d 139, 338 P.2d 126 (1959). It is important to note that *Roberts* was not a condemnation
16 action, but involved a project-related local improvement assessment that was challenged by
17 citizens even though the state had stipulated to the condemnation (because the university lands
18 involved immediately adjacent to a street were not actually being used for university purposes).
19 *Id.* at 574-76. The court’s reference to prior cases between municipal and other corporations
20 was made only after the court found the land was not actually being used by the university –
21 the key fact essential to its holding. *Id.* at 576. The question of whether the remaining land
22 was damaged was a question as to whether the land being taken encompassed all the city
23 needed for the proposed public use, and there is no analysis by the court in this case that
24 suggests the court applied the same test to state lands as it applies as between municipal
25 corporations.

1 Moreover, in cases where this issue was expressly analyzed, the courts have held that
2 state lands are to be treated differently and the question of superior or incompatible use is
3 simply not the issue. *See State v. Superior Ct. for Jefferson Cy.*, 91 Wash. 454, 157 P. 1097
4 (1916); *State ex rel. Mason Cy. Power Co. v. Sup. Ct.*, 99 Wash. 496, 169 P. 994 (1918). In the
5 *Mason Cy. Power Co.* case, the state granted an easement for overflow rights for a power plant
6 to certain individuals and then a company sought to obtain the easement right from those
7 individuals by eminent domain (after having been denied the easement by the state). *Mason*
8 *Cy. Power Co.*, 99 Wash. 496, at 497. The court first found that the state had the exclusive
9 authority to grant the overflow easement. *Id.* at 498. The court next found that the individuals
10 involved could operate a public utility, and their use of the land was therefore a public use. *Id.*
11 at 499. Against arguments by the power company that its use was a superior public use, the
12 court held that it was for the state to determine whether the use it authorized was a public use
13 such that its decision to grant an easement to one entity rather than another could not be
14 disturbed by a court. *Id.* at 500. The court analyzed the issue as follows:

15 But these provisions of the constitution [§ 16, art.1] do not in any way control
16 or affect the power of the state to grant to any administrative department of the
17 state the power to determine what is a public use of the state's own property.
18 The state can attach any conditions that it chooses in regard to the control and
19 use of its property. As between a private individual and a person or corporation
20 to whom is delegated the power of eminent domain for public use under our
law, the question of whether or not property is appropriated for a public use
under our constitution must be, and has always been determined to be, a judicial
one. But that does not apply to the appropriation of lands owned by the
sovereign state itself.

21 *Id.* at 500. Thus, this case is an early example of treating the state's discretion with respect to
22 state lands in a way that trumps private or corporate powers of eminent domain when a
23 superior public use argument is made. Essentially, this case represents an instance where the
24 state had dedicated property to a public use in granting an easement right. The fact this land
25 was state land protected the easement right from being condemned by another – because it was
26 state land that the state had dedicated to a public use through its easement discretion. This is

1 consistent with the later line of cases analyzing whether the state lands involved are already
2 devoted to a public use.

3 Similarly, in *State v. Superior Ct. for Jefferson Cy.*, 91 Wash. 454, 461, 157 P. 1097
4 (1916), the court rejected an invitation to analyze the superiority between two uses as was done as
5 between two public service corporations when land owned by the state was involved. The court
6 found the question solely to be one of the power with respect to state land, and focused
7 exclusively on whether the state had granted to railway companies the right to condemn land that
8 was reserved and set apart for a public use (even though not actually being put to that use at the
9 time). *Id.* The court said, in the context of state lands, “there is no question of superior right as
10 between two public service corporations.” *Id.*

11 Thus, analyzing all of the cases cited by the PUD in their proper context, there is no basis
12 for the PUD’s assertion that they authorize the PUD to condemn state trust land “already devoted
13 to or reserved for a public use.” Whether or not the municipal corporation’s use is compatible
14 with or superior to the public use to which the state land is put is not the question courts have
15 found relevant – they have limited their inquiry to whether the land itself is devoted to a public
16 use and – if so – would deny the municipal entity’s jurisdiction over the land in question.

17 **IV. DNR’S EASEMENT PROCESS IS NOT RELEVANT TO THE PUD’S**
18 **AUTHORITY TO CONDEMN**

19 DNR processes numerous easement applications every year, covering both aquatic lands
20 and uplands, in the context of the 5.6 million acres of land DNR manages. The PUD has
21 attempted to paint DNR’s easement review process in a poor light due to the fact the easement
22 decision has not been made. DNR’s efforts to review the easement application have been
23 hampered by its scope and extent, the volume of other applications it has received, decreased
24 budget and related staffing, and not having its concerns yet addressed by the PUD’s application.⁹

25 ⁹ A general statement of the status of the PUD’s easement application is set for in the Second Saunders
26 Decl. It is not repeated here because DNR’s easement review process is not germane to the PUD’s authority to

1 It is difficult to discern the relevance of DNR's review process to the PUD's authority to
2 condemn. It is as if the PUD is grasping to convince this Court that because DNR has not yet
3 granted an easement,¹⁰ this somehow provides the PUD with the authority to condemn.
4 Obviously, the PUD's authority must come from statute, and there is nothing in the PUD's
5 authorizing statute that gives it the authority to condemn state trust land devoted to a public use
6 just because the state has not granted the PUD an easement. If this Court concludes that the
7 PUD's authority is somehow derived from DNR's easement review process, this will interfere
8 with DNR's easement authority to impose appropriate conditions on the PUD's use and ultimately
9 usurp DNR's responsibility to make decisions in the best interest of the state trust lands at issue.
10 It is also worth noting that a condemnation decree entered by this Court may not contain
11 conditions or limitations on the PUD's easement rights, thereby eliminating DNR's ability to act
12 in the best interests of the trust beneficiaries, include reserved rights, and impose appropriate
13 conditions to protect the state trust lands involved. *See Saunders Second Decl.*

14 Although the PUD has focused on economic productivity as the trust issue of importance
15 to support its premise that the trust can be compensated through the damages the PUD would pay
16 for the taking, the PUD does not comprehend that DNR's obligation is to both current and future
17 beneficiaries and that what defines an economic return for the trust today may be significantly
18 different even ten years hence. *See Saunders Second Decl.* DNR is concerned that the PUD's
19 project transverse a substantial block of state trust land and separates it from the Methow Valley,
20 in a location where grazing leases both provide a flow of revenue for the trust while allowing for

21 condemn. Even assuming *arguendo* DNR has unreasonably delayed its decision, which it has not, this does not
22 provide this Court with a basis to find the PUD has the authority to condemn.

23 ¹⁰ The PUD seems to draw on hearsay statements made by Derek Miller about what Roy Henderson said,
24 who is not a speaking agent with respect to granting easements, to support the PUD's speculation that the
25 easement meets DNR's trust responsibility. *See Saunders Second Decl.* Although these statements are not
26 competent for that purpose, it highlights the significant effort the PUD is making to try to fill DNR's shoes in
DNR's exercise of DNR's easement discretion. Hearsay evidence in a declaration is not competent evidence
under CR 56(e). *Charbonneau v. Wilber Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). Moreover, what
DNR staff have said prior to the Commissioner's easement decision is not relevant to whether or not the PUD has
the authority to condemn in the first instance.

1 increased revenue for future economic values associated with the character of this land. *Id.* If the
2 transmission line is installed, DNR's ability to provide for any other uses of the corridor the PUD
3 seeks to condemn could be precluded because this Court might not provide DNR with reserved
4 rights that it would include in an easement agreement with the PUD. *Id.* Hence, the PUD's
5 condemnation represents a way for the PUD, solely focused on return to its ratepayers, to preclude
6 DNR from making any additional income generating use of these unique trust lands.

7 With respect to protecting the corpus of the trust itself, that is, the land, a transmission line
8 and roads intersecting it, by its very nature, affect DNR's ability to protect the land. It was said
9 rather well in the *Mason Cy.* case that a railroad easement and a park are conflicting uses on the
10 land where the easement crosses – whether the surrounding land can continue to be used as a park
11 or not. *State v. Superior Ct. for Mason Cy.*, 136 Wash. 87, 93, 238 P. 985 (1925). In this
12 regard, the court noted as follows:

13 A public park has been defined as a pleasure ground set apart for the recreation of
14 the public, to promote its health and enjoyment. Clearly, any part of it over which
a railway extends is useless for this purpose.

15 *Id.* Although this case did not involve state land, making the compatibility question relevant for
16 that court, it is clear that the court found the area where the rail line would be located (including
17 the full width of the right-of-way) was not compatible with and conflicted with the park use in that
18 area – even though the surrounding land could be continued to be used for park purposes. In this
19 case, the PUD has proposed a transmission line that will cover a 100 foot swath – in that 100 foot
20 strip the PUD has not proposed to allow the State to grant easements or lease rights, suggesting
21 the PUD expects its use to be the exclusive use and thus eliminating the existing public use. The
22 State has not asserted that the surrounding land may not continue to be used for grazing purposes,
23 rather, the focus is on the lands the PUD seeks to condemn, which will no longer be available for
24 the public use to which it is currently being put. This eliminates DNR's discretion to manage the
25 state trust lands currently being managed for grazing purposes and affects its long-term
26

1 management of these and surrounding lands. The Legislature did not intend to subject state trust
2 lands being devoted to a public use to condemnation. RCW 79.02.010 (11)(h).

3 **V. THE PUD HAS FAILED TO DEMONSTRATE THE EXISTENCE OF AN**
4 **ISSUE OF MATERIAL FACT AND SUMMARY JUDGMENT SHOULD BE**
5 **GRANTED IN FAVOR OF DNR AS A MATTER OF LAW**

6 DNR has demonstrated there is no genuine issue of material fact relevant to the PUD's
7 authority to condemn the state lands at issue in this matter. CR 56(c); *Celotex Corp. v. Catrett*,
8 477 U.S. 317 (1986). Summary judgment is designed to do away with unnecessary trials on
9 issues that cannot be factually supported and could not result in a favorable outcome for the
10 nonmoving party. *Jacobson v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). In order for
11 this Court to dismiss based on the PUD's lack of jurisdiction over the lands in question, DNR
12 needs to establish that the lands are either 1) reserved for a public use by law, or 2) already
13 devoted to a public use by law. Once these facts are established, the PUD is without authority to
14 condemn unless the non-moving party produces concrete evidence that genuine fact issues
15 remain. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989);
16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The PUD has failed to present
17 evidence disputing that the state trust lands in question are not subject to current grazing leases,
18 which the is legal basis upon which they are reserved for a public use by law. The PUD has
19 failed to present factual evidence disputing that the state trust lands in question are being used
20 for grazing purposes pursuant to grazing leases and permits, which is the legal basis for DNR's
21 assertion they are already devoted to a public use as an aspect of DNR's trust land
22 management. This matter may be decided as a matter of law based upon the facts and
23 authorities set forth herein and the related pleadings and declarations on file herewith.

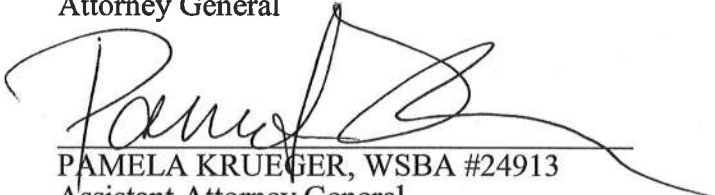
24 **VI. CONCLUSION**

25 The Commissioner of Public Lands and the State of Washington, Department of
26 Natural Resources, respectfully request, on behalf of the State of Washington and the trust
lands that the PUD seeks to condemn, this Court dismiss this action for lack of jurisdiction

1 because the lands identified in the Petition are reserved to a particular use by law and devoted
2 to a public use and are not subject to condemnation by the PUD. In the alternative, the State
3 requests this Court enter partial summary judgment in favor of the State with respect to the
4 lands subject to grazing leases as described herein, precluding the PUD from condemning these
5 lands because they are reserved to a particular use by law.

6 DATED this 23rd day of April, 2010.

7
8 ROBERT M. MCKENNA
Attorney General

9
10 
11 PAMELA KRUEGER, WSBA #24913
12 Assistant Attorney General
13 *Attorneys for Respondents,*
14 *Department of Natural Resources*
15 *and Peter Goldmark*

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APR 26 2010

The Honorable Jack Burchard
Hearing Date: 4/30/2010
Hearing Time: 2:00 PM

GENDLER & MANN, LLP

STATE OF WASHINGTON
OKANOGAN COUNTY SUPERIOR COURT

PUBLIC UTILITY DISTRICT NO. 1
OF OKANOGAN COUNTY, a
municipal corporation of the State of
Washington,

Petitioner,

v.

CHRISTINE DAVIS, a single person;
and TREVOR KELPMAN, a single
person; and DAN GEBBERS and
REBA GEBBERS, Husband and wife;
and WILLIAM C. WEAVER,
Custodian for Christopher C. Weaver, a
minor; and STATE OF
WASHINGTON, and PETER
GOLDMARK, Commissioner of Public
Lands,

Respondents.

NO. 09-2-00679-4

DECLARATION OF STEPHEN
SAUNDERS

I, Stephen Saunders, declare under penalty of perjury of the laws of the State of Washington, that the following is true and correct:

1. I am, and at all times hereinafter mentioned, a permanent resident of the United States and over the age of 18 years. I have personal knowledge regarding the matters stated herein, and am competent to testify as a witness. I am employed as the Division Manager, Asset and Property Management Division, of the State of Washington, Department of Natural Resources ("DNR"), and have responsibility for assuring that trust lands owned by the state are

1 properly managed. I have worked for DNR for over nine (9) years and been employed with the
2 State of Washington in various resource management capacities for over twenty-five (25)
3 years. I hold a Masters of Environmental Studies degree from the Evergreen State College and
4 a Bachelor of Science degree from Huxley College of Environmental Studies at Western
5 Washington University.

6 2. I have reviewed the following pleadings in this matter: State's Motion for
7 Summary Judgment and Memorandum in Support; Declaration of Pamela Krueger; Declaration
8 of Stephen Saunders; Petitioner's Opposition to State's Motion for Summary Judgment;
9 Declaration of Derek Miller; Declaration of Mick Howe.

10 3. SB 6838, that the Public Utility District No. 1 of Okanogan County (PUD) refers
11 to in its Opposition to the State's Motion for Summary Judgment, was not agency-requested
12 legislation, but DNR did testify regarding its passage.

13 4. The grazing leases that authorize grazing uses that would be affected by the PUD
14 proposed Methow Transmission Project as described in the Record of Survey from PUD, dated
15 November 12, 2009 in Book S of Surveys at Pages 262-274, under Recorder's Certificate
16 No. 3149935 (ROS), contain numerous boilerplate provisions that are contained in all
17 agricultural leases, including, but not limited to, Sections 4.08 and 10.05. These provisions are
18 interpreted and applied by the Department in the context of its existing authorities.

19 5. If DNR needed to establish how many of the state's trust lands are currently
20 devoted to a public use, this would require significant research to reliably analyze the existing
21 uses and acres of land subject to them. The Upland Leasing and Rights of Way Programs
22 alone would need to analyze approximately 11,000 leases and easements on state trust lands.

23 6. DNR is responsible for the management of over 5.6 million acres of trust and
24 other public lands, covering both aquatic lands and uplands. Reviewing an easement
25 application that covers over 11 linear miles of land for the transmission line route and over
26 23 miles of access roads, as determined by Dennis Gelvin, Land Surveyor for DNR, and set

1 | forth in his Declaration on file with this Court dated January 9, 2010, is a complex and
2 | time-consuming undertaking because it requires DNR to investigate the lands subject to the
3 | easement to determine appropriate site conditions, as well as to develop appropriate easement
4 | terms and conditions that cover all aspects of the use rights for the extent of the line. DNR's
5 | budget for its right-of-way program was substantially reduced as a result of the 2009-11
6 | biennial budget such that currently only right-of-way program staff located in Olympia are
7 | available to review right-of-way applications for all of DNR's regions across the state. With
8 | the volume of applications received in 2009, including several major utility line corridor
9 | applications, DNR staff have been overwhelmed with processing of all of these applications.

10 | 7. In conjunction with reviewing the PUD's easement application submitted in late
11 | 2008, and after additional materials were requested and provided over time through October
12 | 2009, DNR developed a list of landscape and site specific issues of concern regarding the
13 | proposed easement to discuss with PUD representatives. Initial discussions with the PUD
14 | regarding these issues took place in February 2010 and are ongoing. Although DNR has
15 | worked diligently within budget constraints to review the PUD's application, DNR's resources
16 | are stretched thin and the development of potential easement terms and conditions has been
17 | hindered by the need to compile documents and respond to discovery as a result of this
18 | litigation. At this juncture, the PUD has not been able to address DNR's concerns regarding
19 | the proposed easement. DNR will continue to complete its evaluation, but cannot devote
20 | substantial agency resources to this effort while also defending this condemnation action, in the
21 | context of all of its other right-of-way program responsibilities and decreased staff due to
22 | severe budget cuts.

23 | 8. One of DNR's concerns with the PUD's proposal is that it transverses a
24 | substantial block of state trust land and separates it from the Methow River valley. The existing
25 | grazing leases and permits provide a flow of revenue for the trust while allowing for increased
26 | revenue for future economic values associated with the character of this land. DNR's trust

1 obligations extend to both current and future trust beneficiaries and maximizing the economic
2 return to the trust occurs in the context of both and requires DNR to be impartial in its actions.
3 This sometimes means protecting the trust corpus, i.e., the land itself. If the transmission line is
4 installed, DNR's ability to provide for any other uses of the corridor the PUD seeks to condemn
5 could be precluded because this Court might not provide DNR with reserved rights that it would
6 include in an easement agreement with the PUD. If DNR were allowed to complete its review of
7 the easement application, DNR would also be able to consider appropriate conditions to protect
8 the state trust lands being sought by the PUD.

9 9. Although the PUD has referenced a conversation with Roy Henderson in Derek
10 Miller's Declaration, Roy Henderson is not a speaking agent for DNR with respect to granting
11 easements. Indeed, due to the perpetual nature of the easement, only the Commissioner of Public
12 Lands can make this determination as he has reserved the authority to grant perpetual easements.

13 SIGNED at Olympia, Washington, this 22nd day of April, 2010.

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16 STEPHEN SAUNDERS
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minor; and STATE OF
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GOLDMARK, Commissioner of Public
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Respondents.

NO. 09-2-00679-4

CERTIFICATE OF SERVICE

I certify that on the date and by the method indicated below, I caused to be served a
copy of the following documents on all parties or their counsel of record:

1. **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT;**
2. **DECLARATION OF STEPHEN SAUNDERS; AND**
3. **CERTIFICATE OF SERVICE.**

1	Party	Method of Service	
2	MICHAEL D. HOWE	<input type="radio"/> US Mail Postage Prepaid	<input checked="" type="checkbox"/> UPS Next Day Air
3	10 Valley View Park Drive	<input type="radio"/> Certified Mail Postage Prepaid	<input type="radio"/> By Fax
4	Omak, WA 98841	<input type="radio"/> State Campus Mail	<input type="radio"/> Electronic Mail
5	<i>Attorney for Petitioner</i>	<input type="radio"/> ABC/Legal Messenger	
6	P. STEPHEN DIJULIO	<input type="radio"/> US Mail Postage Prepaid	<input type="radio"/> UPS Next Day Air
7	Foster Pepper PLLC	<input type="radio"/> Certified Mail Postage Prepaid	<input type="radio"/> By Fax
8	1111 Third Avenue, Suite 3400	<input type="radio"/> State Campus Mail	<input type="radio"/> Electronic Mail
9	Seattle, WA 98101-3299	<input checked="" type="checkbox"/> ABC/Legal Messenger	
10	<i>Attorney for Petitioner</i>		
11	MICHAEL T. ZORETIC	<input checked="" type="checkbox"/> US Mail Postage Prepaid	<input type="radio"/> UPS Next Day Air
12	STANISLAW ASHBAUGH	<input type="radio"/> Certified Mail Postage Prepaid	<input type="radio"/> By Fax
13	701 FIFTH AVENUE, SUITE 4400	<input type="radio"/> State Campus Mail	<input type="radio"/> Electronic Mail
14	SEATTLE, WA 98104	<input type="radio"/> ABC/Legal Messenger	
15	<i>Attorney for Respondent</i>		
16	<i>Trevor Kelpman</i>		
17	JAY A. JOHNSON	<input checked="" type="checkbox"/> US Mail Postage Prepaid	<input type="radio"/> UPS Next Day Air
18	PO Box 2136	<input type="radio"/> Certified Mail Postage Prepaid	<input type="radio"/> By Fax
19	Wenatchee, WA 98807-2136	<input type="radio"/> State Campus Mail	<input type="radio"/> Electronic Mail
20	<i>Attorney for Respondents</i>	<input type="radio"/> ABC/Legal Messenger	
21	<i>Dan & Reba Gebbers</i>		
22	RICHARD W. PIERSON	<input checked="" type="checkbox"/> US Mail Postage Prepaid	<input type="radio"/> UPS Next Day Air
23	Williams & Williams PSC	<input type="radio"/> Certified Mail Postage Prepaid	<input type="radio"/> By Fax
24	18806 Bothell Way NE	<input type="radio"/> State Campus Mail	<input type="radio"/> Electronic Mail
25	Bothell, WA 98011	<input type="radio"/> ABC/Legal Messenger	
26	<i>Attorney for Respondents</i>		
	<i>Dan & Reba Gebbers</i>		
	<i>and Christine Davis</i>		
	WILLIAM C. WEAVER	<input checked="" type="checkbox"/> US Mail Postage Prepaid	<input type="radio"/> UPS Next Day Air
	2850 Sunny Grove Avenue	<input type="radio"/> Certified Mail Postage Prepaid	<input type="radio"/> By Fax
	McKinleyville, CA 95519	<input type="radio"/> State Campus Mail	<input type="radio"/> Electronic Mail
	<i>Respondent</i>	<input type="radio"/> ABC/Legal Messenger	

1 DAVID S. MANN
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5 *Attorney for Intervenor*
6 *Conservation Northwest*

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☐ By Fax

☐ Electronic Mail

7 I certify under penalty of perjury under the laws of the state of Washington that the
8 foregoing is true and correct.

9 DATED this 23rd day of April, 2010, at Olympia, Washington.

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11 BARBARA TOMFORD
12 Legal Assistant
13 Natural Resources Division
14 (360) 586-3690
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