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Public Condemnation of School Trust Lands

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He regularly represents local government in litigation over constitutional disputes. He successfully argued on behalf of the City of Moses Lake before the Supreme Court in defense of cities' petition annexation authority. *Grant County Fire District No. 5 v. City of Moses Lake*, 150 Wn.2d 791 (2004). In *Brower v. State*, 137 Wn.2d 44 (1998) he represented the Seattle Seahawks in defense of a state-wide referendum election supporting development of Century Link Field. Mr. DiJulio is a long time member of IMLA, and the Washington State Association of Municipal Attorneys. He is a regular speaker for those organizations; and a lecturer at the University of Washington's Evans Graduate School of Public Affairs.

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1. Introduction

In the early decades of the last century, access to electric power was increasingly recognized as critical to modem life and central to a community's economic prospects. But electric service to farms, ranches, and rural areas lagged far behind service in urban areas. As of 1930, in Washington only 47 percent of farms had electricity, and those with access to electricity paid "exorbitant rates." Jay L. Brigham, *Empowering the West: Electrical Politics Before FDR* 121 (1998). A populist movement, led by the Washington State Grange, promoted Washington's first initiative to the people. That initiative provided for the creation of Public Utility Districts ("PUDs"). The PUD Law was enacted in the election of 1930. Similar concerns led to the creation of the Rural Electrification Administration and the formation of rural electric cooperatives across the nation to bring reliable and economical electrical service to the nation's farms and ranches.

Since 1931, a Washington PUD has had the power similar to that earlier granted to cities. Under that authority, the local government

> may take, **condemn** and purchase, purchase and acquire **any public and private property**, franchises and property rights, **including state, county, and school lands**, and property and littoral and water rights, **for … transmission lines, and all other facilities necessary or convenient**.

Laws of 1931, ch. 1, § 6(e) (codified at RCW 54.16.050) (emphasis added).

Notwithstanding this clear statutory authority, the Washington Commissioner of Public Lands determined to fight the Okanogan PUD's efforts to build a 26-mile transmission corridor in rural, north central Washington. The Commissioner, in support of this effort, sued the State's Attorney General to force the Attorney General to prosecute an appeal on behalf of the Commissioner. *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011). After 5 years of litigation, at every level of the Washington judiciary, the Supreme Court unanimously affirmed the PUD's authority to condemn the State lands. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 342 P.3d 308 (2015). A chronology of the transmission line project is at the end of this paper.

This paper provides some background for the issues addressed in the Okanogan PUD's condemnation of State lands, and guidance to cities with respect to their efforts in similar circumstances.

2. State Trust Lands

The Enabling Act of each of the public land states admitted into the Union since 1802 has included grants of designated sections of federal lands for the purpose of supporting public schools. Twenty-three states continue to manage what is left of

their trust land[1] conveyances: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Louisiana, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. http://www.statetrustlands.org/about-state-trust-lands/state-trust-lands-today.html

Several states retain only a small part of the original grant lands. For example, Nevada, retains only around 3,000 acres of its original 2.7 million acre grant. Alaska, Arizona, Montana, and Wyoming, in contrast, each retain between 85 and 90 percent of their original land grants. *Id.*

3. Trust Obligation

The United States Supreme Court has described the school land grant as a "solemn agreement" between the United States and the states to use revenues from the trust lands to educate the citizenry. *Andrus v. Utah*, 446 U.S. 500, 507, 100 S. Ct 1803, 64 L.Ed.2d 458 (1980). Although the western states have varying constitutional and statutory frameworks for the management of school trust lands, certain legal principles appear common to all trust land states. The Washington Court has described the common case law applying to trust lands as follows:

> Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.

Skamania County v. State, 102 Wn.2d 127, 685 P.2d 576, 580 (1984) ("*Skamania*"). *See also, National Parks and Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 918-19 (Utah 1993) (citing *Skamania*); *Montanans for the Responsible Use of Trust Lands v. Bd. of Land Comm'rs*, 989 P.2d 800 (Mont. 1999) ("*Montrust*"); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 2356 (Okla. 1982).

Courts in the West state general principles regarding trust lands. First, the states' trust responsibility with regard to school trust lands and their beneficiaries acts as a limitation on the power of ta legislature to confer benefits on other public or private entities to the potential detriment of the trust. *Wasden v. State Bd. of Land Comm'rs*, 280 P.3d 693 (Idaho 2012); *Montrust*, 989 P.2d at 407. Second, where there is a conflict between state legislation and the constitutional trust, the legislation should be construed narrowly so as to avoid undermining the State's fiduciary responsibilities to the trust. *State ex rel. Kempthorne v. Blaine County*, 79 P.3d 707 (Idaho 2003) ("*Kempthorne*"). *E.g., Gladden Farms, Inc. v. State*, 633 P.2d 325, 330 (Ariz. 1981) (trust responsibility cannot be sacrificed for the benefit of other public entities); *State ex rel. Ebke v. Board of Educ. Lands & Funds*, 47 N.W.2d 520 (Neb. 1951) (invalidating leasing scheme that favored

[1] "Trust lands," "school trust lands," "grant lands" or "school lands."

existing lessees); *United States v. 78.61 Acres of Land*, 265 F. Supp. 564 (D. Neb. 1967) (school trust trumps general public benefit).

Third, trust land management agencies are granted broad discretion in the discharge of their constitutional responsibilities to the beneficiaries of the school trusts. *Friends of the Wild Swan v. Dep't of Natural Resources & Conservation*, 127 P.3d 394, 397 (Mont. 2005). *See also, Wild Earth Guardians, Inc. v. Hickman*, 308 P.3d 1201, 1205-06 (Ariz. App. 2013) (upholding Land Commissioner's discretion to determine highest and best use of state trust land.)

However, management of trust lands does not preclude the acquisition of those lands for public purposes.

4. Condemnation of Public Trust Lands under State Enabling Acts

4.1 Enabling Acts. In the case of the State of Washington, the authority to condemn trust lands is expressly granted in the Enabling Act of 1889 as amended by Congress in 1932. The Act reads in relevant part:

> The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however*, That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

Enabling Act § 11, 25 Stat. 616 (1889), as amended by Act of May 7, 1932, 47 Stat. 150.

Interpreting a similar provision, the Idaho State Supreme Court stated a clear finding when it ruled on the authority of the state to allow the condemnation of school lands granted under its Enabling Act:

> When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction.... We cannot believe that congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers who have taken homes in the arid portions of the state seeking a livelihood elsewhere.

Hollister v. State, 9 Idaho 8, 71 P. 541, 543 (1903), overruled in part on other grounds, *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970). See also, *Peterson v. Baker*, 39 Wash. 275, 81 P. 681 (1905) (the Enabling Act did not reserve school lands for public uses; thereby freeing said lands for condemnation). Montana, and North and South Dakota are similar. Enabling Act. Ch. 180, § § 10, 11, 25 Stat. 676 (1889). The original version of the Enabling Act reserved these lands for "school purposes only" and set forth certain restrictions on their sale and lease to ensure the lands would derive benefit to Washington schools. *Public Utility District No. 1 of Okanogan County v. State*, 174 Wn. App. 793 at 797, 301 P.3d 472 (2013). The Act has been amended at various times over the years, and in 1932, Congress again amended the Act to expressly grant states the authority to prescribe terms to allow for the acquisition of easements over school lands. With this amendment, Congress also removed the former language of the Act that reserved said lands for "school purposes only."

Idaho and North Dakota affirm the right of the state to allow school lands to be condemned. Montana has rejected such authority; and South Dakota has yet to rule on this particular issue. See *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903), overruled in part on other grounds, *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970); *State ex rel. Board of University and School Lands v. City of Sherwood*, 489 N.W.2d 584 (N.D. 1992); and *State v. District Court in and for Sanders County*, 42 Mont. 105, 112 P. 706 (1910).

4.2 <u>Judicial Interpretation</u>. In a 1903 opinion, the Idaho Supreme Court ruled the Enabling Act does not prevent the taking of school lands through condemnation because:

> [w]hen Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547; *Cooley on Const. Limitations*, 647; *Southern Pac. Ry. v. Railway Co.*, 111 Cal. 221, 43 Pac. 602; *Lewis, Eminent Domain*, sec. 2; *Parmelee v. Railroad Co.*, 7 Barb. 559; *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660. But even if congress had the authority, in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act.

Hollister v. State, 9 Idaho at 8; citing *Riverside Township v. Newton*, 11 S.D. 120, 75 N.W. 899 (1898).

Most recently, the Washington Supreme Court reiterated its earlier holdings that the Enabling Act did not preclude condemnation of trust lands.

> In *Roberts* [*Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911)], we explicitly rejected the notion that the condemnation of school lands is unconstitutional. 63 Wash. at 576. We held the condemnation of a 30-foot strip of university land was consistent with article XVI, section 1 of our state constitution and our enabling act because each provision permitted the sale of school lands so long as full market value was conferred. *Id.* at 575. We also noted that the price paid "had all the elements of a public sale" because it reflected the property's full market value. *Id.* at 576.

Public Utility District No. 1 of Okanogan County, 182 Wn.2d 519, 342 P.3d 651 (2015).

5. There Is No Conflict With The Trust Mandate Where Condemnation Proceedings Ensure Full Compensation To The Trust.

5.1 Trust Requires Full Compensation. Condemnation proceedings have "all the elements of a public sale" and therefore present no conflict with the trust mandate of ensuring full compensation. *Id.* Cases rejecting legislative authorizations involved failures to fully compensate the trust. For example, in *Skamania County v. State*, this Court found that the grant of school trust lands creates "real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees." 685 P.2d at 580. The state violated this fiduciary obligation when it allowed private contractors to escape timber harvest contracts without preserving the full value of those contracts. 685 P.2d at 581-82.

See also, Wasden v. Bd. of Land Comm'rs, 280 P.3d 693, 701 (Idaho 2012) (invalidating statute that allowed lease of trust lands without public auction); *Montanans for Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800 (Mont. 1999) (invalidating certain statutes that failed to ensure full market value for trust lands); *Gladden Farms, Inc. v. State*, 633 P.2d 325, 330 (Ariz. 1981) (invalidating sale of trust lands to existing lessees without public auction); *United States v. 78.61 Acres of Land*, 265 F. Supp. 564, 568 (D. Neb. 1967) (invalidating grant of right-of-way over school lands to United States that was uncompensated); *State ex rel. Ebke v. Bd. of Educ. Lands & Funds*, 47 N.W.2d 520, 525-26 (Neb. 1951) (invalidating statute that permitted leases of trust land based on arbitrary valuations shown to be substantially less than fair market value). These cases should have no application where the only issue should be the **amount** of compensation to be paid for the public's use of the trust lands.

5.2 Condemnation Includes Just Compensation. The U.S. Supreme Court addressed the fundamental issue of full compensation for school and other trust lands in *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). *Lassen* involved acquisition of a right-of-way by the Arizona Highway Department over trust lands managed by

that state's Land Commissioner. *Id.* at 459-60. In addressing the procedures by which the lands were to be transferred, the Court explained:

> **The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses.** We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The State may instead employ the procedures established by the Commissioner's rules, **or any other procedures reasonably calculated to assure the integrity of the trust** and to prevent misapplication of its lands and funds.

Id. at 465 (emphasis added); *see also id.* at 463 ("The method of transfer and the transferee [are] material only so far as necessary to assure that the trust sought and obtained appropriate compensation."). Condemnation and payment of just compensation satisfies that requirement.

The principles articulated in *Lassen* are consistent with law from other states:

> When the state transfers trust assets ... **it must seek full value for the assets**. It may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be.

Skamania County, 102 Wn.2d at 134 (emphasis added) (internal citation omitted); *accord State ex rel. Ebke*, 47 N.W.2d at 523 ("[T]he primary purpose of the trust is the production of income for … the common schools …"); *Washington AGO 1996 No. 11* (Question 5(c) Short Answer) (observing that DNR "may only take into account factors consistent with ensuring the economic value and productivity" of the trust).

Other courts have reached the similar conclusions as Washington's Attorney General, including the U.S. Supreme Court, *Lassen*, 385 U.S. at 468-70 (State enabling act "unequivocally demands ... that the trust receive the full value of any lands transferred from it"); the Montana Supreme Court, *Montanans for the Responsible Use of the School Trust v. State*, 296 Mont. 402, 989 P.2d 800, 810 (1999) (policy allowing free use of trust lands while former lessees remove valuables and determine the value of improvements "is inconsistent with the trust's mandate that full market value be obtained for school trust lands"); and the U.S. District Court for the Eastern District of Washington, *United States v. 111.2 Acres of Land, More or Less, in Ferry County, Washington*, 293 F. Supp. 1042 (E.D. Wa. 1968) (donation of school trust lands to federal government for reclamation project violates school trust absent compensation for full value of lands).

Similarly, the Alaska Supreme Court rejected that state's attempt to create a park from university trust land without compensating the trust. The trust obligation requires Alaska to "maximize the economic return of from land for the benefit of

the university," a goal which "cannot be accomplished if the use of the land is restricted to any significant degree." Hence, preservation of the land as a park "is incompatible with the objective of using university land for the 'exclusive use and benefit' of the university." *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981).

6. Competing Public Interests?

The idea that a property subject to an existing public use can be condemned for another public use that is compatible with the existing use is not a new concept. This principle is discussed in treatises on condemnation authority and has been applied regularly in Washington and in other states. *See, e.g.*, 1A-2 *Nichols on Eminent Domain* § 2.17[8] (Matthew Bender, 3d ed.) (condemnation of property already devoted to a public use permitted where the existing use will not be "materially impaired or destroyed"); 3 John Martinez, *Local Government Law* § 21:27 (2d ed. 2012) (condemnation permitted "where the proposed use is consistent with and will not materially impair the prior public use"); 29A C.J.S. *Eminent Domain* §§ 53, 54 (same). In Washington, the Court recognizes or applies this principle to condemnations of state land. *City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922); *Roberts v. City of Seattle*, 63 Wash. 573, 576, 116 P. 25 (1911).

The following excerpt from *Nichols on Eminent Domain* is instructive:

> In view of the fact that the general rule denying the right to take property already devoted to a public use[2] is predicated on the theory that the existing use is thereby impaired or destroyed, the fact that such use will not be materially impaired or destroyed is sufficient to take the case out of the general rule. If the physical conditions are such that both uses may exist simultaneously it is immaterial that some inconvenience may be caused to the original user.
>
> This exception to the public use doctrine has been called "compatible use," or "consistent use." The compatible or consistent use exception will apply even if the new use causes the previous user some inconvenience, so long as the two uses can stand together. Under this exception, general condemnation authority is adequate to permit a municipality to condemn property of the previous public user. Therefore, it has been stated that the public use doctrine does not even apply when the proposed use will not destroy the existing use of the property or interfere with

[2] The "general rule" being that the condemnation of such lands is not permitted unless authorized expressly or by necessary implication. 1A-2 *Nichols on Eminent Domain* § 2.17[1].

> the prior condemnor's use to such an extent as to be tantamount to destruction.
>
> A particular public easement may be imposed on land already subject to a different public easement without express legislative authority if the exercise of the second easement will not interfere with the exercise of the first, or if the amount of land taken is not enough to impair the use of the remainder for the original purpose. ... Thus, a taking of the right to maintain telegraph poles and wires along a railroad right of way or a turnpike may be effected without express legislative authority.

1A-2 *Nichols on Eminent Domain* § 2.17[8] (citing, *e.g., City of Tacoma* and *Roberts*).

The Washington Supreme Court in the recent decision of *Okanogan PUD No. 1 v. State*, 182 Wash. 2nd 519, 342 P.3d 308 (2015), held similarly. The Court rejected the arguments by the State Department of Natural Resources that the floodgates of condemnation would open.

> Moreover whether the preservation of school lands should outweigh the interests of providing electricity to certain areas is a matter of public policy reserved for the legislature not the court. The question before us is one of pure statutory interpretation. Any reduction of school lands that may result from PUD's exercise of its condemnation powers is not due to judicial expansion but rather express statutory authorization nor does our holding extend so far. As we discuss below, owing to condemnation of an easement is at issue in this case; we have not considered whether condemnation of a fee interest in school lands would be constitutional.

Id. The Court also noted that there were no facts to resolve on the issue of compatibility "that are not answered by the statutory scheme" authorizing PUDs to condemn easements for transmission line corridors.

The compatible use doctrine will find greater expression in future cases. This is the latest analysis of one public agencies right to condemn the property of another public agency.

7. Education Funding v. Environmental Conservation?

It is not the purpose of this paper to address what has been described as the "modern school land trust doctrine." See S.E. O'Day, "School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?," 8 *N.Y.U. Environmental Law Journal* 163 (1999) ("*O'Day*"). Aggressive advocates have gone as far as arguing that school lands should be treated similarly to the public trust applicable to waters of the state, and retained for all to use, and not to be used for resource production.

D. Chasan, "A Trust for All the People: Rethinking the Management of Washington's State Forests," 24 *Seattle Law Rev.* 1 (2000). As summarized in *O'Day*:

> Almost every western state that was granted federal land at statehood for school purposes has encountered this conflict. When the grants were made, the federal government placed conditions in the state's enabling acts to manage these lands for the benefit of schools. Accordingly, many of these conditions were mirrored or expanded upon in state constitutions. Modern judicial and administrative interpretations of the enabling acts and constitutions of grant land states have concluded that the state land managers are under a trust obligation that requires them to maximize revenues from the use of those lands … Some commentators have argued that the adoption of the strict trust obligation by many western courts is inappropriate and any attempt to incorporate environmental values it at odds with strict trust obligation.

O'Day at 165-166. For additional discussion see *Walker*, "The History of School Trust Lands in Nevada: The No Child Left Behind Act of 1864," 7 *Nevada Law Journal* 110 (2006); and, T. Bowlin, "Rethinking the ABCs of Utah's School Trust Lands," 1994 *Utah Law Rev.* 923 (1994).

8. Postscript

The return on the school trust land investments has never been sufficient for support of common schools in the western states. In Washington, the constitution provides the strongest statement in the nation regarding the responsibility of the state for basic education: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders …." Article IX, Section 1, Washington State Constitution. This provision has precipitated decades of litigation over school funding in the state of Washington. See *School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (holding state failing to provide adequate funding for basic education). The state legislature, having failed to comply with the Supreme Court's decision in *McCleary*, was held in contempt by the Court on August 13, 2015. The unanimous order of the Court imposed a fine of $100,000 per day, and encouraged the governor to call a special session so that lawmakers could address the failure to fund basic education. The ruling is the first in Washington in which the Court has sanctioned the other branches of government. Foster Pepper PLLC represented the plaintiffs in both the 1978 school funding case, and the most recent *McCleary* case, including contempt hearings before the Supreme Court against the state.

OKANOGAN PUD V. STATE OF WASHINGTON

CHRONOLOGY OF KEY EVENTS

1996 Okanogan PUD begins planning the Methow Transmission Project ("Project") to construct a new electrical transmission line and substation between Pateros and Twisp.

2003-2006 The PUD completes an environmental impact statement for the Project, receiving formal written comments from DNR that DNR does not object to the transmission line route and that DNR will grant easements over school trust lands within the Project area if certain mitigation measures are taken. Citizen groups file suit to challenge the route selection and the sufficiency of the FEIS (Okanogan County Cause No. 06-2-00168-2). DNR does not participate in the challenge.

2008 The Project's environmental review is upheld by the Court of Appeals; and, the Supreme Court denies review. *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *rev. denied*, 165 Wn.2d 1004 (2008).

2007-2009 The PUD negotiates with DNR to acquire the necessary easements. The PUD's formal easement application is submitted in October 2008. DNR represents that final action on the easements could be expected in two to three months.

Jan. 2009 Peter Goldmark takes office as Commissioner of Public Lands.

Nov. 2009 Still awaiting final action on its October 2008 easement application, the PUD files its petition to condemn the necessary easements over state lands in Okanogan County Superior Court, Cause No. 09-2-00679-4. An amended petition is filed on April 14, 2010 regarding legal description.

May 2010 On the parties' cross-motions, the trial court upholds the PUD's condemnation authority and enters an uncontested order of public use and necessity.

June 2010 The State files a "contingent notice of appeal." Court of Appeals Nos. 291219-III and 29123-5-III. Commissioner Goldmark files a petition for a writ of mandamus requiring the Attorney General to represent him in an appeal. Supreme Court No. 84704-5.

Oct. 2010 The appeal is stayed pending a ruling in *Goldmark v. McKenna*.

Sept. 2011 The Washington Supreme Court holds that the Attorney General is required to prosecute an appeal on behalf of DNR. *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095.

Sept. 2012 Stay of the appeal lifted and briefing filed in Division III of the Court of Appeals.

May 2013 Division III of the Court of Appeals affirms the PUD's authority to condemn the easements over school trust lands. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 174 Wn. App. 793, 301 P.3d 472 (May 7, 2013).

June 2013 The State files a Petition for Review with the Supreme Court. Supreme Court No. 8894-0.

Jan. 29, 2015 Supreme Court affirms lower courts; authorizing PUD condemnation. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 342 P.3d 308 (2015).