FOSTER PEPPER

Public Condemnation of School Trust Lands

International Municipal Lawyers Association

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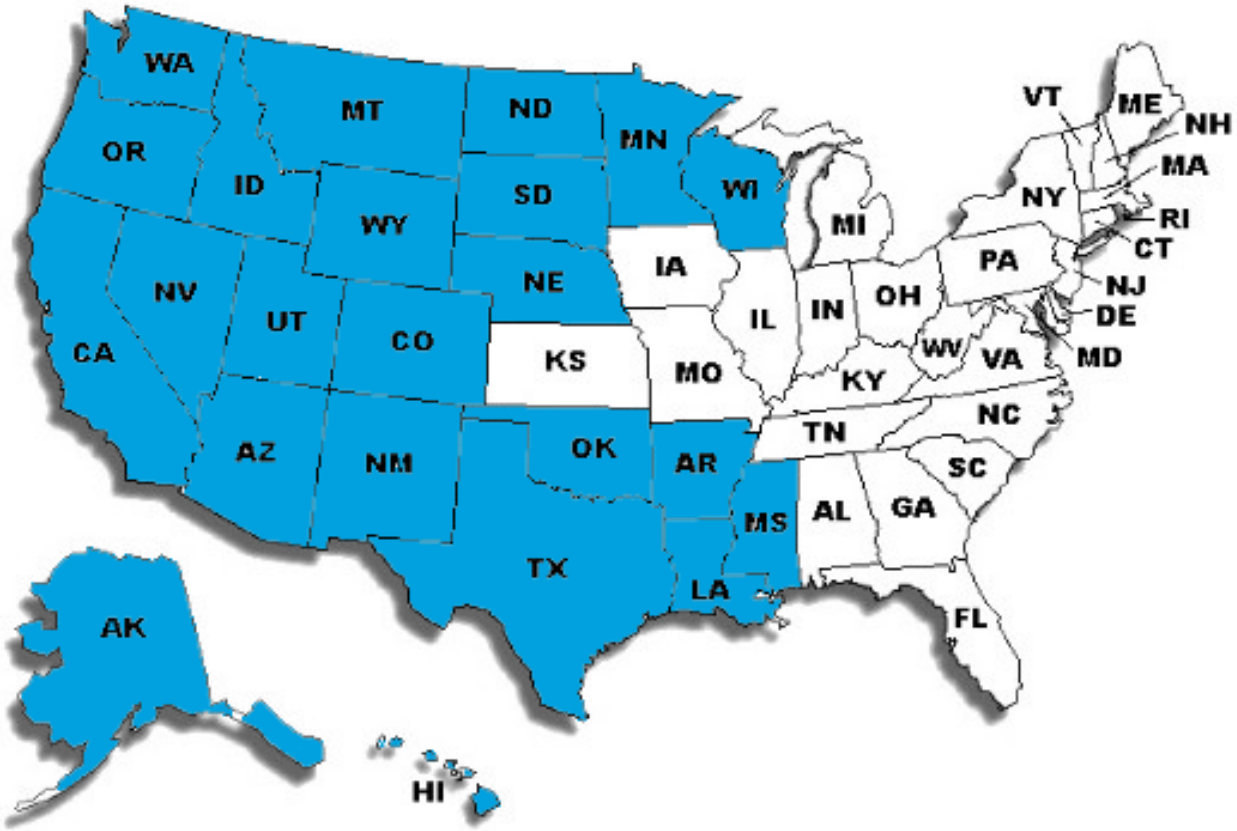
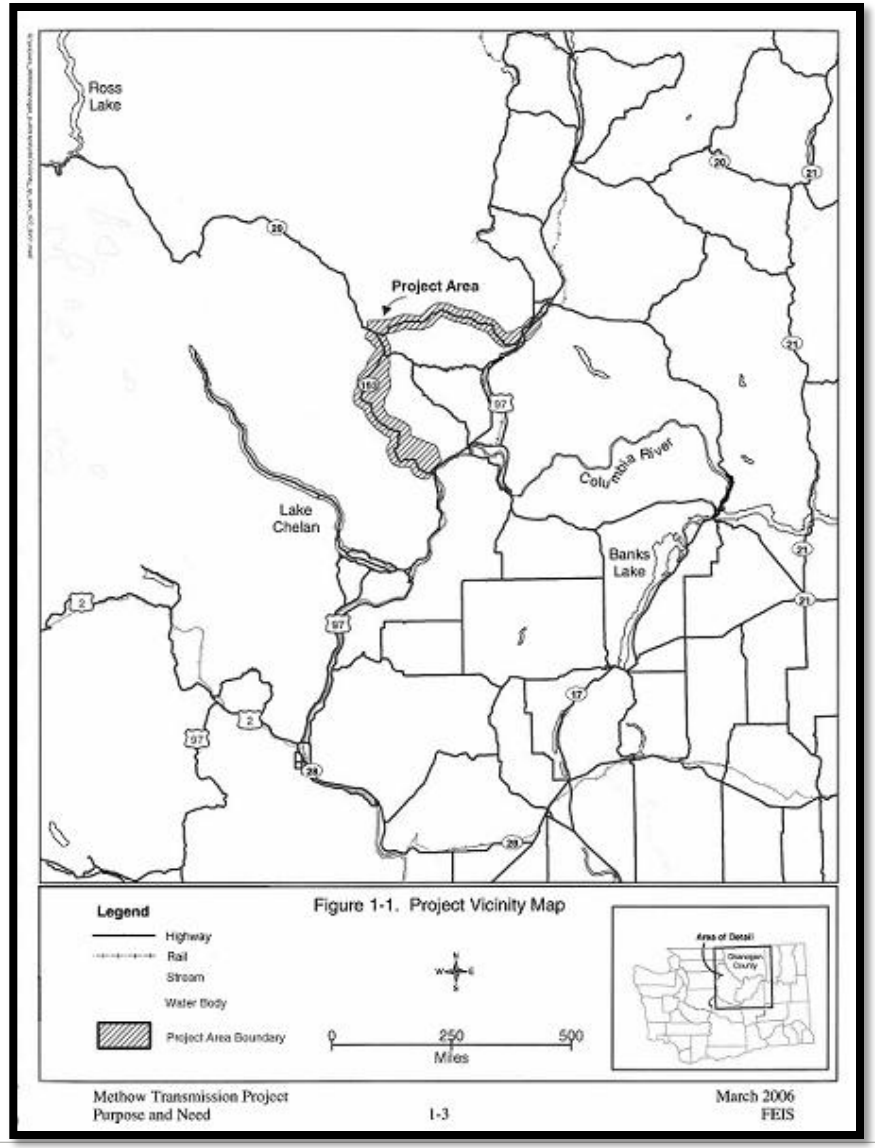
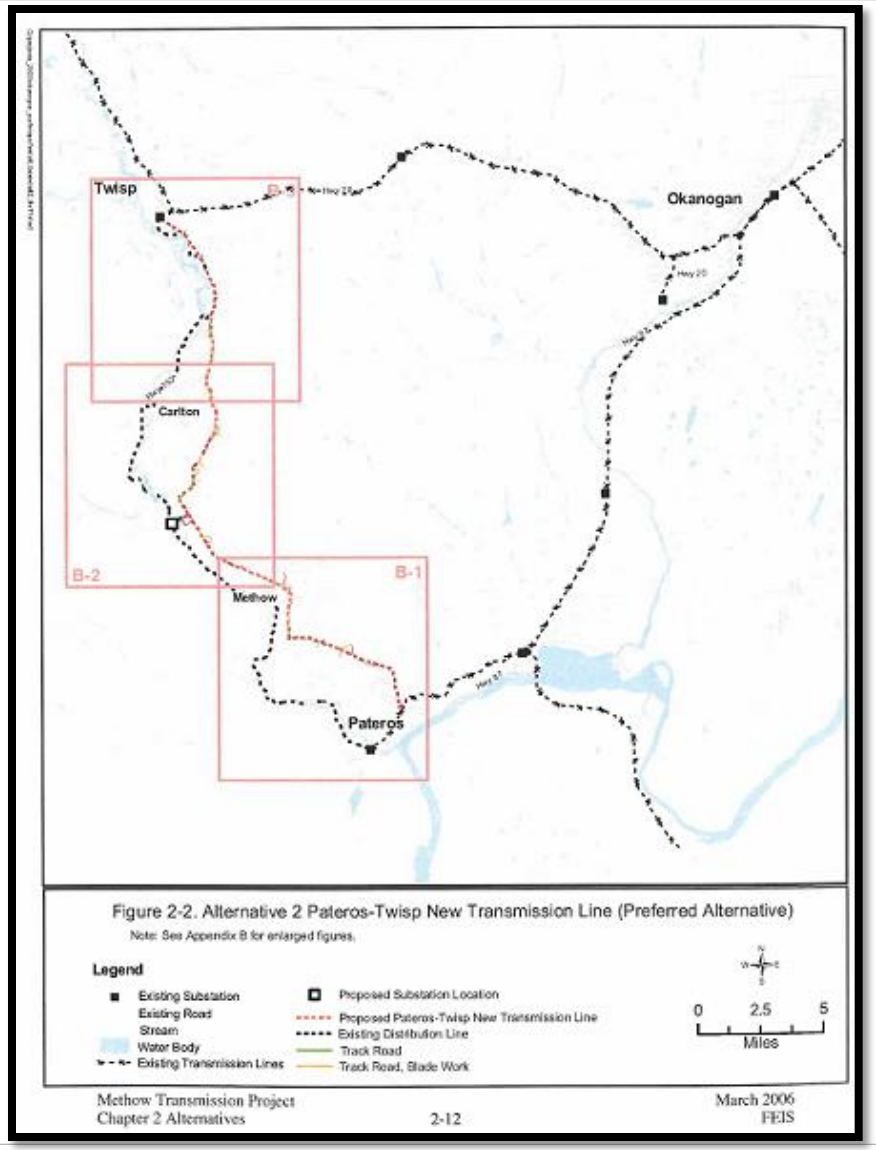
THE LAND GRANT STATES



Okanogan PUD Transmission Project

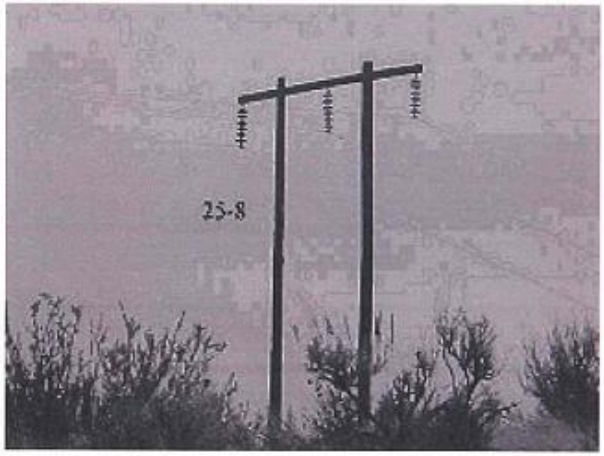


Alternative 2 Route



Typical H-Frame Structure

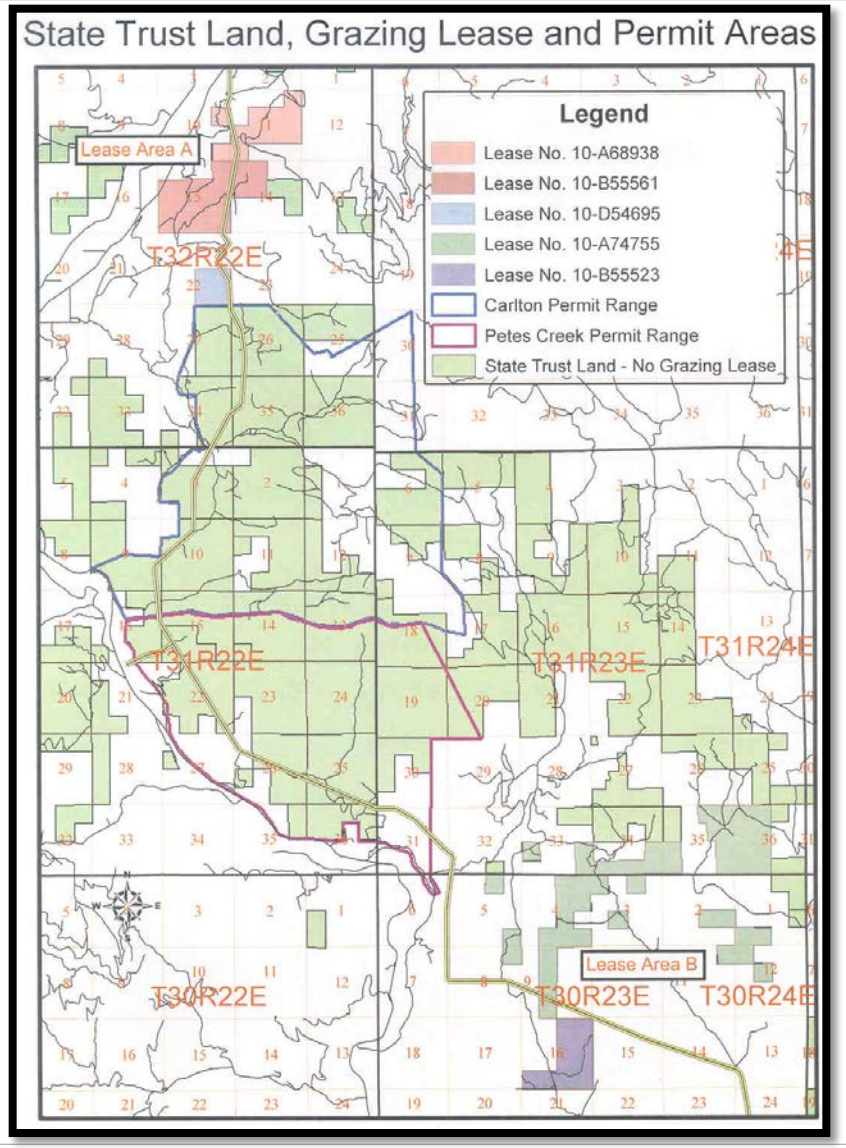
Figure 2-8. Typical H-Frame Structure



Methow Transmission Project
Chapter 2 Alternatives

2-41

March 2006
FEIS


State Trust Land, Grazing Lease and Permit Areas
Legend
Lease No. 10-A68938
Lease No. 10-B55561
Lease No. 10-D54695
Lease No. 10-A74755
Lease No. 10-B55523
Carlton Permit Range
Petes Creek Permit Range
State Trust Land - No Grazing Lease
Lease Area A
Lease Area B
T32R22E
T31R22E
T31R23E
T31R24E
T30R22E
T30R23E
T30R24E

Okanogan PUD Case Background

1904 Washington Supreme Court holds that statutory authority to condemn school trust lands must be expressly stated. *State v. Super. Ct. of Chelan County*, 36 Wash. 381, 78 P. 1011.

1907 Legislature amends condemnation statute to expressly include state, county, and school lands. *See City of Seattle v. State*, 54 Wn.2d 139, 145, 338 P.2d 126 (1959).

1911 Washington Supreme Court upholds condemnation of school trust lands. *Roberts v. City of Seattle*, 63 Wash. 573, 116 P.2d 25.

1922 Washington Supreme Court upholds condemnation of school and other state lands dedicated to a public use where the proposed use would not destroy the public use or preclude its successful operation. *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700.

Okanogan PUD Case Background

1927 Legislature passes the Public Lands Act, which defines "state lands" to include school trust lands "which are not devoted to or reserved for a particular use by law." Laws of 1927, ch. 255,§1.

1930 Voters pass Initiative to the Legislature No. 1, authorizing the creation of public utility districts.

1931 Legislature enacts public utility district statute, granting districts the express authority to condemn "state, county, and school lands." Laws of 1931, ch. 1,§6(e) (now codified at RCW 54.16.050).

1959 Washington Supreme Court upholds condemnation of school trust lands not dedicated to a public use and reaffirms its decision in *City of Tacoma v. State*. *City of Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126.

Okanogan PUD Case Chronology

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).

Okanogan PUD Case Chronology

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.
Feb. 2010	The trial court grants Conservation Northwest's motion to intervene in the eminent domain proceedings.

Okanogan PUD Case Chronology

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	Conservation Northwest appeals the orders on summary judgment and public use and necessity. The PUD cross-appeals Conservation Northwest's intervention. The State files a "contingent notice of appeal." Commissioner Goldmark files a petition for a writ of mandamus requiring the Attorney General to 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.

Okanogan PUD Case Chronology

Sept. 2012	Stay of the appeal lifted and briefing filed in Division III of the Court of Appeals.
Oct. 2012	Washington Supreme Court denies the State's request to transfer the appeal.
May 2013	Division III of the Court of Appeals affirms the PUD's authority to condemn the easements over school trust lands. The court does not address intervention. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 174 Wn. App. 793, 301 P.3d 472, 2013 WL 1891370 (May 7, 2013).
June 2013	The State files a Petition for Review with the Supreme Court. Supreme Court No. 8894-0.
Feb. 25, 2014	Oral arguments heard by Supreme Court.

Update on Okanogan PUD Case

January 29, 2015

Supreme Court unanimously upholds PUD authority to condemn State lands

Public Utility Dist. No. 1 of Okanogan County v. State,

182 Wn.2d 519, 342 P.3d 308 (2015)

Okanogan PUD v. State

We . . . hold that RCW 54.16.050 expressly authorizes public utility districts to condemn school lands held in trust by the state. We next consider whether PUD is nevertheless prohibited from condemning the subject property because of its present use for cattle grazing.

Okanogan PUD v. State

Contrary to DNR's and CNW's contention, Washington recognizes that the prior public use doctrine does not apply when the prior use is compatible with the proposed use. The flaw in DNR's and CNW's position stems from a misapprehension of our early cases. . . .

Okanogan PUD v. State

the analysis for determining a municipal corporation's authority to condemn state land held by the state in its governmental capacity is similar to that for determining a corporation's authority to condemn property already serving a public use . . . Both analyses require express statutory authorization and turn on the character of the property being condemned.

Okanogan PUD v. State

The former, however, concerns the power to condemn and looks to whether the state has set aside state-owned property for public use so that the property is no longer held in its proprietary capacity. The inquiry does not depend on whether the property is actually being used for any present public use.

Okanogan PUD v. State

In contrast, the prior public use doctrine does [require present public use]. It assumes the power to condemn exists and is concerned with the *exercise* of such power. The prior public use doctrine balances competing public uses and applies regardless of whether the property is state owned.

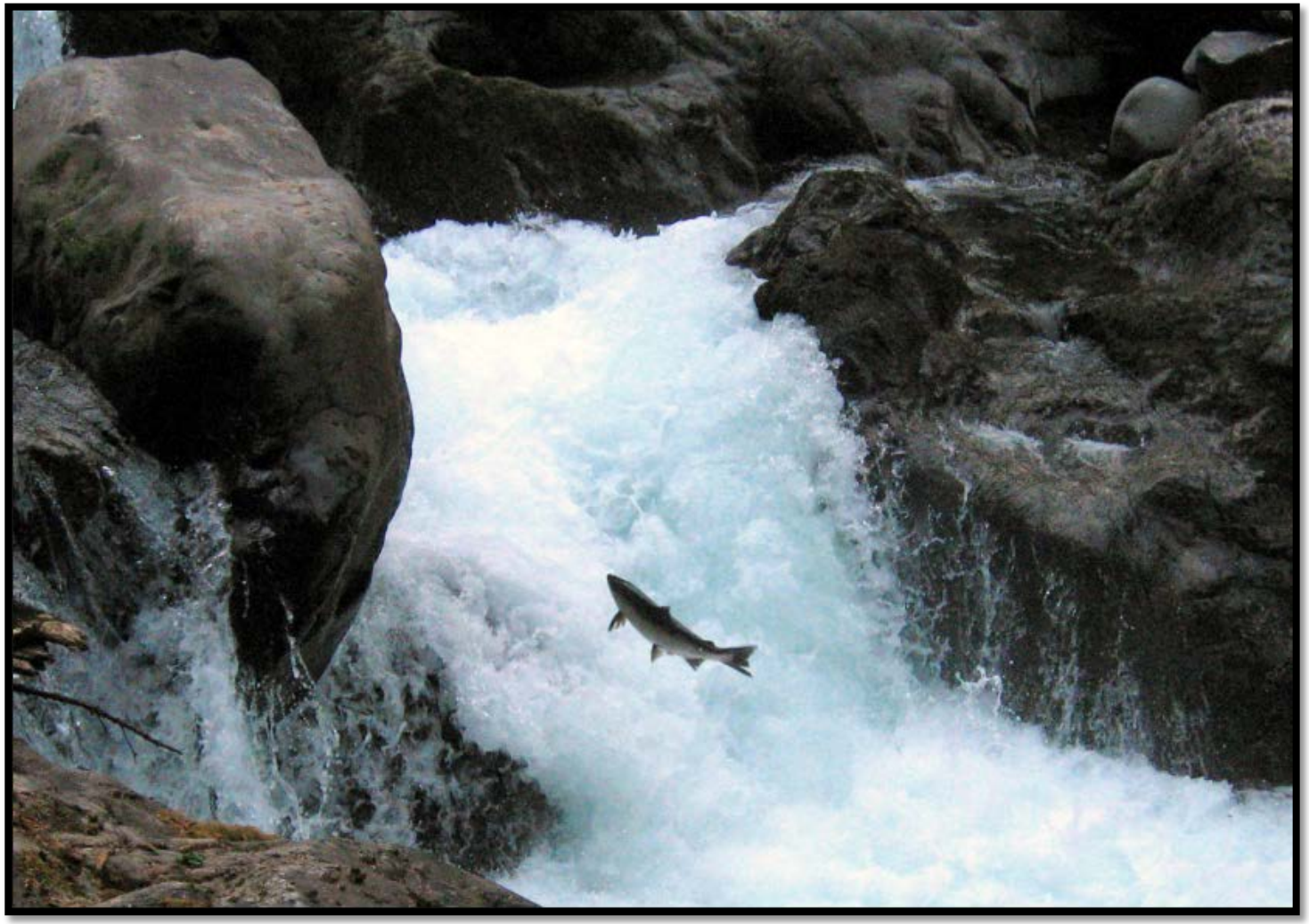
Okanogan PUD v. State

As we explained in *Superior Court* [1916], once the question of power has been determined, then the issue may be about the superiority of rights between *competing* public uses.

Okanogan PUD v. State

In condemnation actions between competing public uses, we have said that we consider "the present or prospective use of such property by the condemnee, the prospective use thereof by the condemner, the comparative advantages flowing to

the public as between the ownership thereof by the condemnee and condemner, and the comparative advantage and disadvantages flowing to the condemnee and condemner by the ownership of such property." *Wash. Boom Co.* [1914].



Cowlitz County v. Martin, 142 Wn. App. 868 (2008).

Public Use — Public Necessity

- Recent City of Seattle Trial Court Ruling:

  …acquisition of the property for ~~general municipal purposes including but not limited to~~ the construction of a new North Precinct Police Station...

Tacoma Skokomish Dam



Property Acquired?

Tacoma explicitly stated in its *Funk* [1920] petition that it needed to condemn the *Funk* litigant's riparian rights because "the volume of water in said river below said dam will be diminished." Thus, Tacoma's petition put the parties on notice only that their parcels would lose the ability to use the river's water, not that their parcels would suffer flood and groundwater damage from an overabundance of water.

Property Acquired?

For these reasons, the *Funk* litigants could not have reasonably predicted that Tacoma would overwhelm the main stem with water and cause water damage to their parcels eight decades after *Funk*.

Richert v. Tacoma Power Utility, 319 P.3d 882 (2014)

(Div. II, March 4, 2014, and published May 13, 2014)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END

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