

1 Kristen K. Mitchell, WSBA #31601
Anne E. Egeler, WSBA #20258
2 Attorney General of Washington
1125 Washington Street SE
3 PO Box 40100
Olympia, WA 98504-0100
4 (360) 753-6200

5 *Attorneys for State of Washington*

6

7

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

8

9 THE CONFEDERATED
TRIBES AND BANDS OF THE
10 YAKAMA NATION, a
sovereign federally recognized
11 Native Nation,

12 **Plaintiff,**

13 **v.**

14 KLICKITAT COUNTY, a
political subdivision of the State
15 of Washington; KLICKITAT
COUNTY SHERIFF'S OFFICE,
16 an agency of Klickitat County;
BOB SONGER, in his official
17 capacity; KLICKITAT COUNTY
DEPARTMENT OF THE
18 PROSECUTING ATTORNEY,
an agency of Klickitat County;
19 and DAVID QUESNEL, in his
official capacity,

20 **Defendants.**

21

22

NO. 1:17-cv-03192-TOR

STATE OF
WASHINGTON'S AMICUS
BRIEF

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATE INVOLVEMENT IN TRACT D 1

 A. The State Holds Trust Lands Within Tract D 1

 B. The State Has a Regulatory Role in Tract D..... 5

 C. The State Is Working Cooperatively with the Yakama Nation and
 Federal Government to Address Water Quality and Taxation in
 Tract D..... 6

III. CONCLUSION 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

TABLE OF AUTHORITIES

Cases

Idaho v. Coeur d’Alene Tribe,
521 U.S. 261 (1997).....5

Martin v. Waddell’s Lessee,
41 U.S. 367 (1842).....5

Skamania v. State,
685 P.2d 576 (Wash. 1984).....3

Statutes

Enabling Act, ch. 180, 25 Stat. 676 (1889).....2, 3

Wash. Rev. Code § 76.045

Wash. Rev. Code § 76.095, 6

Wash. Rev. Code § 77.04.0126

Wash. Rev. Code § 77.556

Wash. Rev. Code § 77.55.0215

Wash. Rev. Code § 77.55.3516

Wash. Rev. Code § 78.445

Wash. Rev. Code § 82.087

Wash. Rev. Code § 82.127

Wash. Rev. Code § 90.48.2607

Other Authorities

Benjamin Harrison: Proclamation 294
Admission of Washington Into the Union, November 11, 18892

Wash. Att’y Gen. Op. 11 (1996)3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Constitutional Provisions

Wash. Const. art. XVI, § 13

1 **I. INTRODUCTION**

2 Pursuant to the Court’s request, the State of Washington submits this
3 amicus brief on behalf of Governor Inslee and state agencies. *See* ECF No. 59
4 at 5. The parties and the United States have already thoroughly briefed the legal
5 issues related to whether Tract D is part of the Yakama Indian Reservation.
6 The State has nothing to add on that issue and takes no position on it.

7 The State has two primary roles currently in Tract D. First, the State owns
8 and manages approximately 36,521 acres of land that is held in trust. Second, the
9 State has a regulatory role in Tract D. This includes regulating forest practices
10 and surface mining; engaging in fire suppression activities throughout Tract D;
11 reviewing and approving hydraulic projects within Tract D; and regulating
12 hunting and fishing within Tract D.

13 The State, the Yakama Nation, and the federal government have worked
14 cooperatively to address jurisdictional issues regarding other State interests,
15 including water quality regulation and collection of state and local sales and use
16 taxes, pending a final determination of the boundary location.

17 **II. STATE INVOLVEMENT IN TRACT D**

18 **A. The State Holds Trust Lands Within Tract D**

19 At statehood, the federal government granted the State of Washington
20 certain lands to be held in trust for the benefit of the public schools and other
21 beneficiaries. On February 22, 1889, Congress enacted the Omnibus Enabling
22

1 Act (Enabling Act) that set forth the terms and conditions for the territories of
2 Dakota, Montana, and Washington to become states. Enabling Act, ch. 180,
3 25 Stat. 676 (1889).¹ The Enabling Act granted the State of Washington several
4 million acres of public land. These granted lands are expressly reserved in the
5 Enabling Act for support of the common schools (K-12); for public buildings at
6 the capitol for legislative, executive, and judicial purposes; for university
7 purposes (University of Washington); for establishment and maintenance of a
8 scientific school (Washington State University); for use and support of an
9 agricultural college (Washington State University); for state normal schools
10 (Central, Eastern, and Western Washington Universities, and The Evergreen
11 State College); and for charitable, educational, penal, and reformatory
12 institutions. *Id.*

13 In response to the Enabling Act, the people of Washington elected
14 delegates to a constitutional convention and ratified the constitution drafted by
15 those delegates. On November 11, 1889, President Benjamin Harrison, by
16 proclamation, verified the territory's compliance with the Enabling Act and
17 admitted Washington into the Union as the 42nd state. Benjamin Harrison:
18 Proclamation 294 – Admission of Washington Into the Union, November 11,
19 1889. The state constitution accepted the federal land grants in trust “for all the
20 people” and imposed restrictions on their disposal in addition to those imposed
21

22 ¹ <http://leg.wa.gov/History/State/Pages/enabling.aspx>

1 in the Enabling Act. *See* Wash. Const. art. XVI, § 1; *see also Skamania v. State*,
2 685 P.2d 576 (Wash. 1984), *and* Wash. Att’y Gen. Op. 11 (1996).

3 Under Section 10 of the Enabling Act, the United States granted
4 Washington land in sections sixteen and thirty-six of every township in the State
5 to support the common schools. *See* Enabling Act § 10. The exception to this
6 grant was where lands in those townships had already been sold or otherwise
7 disposed of, or were part of an Indian or another federal reservation. *Id.* In those
8 instances, the Enabling Act required the United States to grant other land “in lieu”
9 of such lands. *Id.* Accordingly, if the United States wrongfully granted land to
10 Washington in 1889 that should have been part of the Yakama Reservation, in
11 violation of Section 10 of the Enabling Act, then the United States could owe
12 Washington “in lieu” land. Depending on the outcome of this litigation, this issue
13 will likely be the topic of future discussions between the State of Washington and
14 the United States.

15 Within Tract D, the State owns approximately 36,521 acres of land that it
16 manages in trust for the various beneficiaries. Thus, just under one third of the
17 121,465.69 acres of land in Tract D is owned by the State of Washington.
18 ECF No. 58 at 10. The following chart shows the categories of land and acreage
19 managed by the State within Tract D:

20 ///

21 ///

State Lands	Category	Acres
Administrative Site	Other	2
Charitable/Educational/Penal & Reformatory	Federal Grant	7442
Common School and Indemnity	Federal Grant	13,842
Community Forest Trust	Other	2439
Natural Resources Conservation Area	Natural Area	2352
Normal School	Federal Grant	3839
Scientific School	Federal Grant	2599
State Forest Transfer (Statutory Trust)	State Forest Lands	1595
University – Transferred	Federal Grant	2411
Grand Total		36,521

The State’s land is managed primarily as working forests and for grazing leases. Additional minor uses (less than 20 acres) include surface gravel mines, communications sites, and tree stock sources. Only 1194 acres are designated as “non-forested,” with 870 acres of those being road beds. The remaining acreage (approx. 400 acres) includes naturally occurring bald spaces, scree slopes (areas of broken rock at the base of a crag or cliff), gravel pits, and riverbeds. Approximately 2352 acres of this land is for the Klickitat Canyon Natural Resources Conservation Area, and 2439 acres are for the Klickitat Canyon Community Forest.

The trust lands within Tract D are actively managed to maximize net present value. From the year 2000 to the present, the gross timber revenue from the management of lands within Tract D is approximately \$37,225,007.59. Non-timber gross revenue from those lands, from 2006 to the present, is approximately \$263,640.06.

1 In addition to the lands granted to the State discussed above, when the State
2 entered the Union it also received title to the beds of its navigable waters under
3 the Equal Footing Doctrine. This Doctrine holds that the states, upon entry into
4 the Union, “became themselves sovereign; and in that character hold the absolute
5 right to all their navigable waters and the soils under them for their own common
6 use, subject only to the rights since surrendered by the Constitution to the general
7 government.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 283 (1997) (quoting
8 *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842)). As it relates to the present
9 matter, the State has proprietary interests in the State-owned bedlands of the
10 Klickitat River, a portion of which flows through Tract D.

11 **B. The State Has a Regulatory Role in Tract D**

12 In addition to managing land, the State has a regulatory role in Tract D.
13 This includes regulating forest practices (Wash. Rev. Code § 76.09); regulating
14 surface mining (Wash. Rev. Code § 78.44); and conducting fire suppression
15 activities (Wash. Rev. Code § 76.04).

16 The State also regulates hydraulic projects in the forests and waterways
17 located in Tract D. Hydraulic project approvals impose conditions that protect
18 fish life during construction and performance of other work. Wash. Rev.
19 Code § 77.55.021. The State regulates hydraulic projects associated with forest
20 practices in Tract D, as well as hydraulic projects unrelated to forest practices
21 that involve construction or work that uses, diverts, obstructs, or changes the
22

1 natural flow or bed of any body of water in Tract D. *See* Wash. Rev.
2 Code §§ 77.55, 77.55.351; Wash. Rev. Code § 76.09. The State also issues
3 hydraulic project approvals for projects undertaken by non-tribal persons and
4 entities within the Yakama Reservation.

5 Finally, the state Department of Fish and Wildlife regulates hunting and
6 fishing within Tract D. *See* Wash. Rev. Code § 77.04.012. To the extent it is
7 consistent with the Department of Fish and Wildlife’s primary conservation
8 mandate, state law requires the agency to maximize the public’s recreational
9 fishing and hunting opportunities. *Id.* Tract D includes popular hunting areas and
10 a stretch of the Klickitat River that garners use by anglers seeking a less-crowded,
11 remote fishing experience. The Klickitat Hatchery, owned by the Department of
12 Fish and Wildlife and leased to and operated by the Yakama Nation, is also
13 located on the Klickitat River, within Tract D.

14 **C. The State Is Working Cooperatively with the Yakama Nation and**
15 **Federal Government to Address Water Quality and Taxation in**
16 **Tract D**

17 The State, the Yakama Nation, and the federal government have worked
18 cooperatively to address water quality and tax issues pending final determination
19 of the legal boundary.

20 With respect to water quality, the Washington Department of Ecology has
21 worked with the United States Environmental Protection Agency (EPA). Under
22 state law, the Department of Ecology is the state agency designated to take action

1 under the federal Clean Water Act. Wash. Rev. Code § 90.48.260. The EPA has
2 taken the position that Tract D is within the Yakama Reservation, and therefore
3 the state Department of Ecology does not have delegated authority under the
4 federal Clean Water Act. *See* ECF No. 86-1 at 29-30. Because the EPA is
5 fulfilling the requirements of the Clean Water Act, including issuance of permits
6 for Glenwood’s wastewater treatment facility, the Department of Ecology has
7 found it unnecessary to take a position regarding the reservation boundary.

8 The state Department of Revenue has also declined to take a position
9 regarding the reservation boundary. Outside the Yakama Indian Reservation,
10 enrolled members of the Yakama Nation are required to pay state and local sales
11 and use taxes. Wash. Rev. Code §§ 82.08, 82.12. In August 1994, the Department
12 of Revenue directed businesses within Tract D to stop collecting sales and use
13 tax from enrolled members of the Yakama Nation. Decl. of Smith at 2. The intent
14 of this tax collection decision was to provide tax certainty to businesses and
15 enrolled members of the Yakama Nation until there is a final determination of
16 the reservation boundary. *Id.* It is not an indication of the Department of
17 Revenue’s position regarding the location of the reservation boundary.

18 ///

19 ///

20 ///

21

22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

III. CONCLUSION

The State takes no position on the location of the boundary. It appreciates the opportunity to describe the State’s role and interests within Tract D.

DATED this 15th day of July, 2019.

ROBERT W. FERGUSON
Attorney General

s/ Anne E. Egeler
ANNE E. EGELER, WSBA #20258
KRISTEN K. MITCHELL, WSBA #31601
Attorneys for the State of Washington
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100
Telephone: (360) 753-6200
Email: anne.egeler@atg.wa.gov

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

s/ Casey D. Miller

CASEY D. MILLER
Legal Assistant
Office of the Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 586-3243
caseym@atg.wa.gov