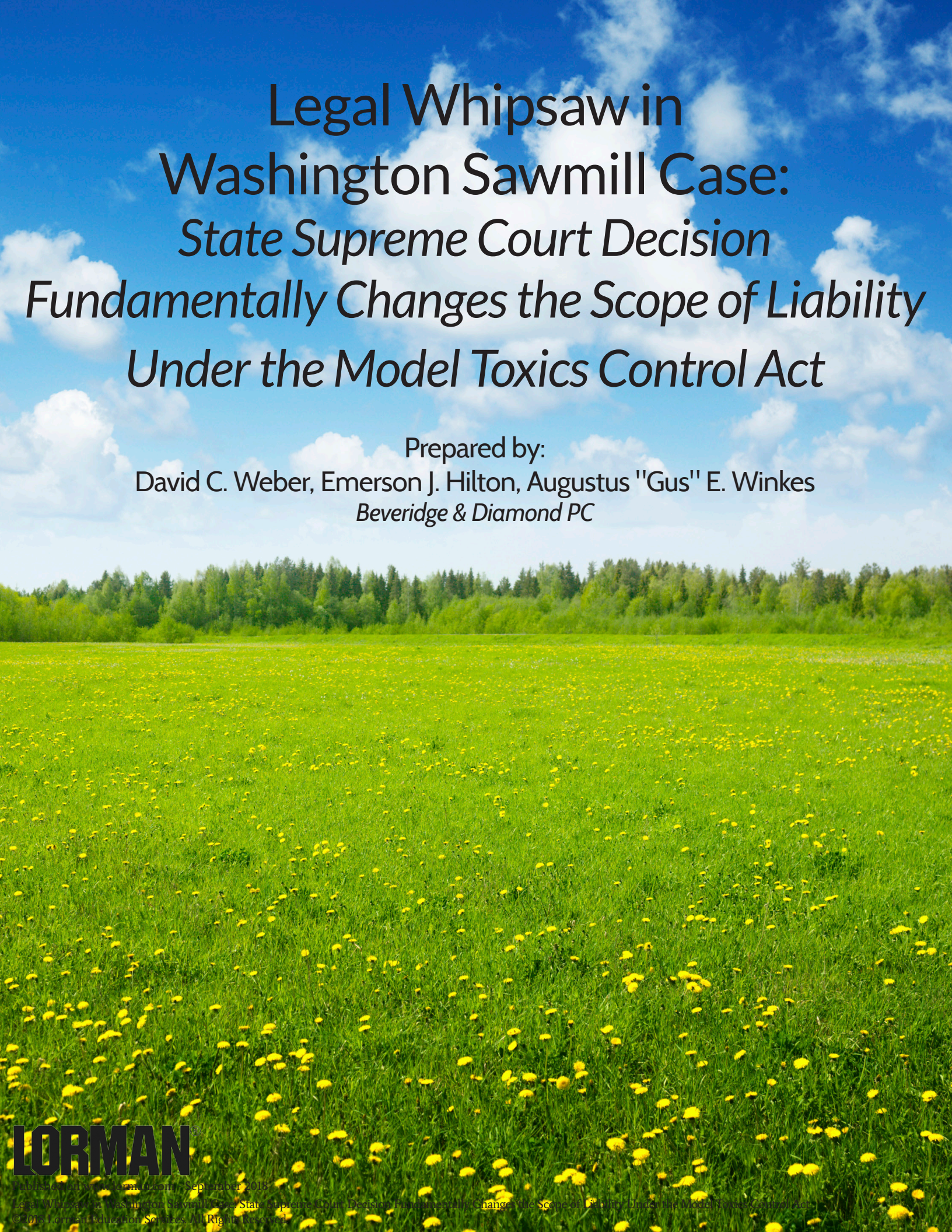
Legal Whipsaw in Washington Sawmill Case: *State Supreme Court Decision Fundamentally Changes the Scope of Liability Under the Model Toxics Control Act*

Prepared by:
David C. Weber, Emerson J. Hilton, Augustus "Gus" E. Winkes
Beveridge & Diamond PC



LORMAN®
Published on www.lorman.com - September 2018

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 1300 available
- ☑ **Slide Decks -** More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Legal Whipsaw in Washington Sawmill Case: State Supreme Court Decision Fundamentally Changes the Scope of Liability Under the Model Toxics Control Act

Written by David C. Weber, Emerson J. Hilton, Augustus "Gus" E. Winkes
May 30, 2018

On May 24, 2018, in a significant decision with far-reaching implications for cleanups at Washington's contaminated sites, the Washington State Supreme Court narrowed the scope of "owner or operator" liability under the state environmental cleanup statute, the Model Toxics Control Act (MTCA). *Pope Resources, LP v. Washington State Department of Natural Resources.*[1] The surprising 6-3 decision held: (1) that a state agency – in this case, the Department of Natural Resources (DNR) – may not be liable as an "owner" under MTCA when it merely acts as a lessor, or property management agent, for a property owned by the state; and (2) that liability as an "operator" under MTCA requires active involvement in the operational decisions at a facility.

The *Pope Resources* decision fundamentally changes the landscape of MTCA liability by providing an exemption to DNR for the 2.6 million acres of aquatic lands the agency manages. Specifically, the decision limits the potential "owner" liability of managers and lessors of contaminated property – most importantly state agencies – who do not actually own the property. In addition, by limiting the scope of "operator" liability under the broad statutory language of MTCA, the decision also upends 25 years of the Department of Ecology's consistent application of the state's cleanup law. A discussion of key takeaways is provided below, followed

by a closer evaluation of the decision and its potential implications for contaminated sites in Washington.

Key Takeaways

Although the implications of the *Pope Resources* decision will take time to sort out, some key observations are already clear:

- *Fewer state agencies to pursue as "owners or operators" under MTCA could mean increased liability for private parties and municipalities.* Fallout from the decision includes the likely increased risk of additional cleanup costs for private and municipal liable parties at contaminated sites on state-owned property in Washington. We expect many contaminated sites on state-owned land may now have "orphan owners," which will require a re-allocation of liability among the remaining parties involved at those sites.

- *The scope of the state's liability under MTCA is unresolved.* The decision in *Pope Resources* did *not* address whether the state itself is exempt from MTCA liability. In fact, Pope Resources conceded that argument at the trial court level. Given the high stakes involved at aquatic cleanup sites, we expect increased litigation over whether the state is a "person" under MTCA and, thus could be liable as an "owner," even though the "state" is not listed explicitly in MTCA's definition of "person."[2]

- *"Owner" liability under MTCA requires an ownership interest similar to that of a fee simple interest in a facility.* In this regard, "delegated management authority" is likely insufficient to hold state agencies – and perhaps other lessors and property managers – liable under MTCA's standard for "owner" liability. Parties seeking

to recover cleanup costs from current or past site owners under MTCA should also ensure they identify clear evidence of an ownership interest such as a deed or other legal instrument, which the Court implies is relevant to the determination of "owner" liability.

- *The decision provides opportunities to avoid the application of "operator" liability under MTCA.* The decision suggests potential new strategies for property owners and lessors to limit or avoid "operator" liability for contamination caused by tenants or third parties. However, property owners should remain mindful that they face strict liability under MTCA and that lack of "operator" liability will not necessarily reduce the owner's own liability.

- *"Operator" liability requires "operational control" or "business management" authority over a facility; mere "management" of underlying lands is insufficient for liability.* The Court held that an "operator" must actually direct, manage, or conduct the "affairs of a facility," rejecting a looser standard of operator liability and drawing heavily on decisions interpreting the federal Superfund statute.

- *Looking ahead, Washington courts will likely follow more closely the federal Superfund law to interpret MTCA.* The *Pope Resources* decision indicates that Washington courts should hew to federal court interpretations of the analogous Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This appears to be true even where the language differs between the two statutes.[3]

Summary of Decision

Factual Background

The claims in *Pope Resources* arose from historical wood waste and related contamination associated with former sawmill operations at Port Gamble Bay on Washington's Olympic Peninsula. The former owner and operator of the mill complex, Pope Resources (Pope), recently completed a significant cleanup of in-water portions of the site. DNR authorized Pope to use the leased aquatic lands for log storage. In 2014, Pope filed a lawsuit against DNR, seeking contribution for cleanup costs under MTCA.[4] Pope argued that DNR was liable under MTCA as an "owner or operator" of submerged lands at the site that are owned by the State of Washington and leased to Pope through a lease issued by DNR.

Lower Court Decisions

The trial court granted summary judgment to DNR in 2016, holding without written or oral elaboration that DNR was not an "owner or operator" under MTCA.[5]

The state Court of Appeals reversed the trial court in a 2-1 opinion, holding that DNR was an "owner or operator" under the statute.[6] The Court of Appeals followed MTCA's plain language in finding that DNR, as the manager of the state's 2.5 million acres of aquatic lands, is an "owner or operator" under MTCA's broad remedial scheme. MTCA defines "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises any control over the facility."[7] By its plain terms, the definition of "owner or operator" is not limited to the entity holding title to the property. Rather, "owner or operator" includes persons with "any ownership interest" or "any control over the facility."[8]

The Court granted DNR's petition for review in 2017.[9] Numerous interested parties filed amicus briefs expressing concerns with DNR's interpretation of MTCA.[10]

Supreme Court Decision

Changing the course of this case, the Court held on May 24, 2018 that DNR cannot be liable for cleanup costs at Port Gamble as an "owner or operator" under MTCA. The Court criticized the Court of Appeals for its "conflation" of the terms "owner" and "operator," which are separately defined under MTCA.[11] Although MTCA defines "owner" as "[a]ny person with any ownership interest" in a facility, the Court concluded that, while the State of Washington itself owns the submerged lands at issue, DNR's "delegated management authority" over those submerged lands is not akin to "a real property right" indicating an "ownership interest."

The Court also held that DNR is not an "operator" of the contaminated Port Gamble submerged lands, despite DNR's role as lessor and manager of those lands on behalf of the state. Despite MTCA's assignment of liability to "[a]ny person . . . who exercises *any* control over the facility",[12] the Court concluded that DNR's "management role over aquatic lands," which includes the power to lease those lands on the state's behalf, is not sufficient "control" over those lands for purposes of MTCA. Instead, the Court held that MTCA follows the federal Superfund law, CERCLA, in imposing "operator" liability only on those with "operational control" of a facility – i.e., those who, under the U.S. Supreme Court's test for CERCLA liability in *United States v. Bestfoods*, "manage, direct, or conduct operations specifically related to pollution."[13] DNR's roles as "designated manager and lessor of aquatic

lands" was "too slim a reed on which to hang MTCA liability," because it "does not amount to necessary *facilities operations* control."[14]

Analysis and Future Considerations

"Owner" Liability Under MTCA

The Court's analysis of "owner" liability under MTCA has several implications for cleanups on state-owned lands. Although "state government agencies" are included in MTCA's definition of "person," *Pope Resources* holds that such agencies cannot be "any person with any ownership interest" simply because they manage state-owned contaminated lands on behalf of the state. Something more is required, as when a state agency holds title to contaminated property. Indeed, the Court did not entirely eliminate state agency "owner" liability under MTCA, confining its holding to the facts of this case. Yet, by extension, *Pope Resources* applies to Washington's many contaminated submerged lands sites and presumably other types of sites as well.

The state itself is *not* included in MTCA's definition of "person," and as mentioned above, Pope conceded before the trial court that the state cannot be liable at all under MTCA. This issue was not squarely raised on appeal or addressed by the Court, but it is now a critical question for contaminated sites located on state-owned land.

If neither the state nor a state agency can be liable as an "owner" of such sites, *Pope Resources* could lead to a de facto "orphan owner" share and increased liability for private parties who leased or operated or are otherwise responsible for contamination of such sites. Assuming that is true, a key question is how the state's ownership share should be allocated among remaining liable parties. Lessees of state-owned land may be the inheritors of this increase in liability.

"Operator" Liability Under MTCA

The Court's confinement of "operator" liability under MTCA to parties who meet the *Bestfoods* test for "operator" liability under CERCLA has significant potential consequences for future cases. *Pope Resources* relies on CERCLA case law to hold that liability only attaches to parties who possess "facilities operations control" – that is, direct control over the daily operations of a facility. As the dissent in *Pope Resources* points out, the majority's holding that MTCA "follow[s] the CERCLA test" is a departure from prior holdings.[15] Indeed, Washington courts have long recognized that MTCA is "heavily patterned after" CERCLA, but *Pope Resources* goes further in suggesting that CERCLA is MTCA's "parent statute" and that the CERLCA standard for "operator" liability controls in the MTCA context despite an important difference between each statute's definition of "operator." In short, *Pope Resources* narrows the scope of operator liability under MTCA. Courts in pending and future cases are likely to hew closely to CERCLA and federal case law to resolve questions about interpretation of MTCA.

Looking ahead, *Pope Resources* may present property owners and lessors with a dilemma. The decision could potentially reward property owners who carefully assign operational control of their property to lessors, including control over decisions about compliance with environmental regulations. The Court noted that, while DNR was the lessor of Port Gamble submerged lands, the relevant leases "delineated the operational control and MTCA liability for the leased facility" to Pope. On the other hand, property owners must keep in mind that – unlike the state or DNR, following *Pope Resources* – private landowners face strict liability under MTCA regardless of whether they are, or are not, also an operator of a facility.

Conclusion

Pope Resources is one of the most important Washington Supreme Court decisions on the scope of MTCA liability. If the State of Washington – and in a large number of circumstances, a state government agency as well – cannot be assigned "owner" liability under MTCA – or any other category of MTCA liability, for that matter – a legislative fix may be needed to bring the state and its agencies onto equal footing with other property owners who are liable under the statute whether or not the private parties had anything to do with the property's contamination. The Court in *Pope Resources* relies heavily on the so-called "polluter pays" principle, but the purpose of MTCA (and CERCLA) is not *only* to apply the "polluter pays" principle; both statutes broadly impose liability on classes of parties to ensure that liability is not limited to a handful of parties who might fail to fund or perform a cleanup. The more parties swept up by the statutes' liability schemes, the more likely it is that sites will be cleaned up.[16] For now, that goal is likely to be frustrated by the *Pope Resources* decision at contaminated sites on state-owned land in Washington.

The lawyers in B&D's Seattle office are recognized leaders in complex environmental litigation, regulatory compliance counseling, and remediation projects under a wide array of environmental laws. Our team has extensive experience in successfully and efficiently prosecuting, defending, and settling large cost recovery and natural resource damages claims under federal and state laws. The opinions presented in this alert do not necessarily express the views of the firm or the firm's clients. This alert is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Pope Resources, LP v. Washington State Department of Natural Resources*, No. 94084-3, --- P.3d ---- , 2018 WL 2347105 (Wash. May 24, 2018).

[2] The Department of Ecology has named DNR a potentially liable party at other sites in the state, including: Whatcom Waterway (2007); Commencement Bay (2012); Western Port Angeles Harbor (ongoing); and at R.G. Haley (ongoing).

[3] In this regard, *Pope Resources* departs from prior state Supreme Court precedent, including *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28 (1992) (stating that Washington courts look to CERCLA cases as "persuasive" authority but declining to follow CERCLA cases where MTCA's language differs).

[4] RCW 70.105 *et seq*. MTCA was adopted by Washington's voters in 1988 to "raise sufficient funds to clean up all hazardous waste sites" and to "prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters." RCW 70.105D.010(2).

[5] Order, J. Laurie., Kitsap County Superior Court, No. 14-2-02374-1 (June 8, 2015).

[6] *Pope Resources, LP v. Washington State Department of Natural Resources*, 197 Wash. App. 409 (2016).

[7] RCW 70.105D.020(22)(a).

[8] *Id*. at 422 (emphases added).

[9] *Pope Resources, LP v. Washington State Department of Natural Resources*, 188 Wn.2d 1002 (2017).

[10] Multiple parties filed amicus briefs in opposition to DNR's arguments, including: Department of Ecology; City of Seattle, City of Tacoma, City of Bellingham and Washington Association of Municipal Attorneys; Georgia-Pacific LLC; City of Port Angeles; Washington Environmental Council; and several of the drafters of MTCA.

[11] *Pope Resources,* 2018 WL 2347105 at *2-3.

[12] Emphasis added.

[13] *Id.* at *8-9.

[14] *Id*. at 9 (emphasis in original).

[15] *Id*. at *10-11.

[16] Interestingly, the Court does not appear to appreciate the possibility that a state government agency may be found to be a potentially liable party as an "owner or operator," but end up paying none of the cleanup costs after application of "such equitable factors as the court determines are appropriate" in a private party cost recovery action. RCW 70.105D.080.