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No. 569647-II

**COURT OF APPEALS OF THE STATE OF  
WASHINGTON**

**DIVISION II**

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CENTER FOR RESPONSIBLE FORESTRY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL  
RESOURCES, et al.,

Respondents,

and

MURPHY COMPANY, DBA MURPHY COMPANY OF  
OREGON,

Intervenor.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR  
COUNTY

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**AMICUS CURIAE BRIEF OF LEWIS COUNTY AND  
AMERICAN FOREST RESOURCE COUNCIL**

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## I. INTRODUCTION

This case involves the management of timberlands that are held in trust by the State to generate critical revenues that are paid to various public service beneficiaries, including Lewis County. While this case specifically deals with a 75-acre timber sale called “About Time,” the legal issues involved affect the entire 2.1-million-acre trust. If the Center for Responsible Forestry’s (“Center”) misguided legal arguments are given merit, the ability of the State to comply with its fiduciary duty and manage the trust to generate revenue for the beneficiaries will be significantly impaired.

The Center argues that the Washington Department of Natural Resources (“DNR”) is failing to manage the trust lands in accordance with the terms of the Habitat Conservation Plan (“HCP”) it adopted in September 1997 (the “1997 HCP”) as a condition of obtaining an Incidental Take Permit (“ITP”) from the federal government. Collectively, the 1997 HCP and ITP provide DNR various assurances that it is operating in

compliance with the federal Endangered Species Act (“ESA”), which in turn allows it to generate consistent revenues for the trust beneficiaries.

The Center misinterprets the 1997 HCP to strictly require DNR to obtain certain percentages of forest stand characteristics by the end of the century. The Center argues that DNR is not on pace to meet those obligations, and because of this, large numbers of timber sales must be immediately stopped, including the About Time sale. The United States Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NOAA Fisheries”) are the federal agencies charged with ensuring that DNR is in compliance with the 1997 HCP’s commitments. USFWS has directly rejected the Center’s arguments. REC-9429-31. The Center ignores both USFWS’s opinion and the federal regulatory structure from which the 1997 HCP arises, and in doing so asks this Court to improperly insert the Center into the role of the regulator of the federal

permit. Allowing the Center to displace the USFWS to achieve its policy objectives is entirely improper.

If given merit, the Center's claims will have major implications on DNR's timber sale program which is critical to funding social services in rural Washington, and also the federal HCP regulatory structure that has allowed landowners across the county to comply with the ESA for decades. The potential ripple effects of this case are immense, both in Washington and beyond.

This Court should uphold the Superior Court's opinion, recognize that the USFWS has found DNR in compliance with the 1997 HCP, protect the trust beneficiaries, and fully reject the Center's misdirected and improper attacks.

## **II. IDENTITY AND INTEREST OF AMICI**

Lewis County is a Washington county validly formed and existing under the Constitution and laws of the State of Washington. Lewis County is one of DNR's trust land beneficiaries that receives revenues from various timber

harvests. These revenues account for approximately six percent of the County's annual budget, and additional trust funds are paid to support numerous "junior taxing districts" within the County, including libraries, schools, emergency response districts, and numerous other public service providers. Additionally, the County's economy is strongly tied to the forest products sector. Timber jobs are a major source of family-wage employment in the County and a decrease in available trust land timber directly reduces the general economic wellbeing of the County.

American Forest Resource Council ("AFRC") is a regional trade association that represents over 50 forest products businesses and forest landowners throughout the western United States. AFRC's mission is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC does this by promoting active management to attain productive public forests, protect



adjoining private forests, and assure community stability.

AFRC's members heavily rely on DNR timber sales as a source of public timber since many of its members do not own private lands to source their mills. AFRC's membership includes the five companies that purchase the largest number of DNR timber sales.

Both the County and AFRC rely on the consistent sale of trust land timber, and the 1997 HCP was intended to provide certainty that this supply would continue uninterrupted. The Center's claims threaten to not only stop the About Time sale, but also halt numerous future sales that will proceed in conformance with the 1997 HCP. The Center's tactic is clearly evidenced by the eight nearly identical lawsuits that it has filed in the recent past, each of which made the same argument related to the 1997 HCP's terms. If the Center's arguments are adopted, there will be significant impacts to both the County and AFRC as the supply of DNR timber will rapidly evaporate.

While DNR and Murphy Company have shown that the Center's claims are without any basis in law, the County and AFRC's *amici curiae* brief highlights three issues that have been overshadowed:

First, the brief explains the critical importance of the trust lands to the trust beneficiaries and the key role those lands play in providing social services and gainful employment in rural Washington.

Second, the brief demonstrates the risk that this case presents to the entire regulatory program that was established by the 1997 HCP. An HCP is a federal permitting document through which an applicant commits to various conservation measures in exchange for assurances of compliance with the ESA. Disrupting this federal program will have major implications.

Finally, the brief provides additional clarity on the interpretive issues at the heart of this case, demonstrating that DNR is complying with its obligations under both the 1997

HCP and the 2006 Policy for Sustainable Forests (“2006 Policy”).

### **III. COUNTER STATEMENT OF THE CASE**

Lewis County and AFRC join in DNR’s statement of the case and incorporate it by reference. To provide additional information on the importance of the proper management of the trust lands, and to allow for a better understanding of the conservation commitments made by the HCP, *amici curiae* provide the following statements.

#### **A. DNR Timber Sales Are Critical to the Wellbeing of Rural Washington Communities and the Forest Products Sector.**

The proper management of the trust lands is an issue of critical importance to the many rural Washington communities that are dependent on the revenues sourced from timber harvests on those lands. Since statehood in 1889, Washington has funded critical public services through a cycle of harvesting, regenerating, and reharvesting timberlands that were granted to the State by the federal government to be held in

trust for the express purpose of establishing and maintaining public institutions. *See Conservation Nw. v. Comm'r of Pub. Lands*, 199 Wn.2d 813, 834, 514 P.3d 174 (2022) (recognizing that timber revenues for beneficiaries lead to “stable and financially viable public systems of education and governance” that are advantageous to “all the people” of Washington); *Skamania Cty. v. State*, 102 Wn.2d 127, 129, 685 P.2d 576 (1984) (explaining history of revenue from timberlands since 1889).

In the 1930s, this sustainable system of public funding was expanded when Washington’s counties were required to deed over hundreds of thousands of acres of timberland to the State to be held in trust to generate revenues for the granting counties and their junior taxing districts. *See* REC-1557-58; RCW 79.22.040; *Chuckanut Conservancy v. Washington State Dep't of Nat. Res.*, 156 Wn. App. 274, 280, 232 P.3d 1154 (2010) (acknowledging transfer of forestlands in 1930s). Today, the State holds approximately 2.1 million acres of timberland in

trust for a range of public beneficiaries. REC-3311. DNR offers timber for sale to satisfy the State's fiduciary obligations to the beneficiaries. In 2020, those sales provided over \$200 million for public trust beneficiaries. REC-1517. The beneficiaries that receive these funds are typically in rural communities where public funding is more difficult to secure, and include county governments, school districts, emergency response districts, public ports, penitentiaries, universities, fire districts, and libraries. Many rural trust beneficiaries continue to heavily rely on the generation of revenues from the harvesting of timber on their trust lands.

Lewis County is a good example of how important the trust land dollars are to rural communities. DNR manages approximately 43,000 acres of forestlands that Lewis County previously transferred to the State. Revenues from DNR's management of these transferred lands are irreplaceable to the County and constitute approximately six percent of its annual budget. These timber revenues help fund road maintenance,

veterans' services, public safety, hospitals, public water and sewer districts, cemeteries, and general social services. The County also dispenses timber revenues to various junior taxing districts, including public schools, the regional library, and the local fire authority. The positive impacts of timber revenues can be found throughout the County, and their reduction will result in significant cutbacks in the services provided.

Furthermore, jobs in the timber sector are crucial to maintaining a strong economy in Lewis County and many other rural communities. AFRC's members purchase much of the timber offered by DNR and have made major manufacturing infrastructure investments in rural communities in reliance on the availability of DNR timber. Through their purchases, investments, and operations, AFRC's members provide critical employment opportunities in rural communities where few other large companies are investing. In many places in rural Washington, the greatest source of family-wage jobs is the forest products sector, and the health of that sector depends on

adequate volumes of timber being available for harvest. Given the size of the DNR timber sale program, it plays an outsized role in assuring the vitality of the sector.

If the Center can erode the certainty of DNR timber sales by misinterpreting key terms of the 1997 HCP, then the economic health of rural Washington communities will be in jeopardy.

**B. The 1997 HCP Committed Half of the Trust Lands for Long-Term Species Conservation in Exchange for the State’s Ability to Actively Manage the Remaining Lands to Financially Support the Trust Beneficiaries.**

In the early 1990s, litigation arising under the ESA largely shut down timber harvests on federal lands in Washington, and similar litigation threatened to stop DNR from selling adequate levels of timber from the trust lands to support the beneficiaries. *See, e.g.*, REC-3343. To address risks posed by ESA litigation to the DNR timber sale program, and to provide certainty and assurances to the trust beneficiaries, DNR adopted the 1997 HCP. REC-3309-11.

It is undisputed that DNR's management approach under the 1997 HCP represents an extremely conservation-minded approach to active management forestry. DNR committed nearly half of the trust assets to long-term conservation through the 1997 HCP. REC-341. The magnitude of DNR's commitment cannot be overstated—the State voluntarily agreed to stop commercially harvesting timber on nearly half of the beneficiaries' assets and devoted hundreds of thousands of acres to species conservation. Voluntarily stopping harvesting on half of the trust estate had major financial impacts on the beneficiaries.

Numerous HCPs have been adopted, or explored in depth, on private and public timberlands across the United States. The *1997 HCP is the most protective approved commercial timberlands HCP in existence* that amici are aware of. The State agreed to the extremely expensive 1997 HCP because it believed the plan would provide DNR greater operational certainty moving forward. This operational



certainty arose because the 1997 HCP supported the issuance of an ITP from USFWS and NOAA Fisheries for numerous ESA listed and unlisted species including the northern spotted owl, marbled murrelet, gray wolf, grizzly bear, bald eagle, peregrine falcon, steelhead, Chinook salmon, chum salmon, and sockeye salmon. This ITP allows DNR to conduct timber operations (consistent with the 1997 HCP's terms) on those lands not set aside for conservation without risk of ESA litigation.

Essentially, the ITP freed the trust lands from the continuous cycle of ESA litigation that had shut down timber harvests on other land bases.

For the past 25 years, USFWS and NOAA Fisheries have continuously monitored DNR to ensure compliance with the permit. To ensure the HCP is properly implemented, DNR has provided USFWS and NOAA Fisheries with HCP compliance reports each year since 1998. REC-9432-11777. The federal wildlife agencies have determined that DNR is actively

achieving the conservation commitments that were agreed to in

1997. REC-9430.

Given that the federal government believes that DNR is adequately protecting endangered species through the implementation of the 1997 HCP, the Center's claims should be seen for what they are—a demand that DNR commit more of the beneficiaries' assets to conservation based on philosophic disdain for timber harvesting. The Center's demands have no legal basis, and they fly in the face of the entire HCP regulatory framework which is intended to provide assurances that future timber harvests can and should occur.

#### **IV. ARGUMENT**

The Center asserts that the About Time sale violates the Public Lands Act because DNR failed to comply with its internal Identification and Management Procedure, the 2006 Policy, and the 1997 HCP. Op. Br. at 43-59. The Center also argues that DNR failed to comply with the State Environmental Policy Act (“SEPA”) in approving the About Time sale. Op. Br.

at 59-61. The Center's legal arguments are deeply flawed on each issue, but Lewis County and AFRC recognize the limited role of *amici curiae* and focuses on the following issues:<sup>1</sup>

1. USFWS has determined that DNR is complying with the objectives of the 1997 HCP—substituting the Center's judgment for that of USFWS will have major public policy consequences.
2. The 1997 HCP does not require DNR to ensure that 10-15 percent of its forests reach an age of 150 years by the end of the HCP term in 2097.
3. The 2006 Policy does not impose a 10-15 percent mandate and does not preclude the harvest of stands that are not reserved for conservation.

For those issues not addressed in this brief, DNR and Murphy Company have adequately explained why the Center's arguments are without merit.

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<sup>1</sup> The issues addressed in this brief involve several terms of art unique to the forest sector. Murphy Company has defined those terms and *amici* will not duplicate that effort here. See Murphy Company Response Br. at 9-12.

**A. The Court Should Reject the Center’s Attempt to Supplant the Enforcing Agencies Regarding HCP Compliance.**

The Center’s argument related to the 1997 HCP is based on its dissatisfaction with USFWS’s conclusion that the Center has misinterpreted the 1997 HCP, and that DNR is fully in compliance with the HCP’s conservation commitments.

Allowing the Center to supplant USFWS and reinterpret the 1997 HCP is improper and would have detrimental policy consequences.

**1. USFWS Has Rejected the Center’s Interpretation of the 1997 HCP.**

USFWS has explicitly rejected the Center’s arguments. Prior to this litigation, but in direct response to policy pressure applied by the Center, DNR contacted USFWS to determine whether Table IV.14 of the 1997 HCP created the enforceable mandates alleged by the Center. USFWS repudiated the Center’s assertions:

The projected distribution of stand development stages, as presented in the HCP in Table IV.14 (WDNR 1997, p. IV.180), is not a management requirement or activity

such as the attainment of specific habitat thresholds in HCP-designated northern spotted owl management areas. Rather, it is a modeled estimate of the likely outcome of HCP implementation after 100 years, based on the stand inventory information that was available to WDNR in 1997. As described in the HCP, the estimated distribution of different forest development stages will be used with other information by USFWS when considering an extension of the HCP at year 70 (WDNR 1997, pp. IV. 180-181). Therefore, the landscape percentages presented in Table IV.14 (e.g., 10-15 percent of lands in fully functional forest at least 150 years old) after 100 years of HCP implementation does not represent an HCP commitment to be achieved in addition to the conservation strategies for northern spotted owl, marbled murrelet, salmonids, and uncommon habitats.

REC-9429-31. USFWS also wrote that it “acknowledge[d] that there are statements made in [the 1997 HCP] that if taken out of context, could be interpreted” as requiring certain percentages of stand structural classes but “no such commitment to provide a specific percentage of land area in different stand development stages is explicitly provided in the HCP itself.”

REC-9430. USFWS further explained that it is “USFWS’s opinion that WDNR’s management activities are in compliance with the HCP through implementation of the conservation strategies.” REC-9430.

Despite this rebuke, the Center seeks to supplant USFWS and dictate to DNR the meaning of the terms of the agreement. The Center's attempt to do so runs afoul of the terms of 1997 HCP. REC-3723 (Section 30.6 of the Implementation Agreement precludes non-parties from maintaining a suit based on a provision of the 1997 HCP). Allowing the Center to supplant the federal agencies' understanding of the 1997 HCP would undermine the assurances provided by the HCP and potentially jeopardize the entire regulatory system. If the Center can replace USFWS in regulating the HCP, then almost every element of DNR's management will be open to third-party activist litigation. Allowing the Center to attempt to reinterpret and enforce the 1997 HCP through litigation is problematic to the most basic workings of the system which was designed to provide litigation protections to the permit holder—not simply establish new battle fronts.

**2. HCPs Are Intended to Provide Assurances to the Permittee That They Will Not Be Pulled into Continuous Litigation.**

Congress amended the ESA in 1982 to provide USFWS and NOAA Fisheries with the ability to offer ITPs based upon HCPs. *See Spirit of the Sage Council v. Norton*, 411 F.3d 225, 227 (D.C. Cir. 2005). In the first decade following those amendments, USFWS and NOAA Fisheries only issued 14 ITPs. *Id.* In response, and to encourage more HCPs, USFWS and NOAA Fisheries developed a “No Surprises” policy that prohibited USFWS and NOAA Fisheries from demanding “greater financial commitment” and imposing “additional land use restrictions on property available for economic use or development” after the adoption of an HCP. *Id.* (quoting federal register notice for the final HCP Handbook). This policy established that HCP assurances were intended to “provide economic and regulatory certainty for non-Federal property owners.” Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed Reg. 8,859, 8,867 (Feb. 23, 1998).

The policy resulted in the desired effect—over 243 incidental take permits were issued under the policy by the end of September 1998. *Spirit of the Sage Council*, 411 F.3d at 227. Many more HCPs have been designed since, including HCPs covering all privately owned timberland in Washington, and a similar HCP currently under development in Oregon.<sup>2</sup> Similarly, major HCPs cover timber lands in California,

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<sup>2</sup> Washington State Department of Natural Resources, *Forest Practices Habitat Conservation Plan*, <https://www.dnr.wa.gov/programs-and-services/forest-practices/forest-practices-habitat-conservation-plan> (last visited Oct. 14, 2022); Oregon Department of Forestry, *Private Forest Accord*, <https://www.oregon.gov/odf/pages/private-forest-accord.aspx> (last visited Oct. 14, 2022).



Montana, and numerous other timber-producing states.<sup>3</sup> HCPs are the tool by which non-federal landowners manage their risk under the ESA; it is a federal program of critical public importance.


The 1997 HCP contains assurances against surprises. Section 23.1 of the Implementation Agreement—Unforeseen Circumstances Consultation—provides, in part, that USFWS and NOAA Fisheries “shall not seek from DNR without its consent a commitment of additional land or financial

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<sup>3</sup> NOAA Fisheries, *Habitat Conservation Plan and Safe Harbor Agreement for Sierra Pacific Industries Forestland Management Program*, <https://www.fisheries.noaa.gov/action/habitat-conservation-plan-and-safe-harbor-agreement-sierra-pacific-industries-forestland> (last visited Oct. 14, 2022); NOAA Fisheries, *Green Diamond, California Aquatic Habitat Conservation Plan*, <https://www.fisheries.noaa.gov/resource/document/green-diamond-california-aquatic-habitat-conservation-plan> (last visited Oct. 14, 2022); Montana DNRC, *Habitat Conservation Plan*, <http://dnrc.mt.gov/divisions/trust/forest-management/hcp> (last visited Oct. 14, 2022); Michigan DNR, *Bat HCP*, <https://www.michigan.gov/dnr/education/michigan-species/mammals/bats/bat-hcp> (last visited Oct. 14, 2022).

undertaking beyond the level of mitigation which is provided under the commitments of the HCP, the ITP, and this Agreement.” REC-3837. The 1997 HCP provides a process for amending the HCP that requires, among other things, “written consent” by DNR, USFWS, and NOAA Fisheries. REC-3840. The Center’s attempt to rewrite the 1997 HCP through third-party litigation is not an appropriate method to alter the terms of the agreement and is a clear attempt to void the federal government’s policy and set aside USFWS’s opinion. It is improper for the Center to attempt such an action through a state court lawsuit in which it has largely attempted to hide that the federal government has already rejected the Center’s position.

**3. Allowing the Center to Reinterpret the 1997 HCP Would Have Major Consequences Throughout the Country.**

 Permitting a third party to reinterpret an HCP and impose surprise obligations on an applicant will set a dangerous precedent. This Court would effectively provide a blueprint to

push every HCP in the country into litigation, which would instantly have a chilling effect on HCPs being pursued.

Significant resources, commitments, and compromises go into achieving balance between conservation and sustainable harvests in HCPs throughout the country. The HCP mechanism should not be undermined to serve the Center's immediate policy preferences. Indeed, USFWS has long highlighted the HCP program as critical to achieving the goals of the ESA given that a tremendous number of endangered species reside on private lands.<sup>4</sup> The Center's arguments, if accepted, will have the perverse effect of resulting in fewer private landowners being willing to engage with the federal government to protect endangered species.

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<sup>4</sup> U.S. Fish & Wildlife Service, *Habitat Conservation Plans*, <https://www.fws.gov/service/habitat-conservation-plans> (last visited Oct. 14, 2022).

**B. The Center’s Interpretations of the 1997 HCP and the 2006 Policy Are Incorrect.**

Lewis County and AFRC agree with both DNR and Murphy Company as to proper interpretation of the 1997 HCP and 2006 Policies but provide the following analysis to clarify points and ensure that the 1997 HCP is not improperly altered.

**1. The 1997 HCP Does Not Require DNR to Ensure That 10-15 Percent of its Forests Reach an Age of 150 Years by the End of the HCP Term in 2097.**

The Center asserts that the 1997 HCP “includes a commitment to provide fully functional forests at least 150 years old across 10-15% of each HCP planning unit... by Year 100 of the 1997 HCP.” Op. Br. 56. If the 1997 HCP strictly required DNR to ensure that 10-15 percent of the forest would reach 150 years old by the end of the HCP term, then the Center should be able to provide a direct and clear citation to that requirement in its brief—but the Center cannot. The Center’s analysis hinges on Table IV.14 of the HCP. See Op. Br. at 56 (citing REC-3654). That table shows “structure objectives” and

is explained by the accompanying text as the outputs of a modeling exercise performed to determine the likely impacts that the HCP would have on the landscape. REC-3653-55.

Apparently recognizing that Table IV.14 does not articulate a clear mandate, the Center attempts to pull quotes from several narrative sections of the 1997 HCP and non-HCP documents to suggest that Table IV.14 creates an enforceable mandate. *See*

Op. Br. at 13-14. None of those quotations identify the percentages provided in Table IV.14 as enforceable mandates.

This interpretive gymnastics is nothing more than an attempt to cloud the fact that Table IV.14 is not a mandate and the Center's alleged mandate does not exist anywhere else in the HCP.

USFWS has published a nearly 400-page guidance document on how to write an HCP. As that handbook makes clear, all HCPs must include broad strategic goals and objectives, as well as more detailed and direct commitments

and conservation measures.<sup>5</sup> In an HCP, strict conservation measures are laid out and must be adhered to, but general policy objectives and modeled outcomes do not become regulatory requirements simply because they appear in the HCP document.

The Center cannot cherry-pick modeled objectives in the 1997 HCP and demand strict enforcement. As noted at length above, the federal government has reached the same conclusion. REC-9429-31.

**2. The 2006 Policy Does Not Impose a 10-15% Mandate and Does Not Preclude DNR From Harvesting Stands That Are Not Reserved for Conservation.**

The Center argues that, in part, the 2006 Policy is intended to implement the HCP and “ensure” that the alleged 10-15% mandate contained in Table IV.14 is met. Op. Br. at 20.

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<sup>5</sup> See USFWS and NOAA Fisheries, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (Dec. 21, 2016), available at <https://www.fisheries.noaa.gov/national/endangered-species-conservation/endangered-species-act-guidance-policies-and-regulations> (Sections 1-5) (last visited Oct. 20, 2022).

The Center also argues that “structurally complex” stands cannot be harvested until that 10-15% mandate is met. Op. Br. at 22. According to the Center, DNR failed to identify structurally complex stands in About Time in approving the sale. Op. Br. at 47-53.<sup>6</sup> The Center’s assertion that the 2006 Policy prohibits the harvesting of stands like About Time until the 10-15% mandate is satisfied evaporates upon review.

The Center’s arguments hinge on misinterpretations of the following two bullet points which appear in the General Silvicultural Strategy of the 2006 Policy:

- “The department will target 10-15 percent of each Western Washington *Habitat Conservation Plan* planning unit for ‘older’ forests—based on structural characteristics—over time.”
- “Through landscape assessments, the department will identify suitable structurally complex forest stands to be

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<sup>6</sup> The Center asserts that DNR has failed to follow internal policy. DNR and Murphy company have demonstrated that: (1) the Center has waived this argument, (2) the internal policy is not legally enforceable, and (3) DNR complied with its policy. *See* DNR Response Br. at 28-36; Murphy Company Response Br. at 20-22.

managed to help meet older-forest targets. Once older-forest targets are met, structurally complex forest stands that are not needed to meet the targets may be considered for harvest activities. However, old growth is addressed in the Old-Growth Stands in Western Washington policy.”

REC-12592. The Center misinterprets these two provisions in two ways:

First, the General Silvicultural Strategy does not create an enforceable mandate for achieving the “target” of 10-15 percent older forest conditions. The 2006 Policy is clear that the 10-15 percent “target” flows from the 1997 HCP’s objective and, therefore, is just that—an aspirational target, not an enforceable mandate. REC-12591. The General Silvicultural Strategy is largely a goal-focused document. REC-12591.

Additionally, DNR’s policy goals are intended to take time (somewhere between 70-100 years), and the Strategy makes no mention of strict, enforceable deadlines. REC-12591-92.

Indeed, the Board of Natural Resources took steps to ensure that it was not creating enforceable deadlines by expressly not creating a cause of action to challenge DNR’s implementation



of the 2006 Policy. REC-602. The General Silvicultural Strategy was not intended to be used as a blunt instrument to litigate against DNR on a continuous basis, and the Center should not be permitted to assert its own interpretations of the 2006 Policy and then attempt to enforce them through SEPA or the Public Lands Act.

Second, the Center puts forth a convoluted argument that the second bullet reproduced above prohibits the harvest activities authorized in About Time. REC-12592. The relevant portion of the 2006 Policy says that structurally complex stands will be identified as needed to meet the targets, and those specifically identified structurally complex stands will not be harvested until the older forest targets are met. REC-12592. As DNR explains, stands in the About Time sale area are (1) not structurally complex, and (2) have not been identified by DNR as necessary to meet the older forest targets. *See* DNR Response Br. at 10-11, 13, 34, 36 (explaining why any “botanically diverse” characteristics of the area do not limit

harvest). Thus, the Center misinterprets the 2006 Policy and how it is applied to sales like About Time.

## V. CONCLUSION

Although the Center claims to be an advocate for the clear intent of the 1997 HCP, its arguments run directly afoul of the federal government's HCP policy and the 1997 HCP. The 1997 HCP promised the beneficiaries financial certainty from their trust assets. The Center must not be allowed to impose its own preferences on the 1997 HCP. Doing so would harm the stability of HCPs throughout the country. The ultimate impact of Center's claims, if accepted, is less certainty for numerous economic sectors as well as worse outcomes for endangered species as HCPs lose their incentive value. The Court should dismiss the Center's claims in their entirety.

RESPECTFULLY SUBMITTED this 20th day of  
October, 2022.

I certify that this memorandum is  
4,658 words, in compliance with RAP  
18.17.

/s/ David O. Bechtold

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## **DECLARATION OF SERVICE**

I declare that on October 20, 2022, I caused the following to be filed in the Court of Appeals – Division Two and a true copy of the same to be served electronically on the parties via the Appellate Court's electronic filing portal.

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

DATED this 20th day of October, 2022, in Seattle,  
Washington.

*/s/ Eliza Hinkes*  
Eliza Hinkes  
Paralegal

4845-3072-6866, v. 2

# NORTHWEST RESOURCE LAW PLLC

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## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
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**Superior Court Case Number:** 21-2-00519-8

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