

FILED
Court of Appeals
Division II
State of Washington
9/6/2022 9:18 AM

NO. 569647-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CENTER FOR RESPONSIBLE FORESTRY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL
RESOURCES, BOARD OF NATURAL RESOURCES, AND
COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, in
her official capacity,

Respondents,

and

MURPHY COMPANY, dba MURPHY COMPANY OF
OREGON,

Intervenor.

**DEPARTMENT OF NATURAL RESOURCES'
RESPONSE BRIEF**

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I. INTRODUCTION

The Department of Natural Resources (DNR) sustainably manages state trust lands to generate revenue while simultaneously using the lands for environmental and public benefits, like habitat conservation, carbon sequestration, and recreation. DNR's obligation to manage the state trust lands to support specific beneficiaries is well-settled law. The 75-acre About Time timber sale challenged by the Center for Responsible Forestry (the Center) will generate revenue for those beneficiaries while adhering to DNR's long-term policies and strategies designed to conserve forests across the landscape.

The Center challenges About Time under the Public Lands Act and the State Environmental Policy Act (SEPA). Neither challenge has merit. The Center's arguments under the Public Lands Act are based on a misreading of DNR's policies and are an impermissible attempt to enforce DNR's policy documents and its agreement with a federal agency. The Center's arguments under SEPA fail for the same reason. Both arguments are improperly

based on allegations of future management outcomes on the state trust lands, not the 75-acre About Time timber sale at issue.

This Court should affirm the superior court's dismissal of the Center's appeal because the Center is challenging what it believes the state trust lands will look like in 84 years, not the About Time timber sale. The Center's claim is not ripe and seeks to change DNR's policies. Its questions should be presented to the Legislature, not this Court.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

Whether the Board of Natural Resources properly approved the About Time timber sale when it was consistent with governing laws and policies.

Whether DNR's threshold determination under SEPA was correct when it relied on prior environmental analysis, conducted additional site-specific analysis, and considered the Center's comments.

III. COUNTERSTATEMENT OF THE CASE

DNR manages the state's forest and land resources. RCW 43.30.010; REC-12555, REC-16695-97;¹ *Conservation Northwest v. Commissioner of Public Lands*, ___ Wn.2d ___, 514 P.3d 174 (Wash. No. 99183-9, July 21, 2022) (*Conservation Northwest*). DNR's Board of Natural Resources (Board) adopts the policies for management of those resources and approves timber sales that implement its policies. RCW 43.30.215(1), (2); RCW 79.15.060; REC-12101.

¹ DNR filed the About Time record via the Court's electronic portal on July 14, 2022. Four key documents are provided in Appendix 1: REC-1588-89 (excerpt of 2021 Analysis), REC-3654 (HCP Table IV.14), REC-9429-30 (USFWS October 2021 letter), and REC-12591-92 (General Silvicultural Strategy).

DNR terminology uses many terms of art. A list of acronyms is available at REC-3313 and REC-11699, and each programmatic decision provides a glossary. REC-3783-3800 (HCP), REC-12602-05 (Policy), REC-17873-76 (2015 SHC).

A. DNR’s Management Framework Sets Harvest Levels and Conservation Goals.

DNR’s management framework complies with federal and state laws of general applicability and also consists of common law fiduciary trust principles, a federal permit, and Board-adopted policies. REC-17742-44; *Chuckanut Conservancy v. Dep’t of Nat. Res.*, 156 Wn. App. 274, 280-91, 232 P.3d 1154 (2010) (*Chuckanut*); RCW Title 79.

1. Fiduciary Principles Limit the Scope of Laws and Policies That Apply to Trust Land Management.

The Legislature delegated DNR as the manager of over two million acres of state trust lands to generate revenue to support specific, designated trust beneficiaries. RCW 43.30.010, RCW Title 79; *Conservation Northwest*, 514 P.3d at 177; REC-59, REC-72-73.

In July 2022, the Washington Supreme Court affirmed DNR’s land-management policies. *Conservation Northwest*, 514 P.3d at 185. The Court held that the state trust lands are held

and managed in trust for designated beneficiaries. *Id.* at 182. DNR generates revenue “primarily by selling timber from the state forest land.” *State Owned Forests v. Sutherland*, 124 Wn. App. 400, 404, 101 P.3d 880 (2004); *Chuckanut*, 156 Wn. App. at 288.

DNR manages two different categories of trust lands. *Conservation Northwest*, 514 P.3d at 179 n.3, 180-81. Both are managed under fiduciary principles but have slightly different objectives and restrictions. *Compare* RCW 79.11.090 and RCW 79.02.010(15) *with* RCW 79.22.050 and RCW 79.02.010(14).

Lands that DNR received at statehood from the federal government are called “state lands.” RCW 79.02.010(15). State lands are held in trust for common schools and public institution beneficiaries identified in the Enabling Act. Enabling Act, ch. 180, 25 Stat. 676 §§ 10-18 (1889); RCW 79.02.010(15)(a)-(g). Lands that the Legislature required counties to deed to the State in the 1920s and 1930s are called “state forestlands” but were formerly known as “forest board transfer lands.”

RCW 79.02.010(14). State forestlands are held in trust for the counties that deeded the land to the State. RCW 79.22.040. DNR refers to “state trust lands” to refer to both state lands and state forestlands.

About Time is comprised of both state lands and state forestlands and will generate revenue for three categories of its beneficiaries. REC-481, REC-491, REC-945. Revenue from the sale will support public services in Grays Harbor County; charitable, educational, penal, and reformatory institutions throughout the state; and the capitol buildings. REC-481; Enabling Act, ch. 180, 25 Stat. 676 §§ 12, 15, 17 (1889); RCW 79.02.010(14), (15)(f), (g), .400, .410; RCW 79.22.040; RCW 79.24.010, .020; RCW 79.64.110(1)(a)(ii).

2. Under DNR’s HCP, Half of the State Trust Lands Are Conserved, and Timber Harvest Occurs on the Remaining Lands About Every 60 Years.

Between 1997 and 2019, the Board adopted three programmatic decisions: the Habitat Conservation Plan (HCP),

Policy for Sustainable Forests, and Sustainable Harvest Calculation. Together, these three decisions require DNR to sell a specified amount of timber from the state trust lands while also managing areas conserved under the HCP conservation strategies and Policy for Sustainable Forests' objectives. REC-364.

DNR, like all landowners, is subject to the federal Endangered Species Act. In the early 1990s, U.S. Fish and Wildlife Service (USFWS) added the spotted owl and marbled murrelet to the federal list of endangered species. *See* REC-3829 (§§ 2-4). Following that listing, DNR negotiated a HCP covering nearly 1.5 million acres of state trust lands in western Washington to minimize legal risk for its beneficiaries. REC-3829 (§ 2.0). The HCP contains an Implementation Agreement that expressly prohibits third-party enforcement of the HCP. REC-3845 (§ 30.6). DNR's HCP conserved half of the state trust lands but permits timber harvest on the remaining lands. REC-83.

The HCP has a term of 70-100 years and contains four "conservation strategies" that restrict DNR's management on the

state trust lands. REC-60-61, REC-3835 (¶¶ 19.1, 19.2). The strategies detail the activities permitted on the state trust lands in order to achieve the HCP's goals.

DNR's average harvest rotation is 60 years for the lands that are not conserved. REC-3654; *see also Chuckanut*, 156 Wn. App. at 288 n.34. The HCP states that DNR can harvest on rotations as short as 30-35 years and explicitly permits harvest of 80- to 100-year-old timber. REC-108, REC-148, REC-3654.

The HCP includes a table that projects the distribution of forests by "stand stage" that will result after 100 years of conservation and timber harvest. REC-3654 (Table IV.14). In 1997, DNR and USFWS anticipated that by the HCP's termination in 2097, the state trust lands would be in a variety of forest conditions. REC-9430. The HCP notes that it used age as "a surrogate for stand structure." REC-3654 n.2.

Table IV.14: DNR HCP stand structure objectives at year 100 (in percent of land area)

Stand Stage¹	West-side Planning Units Excluding the OESF	OESF Planning Unit
Open (0-10 Years) ²	5-10	5-15
Regeneration (10-20 years) ²	5-15	5-15
Pole (20-40 years) ²	15-25	5-15
Closed (40-70 years) ²	25-35	5-15
Complex (at least 70 years) ²	25-35	60-70
Fully Functional (Subset of Complex)	(At least 150 years) 10-15	(At least 200 years) 10-15

REC-3654.

3. The Policy for Sustainable Forests Set a Target of 10 Percent Older Forests on the State Trust Lands by 2106.

DNR’s management of the state trust lands is also governed by the Policy for Sustainable Forests, a suite of 23 policies adopted by the Board in 2006. REC-90-92, REC-601-08, REC-12548-53; *see* REC-12540-609. The 2006 Policy replaced the prior policy, the 1992 Forest Resource Plan. REC-601 (§ 2); *State Owned Forests*, 124 Wn. App. at 404. Similar to the claims in this appeal, the *State Owned Forests* plaintiffs challenged the 1992

Plan and unsuccessfully attempted to enjoin 25 timber sales under SEPA. *Id.* at 406. The court denied their request to halt future timber sales from state trust lands. *Id.*

The policies identify the Board’s management direction for the state trust lands to ensure the state trust lands are sustainably managed to provide timber harvest and other benefits in perpetuity. REC-335, REC-12548-49. The Board retains the discretion to amend these policies. RCW 43.30.215(2); REC-12595.

The Center focuses its challenge on one of the 23 policies, the General Silvicultural Strategy (the Silvicultural Strategy), which sets a target for 10 percent of the state trust lands to be “older” forests by 2106.² REC-12591-92. A “young forest” is “[a] forest that is 50-80 years old.” REC-3799. In contrast, “older forests” are not defined by age, but by “structural complexity,” a technical term encompassing three tree development stages:

² “Old growth” is different than “older” forests. REC-60, REC-76, REC-12578-80. About Time does not include old growth.

botanically diverse, niche diversification, and fully functional. REC-85, REC-17799-800.

Groups of trees that are similar in structure or age are called a “stand” of trees. REC-3795. As a stand of trees develops, the stand increases in structural complexity, meaning it transitions from homogenous, uniform structure to trees of varying sizes, increased understory vegetation, and broken, fallen, and deformed trees. REC-16796, REC-17642-44, REC-17799. Complex structure provides habitat for different species of wildlife than a young forest stand with simple structure. REC-3648-53 (Table IV.13).

The transition of a stand to advanced stages of structural complexity requires either natural disturbance or human intervention, plus time. “Active management” can accelerate the development of complex structures, i.e., create older forest structural conditions in younger aged forests. REC-3680, REC-12591, REC-16676, REC-16725, REC-16729, REC-16809 (“[A]ctive management ... is expected to achieve fully

functioning stands within 80 to 90 years, rather than approximately 220 years using passive techniques.”). A simplified depiction of stand development over time is at REC-375 and REC-1197.

Stand Development Stages

- Foundation of Ecological Forestry (*Carey, Franklin, et al.*)
- Interrelationships of biodiversity, function, and structure
- Use to assist in silviculture decision making

	Summarized Stand Development Stage	Stand Development Stage
Less Complex Forest	Ecosystem Initiation	Ecosystem Initiation
		Sapling Exclusion
↑ ↓	Competitive Exclusion	Pole Exclusion
		Large Tree Exclusion
		Understory Development
		Botanically Diverse
More Complex Forest	Structurally Complex	Niche Diversification
		Fully Functional

REC-85; *see also* REC-17800.

The HCP conservation strategies and Policy objectives are not to grow trees to a certain age, but to grow trees that provide

wildlife habitat. REC-12581. Consistent with those objectives, DNR measures older forest conditions using a forest stand's structural characteristics instead of age because two forest stands can be the same age but provide different biological functions. Two photos of 80-year-old stands depict this, with the left photo showing trees more than twice as large as the right photo, despite identical ages. REC-1301 (Figure 38). DNR manages the conserved state trust lands to provide biological function, not to achieve an age-based target.

The Silvicultural Strategy counts forests in only the two most advanced stand development stages as meeting its older forest target: niche diversification and fully functional. REC-12591. The Board chose not to include "botanically diverse" forests as contributing to its older forest target. REC-12591.

The Silvicultural Strategy anticipates that the target will be met over a period of 70-100 years. REC-12591-92. The

Silvicultural Strategy does not prohibit timber harvest until that target is met. REC-12591-92.

4. The 2015 Sustainable Harvest Calculation Set the Volume of Timber Scheduled for Harvest Until 2024.

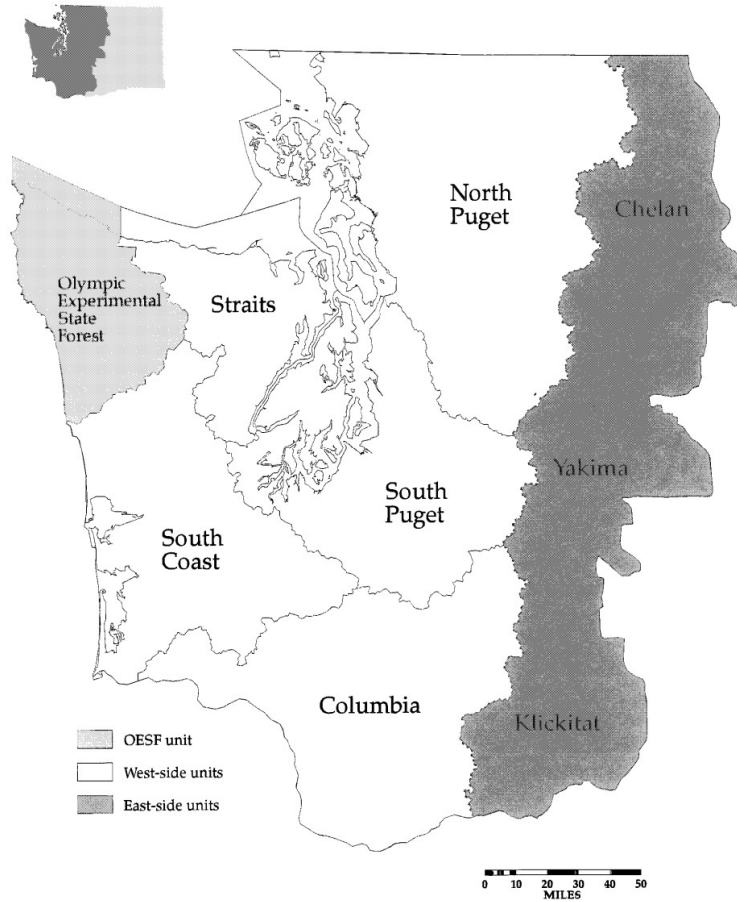
Statutes require DNR to calculate the “sustainable harvest level” in ten-year planning periods. RCW 79.10.300(4); REC-12573-75. The Legislature defined “sustainable harvest” as management “to provide harvesting on a continuing basis without major prolonged curtailment or cessation.” RCW 79.10.310; *Conservation Northwest*, 514 P.3d at 178; *Chuckanut*, 156 Wn. App. at 288. The Board adopts a harvest level each decade and then sells timber from the state trust lands to meet that harvest level. RCW 79.10.300(5), 79.10.340. The current level applies to 2015-2024. REC-661. The process to develop the next decade’s level (2025-2034) started in 2021. REC-431-32.

DNR’s sales program is designed to sell the level adopted by the Board for 20 separate beneficiaries. REC-662 (§ 8), REC-668, REC-17748-49. Because the Board set the harvest level

for each beneficiary when it adopted the sustainable harvest calculation in 2019, DNR does not have unfettered ability to move timber harvests from one location to another during the planning decade, absent Board amendment to the sustainable harvest calculation.

B. By 2100, Implementation of DNR’s Policies Will Result in More Than 20 Percent Older Forests on the State Trust Lands and More Than 10 Percent Older Forests in the South Coast Planning Unit.

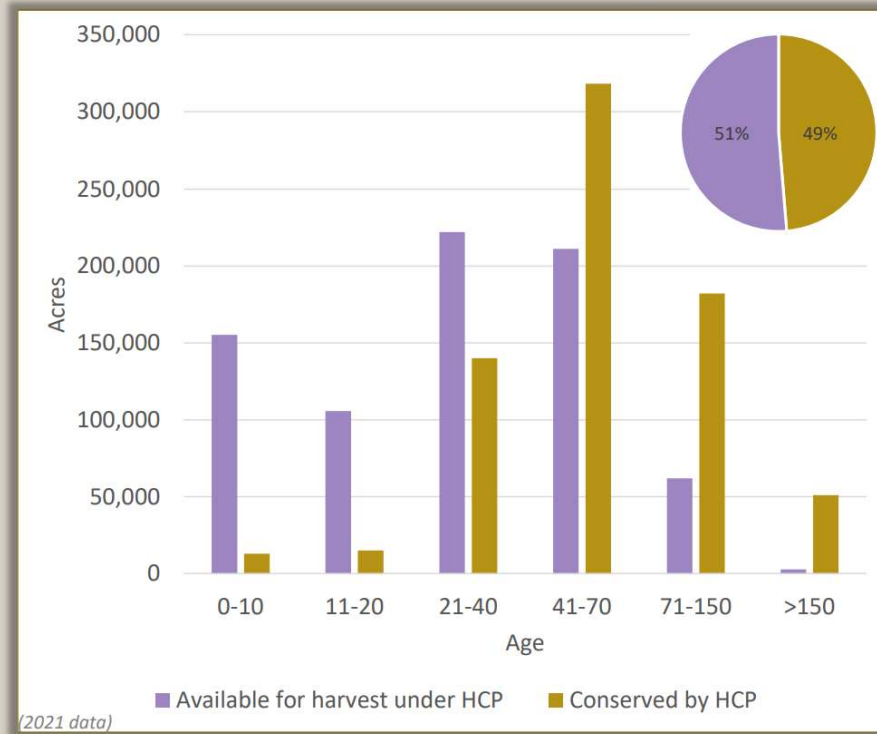
The nearly two million acres of state trust lands governed by the HCP are divided into nine “planning units.” REC-3333. About Time is in the South Coast Planning Unit, in southwest Washington. REC-3810.



REC-3805.

DNR conserved 49 percent of the state trust lands to meet the HCP's conservation strategies and the Board's Policy objectives. REC-1577, REC-17873 (deferral).

Acres Available for Harvest and Conserved under the HCP Strategies



REC-83. The conserved lands include habitat for listed species, old growth, and riparian areas. REC-1048, REC-1050, REC-1387-89, REC-1581, REC-9387, REC-11787.

DNR’s implementation of the HCP strategies and the Policy objectives over each decision’s 100-year term is expected to result in a larger percentage of older forests on the state trust lands than

when the decisions were adopted in 1997 and 2006. REC-351-52, REC-400.

In order to ensure that it will meet the HCP and Policy goals, DNR routinely analyzes the status of the trust lands. REC-350-52, REC-400, REC-1589, REC-16774.

Source	Analysis Area	Current Older Forest %	~2060 Older Forest %	2100 Older Forest %	REC-350-52
2004 Sustainable harvest FEIS	Western Washington	<2%	10% (2067)	-	
2007 Sustainable harvest FEIS addendum	Western Washington	<1%	16% (2067)	-	
2010 South Puget HCP Planning Unit Forest Land Plan FEIS	South Puget HCP Planning Unit	<2%	18.2%	33.3%	
2016 Olympic Experimental State Forest HCP Planning Unit Forest Land Plan FEIS	OESF HCP Planning Unit	11%	15.5% (2013 RDEIS)	21.6% (2013 RDEIS)	
2019 Sustainable harvest FEIS	Western Washington	3.1%	8% (2068)	-	
2021 Older Forest (this analysis)	Western Washington	3.4%	6.9%	20.5%	

REC-405. USFWS also annually monitors DNR’s compliance with the HCP strategies. See REC-9432-11777.

In May 2021, DNR conducted a landscape assessment to evaluate whether its management practices were increasing the percentage of structurally complex forests on the state trust lands. REC-352, REC-1579-92 (2021 Analysis). The 2021 Analysis confirmed that by 2100, the conserved lands will result in DNR exceeding the Policy’s 10 percent target for the South Coast

Planning Unit, and 20.5 percent of the forests on all western Washington state trust lands will be older forests. REC-406.

Table 2. Percent area western Washington HCP planning units with older forest conditions in conservation areas by decade through 2100. Values over 10% in bold.

HCP Planning Unit	Year								
	2021	2030	2040	2050	2060	2070	2080	2090	2100
Columbia	1.0%	1.1%	1.3%	1.7%	2.6%	4.4%	7.4%	11.6%	16.1%
North Puget	3.3%	4.1%	5.1%	6.6%	8.6%	11.3%	14.6%	18.5%	22.5%
OESF	10.3%	10.9%	11.4%	12.3%	13.5%	15.5%	18.9%	25.6%	32.6%
South Coast	0.2%	0.3%	0.7%	1.2%	2.2%	3.6%	6.1%	9.0%	12.5%
South Puget	2.5%	3.3%	4.3%	5.7%	7.4%	9.8%	12.9%	16.3%	19.6%
Straits	1.7%	2.4%	3.1%	4.1%	5.4%	7.1%	9.6%	12.3%	14.8%
Total (Western Washington)	3.4%	3.9%	4.5%	5.5%	6.9%	9.0%	12.0%	16.1%	20.5%

Although most planning units currently contain only a small percentage of older forests, the forests that are conserved will continue to grow during the remaining 75-84 years of the HCP's and Policy's 100-year terms. REC-406. The 2021 Analysis confirmed that the existing conserved forests will exceed the targets within the 100-year timelines, and DNR does not need to conserve additional trust land. REC-1588.

C. About Time Is Designed to Be Consistent with the Management Framework. The Approval Process Included Multiple Levels of Review and Numerous Opportunities for Public Comment.

Each DNR timber sale takes about two years to design and includes multiple stages of review, public comment, and approval. REC-57. Since March 2005, DNR timber sales have been third-party certified by the Sustainable Forest Initiative (SFI) forest management standard, which sets rigorous measures for sustainable stewardship of forest lands. REC-489, REC-1022 (G-116), REC-12568.

Sale design begins with review of the sale area to exclude old growth, cultural or archaeological sites, unstable slopes, or uncommon habitat from the sale area. *See* REC-350, REC-1265-67. Next, DNR applies the HCP strategies to protect spotted owls, marbled murrelets, riparian areas and wetlands, and unlisted species. REC-838. DNR then selects a minimum of eight “leave” trees per acre to protect from harvest, including some of the largest, most structurally unique trees that already exhibit older forest

characteristics; 664 individual trees are protected as leave trees in About Time. REC-114-15, REC-152, REC-489, REC-491, REC-760-61, REC-807, REC-11772. In addition to the leave trees, 22 acres adjacent to the sale area are in riparian areas conserved for long-term growth. REC-699, REC-758.

The review process includes three public comment periods. First, the forest practices regulatory review process provides a two-week public comment period. REC-676. Next, DNR prepares a SEPA checklist to ensure the sale will not have site-specific impacts, and then solicits and considers public comments on the SEPA checklist and application. WAC 197-11-340(2), WAC 222-10, WAC 332-41-510; REC-676, REC-709-37. Finally, the Board accepts both written and verbal comment during its public meetings. *See* RCW 43.30.225(1); REC-460-63.

The Center submitted SEPA comments to DNR and written and verbal comment to the Board. REC-462, REC-532-41, REC-744-56. None of the Center's comments were about the

About Time sale. Instead, the comments criticized DNR's future compliance with the HCP or Policy. REC-538, REC-746.

DNR next requests Board approval at a public meeting. RCW 43.30.215, 79.15.060; REC-463, REC-481. If the Board approves the sale, DNR sells it at auction about six weeks later. RCW 79.15.120; REC-489. After auction, DNR confirms the sale to the highest bidder, who, for About Time, will have less than two years (until October 31, 2023) to complete the work required by the timber sale contract. REC-1017 (G-031). Finally, after the harvest is complete, DNR will plant seedlings to reforest the sale area. RCW 76.09.070; REC-11761.

About Time is a harvest of 75 acres of approximately 74- to 83-year-old second-growth timber. REC-481, REC-1042-46. The area was previously harvested sometime before 1934, and portions may have been replanted. In about 1940, a fire burned portions of the sale area. REC-807, REC-927, REC-1042-46. As a result of the prior management and disturbances, the timber in About Time includes stands of varying structures and ages.

D. About Time Is One of Eight Serial Appeals Filed by the Center in Four Superior Courts.

The Center appealed the About Time sale in Grays Harbor County Superior Court. CP 1.³ The Center then filed nearly identical appeals of the Bluehorse and Prospero sales.⁴ CP 769, 872-75, 925.

DNR filed a motion for partial dismissal of the Center's duplicative appeals. CP 798-870. In response, the Center filed stipulations in its Bluehorse and Prospero appeals, stating that all its appeals were based on "one common legal and/or factual

³ The Center filed its designation of clerk's papers on May 26, 2022, and DNR filed a supplemental designation on July 20, 2022. The clerk's office only provided the clerk's papers included in the supplemental designation. *See* Appendix 3.

⁴ The Center also filed identical appeals of five other sales in three other counties: Elochromotive Sorts, 21-2-00023-35 (June 2, 2021), Green Thomas, 21-2-00044-35 (November 2, 2021), and Two Years Out, 21-2-00050-35 (December 2, 2021) in Wahkiakum County Superior Court; Point Blank in Lewis County, 21-2-00660-21 (December 2, 2021); and Pivot in Pacific County, 22-2-00051-25 (March 2, 2022). The Center voluntarily dismissed all of these appeals.

issue[:]” DNR’s compliance with its HCP and Policy. CP 872-75, 927-29.

After briefing on the About Time appeal, the superior court consolidated all three of the Center’s appeals. CP 963. After a hearing on the merits, the superior court dismissed the Center’s claims. CP 922; Order Consolidating Appeals, Entering Judgment Awarding Record Costs, and Dismissing Appeals (filed March 30, 2022).⁵

Although three appeals were consolidated in superior court, the Center is not pursuing its challenge to Bluehorse or Prospero. Because the Center fails to assign any error to or argument regarding the adequacy of the Bluehorse or Prospero sales, the Center abandoned its appeal of those two sales. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

⁵ The Order is attached as Appendix 2 and was attached to the Center’s Notice of Appeal. It was designated by the Center as a clerk’s paper on May 26, 2022, but was not provided by the superior court. *See* n.3, above.

IV. ARGUMENT

The Center challenges About Time under RCW 79.02.030 and RCW 43.21C. Its challenge fails because About Time is consistent with DNR's governing laws, policies, procedures, and HCP. Moreover, DNR's 2021 Analysis shows that DNR will exceed its long-term target for older forests by 2100. Because the Center's SEPA challenge is based on the same reasoning, that challenge also fails.

A. Under the Public Lands Act and SEPA, This Court Uses Deferential Standards of Review.

The Public Lands Act and SEPA use the arbitrary and capricious and clearly erroneous standards, respectively. These are very deferential standards.

Under RCW 79.02.030, this Court reviews de novo DNR's record to determine whether the challenged decision was arbitrary and capricious. *Nw. Alloys, Inc. v. Dep't of Nat. Res.*, 10 Wn. App. 2d 169, 184, 187, 447 P.3d 620 (2019), *review denied*, 194 Wn. 2d 1019 (2020); *Echo Bay Cmty. Ass'n v. Dep't of Nat. Res.*, 139 Wn. App. 321, 325, 160 P.3d 1083 (2007). The Center has the "heavy

burden” to demonstrate that DNR’s decision was arbitrary and capricious. *Nw. Alloys*, 10 Wn. App. 2d at 187.

An agency’s decision is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the attending facts or circumstances. *Nw. Alloys*, 10 Wn. App. 2d at 187. “Where there is room for two opinions, agency action taken after due consideration is not arbitrary and capricious even if a reviewing court may believe it to be erroneous.” *Id.*

SEPA is a procedural law designed to ensure that government agencies consider environmental values and consequences before taking action. *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 598, 344 P.3d 199 (2015). The standard of review under SEPA is “clearly erroneous.” *Wild Fish Conservancy v. Dep’t of Fish & Wildlife*, 198 Wn.2d 846, 866, 502 P.3d 359 (2022) (*Wild Fish*). Under the clearly erroneous standard, this Court will affirm an agency’s threshold determination of nonsignificance unless it is “left with the definite and firm conviction that a mistake has been committed.” *Id.* at 867 (quoting

PT Air Watchers v. Dep't of Ecology, 179 Wn.2d 919, 926, 319 P.3d 23 (2014)).

Under both the Public Lands Act and SEPA, this Court defers to DNR's expertise and specialized knowledge. *Nw. Alloys*, 10 Wn. App. 2d at 187; *Wild Fish*, 198 Wn.2d at 859, 866. DNR experts include "foresters, engineers, geologists, biologists, cartographers, hydrologists, soil scientists, economists, and others." REC-12555. Limited appellate review over agency decisions protects the integrity of administrative decision-making. *Nw. Alloys*, 10 Wn. App. 2d at 184.

B. About Time Complies with the Public Lands Act.

About Time was designed to implement policy decisions that manage state trust lands for timber harvest while also providing wildlife habitat, recreation areas, and other environmental services. The Center argues About Time is arbitrary and capricious because it assumes 10 percent of the 234,000 acres of state trust lands in the South Coast Planning Unit will not be

older forests by 2106. REC-3333. The Center's challenge fails for three reasons.

First, About Time complies with DNR's internal guidance, but the Center waived its challenge. Second, About Time is consistent with the Policy's General Silvicultural Strategy, which explicitly permits harvest when DNR has conserved sufficient land to achieve its long-term older forest target. Finally, About Time complies with DNR's governing statutes.

1. About Time Complies with DNR's Internal Guidance.

DNR implements its three governing policies, the 2006 Policy for Sustainable Forests, 2015 Sustainable Harvest Calculation, and 1997 HCP, through internal policies and procedures. REC-1576. The internal guidance provides direction to staff to ensure individual timber sales are consistent with all policies and governing laws, but the internal procedures cannot deviate from the Board-adopted policies. Only the Board has discretion to modify, terminate, or create new policies. RCW 4.30.215(2).

a. The Center Waived Its Challenge Based on DNR’s Internal Procedure.

The Center bases its challenge to About Time on an internal procedure adopted in 2007, “Identifying and Managing Structurally Complex Forests to Meet Older Forest Targets” (the 2007 Procedure).⁶ Op. Br. at 43-44, 48-53; *see* REC-1268-70. The Center’s dilatory challenge to DNR’s compliance with the 2007 Procedure is procedurally defective because the Center waived its challenge by failing to address the 2007 Procedure in the superior court. *See* CP 223 at n.11; *compare with* CP 74-111, CP 730-66.

Under RAP 2.5, the Center may not raise this issue for the first time on appeal. *State v. Loos*, 14 Wn. App. 2d 748, 756, 759, 473 P.3d 1229 (2020) (where party did not raise argument below, it is “precluded from raising the argument for the first time on appeal”); *Samra v. Singh*, 15 Wn. App. 2d 823, 838, 479 P.3d 713 (2020) (same). While RAP 2.5(a) permits a party to “present a

⁶ The Center’s Opening Brief refers to DNR’s 2007 Procedure as the “Identification and Management Procedure.”

ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to consider the ground,” the Center is seeking to overturn the superior court’s decision on a basis not presented to the superior court. This Court may decline to consider this new argument.

b. The Center Cannot Challenge About Time’s Compliance with DNR’s Internal Procedure.

The Center’s challenge also fails because internal agency guidance is not legally enforceable. *Nw. Pulp & Paper Ass’n v. Dep’t of Ecology*, 20 Wn. App. 2d 533, 545, 500 P.3d 231 (2021). The Center does not contend that the About Time sale is directly contrary to any statute or regulation. Instead, it contends that the About Time sale is inconsistent with internal agency guidance and posits that inconsistency renders the sale arbitrary and capricious. In effect, the Center asks this Court to give internal agency guidance the same legally enforceable effect as a validly promulgated regulation. This Court should decline. As discussed below, the About Time sale is consistent with the policies cited by

the Center. But even if it were inconsistent in some way, that does not automatically render About Time arbitrary and capricious.

The Center provides no binding authority supporting its novel argument that actions are necessarily arbitrary and capricious where they are inconsistent with an internal policy. The Center relies heavily on one federal case. *See* Op. Br. at 37, 45-47, 52. Federal law is at best persuasive authority, and here, where it involves an entirely unrelated management plan by a federal agency, is not relevant to this Court's review of About Time. *Xieng v. Peoples Nat. Bank of Wash.*, 120 Wn.2d 512, 531, 844 P.2d 389 (1993) (federal authority is persuasive in absence of state authority). The federal code at issue in *Alliance for the Wild Rockies* required federal agency action to be consistent with adopted land management plans. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1109 (9th Cir. 2018), citing 16 U.S.C. § 1604(i). Washington has no similar statute that requires that timber sales be consistent with DNR's internal guidance. The Center asks this Court to adopt the Ninth Circuit's

reasoning but fails to identify the federal statute requiring that result in *Alliance*. See also *Or. Nat'l Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1033 (9th Cir. 2020) (courts may not impose procedural requirements not found in statutes).

This Court may dismiss the Center's challenge based on DNR's 2007 Procedure. *Nw. Pulp*, 20 Wn. App. 2d at 550; *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wn. App. 22, 33, 347 P.3d 1090 (2015) ("No justiciable controversy may be alleged when agency action has no legal or regulatory effect or implicates no one's legal interests.") (citation omitted). Because the 2007 Procedure has no legal or regulatory effect, the Center's argument that DNR failed to comply with it does not support a conclusion that DNR acted arbitrarily.

c. About Time Is Consistent with the 2007 Procedure.

If this Court considers the merits of the Center's challenge to DNR's compliance with its internal guidance, the challenge fails because the record reflects that the sale complies with DNR's internal guidance. REC-711-12 (#8), REC-714-15 (#13.b.).

Timber is available for harvest unless it is included in the nearly 50 percent of the state trust lands that are conserved. About Time is not conserved under any of the four HCP strategies. It is available for harvest now, and again in 60-70 years, before the HCP terminates in 2097. The 2007 Procedure allows DNR to harvest timber that is structurally complex or older than 70 years.

The 2007 Procedure explains how DNR identifies and manages forests to meet its older forest target. REC-1268. The Procedure requires DNR to identify and designate the lands that will be in structurally complex conditions by the termination of the HCP (2097) and Policy (2106). Those are the nearly 50 percent of state trust lands conserved by the HCP.

The Center correctly states that DNR has not developed a “forest land plan” for the South Coast Planning Unit. Op. Br. at 49. Because of that, the 2007 Procedure requires DNR to provide three types of information when a planned sale includes structurally complex timber:

a) an assessment of forest conditions using readily available information, b) an analysis of the known landscape management strategies and, c) role of the structurally complex stand in meeting old forest targets.

REC-1269. Because a small portion of About Time is botanically diverse, DNR provided the information in its SEPA checklist and timber sale documentation. The assessment of forest conditions is REC-1042-46. The analysis of known landscape strategies is at REC-711-12 (#8) and REC-1579-91. Because DNR's 2021 Analysis concluded that existing conservation areas are sufficient to meet the 10 percent target, REC-1588, the timber in About Time does not have a role in meeting the older forest target, and no additional documentation is necessary.

The 2007 Procedure requires DNR to "include [that information] in the . . . SEPA checklist." REC-1270. The SEPA checklist identifies the stand age and incorporates its prior analysis. *See* REC-711 (#8), REC-713 (#11.b), REC-807. DNR prepared an additional assessment of forest conditions that describes the stands in more detail, and the Center is correct that this was not attached

to the SEPA checklist. REC-1042-46; Op. Br. at 50. However, the summary was based on DNR's forester review of the stand and its history that he performed before preparing the checklist and before Board approval. REC-489-90, REC-463, REC-807. The information in the SEPA checklist and timber sale development complies with the 2007 Procedure, even without the subsequent summary. *See* REC-709-59 (SEPA documents); REC-760-1060 (timber sale documents).

The 2007 Procedure next describes action steps. The Procedure explains that DNR is required to designate stands that will be managed for structural complexity. REC-1269. DNR has done that in the conservation areas. Those conserved acres include old-growth, riparian buffers, spotted owl habitat, marbled murrelet nest sites, and unstable slopes. REC-1048, REC-1050, REC-1387-89, REC-9387, REC-1581, REC-11787. That acreage exceeds 10 percent of the South Coast Planning Unit, and under the 2007 Procedure, "Once those stands designated as suitable constitute at least 10 percent of the HCP planning unit, other (not otherwise

withdrawn) stands are available for the full spectrum of timber harvests.” REC-1270.

DNR’s existing conserved areas “defer from final harvest older forests and other structurally complex stands designated as suitable to meet older forest targets.” REC-1270. About Time is consistent with this objective. It is also consistent with the 2007 Procedure’s second objective, which limits harvest in the conserved areas to enhancement. Even though parts of the sale area are botanically diverse, DNR’s management is not limited to enhancement because About Time does not meet the Policy’s definition of older forest (niche diversification or fully functional) and is not part of the acres that are conserved for older forests. Therefore, the “full spectrum of timber harvests” is permitted on the About Time trust lands. REC-1270. About Time is consistent with DNR’s internal guidance implementing the Policy’s Silvicultural Strategy.

2. About Time Is Consistent with the Policy's General Silvicultural Strategy.

The Center incorrectly argues that the Silvicultural Strategy prevents DNR from harvesting structurally complex forests until DNR meets its 10 percent target for older forests. The Center misreads the Silvicultural Strategy by taking one phrase out of context and ignoring the remaining language. Under the Silvicultural Strategy, DNR is permitted to harvest the timber in About Time. In addition, harvest is required by statutes and DNR's fiduciary duties.

a. The Silvicultural Strategy Allows Timber Harvest When Sufficient Acres Are Conserved to Grow Into Older Forests Over 100 Years.

Although DNR has conserved nearly 50 percent of the trust lands, the Center argues that the Silvicultural Strategy requires DNR to conserve the timber in About Time. REC-537, REC-744. The Center's claim fails because the Silvicultural Strategy does not prohibit timber harvest, even in structurally complex forests. Its purpose is to ensure that DNR's management decisions for the

trust lands between 2006 and 2106 will increase the percentage of older forests on state trust lands. REC-1579, REC-1588. The Strategy explains the 10-15 percent target is intended to be met “over time,” the 70- to 100-year term of the Policy. REC-12591-92. The Center repeatedly mischaracterizes the 10 percent target as a condition precedent. *See* Op. Br. at 1-2, 22, 26, 48, 51, 55.

The Silvicultural Strategy requires DNR to designate lands that will become older forests by the end of the Strategy’s 100-year term. DNR has done that in the areas conserved under the HCP strategies which are nearly 50 percent of the state trust lands. REC-83, REC-1548. Conserved forests will develop structural complexity over time. REC-1579-80, REC-1588-89, REC-3653. Twenty years of data collection and modeling, analyzed on eight occasions, has consistently confirmed that DNR will meet the target with the conserved lands. REC-352, REC-400, REC-405-06, REC-1495-1510, REC-1589. DNR has no policy or legal basis to set aside additional land.

The Center also ignores the Silvicultural Strategy's definition of older forests as the latter two stages of structural complexity, and argues that the timber in About Time should be conserved because by the termination of the HCP and Policy, some of the trees will be 160 years old. *See* Op. Br. at 48, 55, 58. The Center asks this Court to replace the approach adopted by the Board and replace it with an age-based approach. The Center's invitation is misdirected, fails to recognize the purposes of the HCP and Policy, and ignores DNR's statutes and case precedent.

b. DNR's Governing Laws Require Timber Harvest on the State Trust Lands That Are Not Conserved.

The Silvicultural Strategy must be interpreted in the context of DNR's management framework. Setting aside land not needed to meet the target, as the Center advocates, would likely violate DNR's fiduciary obligation to make the trust property productive, and its statutory direction to manage the lands for timber production.

The Washington Supreme Court recently reaffirmed that state lands are held in trust. *Conservation Northwest*, 514 P.3d at 182. As the trustee, the State has a fiduciary obligation to generate revenue for the specific beneficiaries. *Id.* at 177; *County of Skamania v. State*, 102 Wn.2d 127, 136, 685 P.2d 576 (1984) (*Skamania*); RCW 79.10.310 (DNR must “manage[] the forest to provide harvesting on a continuing basis without major prolonged curtailment or cessation of harvest.”). In order to comply with its fiduciary obligations, “DNR can cease harvesting timber *only if the trust is compensated*. DNR has no power to preserve the entire forest. Only the legislature can do that.” *Chuckanut*, 156 Wn. App. at 289 (emphasis in original).

The Center filed eight appeals between June 2021 and March 2022 that requested release of \$18.4 million to benefit external groups at the expense of the trust beneficiaries. *See* n.4; *Skamania*, 102 Wn.2d at 136 (breach of trust when timber contracts worth \$90 million released). Its members have requested that 1,200 acres, 414,000 acres, all trees older than 60,

or all trees be conserved. REC-54, REC-58, REC-532. Until the Legislature appropriates funds to compensate the beneficiaries, amends DNR's governing statutes, or the Board modifies its policies, DNR does not have the legal authority to conserve timber that is available for harvest consistent with its governing statutes and policies.

c. The Silvicultural Strategy Allows Harvest of the Timber in the About Time Sale.

The Silvicultural Strategy allows DNR to harvest timber that is not conserved under one of the HCP's conservation strategies or the Policy's objectives. The timber in About Time is not included in the nearly 50 percent of state trust lands set aside to meet those objectives.

The Center misrepresents the facts about the About Time timber. The Center claims that DNR will harvest older, unmanaged, structurally complex, unplanted, native trees in a 1,200-acre intact forest. Op. Br. at 60; REC-532, REC-536. The Center describes the timber as "future old growth" rather than what it actually is. About Time is 75 acres of previously harvested,

second-growth timber surrounded by state trust lands and private timberland managed sustainably for perpetual harvest and reforestation. REC-489, REC-713(b), REC-758, REC-1044-45, REC-1049.

DNR staff properly exercised their technical expertise in About Time's design. Classifying forest stands is a specialized field that requires expertise to perform correctly. *See Nw. Ecosystem All. v. Forest Prac. Bd.*, 149 Wn.2d 67, 78, 66 P.3d 614 (2003) (“[A]gency expertise is crucial in an area like this one, where several agencies are involved in implementing statutory directives relating to commercial use of forests in balance with environmental concerns as well as SEPA, federal acts” and ESA-listed species.). DNR's record includes the methodology used to classify a stand of trees. REC-1271-336. DNR's application of that methodology to About Time is at REC-1045-46.

The Center's disagreement with DNR's statutes that require timber harvest on the state trust lands is not arbitrary or capricious

error in DNR's exercise of professional judgment in the design or approval of About Time.

3. About Time Complies with DNR's Governing Statutes Which Require Management for Perpetual Harvest and Reforestation.

About Time is consistent with RCW Title 79 and DNR's management framework. It is a sale of timber from state trust lands that will generate revenue for three categories of its beneficiaries. After harvest, DNR will reforest the land to grow another crop of timber for future beneficiaries. The Center fails to provide any basis for this Court to conclude About Time is not compliant with DNR's governing law.

RCW Title 79 directs DNR's management of the state trust lands. DNR has been managing the lands since statehood. RCW 79.10.080; *Conservation Northwest*, 514 P.3d at 177. The state forestlands, "chiefly valuable for purpose of developing and growing timber," are managed in a perpetual trust. RCW 79.22.010. Neither RCW Title 79 nor WAC Title 332 contain a 10 percent requirement for older forests. The Center has

failed to meet its “heavy burden” to show that About Time’s design or approval was arbitrary and capricious.

C. About Time Is Consistent with DNR’s Federal HCP.

DNR’s management of the state trust lands is restricted by the terms of its 1997 habitat conservation plan (HCP), approved by the Board and two federal agencies.⁷ REC-542, REC-3847. The Center argues that the Board’s approval of About Time was arbitrary and capricious because DNR is not complying with the HCP. Specifically, the Center argues that the HCP requires DNR to provide fully functional forests across 10-15 percent of each HCP planning unit, and that the timber in About Time could have helped DNR meet its requirement in 2097. Op. Br. at 56, 59. The Center’s claims fail because the Center cannot challenge DNR’s

⁷ The Center repeatedly confuses the requirements in the Policy and HCP. Op. Br. at 1-2, 12-13, 15-16, 20-21, 24, 30-31, 47-49, 54, 56, 58. While both govern management of state trust lands, they are functionally different. The HCP is part of a federal permit enforced by federal agencies under the federal Endangered Species Act. The Policy was adopted by the Board under state law and can be amended by the Board. REC-12595.

compliance with the HCP in state court, and DNR is in compliance with the HCP.

1. The Center Cannot Privately Enforce the HCP.

The Center challenges the future results of DNR's implementation of the HCP strategies. Op. Br. at 56. The Center's challenge is not ripe. Further, the Center cannot challenge compliance with the HCP in state court.

The Center's appeal assumes that harvest of About Time means DNR will not be in compliance with the HCP when it terminates in 2097. The ripeness doctrine prevents courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). The Center's challenge is not ripe because the HCP requires 70-100 years of implementation before yielding results.

Washington courts have long declined to issue advisory opinions based on speculative assumptions about future conditions

that may never occur. *Walker v. Munro*, 124 Wn.2d 402, 411-14, 879 P.2d 920 (1994) (Washington courts do not issue advisory opinions that are based on speculation of future actions); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 415-16, 27 P.3d 1149 (2001) (“[W]e have repeatedly refused to find a justiciable controversy where the event at issue has not yet occurred or remains a matter of speculation.”). The Center’s challenge is based on claims of injury that have not happened and likely will never occur.

Further, the Center cannot challenge DNR’s compliance with the HCP in state court. Only the federal agencies can enforce DNR’s compliance with the HCP, and federal district courts have exclusive jurisdiction to enforce the terms of an HCP. 16 U.S.C. § 1540(f), (g); *Ctr. for Biological Diversity v. Env’t Prot. Agency*, 847 F.3d 1075, 1089 (9th Cir. 2017). Moreover, the Implementation Agreement expressly prohibits third-party enforcement of the HCP. REC-3845 (¶ 30.6); *see Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001)

(looking to HCP implementation agreement to determine scope of third-party rights). The Center's challenge to About Time's compliance with the HCP is a brazen backdoor attempt to improperly enforce the HCP in state court, and this Court should decline to consider it.

The Center's challenge also fails because to support its arguments, the Center relies heavily on language it excerpts from the HCP's "Biological Opinion." Op. Br. at 8, 10, 12-15, 18, 56, 58. However, that document does not govern DNR's implementation of the HCP. Federal agencies are required to prepare a Biological Opinion to comply with their legal requirements under Section 7 of the Endangered Species Act. 16 U.S.C. § 1536(c); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1107 (9th Cir. 2012). A party challenging USFWS's compliance with Section 7 of the Endangered Species Act might rely on the Biological Opinion, but it has no relevance in determining DNR's obligations under Section 10 of the Endangered Species Act. The three documents

that govern DNR are the HCP, Incidental Take Permit, and Implementation Agreement. REC-3309-827 (HCP), REC-3828-48 (Implementation Agreement), REC-5260-76 (ITP). The Center fails to identify how About Time is inconsistent with those governing documents.

2. About Time Is Consistent with the HCP Strategies.

The HCP requires DNR to implement four conservation strategies to protect two listed species' habitats, riparian areas, and certain uncommon habitats. Implementation of the strategies is expected to result in a range of forest structure across the state trust lands after 100 years. REC-9429. The Center alleges future error based on DNR's future compliance with a row in a table and error in the content of DNR's annual reports to USFWS. Both challenges fail.

a. The HCP's Table IV.14 Predicts Landscape Conditions in 100 Years but Is Not a Management Requirement.

In October 2021, USFWS stated that DNR's current management practices, including timber harvest, are in compliance with the HCP.

[I]t is the USFWS's opinion that WDNR's management activities are in compliance with the HCP. . . . Harvest and management of structurally complex forest stands, when consistent with . . . the HCP . . . , is a permitted management activity under WDNR's HCP.

REC-9430. The Center ignores USFWS's opinion and argues that DNR will not comply with Table IV.14's estimated percentage of forests that will be in the "fully functional" stage by 2097. Op. Br. at 56.

As with its challenge to the Policy, the Center misunderstands DNR's governing document and ignores DNR's data and analysis. The HCP differs from the Policy in two significant ways. First, the Policy sets a target for each of the six western Washington planning units, but Table IV.14 of the HCP compares only two: the Olympic Experimental State Forest

(OESF), and the rest of western Washington. The HCP combines five western Washington planning units in Table IV.14.

Table IV.14: DNR HCP stand structure objectives at year 100 (in percent of land area)

Stand Stage¹	West-side Planning Units Excluding the OESF	OESF Planning Unit
Open (0-10 Years) ²	5-10	5-15
Regeneration (10-20 years) ²	5-15	5-15
Pole (20-40 years) ²	15-25	5-15
Closed (40-70 years) ²	25-35	5-15
Complex (at least 70 years) ²	25-35	60-70
Fully Functional (Subset of Complex)	(At least 150 years) 10-15	(At least 200 years) 10-15

REC-3654.

The Center alleges that DNR’s analysis shows that DNR will not meet the HCP’s objectives by 2097. Op. Br. at 58. This is incorrect. DNR’s 2021 Analysis concluded that the western Washington state trust lands will exceed 10 percent older forests by 2080, even though three planning units, including South Coast, will not have individually reached 10 percent. REC-1588-89. This Court defers to DNR’s expertise and specialized

knowledge. *Nw. Alloys*, 10 Wn. App. 2d at 187. The Center provides no contrary analysis; it misreads the table and misunderstands the geographic scale.

Second, the HCP differs from the Policy because Table IV.14 does not set a target, but estimates the diversity of forest stand structure on the state trust lands after the HCP has been implemented for 100 years. REC-60-61, REC-82, REC-3653, REC-9430. The table is not one of the four conservation strategies and does not create a legal requirement. REC-9430 (“The projected distribution of stand development stages, as presented in the HCP in Table IV.14 . . . is not a management requirement.”); REC-3856. DNR cannot violate a non-existent requirement.

Table IV.14 anticipates 50-85 percent of the state trust lands will be less than 70 years old in 2097, when the HCP terminates. REC-3654. After About Time is harvested, the area will be replanted. REC-11761, RCW 76.09.070. In 2097, that replanted timber will be 70 years old, an outcome completely consistent with the HCP’s conservation strategies and Table IV.14. The Center

has not met its “heavy burden” to support its allegation that DNR’s approval of About Time was arbitrary and capricious.

b. DNR’s Annual Reports Are Consistent with the HCP’s Conservation Strategies.

The Center asserts that because DNR’s annual reports to USFWS do not address stand structure, DNR has violated its commitment to monitor its progress under the HCP. Op. Br. at 57. This is a prohibited challenge to DNR’s compliance with the HCP, not the About Time sale. The Implementation Agreement prescribes the process to address violations, which requires written notice followed by mediation between USFWS and DNR. REC-3843-44 (¶ 29.2 “In the Event of a Possible Violation”). Moreover, the Center misunderstands the HCP’s monitoring and reporting requirements.

The HCP requires DNR to conduct three types of monitoring and submit annual reports to USFWS. REC-3691-93, REC-3698. Twenty-four reports are in the record. *See* REC-9432-11777. The annual reports review implementation of the four conservation strategies. REC-11697.

The Center correctly notes that DNR does not address age in each annual report. Op. Br. at 57. That is because age is not a conservation strategy. The conservation strategies, such as spotted owl habitat, are reported in considerable detail. *See, e.g.*, REC-11694-11777 (2020 Report). Further, age was only required in the first report in 1999, in order to measure the initial conditions at the inception of the HCP's 100-year term. REC-9435, REC-9576, REC-9748-56. Moreover, USFWS, the federal agency with authority to enforce the HCP, has not objected to DNR's annual reports. To the contrary, in October 2021, it affirmed DNR's management practices. REC-9430.

The Center asks this Court to replace the expert, implementing agencies' opinions with the Center's opinion about appropriate management of the trust lands. The Center provides no reason for this Court to ignore USFWS's expert opinion that DNR is in compliance with the HCP or add a new legal requirement to the HCP. When courts review challenges to timber sales under RCW 79.02.030, the opinion of the technical expert agencies are

given substantial deference and are not supplanted by the lay opinions of an interest group.

DNR is in compliance with its HCP. The Center's challenge is based on an erroneous reading of the HCP and a disagreement with management policies, not an error in About Time. This Court should affirm the superior court's dismissal.

D. DNR Complied with SEPA by Relying on Its Existing Environmental Analysis, Conducting Additional Site-Specific Review for About Time, and Responding to the Center's Comments.

Neither of the Center's SEPA challenges has merit. The Center's first argument is based on its contention that the decision approving About Time is inconsistent with DNR's policies and the HCP. Op. Br. at 60. But for the reasons discussed above, the challenged decision is entirely consistent with those policies and the HCP. Accordingly, the Center's first SEPA argument fails.

The Center's second argument also fails. The Center contends that DNR's threshold determination of non-significance (DNS) is clearly erroneous because "DNR plans to commercially

harvest virtually all of the trees within [a] 1,200-acre forest in the near future,” and that timber is important to fulfilling DNR’s commitments under its Policy and the HCP. Op. Br. at 60-61. But the challenged DNS is related to the 75-acre About Time sale. The Center’s arguments about possible future harvests on other state trust lands is not relevant to whether DNR correctly determined that the 75-acre About Time sale is not likely to have significant, adverse environmental impacts.

In any event, DNR’s DNS for About Time is correct. *See Norway Hill Pres. & Prot. Ass’n. v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976); WAC 197-11-310. DNR’s DNS for About Time is supported by the record, based on significant agency expertise in forest management, and in compliance with SEPA’s procedural requirements.

In issuing its DNS, DNR relied on its existing environmental impact statements (EISs) prepared for its policy decisions. REC-711-12 (#8). Those EISs constitute nearly

10,000 pages of the record in this case.⁸ DNR may rely on its prior environmental analysis for its programmatic management decisions that the About Time sale implements. *Chuckanut*, 156 Wn. App. at 292; WAC 197-11-055(2)(b).

DNR's SEPA checklist confirms that there is nothing about the About Time sale or its location that will result in any probable, significant, adverse environmental impacts that were not previously analyzed. REC-709-35.

DNR and the Board also considered the Center's comments, and the policy framework before approving About Time. REC-59-65. In May 2021, the Board reviewed the existing management policies for older forests. REC-68-342. The Board also received written comment and heard the Center's public testimony specifically related to About Time. REC-462,

⁸ See REC-2050-3308, REC-4054-964 (HCP EISs), REC-5558-9127 (HCP amendment EISs), REC-11805-12539 (Policy EISs), REC-13685-16078 (FP HCP EISs), REC-16109-17569 (2005 SHC EISs), and REC-17570-18100 (2015 SHC EISs).

REC-532-41. DNR responded to the Center's comments on About Time and the Center's similar concerns with numerous other timber sales.⁹ REC-741, REC-758-59 (About Time); *see also* REC-46, REC-49, REC-63, REC-65, REC-353-55, REC-419, REC-466.

The Center's limited SEPA arguments fail to identify any error in DNR's SEPA analysis. DNR's DNS was not clearly erroneous. Regardless, any other potential SEPA arguments that the Center might attempt to raise in its reply will not be properly before this Court, as it does not generally review claims that are raised for the first time in a reply brief. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78 n.20, 322 P.3d 6 (2014) (citing RAP 10.3); *see also* RAP 2.5(a).

⁹ REC-1646, REC-1670-71, REC-1673, REC-1675-80, REC-1684, REC-1686-88, REC-1718-20, REC-1722-23, REC-1727-28, REC-1737-38, REC-1753, REC-1776-81, REC-1791-94, REC-1797-99, REC-1805, REC-1814-15, REC-1818, REC-1820, REC-1878-79, REC-1883, REC-1894, REC-1896-99, REC-1927-31, REC-1934-35, REC-1980.

This Court should affirm the superior court's dismissal of the Center's SEPA claims because the Center has not proven the About Time DNS was clearly erroneous.

E. DNR Is Entitled to Its Costs for Preparing Three Agency Records.

The Center does not challenge the Superior Court's \$5,037 judgment requiring the Center to pay DNR's costs for preparing three agency records. Order at 4 (¶ 1) (Appendix 2). Accordingly, DNR remains entitled to that award. DNR also requests its costs for the supplemental designation of clerk's papers. CP 1-965; RAP 14.3(a).

F. The Center Is Not Entitled to Attorney Fees.

The Center requested to postpone briefing on attorney fees. Op. Br. at 61. This is not permitted. RAP 18.1(b) expressly requires that a party requesting attorney fees "must devote a section of its opening brief to the request for fees or expenses." The Center has waived any request for attorney fees.

Regardless, even if the Center were the prevailing party, it would not be entitled to attorney fees. "[A]ttorney fees are

recoverable only if specifically authorized by statute, by agreement of the parties, or upon a recognized equitable ground.” *Clark v. Wash. Horse Racing Comm’n*, 106 Wn.2d 84, 92-93, 720 P.2d 831 (1986). Attorney fees are not available under the Public Lands Act, which unambiguously states that “no costs shall be awarded against the state, the board, or the commissioner.” RCW 79.02.030.

SEPA gives the court discretion to award attorney fees “up to \$1,000,” but only if DNR’s legal position is “frivolous and without reasonable basis.” RCW 43.21C.075(9). DNR’s SEPA DNS, which relies on decades of environmental analysis, was not frivolous or unreasonable.

V. CONCLUSION

Neither RCW 79.02.030 nor SEPA provide a legal basis for an interest group to substitute its preferred policies for the statutory, common law, and Board-adopted policies that together, create the management framework that governs DNR timber sales. The Center’s disagreement with DNR’s statutory authority and

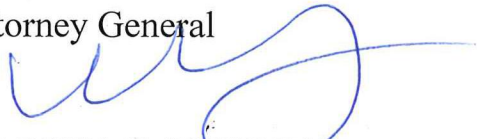
management policies reflects a political disagreement about the role of forest management in Washington. It does not reflect legal error in DNR's design of, or the Board's approval of, About Time. DNR followed the law, its policies, and the procedural requirements of SEPA.

DNR respectfully requests that this Court affirm the superior court's dismissal of the Center's appeal, affirm the agency's approval of About Time and SEPA threshold determination, and affirm the superior court's judgment awarding DNR its record costs.

This document contains 8,813 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of
September 2022.

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Public Lands and Conservation Division

1125 Washington Street SE

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(360) 810-0196

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 6, 2022, through the Washington State Appellate Courts' eFiling Portal.

I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 6th day of September 2022.

s/ Kim L. Kessler

KIM L. KESSLER
Legal Assistant
Public Lands and
Conservation Division

Appendix 1

Figure 4. An example of spatial arrangement of input data for and results of the stand identification process converting RS-FRIS grid data into stand polygons.



Results

Older forests

Currently, through implementation of the HCP and other Policies and laws, older forest in conservation areas exceeds 10 percent in the OESF HCP Planning Unit. North Puget HCP Planning Unit achieves 10 percent older forest by 2070, South Puget by 2080, Columbia and Straits by 2090, and South Coast by 2100 (Table 2).

Table 2. Percent area western Washington HCP planning units with older forest conditions in conservation areas by decade through 2100. Values over 10% in bold.

HCP Planning Unit	Year								
	2021	2030	2040	2050	2060	2070	2080	2090	2100
Columbia	1.0%	1.1%	1.3%	1.7%	2.6%	4.4%	7.4%	11.6%	16.1%
North Puget	3.3%	4.1%	5.1%	6.6%	8.6%	11.3%	14.6%	18.5%	22.5%
OESF	10.3%	10.9%	11.4%	12.3%	13.5%	15.5%	18.9%	25.6%	32.6%
South Coast	0.2%	0.3%	0.7%	1.2%	2.2%	3.6%	6.1%	9.0%	12.5%
South Puget	2.5%	3.3%	4.3%	5.7%	7.4%	9.8%	12.9%	16.3%	19.6%
Straits	1.7%	2.4%	3.1%	4.1%	5.4%	7.1%	9.6%	12.3%	14.8%
Total (Western Washington)	3.4%	3.9%	4.5%	5.5%	6.9%	9.0%	12.0%	16.1%	20.5%

Table 3. Current and future area of older forest conditions based on analyses performed as part of previous landscape planning processes.

Source	Analysis area	Current Older forest (%)	Older Forest in 2060 (%)	Older Forest in 2100 (%)
2004 Sustainable harvest FEIS	Western Washington	<2%	10% (2067)	na
2007 Sustainable harvest FEIS addendum	Western Washington	<1%	16% (2067)	na
2010 South Puget HCP Planning Unit Forest Land Plan FEIS	South Puget HCP Planning Unit	<2%	18.2%	33.3%
2016 Olympic Experimental State Forest HCP Planning Unit Forest Land Plan FEIS	OESF HCP Planning Unit	11%	15.5% (RDEIS, DNR 2013)	21.6% (RDEIS)
2019 Sustainable harvest FEIS	Western Washington	3.1%	8% (2068)	na
2021 Older Forest Document (this report)	Western Washington	3.4%	6.9%	20.5%

HCP-defined age class analysis

As a secondary analysis, DNR calculated the area of each HCP planning unit over 150 years old (200 years old in the OESF) in stands over five acres in conserved areas. DNR found the percent of each HCP Planning Unit is stands larger than 5 acres older than 150 years, or 200 years in the OESF (Table 4). All planning have 10 percent of their area in stands over 150 (200 in the OESF) in conservation areas by 2110.

Table 5. Percent area western Washington HCP planning units with stands older than 150 years old (200 years or older in the OESF) in conservation areas by decade through 2110.

HCP Planning Unit	Year									
	2021	2030	2040	2050	2060	2070	2080	2090	2100	2110
Columbia	0.8%	1.0%	1.2%	1.5%	1.7%	2.1%	3.0%	4.7%	8.3%	13.5%
North Puget	2.8%	3.3%	4.3%	5.4%	6.7%	8.5%	11.0%	14.4%	18.5%	23.9%
OESF	8.6%	9.3%	9.9%	10.6%	11.1%	12.0%	12.9%	13.6%	14.6%	14.9%
South Coast	0.1%	0.1%	0.2%	0.3%	0.6%	1.1%	2.2%	3.8%	6.3%	10.1%
South Puget	0.9%	1.5%	2.8%	4.0%	5.2%	6.9%	9.0%	11.8%	16.0%	20.5%
Straits	0.6%	1.0%	1.8%	3.0%	3.8%	5.0%	6.6%	8.7%	11.4%	15.1%
Total (Western Washington)	2.6%	3.0%	3.6%	4.4%	5.1%	6.2%	7.8%	10.0%	13.1%	17.0%

Table IV.13: Habitats and representative wildlife species covered by this HCP for the west-side planning units (*continued*)

Type of habitat	Representative species that can use these habitat types
Old-growth forest stage	Johnson's hairstreak butterfly, pine white butterfly, <i>Acalypta saundersi</i> (a lace bug), <i>Cychnus tuberculatus</i> (a carabid beetle), <i>Lobosoma horridum</i> (a weevil), <i>Omus dejeani</i> (a tiger beetle); and see list for spotted owl high quality nesting habitat

Provision of a Range of Forest Types Across the HCP Landscape

DNR management activities that will occur under the HCP will ensure a range of forest types in adequate amounts to provide for multi-species conservation across the landscape covered by the HCP. DNR has modeled the age-class distribution that will likely result from expected management under the HCP and existing policies. Results from this modeling have been used to develop a table (see Table IV.14) of expected percentages of each of several forest habitat/structural types, using age-class as a surrogate, that would likely exist 100 years following implementation of such management.

Table IV.14: DNR HCP stand structure objectives at year 100 (in percent of land area)

Stand Stage¹	West-side Planning Units Excluding the OESF	OESF Planning Unit
Open (0-10 Years) ²	5-10	5-15
Regeneration (10-20 years) ²	5-15	5-15
Pole (20-40 years) ²	15-25	5-15
Closed (40-70 years) ²	25-35	5-15
Complex (at least 70 years) ²	25-35	60-70
Fully Functional (Subset of Complex)	(At least 150 years) 10-15	(At least 200 years) 10-15

¹Stand stages are defined as:

Open- earliest seral stage; overstory has been removed; dominated by herbs and shrubs with some young conifer and deciduous trees present.

Regeneration-shrubs and saplings; branches beginning to intertwine; dense canopies from ground-level upwards.

Pole - early stages of stem exclusion; stems closely spaced and numerous; little understory; limited self-pruning; and insufficient canopy lift to allow larger birds to penetrate.

Closed - have undergone some stem exclusion and competition mortality; have achieved some canopy lift from self-pruning; have well-developed, deep canopies; and lacking complex structural characteristics of older types.

Complex - stocked with large trees with a variety of diameters and heights evident; mortality within the stand (or residual trees, snags, and logs) provides cavities in standing snags, downed logs, deformities in standing live trees; large horizontal branches; and a complex canopy with conifer establishment occurring under opening in the canopy.

Fully Functional - a subset of complex forests but more mature and structurally complex.

²Age-classes shown are a surrogate for stand structure. If and when it can be shown that appropriate structure can be obtained at a different age, different age classes may be used.

The information in the above table was derived from modeling that contained assumptions based on the Forest Resource Plan policies. These assumptions are described in Appendix 5 of the Final EIS (available from DNR). The FRP states that the goal for average rotation age for west-side conifer dominated forests will be 60 years. At present, DNR expects to continue this policy and information regarding the average rotation age will be provided to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service at scheduled inter-agency HCP reviews. However, as long as DNR can show that reaching the stand structure objectives is likely, other rotation ages may be used. Additionally, DNR maintains the flexibility to harvest specific stands at an earlier age to address specific silvicultural situations (i.e., a 30- to 35-year old stand that was not thinned at an appropriate age may be more quickly converted into a healthy, productive stand by clear-cutting the stand and “starting over”).

Subsequent to the modeling exercise, DNR, the U.S. Fish & Wildlife Service and the National Marine Fisheries Service negotiated a 70-year term for this HCP, with provisions for up to three, 10-year extensions. (See the Implementation Agreement in Appendix B of this document.) Such exten-



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Washington Fish and Wildlife Office
510 Desmond Dr. S.E., Suite 102
Lacey, Washington 98503

In Reply Refer To:
01EWF00-2022-TA-0095

Angus Brodie
Deputy Supervisor for State Uplands
Washington Department of Natural Resources
1111 Washington Street SE MS #47001
Olympia, WA 98504-7001

Dear Mr. Brodie:

Subject: Projections of Forest Types and Stand Structural Conditions on
Washington Department of Natural Resources State Trust Lands.

This letter provides clarification regarding the Washington State Department of Natural Resources' (WDNR) Trust Lands Habitat Conservation Plan (HCP) pertaining to projections of forest stand structural conditions provided through implementation of HCP conservation strategies.

Recently, there has been increased interest regarding the “*age-class distribution that will likely result from expected management under the HCP and existing policies*” within the Olympic Experimental State Forest (OESF) and five west-side planning units (WDNR 1997, p. IV.179). The estimated future conditions are described in the HCP in a subsection titled: *Provision of a Range of Forest Types Across the HCP Landscape* (WDNR 1997, pp. IV. 179 - 182). Specifically, I am writing to clarify the U.S. Fish and Wildlife's (USFWS) understanding of this section of the HCP.

This section of the HCP describes a range of forest stand development stages ranging from open (0-10 years) to fully functional older forest stands (at least 150 years-old) that were projected to result after 100 years of implementation of the HCP (WDNR 1997, p. IV. 180). The modeled distribution of forest stand stages after 100 years is presented as a percentage of land area in each forest stage that is likely to result as an outcome of implementing all habitat protection measures contained in conservation strategies for the northern spotted owl, marbled murrelet, riparian, wetland, snag and leave tree, and uncommon habitats, in addition to WDNR's other policies (WDNR 1997, pp. IV.147-158).

INTERIOR REGION 9
COLUMBIA-PACIFIC NORTHWEST

IDAHO, MONTANA*, OREGON*, WASHINGTON

*PARTIAL

REC-00009429

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.

We acknowledge that there are statements made in the USFWS's 1997 Biological Opinion (USFWS 1997) that if taken out of context, could be interpreted as a USFWS expectation that WDNR was committed to provide "*certain percentages of stand structural classes from open forest to fully functional complex forests*" (USFWS 1997, p. 5); or, "*Fully functioning conifer forest, a subset of complex forests, would be provided. By 2096 these would comprise 12 percent of West-side Planning Units at least 150 years old and 10 to 15 percent of the OESF Planning Unit at least 200 years old*" (USFWS 1997, p. 22). However, no such commitment to provide a specific percentage of land area in different stand development stages is explicitly provided in the HCP itself, nor was it described in the description of the HCP presented in the 1998 Final Environmental Impact Statement for the HCP. The landscape percentages of different stand stages after 100 years of implementation is used in the USFWS's Biological Opinion to estimate future conditions in the analysis of the effects of the HCP to northern spotted owl habitat (USFWS 1997, pp. 64-67).

Using forest inventory data to model future conditions in areas conserved under the conservation strategies included in the HCP is an important analytical tool used in our analyses of the long-term effects of the HCP. Similar modeling projections were provided for future habitat development in our analysis of the long-term conservation strategy for the marbled murrelet (WDNR 2019, pp. 15-17). It is important to acknowledge that these are estimates, based on the best available information at the time. We recognize that forest inventory data and analytical methods will change over time. We expect that WDNR's methods, and therefore estimates, of the distribution of stand structure across the landscape will adjust over time through HCP implementation, land management activities and other updates to data.

Based on WDNR's research and monitoring, it is the USFWS's opinion that WDNR's management activities are in compliance with the HCP through implementation of the conservation strategies and species-specific conservation measures. In addition, the likely range of forest stand development stages described above are not a conservation strategy required by the HCP, but instead represent a likely outcome of HCP implementation. Harvest and management of structurally complex forest stands, when consistent with habitat protection measures described within the HCP conservation strategies, is a permitted management activity under WDNR's HCP. We look forward to continued communication and cooperation with WDNR as part of the implementation of its HCP.

Sincerely,

**BRADLEY
THOMPSON**

Brad Thompson, State Supervisor
Washington Fish and Wildlife Office

Digitally signed by BRADLEY
THOMPSON
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-
- **The department may use different geographic scales to address special circumstances.**
 - **The department will utilize the requirements of the State Environmental Policy Act to communicate department objectives and outcomes; to consider local, regional and statewide interests and concerns; and to develop and analyze forest management strategies.**
 - **The department will prioritize and develop new forest land plans over time. The development of plans will depend on available resources and budget.**
 - **As plans are developed, the department will integrate previous planning work within new forest land plans as appropriate.**

The department will provide professional management of forested state trust lands through active management and stewardship...

General Silvicultural Strategy

DISCUSSION

DNR defines silviculture as the art and science of cultivating forests to achieve objectives. Innovative silvicultural treatments may be used to create, develop, enhance, or maintain forest biodiversity, health and revenue potential. All silvicultural strategies are applied within a context of specific objectives (stand-level or larger-area) to achieve ecological outcomes, long-term sustainable flow of forest products, services, and other values. DNR generally intervenes with the management of stands whose progress toward objectives is below potential. Site-specific silvicultural prescriptions include intensive activities, such as improved planting stock, site preparation, fertilization and thinning. Stands selected for regeneration harvests include, but are not limited to, those that are not likely to positively respond to partial harvest regimes.

Treatments such as biodiversity pathways can be used to create complex, multi-aged forest stand structures that sustain key forest stand elements, replicating vital ecological functions at the stand and landscape levels. By developing the stand structures that are typical of older forests, this approach can be used to meet the older-forest targets of DNR's *Habitat Conservation Plan* (HCP).

DNR intends to actively manage suitable structurally complex forests to achieve older-forest structures across 10-15 percent of each Western Washington HCP planning unit in 70-100 years. Older-forest structures that contribute to this target are represented by stands in the fully functional or niche diversification stage of stand development.

The landscape context of a structurally complex stand greatly influences its suitability to be managed to meet older-forest targets. The size of the stand, its proximity to old-growth or other structurally complex forest stands, or the scarcity of old-growth and other structurally complex stands are all factors in determining if a stand is suitable for contributing to older-forest targets. Assessment of the landscape conditions can identify the relative contribution that a structurally complex forest stand can make toward achieving those targets.

POLICY ON GENERAL SILVICULTURAL STRATEGY

- The department will provide professional management of forested state trust lands through active management and stewardship of the greatest possible portion of these lands.
- The department will carry out active management as an integral part of the department's fiduciary responsibilities to achieve, on a landscape basis, a combination of forest structures that, over time, provide for broad and balanced economic, ecological and social benefits.
- The department will use intensive and innovative silviculture to guide the desired progression of stand development to simultaneously produce trust revenue and create structural diversity across the landscape.
- 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 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.



Forest Roads

DISCUSSION

DNR repairs and maintains about 14,000 miles of forest roads statewide (12,000 on forested state trust lands and 2,000 on other non-DNR lands). The road system is a trust asset that facilitates cost-effective management of other trust assets and increases their value.

DNR's road system also provides a variety of social benefits, including recreational access and access to private forestlands and residences. However, if not properly managed, roads have the potential to cause increased costs and risks by damaging the environment or providing opportunities for illegal activities on forested state trust lands. Design, location and abandonment of forest roads are carefully considered in regard to the impacts to the environment and forestland management needs. Public access and recreation can also be a consideration.

POLICY ON FOREST ROADS

- The department will develop and maintain forest roads to meet trust objectives and Board of Natural Resources policy, including protecting and enhancing the asset value.
- To minimize adverse environmental impacts, the department will rely on the requirements of DNR's *Habitat Conservation Plan*, state forest practices rules and the State Environmental Policy Act, and will minimize the extent of the road network, consistent with other Board of Natural Resources policy.

Appendix 2

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**STATE OF WASHINGTON
GRAYS HARBOR COUNTY SUPERIOR COURT**

CENTER FOR RESPONSIBLE FORESTRY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, BOARD OF NATURAL RESOURCES, and COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, in her official capacity,

Respondents,

and

MURPHY COMPANY, DBA MURPHY COMPANY OF OREGON,

Intervenor.

NO. 21-2-00519-14
(Consolidated with 21-2-00647-14 and 22-2-00005-14)

ORDER CONSOLIDATING APPEALS, ENTERING JUDGMENT AWARDING RECORD COSTS, AND DISMISSING APPEALS

CLERK'S ACTION REQUIRED

Judgment Summary (RCW 4.64.030)

Judgment Creditor: Washington State Department of Natural Resources

Judgment Creditor's Attorney: Martha Wehling (WSBA No. 36295)

Judgment Debtor: Center for Responsible Forestry

Judgment Amount: \$5,037.56

//

1 THIS MATTER came before the Grays Harbor County Superior Court under
2 RCW 79.02.030 and RCW 43.21C. Parties were represented at the March 15, 2022, oral argument
3 by ALEX SIDLES, counsel for Appellant Center for Responsible Forestry; MARTHA WEHLING,
4 counsel for Respondents Department of Natural Resources (DNR); and JULIE WEIS, counsel for
5 Intervenor-Respondent Murphy Company. The same counsel represented the parties at the March
6 24, 2022 oral argument on record costs.

7 **A. Consolidation of Three Timber Sale Appeals**

8 The Parties stipulated to consolidation under CR 42(a) of the Center for Responsible
9 Forestry's three appeals in Grays Harbor County Superior Court, Cause Nos. 21-2-00519-14 (About
10 Time timber sale), 21-2-00647-14 (Bluehorse timber sale), and 22-2-00005-14 (Prospero timber
11 sale). The Center for Responsible Forestry's three appeals are pled under the same legal issues, and
12 are appropriately resolved in one proceeding for judicial economy.

13 **B. DNR's Agency Records for Three Timber Sales**

14 The Center for Responsible Forestry appealed three DNR timber sales under
15 RCW 79.02.030, which requires DNR to certify the agency record within 30 days after the notice
16 of appeal is filed. The Center for Responsible Forestry filed its notice of appeal of About Time on
17 October 5, 2021; Bluehorse on December 1, 2021; and Prospero on January 6, 2022. DNR prepared
18 three agency records, as required by RCW 79.02.030. DNR's record certifications and indexes were
19 filed on November 3, 2021 (About Time); January 5, 2022 (Bluehorse); and February 11, 2022
20 (Prospero).

21 DNR provided Judge Katherine Svoboda with an electronic copy of all three agency
22 records, and DNR filed an electronic copy of all three agency records with the Grays Harbor County
23 Superior Court clerk's office. DNR filed a hard copy of the Bluehorse agency record with the Grays
24 Harbor County Superior Court clerk's office. Consistent with the October 20, 2021 ex parte order,
25 DNR did not file a hard copy of the About Time agency record prior to oral argument. The Grays
26

1 Harbor County Superior Court clerk's office requires DNR to file hard copy records of the About
2 Time and Prospero agency records.

3 The Center for Responsible Forestry strenuously objects to paying DNR's costs for filing
4 three hard copy records. Therefore, DNR will only file excerpts of the Prospero record. **Attachment**
5 **A** to this order provides a crosswalk to the three agency records prepared under RCW 79.02.030. It
6 identifies the excerpts of the Prospero record that will be filed as hard copies and which are not
7 included in the About Time or Bluehorse records.

8 The Center for Responsible Forestry stipulates that it will not challenge the adequacy of the
9 agency records at the appellate stage, and acknowledges that Grays Harbor Superior Court had
10 electronic copies of all three agency records before it at the time of the court's decision. The Center
11 also acknowledges that appellate review of the Prospero timber sale will require different citations
12 to the agency record than the record certified by DNR and filed in Grays Harbor County Superior
13 Court.

14 **C. Findings and Order**

15 The Court reviewed the pleadings, legal authority, and agency records, and being fully
16 advised in the matter, FINDS:

17 1. The Center for Responsible Forestry's claims challenging the About Time,
18 Bluehorse, and Prospero timber sales fail to identify arbitrary and capricious agency action under
19 the Public Lands Act, RCW Title 79.

20 2. The SEPA threshold determinations for the About Time, Bluehorse, and Prospero
21 timber sales were not clearly erroneous.

22 3. The Center for Responsible Forestry's disagreement with agency policies or
23 outcomes is not arbitrary and capricious agency action or clearly erroneous under SEPA.

24 4. Respondents complied with the procedural requirements for the About Time,
25 Bluehorse, and Prospero timber sales.

26 //

1 Based on the above findings, the Court ORDERS:

2 1. The Center for Responsible Forestry is responsible for Respondent Department of
3 Natural Resources' costs for providing hard copy records to the Grays Harbor County Superior
4 Court for its appeal of the About Time, Bluehorse, and Prospero timber sales under
5 RCW 79.02.030. The following costs are awarded to DNR for printing and delivering hard copy
6 records to the Grays Harbor County Superior Court clerk's office: About Time - \$2,719.05 (18,127
7 page record); Bluehorse - \$2,172.71 (19,284 page record); and Prospero excerpts - \$145.80 (18,877
8 page record). Judgment is entered in the amount of \$5,037.56.

9 2. The Center for Responsible Forestry's appeals challenging the About Time,
10 Bluehorse, and Prospero timber sales are dismissed with prejudice.

11 DATED this 30th day of March 2022.



JUDGE KATHERINE SVOBODA
Grays Harbor County Superior Court

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13
14
15 **PRESENTED BY:**

16 ROBERT W. FERGUSON
17 Attorney General

18
19 s/ Martha F. Wehling
20 MARTHA F. WEHLING, WSBA #36295
21 KIERA E. MILLER, WSBA #48419
Assistant Attorneys General
Public Lands and Conservation Division
Attorneys for Respondents

3/24/2022
DATE

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APPROVED AS TO FORM:

BRICKLIN & NEWMAN, LLP

s/ Alex Sidles pursuant to email authorization
ALEXANDER SIDLES, WSBA #52832

3/25/2022
DATE

WASHINGTON FOREST LAW CENTER

PETER GOLDMAN, WSBA #14789
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HAGLUND KELLEY, LLP

s/ Julie Weis pursuant to email authorization
JULIE A. WEIS, WSBA #43427
CHRISTOPHER T. GRIFFITH, WSBA #57623
Attorneys for Intervenor Murphy Company

3/27/2022
DATE

Attachment A

Attachment A

Attachment A to

Order consolidating appeals, entering judgment awarding record costs, and dismissing appeals
DNR Agency Records That Will Be Designated for Appellate Review

Record Index	About Time 21-2-00519-14	Bluehorse 21-2-00647-14	Prospero 22-2-00005-14
I. Board of Natural Resources Meetings	I.(A)-(I)	I.(A)-(K)	I.(A)-(K)
	REC-00000001	REC-00000001	N/A
	--	--	
	REC-000000541	REC-00000628	I.(L) (1)-(5)
		and	
		REC-00019256	REC-00000526
		--	--
		REC-00019284	REC-00000899
I. Board of Natural Resources Resolutions	J.(1)-(10)	L. (1)-(10)	I.M. (1)-(10)
	REC-000000542	REC-00000629	N/A
	--	---	
	REC-000000671	REC-0000754	
II.A. Forest Practices Permit	(1)-(4)	(1)-(3)	(1)-(2)
	REC-000000672	REC-00000755	REC-000001030
	--	--	--
	REC-000000708	REC-00000819	REC-000001076
II.B. State Environmental Policy Act	(1)-(7)	(1)-(11)	(1)-(7)
	REC-000000709	REC-0000820	REC-000001077
	--	--	--
	REC-000000759	REC-0001771	REC-000001133

Record Index	About Time 21-2-00519-14	Bluehorse 21-2-00647-14	Prospero 22-2-00005-14
II.C. Timber Sale Documents	(1)-(38) REC-00000760 -- REC-000001060	(1)-(63) REC-0001772 -- REC-00002035	(1)-(32) REC-000001134 -- REC-000001621
II.D. Policies, Procedures, and Reports	(1)-(26) REC-000001061 -- REC-000001645	(1)-(34) REC-0002036 -- REC-0002722	(1)-(32) N/A (33)-(34) REC-000002295 -- REC-000002300
II.E. Correspondence with Stephen Kropp/Center for Responsible Forestry About Timber Sales	(1)-(65) REC-000001646 -- REC-000002049	(1)-(81) REC-0002723 -- REC-0003278	(1)-(80) N/A
III.A. Programmatic Management Framework 1997 Habitat Conservation Plan	(1)-(52) REC-000002050 -- REC-000011804	(1)-(52) REC-0003279 -- REC-0012959	(1)-(52) N/A
III.B. Programmatic Management Framework 2006 Policy for Sustainable Forests	(1)-(3) REC-000011805 -- REC-000012609	(1)-(3) REC-0012960 -- REC-0013764	(1)-(3) N/A

Record Index	About Time 21-2-00519-14	Bluehorse 21-2-00647-14	Prospero 22-2-00005-14
III.C. Programmatic Management Framework 2006 Forest Practices Habitat Conservation Plan	(1)-(6) REC-000012610 -- REC-000016108	(1)-(6) REC-0013765 -- REC-0017263	(1)-(6) N/A
III.D. Programmatic Management Framework 2005-2014 Sustainable Harvest Calculation	(1)-(3) REC-000016109 -- REC-000017569	(1)-(3) REC-0017264 -- REC-0018724	(1)-(3) N/A
III.E. Programmatic Management Framework 2015-2024 Sustainable Harvest Calculation	(1)-(2) REC-000017570 -- REC-000018100	(1)-(2) REC-0018725 -- REC-0019255	(1)-(2) N/A
IV. Supplemental Documents to Agency Record	A.(1)-(3) REC-0000018101 -- REC-0000018120	N/A	N/A
V. Supplemental Documents -- Not Part of Agency Record	A.(1)-(2) REC-0000018121 -- REC-0000018127	N/A	N/A

Appendix 3

C4RF COA – Designation of Clerk’s Papers

Sub. No. & Date Filed	Document Name	Who Designated	CP
About Time 21-2-00519-14			
1 10/05/2021	Notice of Appeal to Superior Court	C4RF – 05/26/2022	
2 10/05/2021	Summons	DNR – 07/20/2022	1-2
6 10/20/2021	Order Setting Trial Date	DNR – 07/20/2022	3-6
7 10/25/2021	Answer (DNR)	C4RF – 05/26/2022	
8 11/03/2021	Certification <i>and index for agency record</i>	DNR – 07/20/2022	7-26
9 12/13/2021	Certification <i>amended</i>	DNR – 07/20/2022	27-73
10 01/12/2022	Brief <i>Appellant</i>	DNR – 07/20/2022	74-111
13 01/19/2022	Declaration Affidavit [John Murphy]	DNR – 07/20/2022	112-117
17 01/21/2022	Order Granting Motion Petition (Intervention)	C4RF – 05/26/2022	
22 02/07/2022	Brief <i>responsive</i> Party: Intervenor Murphy Company	DNR – 07/20/2022	118-198
24 02/07/2022	Brief <i>response</i> Party: Respondent DNR	DNR – 07/20/2022	199-729
25 02/17/2022	Answer (Intervenor)	C4RF – 05/26/2022	
26 02/28/2022	Affidavit Declaration Certificate Confirmation of Service [Appellant’s reply brief]	DNR – 07/20/2022	730-766
27 03/10/2022	Notice of Hearing <i>Evidentiary</i>	DNR – 07/20/2022	767
28 03/15/2022	Court Hearing Minutes	C4RF – 05/26/2022	
29 03/22/2022	Notice of Hearing	DNR – 07/20/2022	768
30 03/24/2022	Court Hearing Minutes	C4RF – 05/26/2022	
31 03/30/2022	Judgment Summary (Consolidating Appeals)	C4RF – 05/26/2022	
32	Notice of Appeal to Court of Appeals	C4RF – 05/26/2022	

Sub. No. & Date Filed	Document Name	Who Designated	CP
Bluehorse 21-2-00647-14			
1 12/01/2021	Summons	DNR – 07/20/2022	769-770
2 12/01/2021	Notice of Appeal to Superior Court	C4RF – 05/26/2022	
6 12/17/2021	Answer (DNR)	C4RF – 05/26/2022	
7 01/05/2022	Note for Trial and Statement of Arbitrability	DNR – 07/20/2022	771-773
8 01/05/2022	Certification [DNR's record]	DNR – 07/20/2022	774-797
9 01/07/2022	Motion Party: Assistant Attorney General	DNR – 07/20/2022	798-870
13 01/26/2022	Notice of Hearing	DNR – 07/20/2022	871
17 01/31/2022	Stipulation	DNR – 07/20/2022	872-875
18 02/11/2022	Agreement <i>briefing agreement</i>	DNR – 07/20/2022	876-878
19 02/28/2022	Affidavit Declaration Certificate Confirmation of Service [Appellant's opening brief]	DNR – 07/20/2022	879-921
20 03/15/2022	Court Hearing Minutes	DNR – 07/20/2022	922
21 03/22/2022	Notice of Hearing	DNR – 07/20/2022	923
22 03/24/2022	Court Hearing Minutes	DNR – 07/20/2022	924
24 04/04/2022	Order Consolidating Cases	C4RF – 05/26/2022	
Prospero 22-2-00005-14			
1 01/06/2022	Summons	DNR – 07/20/2022	925-926
2 01/06/2022	Notice of Appeal to Superior Court	C4RF – 05/26/2022	
7 01/24/2022	Answer (DNR)	C4RF – 05/26/2022	
11 01/31/2022	Stipulation	DNR – 07/20/2022	927-929
12	Certification <i>and index</i>	DNR – 07/20/2022	930-951

Sub. No. & Date Filed	Document Name	Who Designated	CP
02/11/2022			
13 02/11/2022	Note for Trial and Statement of Arbitrability	DNR – 07/20/2022	952-955
18 02/15/2022	Declaration Affidavit <i>of John Murphy</i>	DNR – 07/20/2022	956-962
19 02/17/2022	Order Granting Motion Petition	C4RF – 05/26/2022	
22 03/15/2022	Court Hearing Minutes	DNR – 07/20/2022	963
23 03/22/2022	Notice of Hearing	DNR – 07/20/2022	964
24 03/24/2022	Court Hearing Minutes	DNR – 07/20/2022	965
25 04/07/2022	Order Consolidating Cases	C4RF – 05/26/2022	

ATTORNEY GENERAL'S OFFICE - PUBLIC LANDS & CONSERVATION DIVISION (RES)

September 06, 2022 - 9:18 AM

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Appellate Court Case Title: Center for Responsible Forestry, Appellant v. WA State Dept. of Natural Resources, Respondent
Superior Court Case Number: 21-2-00519-8

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