No. 99183-9

SUPREME COURT OF THE STATE OF WASHINGTON

CONSERVATION NORTHWEST, et al.,

Plaintiffs/Appellants,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ (in her official capacity), et al.,

Defendants/Appellees,

and

WAHKIAKUM COUNTY,

Defendant/Appellee/Intervenor-Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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INTRODUCTION

Conservation Northwest et. al ("CNW") seek direct review of an order of dismissal from Thurston County Superior Court dated October 5, 2020. The issue on review is the interpretation of the phrase "[a]ll the public lands granted to the state are held in trust for all the people" in the Washington State Constitution, art. XVI, § 1. The interpretation of this constitutional text is a matter of substantial public importance because it dictates how two million acres of State-owned land are held and managed. Under the required plain language reading, "all the people" means *each and every one of the people of Washington*, and it imposes a constitutional duty on the State to hold and manage lands in the public interest.

The Department of Natural Resources ("DNR") does not currently manage public lands for "each and every one of the people," but rather contends that "all the people" actually refers to a narrow group of beneficiaries, and that the agency must serve only those beneficiaries. DNR's position relies on an overextension and misinterpretation of *County of Skamania v. State*, 102 Wn.2d 127, 132, 685 P.2d 576, 580 (1984). In *Skamania*, in discussion limited to the facts of the case, this Court stated that the State has a private fiduciary relationship to institutional beneficiaries. DNR understands this fiduciary relationship to require the agency to prioritize maximizing revenue for the named beneficiaries to the exclusion of all other public interests. Defendant-intervenors, which consist

of a timber industry association, five counties, and various local government entities, share the view that the State must prioritize revenue maximization.

The issue of to whom DNR owes its trust responsibilities is squarely before this Court because CNW brought both a valid declaratory judgment action based on concrete, on-the-ground harms and because CNW has timely challenged two programmatic DNR actions made based on the agency's misunderstanding of its trust responsibilities. These actions are the approval of a decadal Sustainable Harvest Calculation ("Harvest Calculation"), which sets timber volume targets, and a plan dictating the future of threatened species conservation on State lands, the Marbled Murrelet Long-Term Conservation Strategy ("Marbled Murrelet Strategy"). The core legal question is also at issue in similar suits brought by Defendant-Intervenors in Thurston and Skagit County Superior Courts, and by Skagit County in Skagit County Superior Court.

Direct review is warranted under RAP 4.2(a)(4) because the question of to whom DNR owes trust responsibilities—either "all the people" or a narrow group of named beneficiaries—has enormous consequences to the public interest. The scope of DNR's duties to the public dictates whether the State has the discretion to consider both logging and other economic and social benefits in the Harvest Calculation, and dictates whether the State may honor its own commitments to the United States to contribute to the recovery of threatened marbled murrelets.

Resolution of this appeal will also determine whether DNR must use State forests to achieve broad public benefits in addition to commercial logging with revenue dedicated to named beneficiaries: longer rotation forestry to increase carbon sequestration, creative solutions to reduce land use conflicts, preservation of forested land base near residential areas, and promotion of forest health to minimize risk of destructive wildfires.

Direct review is further warranted under RAP 4.2(a)(3) because there is inconsistency in past decisions of this Court. *Skamania* concerned a challenge to the Legislature's decision to release private timber companies from finalized timber sale contracts, resulting in a severe loss of already secured revenue to the designated beneficiaries. *Skamania* did not involve management of lands and did not interpret the state constitution. Over time, *Skamania*'s limited, fact-based interpretation has taken on a life of its own and metastasized into a State policy that every aspect of public land management must prioritize revenue maximization over the interests of "all the people." *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) conflicts with that application of *Skamania*, because *McCleary* requires a plain language reading of art. XVI, § 1, under which "all" the people means "each and every one of them." Other decisions by this Court, including *PUD No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 342 P. 3d 308 (2015), describe the State as holding lands in a sovereign capacity, in trust for the public. In *PUD No. 1*, this Court expressly rejected DNR's attempts to

extend *Skamania* to land management decisions. Accordingly, direct review by this Court is merited to reconcile these conflicting decisions and to provide interpretation of art. XVI, § 1 and, thus, the scope and of the constitutional trust mandate regarding management of State lands.

I. NATURE OF THE CASE AND DECISION

DNR manages approximately two million acres of public land, which largely consist of federally-granted lands acquired at Statehood, and lands acquired from counties in the early twentieth century. The granted lands are governed by the Washington Enabling Act and the State constitution, and the county lands are tiered to the same requirements by statute. RCW 79.22.040. DNR management is subject to applicable law, including the Public Lands Act, RCW 79.02.010 *et seq.*, and the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* These obligations give rise to the challenged Harvest Calculation and Marbled Murrelet Strategy.

Appellants are affected individuals, as well as the non-profit conservation groups Conservation Northwest, Washington Environmental Council, and Olympic Forest Coalition (collectively, "CNW"). CNW brought three claims centered around DNR's overly narrow construction of the constitutional trust mandate. The first claim seeks a declaratory judgment as to the interpretation of Const. art. XVI, § 1's terms that the federal lands received would be held "in trust for all the people." With respect to claim 1, each of the plaintiffs established that they are injured by

DNR's implementation of the agency's perceived obligation to maximize revenue. For example, DNR has attempted logging on landslides above the home of Holly Koons' and Max Duncan's home in Whatcom County, irrespective of risk to homes and the elementary school below. The agency further asserts that it is legally obligated to sell or exchange with developers public lands close to residential areas because those lands have a higher value for development. DNR likewise has sought to maximize revenue by logging large diameter trees in eastside forests, and now contends that its narrow fiduciary duties to beneficiaries means the agency cannot pay for needed prescribed burns and other forest health measures to reduce ever-increasing risk of wildfire to the public.

Claims 2 and 3 timely challenge, by constitutional writ, the Harvest Calculation and the Marbled Murrelet Strategy approvals made on December 16, 2019. The bases for the challenge include the assertion that DNR unlawfully construed its legal duties to require revenue maximization and prohibits meaningful consideration of the public interest.

Wahkiakum County et al., consisting of various local government entities and the timber industry organization American Forest Resource Council, intervened in support of DNR's narrow construction of the trust mandate. The parties recognized that the core of the case is the question of to whom DNR owes its trust duties. Accordingly, the parties thoroughly briefed the merits on cross motions for summary judgment.

In a telephonic hearing on the cross-motions held on October 2, 2020 in Thurston County Superior Court, the Honorable Erik D. Price held that *Skamania* bound his interpretation of art. XVI, § 1, and that all three of CNW's claims hinged on this point. Although acknowledging CNW's constitutional arguments raised an important issue, were practical, and even appeared to be potentially sound policy, the trial court dismissed all three of CNW's claims *on the merits* under CR 12(b).[1] The trial court also opined that these matters were better resolved on appeal.

On October 5, 2020, the trial court entered a final order and judgment dismissing CNW's claims. CNW sought direct review on October 28, 2020, and now timely files the Statement of Grounds for Direct Review.

The scope of DNR's trust duties is also at issue in separate suits in both Skagit and Thurston County Superior Courts. Wahkiakum County et. al. have brought claims challenging the Harvest Calculation and Marbled Murrelet Strategy in Thurston County Superior Court.[2] Wakhiakum County is also pursuing a common law breach of trust trial against the State in Skagit County Superior Court, concerning the same agency actions.[3] Other plaintiffs, led by Skagit County, are parties to the breach of trust suit.

II. ISSUES PRESENTED FOR REVIEW

[1] CNW will file a transcript of the proceedings and the declarations cited herein in the forthcoming verbatim report of proceedings and clerk's papers.

[2] This case, Thurston County No. 20-2-01653-34, is currently pending.

[3] Skagit Cy. No. 19-2-01469-29.

1) Does article XVI, § 1 of the Washington State Constitution's direction that "[a]ll the public lands granted to the state are held in trust for all the people," require DNR to hold and manage State lands on behalf of all the people, instead of a narrow group of beneficiaries?

2) Does DNR's incorrect understanding of its constitutional duties render its decisions approving the Sustainable Harvest Calculation and Marbled Murrelet Long-Term Conservation Strategy invalid?

III. GROUNDS FOR DIRECT REVIEW

A. This Case Presents a Fundamental and Urgent Issue of Broad Public Import Which Requires Prompt and Ultimate Disposition. (RAP 4.2(a)(4)).

DNR's application of its trust duties permanently shapes State-owned lands in Washington State and communities that rely on them. This case is of similar Statewide public import as other cases in which the Court has accepted direct review under RAP 4.2(a)(4). *See, e.g.*, *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 7, 43 P.3d 4, 8 (2002) (appeal relating to domestic well permit exemption); *Ass'n of Wash. Bus. v. Dep't of Ecology*, 195 Wash. 2d 1, 8, 455 P.3d 1126, 1130 (2020) (review of Clean Air Rule).

1. Interpretation of Const. art. XVI § 1 determines how DNR manages millions of acres of State-owned lands.

DNR is one of the State's biggest land managers. Propelled in large part by the private trust rationale mentioned in *Skamania*, DNR annually

auctions 400-500 million board feet of timber contracts on the state forests, enough to fill about 100,000 logging trucks.

DNR's land management approach prioritizes maximizing revenue for beneficiaries. The agency also deducts between 25 to 50 percent of timber sale revenue as its management fee. DNR's overly narrow interpretation of its trust duties and refusal to prioritize the public interest in carrying out its duties has resulted in land management that damages the broader public interest, and fails to take full advantage of the economic and social values associated with trust management for "all the people."

Because of the acreage of DNR's land holdings, the scope of the agency's trust duties is of profound public importance. The public relies on DNR-managed public lands for jobs, clean water and air, recreation, subsistence, and funding of government entities. As demonstrated by the record in this case, DNR's incorrect understanding of the scope of its trust duties prevents the agency from making sound management decisions, including in the Harvest Calculation and Marbled Murrelet Strategy, that would create greater overall economic and social value to the public.

Correct interpretation of the constitutional command that "[a]ll the public lands granted to the state are held in trust for all the people," would allow DNR to modernize its forest management to both provide more stable, reliable funding to beneficiaries and to provide greater public benefit. Experienced DNR staff that no longer work at the agency have detailed

examples of how management on behalf of "all the people" would preserve and diversify forest products economies. Dr. Paula Swedeen, a member of the Washington Forest Practices Board and former DNR staff biologist, explains how logging regimes focused on longer rotations and greater carbon sequestration could produce equal or greater timber volume over the long-term, while sequestering the equivalent of three years of all of Washington State's greenhouse gas emissions. Dec. of Dr. Paula Swedeen, ¶¶ 22-31.

Miguel Perez-Gibson, a former senior DNR manager who worked over twenty years at the agency, writes that DNR's interpretation of its trust mandate fails to consider many benefits that can be provided by State lands. Dec. of Miguel Perez-Gibson at ¶¶ 28-29. Mr. Perez-Gibson details his professional opinion that "DNR's capable policy makers and foresters need the legal room and direction to enlarge the view of what a working forest is," and how this flexibility would likely result in better funding for beneficiaries and increased public value. *Id.* at ¶¶ 30-39. Michael R. Cronin, another former DNR manager, explains that DNR's pursuit of a narrow trust mandate forces DNR to "sell or exchange working forests in areas where residential real estate is valuable, and will inevitably lead to ongoing loss of forest land near population areas." Dec. of Michael R. Cronin at ¶ 23.

While the scope of DNR's trust duties dictates what actions the agency takes, it also dictates what actions the agency does not take—namely adequate investment in forestry that would improve forest health and provide local jobs. The agency has failed to carry out promised restoration of riparian areas in west side forests, to the detriment of salmon habitat. On the east side, the agency has pushed logging of large diameter trees and salvage sales, when long-term forest health requires prescribed burning and thinning of overstocked stands. *See* Dec. of David Werntz at ¶¶ 8-13.

The Court should accept direct review of this case because DNR's legal duties in managing "[a]ll the public lands granted to the state" have enormous importance to "all the people." Wash. Const. art. XVI, § 1.

2. Direct review will promote judicial economy and avoid potentially disparate decisions in the Courts of Appeal.

The issue of interpretation of art. XVI, § 1 regarding the scope and nature of the trust mandate governing State-owned lands is squarely presented, fully briefed on the merits, and presents a single, discrete question for the court to resolve. *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear,* 80 Wn.2d 175, 178, 492 P.2d 1012 (1972) (Court views favorably case that is of great public interest and is adequately briefed on the merits); *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P. 2d 920 (1994) (Court leans toward resolution of ripe state constitutional issues). In seeking intervention below, Wahkiakum County correctly argued that the

constitutional interpretation issue presented here is also instructive for pending cases challenging the Harvest Calculation and Marbled Murrelet Strategy in Thurston and Skagit County Superior Courts. The Thurston County case would be heard based on a voluminous administrative record, while the Skagit County case is preparing for a likely weeks-long trial.

Direct review would avoid potentially conflicting decisions and enable the courts below to apply the correct legal standard in the first instance. *See State v. Chelan Cty. Dist. Court*, 189 Wn.2d 625, 634, 404 P.3d 1153, 1157 (2017) (review appropriate where "questions are important, affect a multitude of cases each year, have statewide significance, and implicate the Constitution.") (Gonzalez, J., dissenting). Given the environmental and financial stakes, appeals of the two other closely related suits are highly likely. Absent direct review by this Court, there is a high potential for divergent outcomes in the competing cases on review by the Division I and Division II Courts of Appeal.

B. Direct Review is Required to Resolve Inconsistent Supreme Court Decisions (RAP 4.2(a)(3)).

Direct review is appropriate to resolve inconsistency in Supreme Court precedent arising from a "change in approach" in case law over time, particularly where a general rule has been too broadly construed. *See Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614, 619 (2014). Here, *Skamania* was limited to facts pertaining to proceeds of contracted timber sales. 102 Wn. 2d at 129. In this narrow context of

disposition of trust resources, the directive to maximize value was consistent with Const. art. XVI, §§ 1-3, which plainly requires the State to secure full value for timber sales. The private fiduciary rationale of the decision was non-essential and did not extend to the broader questions of holding and managing land. DNR was not a defendant. Nonetheless, DNR has improperly extrapolated *Skamania* to require maximization of revenue to the exclusion of the public interest in nearly every aspect of DNR's land management. This is far beyond the narrow reach of *Skamania* and is inconsistent both in analysis and substance with art. XVI, § 1 and other Supreme Court precedent.

1. The analysis employed in *Skamania* is inconsistent with the analysis of similar language in *McCleary*.

McCleary v. State, 173 Wn.2d 477, 269 P.3d 227 (2012) stands in part for the principle that the Court must use a plain language interpretation of the State constitution, and specifically that the term "all" in the constitution with respect to "all children" refers to "every and each and every one of them." *Id.* at 520. Accordingly, under the analysis employed in *McCleary*, the constitutional command that "all the public lands are held in trust for all the people" means that those lands are held for *each and every one of the people* of Washington. This plain meaning interpretation is inconsistent with DNR's expanded application of *Skamania* to prioritize revenue maximization over all other public interests.

As explained by eminent Washington constitutional scholar Professor Hugh Spitzer, applying the plain terms of § 1 in the fashion employed in *McCleary* harmonizes with the circumstances surrounding the adoption of Const. art. XVI, § 1. The Framers' primary concern in placing the federally-sourced lands into trust for all the people was to prevent state officials from corruptly selling them below fair market value out of the eyes of the public. The Framers specifically *rejected* terms that would have required the State to maximize its revenues in managing the public lands. Dec. of Prof. Hugh Spitzer at ¶¶ 27-30.[4]

It is also notable that the analysis underlying the private trust rationale in *Skamania* has been largely superseded by later federal court decisions, and therefore that part of the decision is no longer good law. *See Kennewick v. Fountain*, 116 Wn.2d 189, 192, 802 P.2d 1371, 1373 (1991). Subsequent to *Skamania*, the U.S Supreme Court has held that the federal land grants do not hinge on a general nationwide principle of trust law but, rather, on the specific enabling act and state constitutional provision at issue

[4] *See also* Fairfax, Souder & Goldenman, *supra* note 18, at 854; Daniel Jack Chasan, *A Trust for All the People: Rethinking the Management of Washington's State Forests*, 24 Seattle U. L. Rev. 1, 15 (2000) ("The fact that Congress used [trust language] in one place, but not another, indicates that Congress had no intent to create a trust in the earlier cases."); *See* Sean E. O'Day, Note, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, a Hobson's Choice?*, 8 N.Y.U. Envtl. L.J. 163, 184 (1999) ("Outside of the New Mexico-Arizona Enabling Act, no other state enabling act mentions the word 'trust.'"); Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 Nat. Resources & Env't 39, 40 (Summer 1997) ("The trust concept did not appear in any enabling act until Congress passed the New Mexico-Arizona Enabling Act in 1910."); John B. Arum, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 Wash. L. Rev. 151, 160 (1990) ("The Enabling Act does not manifest an intent to impose the equitable duties of a trustee on the state.").

in each state. *Papasan v. Allain*, 478 U.S. 265, 270, 289-90 n.18 (1986). At least two federal appellate courts have since agreed. *Dist. 22 UMW v. Utah*, 229 F.3d 982, 988 (10th Cir. 2000); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).

2. The private trust rationale in *Skamania* conflicts with other Supreme Court precedent.

DNR's extension of *Skamania* to require revenue maximization for a narrow group of beneficiaries creates an incoherent legal framework, in which DNR must manage public lands under a private trust duty. This framework is inconsistent with more recent Supreme Court precedent.

In *PUD No. 1 of Okanogan Cty. v. State*, 182 Wn. 2d 519, 342 P. 3d 308 (2015), the Court reasoned that the condemnation of State lands was compatible with *Skamania* in that the PUD proposed to compensate for this condemnation. *Id*. at 546-47. However, the Court went on to hold that "Congress did not expect states to hold school lands inviolate or for the sole use of the schools," which is directly contrary to the private trust rationale of *Skamania*. *Id*. at 547-48. Instead, the court held that DNR held these lands in its sovereign, "governmental capacity, that is, in trust for the public use." *Id*. at 536. The Court distinguished between sale and management of land, and *expressly rejected* DNR's attempted extension of *Skamania* to land management decisions. *Id.* at 549; *accord State ex rel. Garber v. Savidge*, 132 Wash. 631, 634, 233 P. 946 (1925); *Case v. Bowles*, 327 U.S. 92, 100 (1946).

In addition to conflicting with other Supreme Court decisions, DNR's application of *Skamania* to require revenue maximization for beneficiaries conflicts with Washington's constitutional structure, which dictates that the Commissioner of Public Lands is selected by Statewide election, and subjects the Commissioner to the control of the Legislature. Const. art. III, §§ 3, 23. Revenue maximization to the exclusion of the public interest is also inconsistent with the State Environmental Policy Act, which declares that the "legislature recognizes that each person has a fundamental and inalienable right to a healthful environment." RCW 43.21C.020(3).

IV. CONCLUSION

This case involves a fundamental issue of constitutional interpretation with broad public import regarding the management of millions of acres of State-owned lands held in trust for "all the people" of Washington. Direct review will allow this Court to resolve its prior inconsistent decisions and promote judicial economy by definitively resolving an issue that is dispositively relevant to multiple other pending cases pertaining to the Harvest Calculation and Marbled Murrelet Strategy. For all these reasons, CNW requests that this Court grant direct review.

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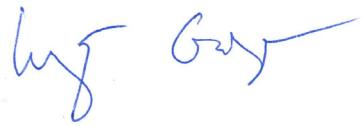
Respectfully submitted this 12th day of November 2020.

ZIONTZ CHESTNUT



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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 November 12, 2020, by e-mail as follows:

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

Dated this 12th day of November, 2020.

/s/ Wyatt Golding
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November 12, 2020 - 3:31 PM

Transmittal Information

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Appellate Court Case Title:	Conservation Northwest et al. v. Commissioner of Public Lands et al.
Superior Court Case Number:	20-2-01051-8

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