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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR SKAGIT COUNTY

CONCRETE SCHOOL DISTRICT, a Washington public school district; QUILLAYUTE VALLEY SCHOOL DISTRICT NO. 402, a Washington public school district; NASELLE-GRAYS RIVER SCHOOL DISTRICT, a Washington public school district; CLALLAM COUNTY FIRE DISTRICT NUMBER 4, a county fire district; WAHKIAKUM COUNTY, a Washington county; PACIFIC COUNTY, a Washington county; SKAMANIA COUNTY, a Washington County; MASON COUNTY, a Washington County; CITY OF FORKS, a Washington code city; and AMERICAN FOREST RESOURCE COUNCIL, a non-profit corporation,

Plaintiffs,

v.

STATE OF WASHINGTON; WASHINGTON DEPARTMENT OF NATURAL RESOURCES, an agency of the State of Washington; and WASHINGTON BOARD OF NATURAL RESOURCES, an agency of the State of Washington,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; BREACH OF FIDUCIARY DUTY; VIOLATION OF STATE ENVIRONMENTAL POLICY ACT, RCW CHAPTER 43.21C; AND APPLICATION FOR CONSTITUTIONAL WRIT OF CERTIORARI**

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## I. INTRODUCTION

1. The State of Washington (“State”), the Washington Board of Natural Resources (“Board”) and the Washington Department of Natural Resources (“Department” or “DNR”) are bound by fiduciary duties to manage over 1.4 million acres of commercial forestlands in trust to provide revenues for public schools, fire departments, hospital districts, and counties of western Washington. Instead of fulfilling these duties, the Board has chosen to pursue other objectives with these lands in a manner that will dramatically reduce the revenues produced for the trust beneficiaries. This action will result in across-the-board budget cuts and reductions of critical public services in rural areas of western Washington. The Board’s action will also significantly reduce timber supply for forest products manufacturers who are a mainstay of rural economies. The Board has taken these service-reducing actions while paying lip service to its trust obligations, by prioritizing measures that it can advertise as “wildlife conservation,” or as providing long-term environmental benefit. In reality, none of the actions proposed by the Board result in meaningful wildlife conservation. Defendants’ decisions deprioritize the interests of the trust beneficiaries in order to advance other priorities, and gratuitously give up portions of the trust assets; they constitute grave violations of their fiduciary duties and should be overturned.

2. In 1889, in the enabling act admitting Washington to the Union, the federal government granted to the State, to be held in trust, title to sections sixteen and thirty-six in every township of the proposed state in order to support the common schools; fifty sections to fund the state capitol buildings; seventy-two sections to support state universities; additional lands to support the building of a state penitentiary; ninety thousand acres to support state agricultural colleges; one hundred thousand acres to support normal schools; and grants for the support of state charitable, educational, penal, and reformatory institutions.<sup>1</sup> Today, Washington holds nearly a million acres of westside forest land in trust for the purpose of providing financial support to the

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<sup>1</sup> Omnibus Enabling Act of 1889, 50th Cong., 2d Sess., ch. 180, 20 Stat. 676 (1889).

1 schools, universities, and other public institutions that were endowed with these lands in  
2 Washington’s Enabling Act. The terms of the trust are set by the Enabling Act and embodied in  
3 Washington’s Constitution, as the Constitutional provisions were the final prerequisite for  
4 President Harrison’s Proclamation of Statehood on November 11, 1889. The terms of the trusts  
5 have not been amended in the succeeding 130 years. These endowed land trusts are “real,  
6 enforceable trusts” under both state and federal law. *Skamania Cty. v. State*, 102 Wn.2d 127, 132,  
7 685 P.2d 576, 580 (1984). In the management of these trusts, the state therefore has the same  
8 fiduciary duties toward the beneficiaries as would a private trustee.

9 3. By statutes passed in the 1930s, the State required counties to deed to the  
10 predecessor of DNR land that the counties owned after tax foreclosures, on the understanding that  
11 the State would manage the lands in trust to produce sustained-yield forest products and that  
12 revenues from those lands would come back to the counties and their junior taxing districts as a  
13 long-term sustained source of revenue. RCW 79.22.040. Like the federally-endowed lands, these  
14 state forest lands are held in real, enforceable trusts for the benefit of the counties and their junior  
15 taxing districts. In the management of these trusts the state has the same fiduciary duties toward  
16 the beneficiaries as would a private trustee.

17 4. Among the fiduciary duties owed by the state as trustee are a duty of undivided  
18 loyalty to the trust beneficiaries, a duty of full disclosure, and a duty of prudent management of  
19 the lands, which includes the duty to make reasonable inquiries and investigations. To fulfill these  
20 fiduciary duties, the state relies upon DNR, the agency to which the state has delegated the task of  
21 managing the state trust land, and the Board, which is charged by statute with adopting policies by  
22 which the state trust lands are to be managed.

23 5. On December 3, 2019, the State, through the Board and on the advice and  
24 recommendation of DNR, made two policy decisions that violated the State’s, the Board’s, and  
25 DNR’s fiduciary obligations to the trust beneficiaries.  
26

1           6.       First, the Board adopted Resolution 1660, setting a Sustainable Harvest Calculation  
2 for the 2015-2024 planning decade that substantially lowered harvest rates across the state trust  
3 land base. The Sustainable Harvest Calculation, which was adopted five years late, will correlate  
4 to an approximately 23% drop in revenues to the trust beneficiaries from the already reduced  
5 harvest levels of the last decade. The Board violated its fiduciary duties of prudent management  
6 and undivided loyalty in adopting the Sustainable Harvest Calculation, among other reasons,  
7 because it failed to use reasonable care in crafting a sustainable harvest model; failed to ensure  
8 that the beneficiaries' interests were properly prioritized in the model; failed to meaningfully  
9 inventory the forest asset so that its sustainable harvest model could be based on accurate input  
10 data; ignored the advice of its own expert; failed to follow industry best practices in the  
11 management of the forestland asset; and failed to act in a transparent manner and provided no  
12 meaningful way for trust beneficiaries to understand the process or the impacts its decision would  
13 have on them.

14           7.       Second, the Board breached its fiduciary duties by adopting Resolution 1559,  
15 selecting a Long-Term Conservation Strategy for the Marbled Murrelet (the "Murrelet Strategy"  
16 or "LTCS") that improperly reduced the corpus of the trusts by setting aside trust lands for  
17 purported murrelet conservation that do not provide habitat for the murrelet and are not required  
18 to be set aside in order for DNR to meet its obligations under the Endangered Species Act ("ESA").  
19 The marbled murrelet (*Brachyramphus marmoratus*) is a small seabird that is listed as threatened  
20 under the ESA. The murrelet uses late-successional and old-growth forests for nesting purposes,  
21 but otherwise makes no use of forestlands. The Murrelet Strategy sets aside thousands of acres of  
22 managed second- and third-growth forests for the murrelet, which the murrelet simply cannot use.  
23 The Murrelet Strategy adopted by the Board violates its fiduciary duties of prudent management  
24 and undivided loyalty because the strategy prioritized murrelet conservation over the interests of  
25 the beneficiaries; it unnecessarily set aside tens of thousands of acres of trust land in a manner that  
26 made them entirely unprofitable; it failed to act like a reasonably prudent forester managing

1 commercial forest lands; it failed to make reasonable inquiries to determine the minimum amount  
2 of land that was necessary to set aside for the murrelet so as to satisfy the requirements of the  
3 Endangered Species Act; and it failed to defend the trusts by ensuring that the federal government  
4 abided by the terms of the 1997 Habitat Conservation Plan governing state forest lands.

5 8. In addition to these violations of the State’s fiduciary obligations to the trust  
6 beneficiaries, both the Sustainable Harvest Calculation and Murrelet Strategy decisions were made  
7 in violation of the State Environmental Policy Act, Chapter 43.21C RCW (“SEPA”). Specifically,  
8 DNR failed to properly evaluate in each Environmental Impact Statement (“EIS”) the impacts that  
9 the decisions would have on public services due to reductions in revenues to counties, junior taxing  
10 districts, the common schools, and the state universities. DNR failed to analyze the impacts that  
11 reductions in harvest levels would have on school districts that are dependent on timber revenues,  
12 or on fire departments that are losing significant revenue as a result of set asides, or on county  
13 sheriff’s departments that rely heavily on timber revenues. Under WAC 197-11-444, “public  
14 services and utilities,” “fire,” “schools,” “parks or other recreational facilities,” and “other  
15 governmental services or utilities” are each elements of the environment which must be analyzed  
16 in an EIS when a proposed action will affect them. For many of the trust beneficiaries a decrease  
17 or increase in harvests from state trust lands directly impacts the scope and availability of these  
18 governmental services. The purpose of SEPA is to ensure that when public officials make  
19 decisions with adverse impacts on elements of the environment, they make those decisions with  
20 full information, and with full information having been provided to the public. The failure of the  
21 Final Environmental Impact Statements (“FEIS”) for the Sustainable Harvest Calculation and the  
22 Murrelet Strategy to provide that information makes those FEISs inadequate. The FEISs for both  
23 the Long-Term Murrelet Strategy and the Sustainable Harvest Calculation are deficient and must  
24 be set aside.

25 9. Both the Sustainable Harvest Calculation and Murrelet Strategy decisions were  
26 willful and unreasoning actions, in disregard of the facts and circumstances, and therefore arbitrary

1 and capricious or contrary to law. Under Article IV, Section 6 of the Washington Constitution,  
2 the Court has inherent power to set aside such arbitrary and capricious decisions. Due to the  
3 importance of these issues to Washington's timber economy, and the tens of thousands of  
4 Washingtonians that rely upon it, this Court should also grant a Constitutional Writ of Certiorari  
5 to review DNR's Sustainable Harvest Calculation and Murrelet Strategy decisions and set aside  
6 those decisions accordingly.

## 7 **II. PARTIES**

8 10. Concrete School District is a school district created under the laws of the State of  
9 Washington which serves students living in a large swath of eastern Skagit County. Concrete  
10 School District is a junior taxing district of Skagit County, and relies on funds generated from the  
11 harvest of timber on state trust transfer lands in Skagit County. Concrete School District is entitled  
12 to receive funding from the harvest of timber on the federally granted trust lands through the  
13 Common School Trust. In addition, it is entitled to receive revenues from the harvest of Forest  
14 Board Transfer Lands (now technically "State Forestlands") within its jurisdictional boundaries.  
15 Timber revenues are a critical source of revenue to the school district which, despite covering a  
16 large area, has a small tax base due to the existence of a large amount of federally owned land in  
17 the district. Historically, the district used timber revenues to pay teacher salaries, but given the  
18 inconsistent nature of those DNR payments in recent years the district has been forced to rely on  
19 other sources of funding for teacher salaries to avoid layoffs, and has instead attempted to utilize  
20 timber revenues to fund the district's capital projects budget. The district relies on timber revenues  
21 to maintain roofs, floors, classrooms, parking lots, and other critical infrastructure. Timber  
22 revenues have fallen short of being able to provide the necessary funding to address an historic  
23 backlog of deferred maintenance. Currently the district is in immediate need of upgrading the  
24 heating system of Concrete Elementary School. Given the inefficiencies of the historic heating  
25 system, at times some classrooms will be at 45 degrees while others hover near 85 degrees.  
26 Upgrading the system will cost approximately \$1 million. Timber revenues have fallen far short

1 of being able to fund this project and numerous other necessary improvements. In 2019 the district  
2 has received almost no timber revenue, despite receiving hundreds of thousands of dollars in prior  
3 years. The proposed decreases in the harvest levels in Skagit County, nearly a 50% reduction in  
4 coming years, will have severe negative consequences on the district's ability to maintain its  
5 facilities.

6 11. Plaintiff Quillayute Valley School District No. 402 is a school district created under  
7 the laws of the State of Washington which serves students living in and around Forks, Washington.  
8 Quillayute Valley School District No. 402 is a junior taxing district of Clallam County, and relies  
9 on funds generated from the harvest of timber on Forest Board Transfer Lands in Clallam County.  
10 Quillayute Valley School District No. 402 is also entitled to receive funding from the harvest of  
11 timber on the federally granted trust lands through the Common School Trust. At present the  
12 school district needs to construct a new stadium to facilitate school-sponsored athletic activities.  
13 The current stadium was built in 1961 and is at the end of its useful life. Given budgetary  
14 constraints faced by the district, timber revenues are the only foreseeable source of funds to  
15 construct the new stadium. However, given DNR's volatile management of the trust, Quillayute  
16 Valley School District has been unable to commit funds to the stadium project. Recently, as a  
17 result of uncertainty related to timber revenues, the school district was again forced to defer the  
18 construction of the badly needed stadium replacement.

19 12. Naselle-Grays River Valley School District is a school district in rural southwest  
20 Washington that serves approximately 300 students in grades K-12. The district also operates the  
21 Naselle Youth Camp School, which is a state institutional school. The district is a junior taxing  
22 district of Pacific County and relies on funds generated from the harvest of timber on Forest Board  
23 Transfer Lands in Pacific County. Naselle-Grays River Valley School District is also entitled to  
24 receive funding from the harvest of timber on the federally granted trust lands through the  
25 Common School Trust. DNR timber revenues are a critical component of the school district's  
26 general fund which provides funding for personnel salaries, building repairs, vehicle upgrades, and

1 all other expenses associated with maintaining and operating its schools. Approximately 10% of  
2 the school district's personnel cost is directly funded by timber revenues. A drop in timber  
3 revenues would result in the district losing critical personnel, likely requiring it to lay off teachers.  
4 Similarly, an increase in timber revenues would allow the district to hire needed personnel. A  
5 significant number of students in the district come from households that rely on the timber industry.  
6 Not only will a decrease in timber harvests place strains on the district's budgets, but it will also  
7 likely increase needs that the district will need to fill.

8 13. Clallam County Fire District No. 4 is a county fire protection district based in and  
9 around Joyce, Washington. The district is a junior taxing district of Clallam County and relies on  
10 timber revenues to provide services in its jurisdiction. At present the district is using an outdated  
11 fire engine that is in need of a replacement. Given a lack of timber revenues, the district has been  
12 unable to purchase the necessary engine. The district does not intend to replace the engine until it  
13 receives additional timber revenues.

14 14. Plaintiff Wahkiakum County is a Washington county, validly formed and existing  
15 under the Constitution and laws of the State of Washington. In accordance with RCW 79.22.040,  
16 Wahkiakum County transferred ownership of 12,612 acres of forestlands to DNR to be held in  
17 trust and prudently managed for the benefit of Wahkiakum County. Revenues generated from  
18 DNR's sale of timber on these transferred lands are paid to Wahkiakum County pursuant to RCW  
19 79.64.110. Over the past decade approximately 25% of Wahkiakum County's annual budget has  
20 been generated from the sale of timber on lands it transferred to DNR to be held in trust. At present  
21 DNR timber revenues provide higher amounts of funding than the county's property tax  
22 collections, and there is no viable alternative to replace a loss of timber revenues in the County's  
23 budget. The interim marbled murrelet plan created by the *State Trust Lands Habitat Conservation*  
24 *Plan* ("HCP") prejudiced Wahkiakum County by preventing harvest of mature timber that created  
25 no benefit for the marbled murrelet while DNR considered its long-term murrelet conservation  
26 plan. The Murrelet Strategy releases some of that timber for harvest, thus causing harvests over



1 the next decade to increase. However, this increase is lower than it should be because the  
2 Sustainable Harvest Calculation is lowering harvest levels on all of the county's state forest  
3 transfer lands, both newly released lands and previously available lands. The Murrelet Strategy  
4 also continues to hold thousands of acres back unnecessarily from future harvests which will  
5 depress County revenues from what they would be if those lands were being managed prudently,  
6 consistent with the State's duty of undivided loyalty to the County.

7 15. Plaintiff Pacific County is a Washington County validly formed and existing under  
8 the Constitution and laws of the State of Washington. In accordance with RCW 79.22.040, Pacific  
9 County has transferred ownership of 23,227 acres of forestlands to DNR to be held in trust and  
10 prudently managed for the benefit of Pacific County. Revenues generated from DNR's sale of  
11 timber on these transferred lands are paid to Pacific County pursuant to RCW 79.64.110. Over  
12 the past decade a significant share of Pacific County's annual general fund budget has been  
13 generated from the sale of timber on lands it transferred to DNR to be held in trust. In addition to  
14 these general funds, Pacific County also distributes DNR trust revenue to numerous junior taxing  
15 districts in the county including the county's hospital districts, fire districts, emergency response  
16 districts, and various school districts including the Raymond School District and Naselle-Grays  
17 River School District. At present, there is no viable alternative to replace the loss of timber  
18 revenues in the county's budget, nor the budgets of the county's junior taxing districts that provide  
19 critical services in the county. Decreases in timber funding will result in fewer resources available  
20 to the school children of Pacific County, the hospitals of Pacific County, and the firefighters who  
21 protect Pacific County.

22 16. Plaintiff Skamania County is a Washington County validly formed and existing  
23 under the Constitution and laws of the State of Washington. In accordance with RCW 79.22.040,  
24 Skamania County has transferred ownership of 42,553 acres of forestlands to DNR to be held in  
25 trust and prudently managed for the benefit of Skamania County. Revenues generated from DNR's  
26 sale of timber on these transferred lands are paid to Skamania County pursuant to RCW 79.64.110.

1 Skamania County has a long history of working to ensure the state lands trusts are properly  
2 managed and was the named plaintiff in the leading Washington Supreme Court decision relating  
3 to the trust mandate. *Skamania Cty*, 102 Wn.2d 127 (1984). Skamania County retains an interest  
4 in ensuring the holdings of that case are followed. Over the past decade approximately 17% of  
5 Skamania County's annual budget came from the sale of timber on lands it transferred to DNR to  
6 be held in trust. At present, there is no viable alternative to replace a loss of timber revenues in  
7 the county's budget. Timber revenues make up a critical portion of the county's budget and a  
8 reduction in such revenues would result in a corresponding decrease in public services such as  
9 policing, firefighting, emergency response, and road maintenance.

10 17. Plaintiff Mason County is a Washington County validly formed and existing under  
11 the Constitution and laws of the State of Washington. In accordance with RCW 79.22.040, Mason  
12 County has transferred ownership of 28,909 acres of forestlands to DNR to be held in trust and  
13 prudently managed for the benefit of Mason County. Revenues generated from DNR's sale of  
14 timber on these transferred lands are paid to Mason County pursuant to RCW 79.64.110.  
15 Historically, Mason County relied on DNR trust revenues to pay the salaries of critical county  
16 employees. The volatile and inconsistent nature of DNR's management made it difficult for the  
17 county to predict whether it would be able to fully fund these positions. In 2017 Mason County  
18 received significantly less in DNR timber revenue than it had anticipated; as a result Mason County  
19 was forced to lay off personnel. Following those 2017 layoffs, Mason County shifted to using  
20 timber revenues to provide critical county infrastructure upgrades, in order to protect personnel  
21 from layoffs. Mason County has subsequently used timber revenues for critical upgrades including  
22 the purchase of new patrol cars for the sheriff's office and the upgrading of the county jail. In  
23 addition to these funds, Mason County also distributes DNR trust revenue to numerous junior  
24 taxing districts in the county including the county's hospital districts, library district, port districts,  
25 fire districts, emergency response districts, and various school districts including the Hood Canal  
26 School District and North Mason School District. Decreases in timber funding will result in fewer

1 resources being available to the school children of Mason County, the hospitals of Mason County,  
2 and the emergency responders who protect Mason County.

3 18. Plaintiff City of Forks is a city located in western Clallam County on the Olympic  
4 Peninsula. Forks is organized as an optional municipal code city under RCW Title 35A. Forks  
5 has a long history as a “timber town” and relies on state trust timber sales to provide local  
6 employment, school funds, and general county funds. The City of Forks is actively engaged in  
7 ensuring the proper management of the state trust land to benefit rural communities and was an  
8 intervenor-defendant in litigation related to the past decade’s Sustainable Harvest Calculation.  
9 Quillayute Valley School District, a junior taxing district of Clallam County, serves the Forks  
10 community and is one of the City’s largest public sector employers. The City also partners with  
11 various other junior taxing districts, including the local hospital, fire district, and parks and  
12 recreation district, to maximize DNR timber revenues.

13 19. Plaintiff American Forest Resource Council (“AFRC”) is a nonprofit corporation  
14 and has paid all fees due and owing to the State of Washington. AFRC is a forest products trade  
15 association, which represents the interests of approximately 50 lumber and plywood  
16 manufacturing companies and landowners throughout Washington, Oregon, California, Idaho, and  
17 Montana. AFRC’s members are dependent upon the consistent and sustainable management of  
18 publicly owned forest lands to supply their mills. AFRC represents the majority of purchasers of  
19 commercial softwood and hardwood timber from DNR trust lands. The majority of timber from  
20 state trust lands is processed at AFRC member mills. AFRC members have invested hundreds of  
21 millions of dollars in forest products mills in the State of Washington in reliance on the sustainable  
22 source of timber provided by Washington’s state trust forest lands. AFRC members provide  
23 thousands of family-wage jobs in rural Washington communities, where the jobs in AFRC-  
24 member mills and in other parts of the forest products industry that are essential to growing and  
25 harvesting the wood for those mills are often the only family-wage jobs available. The reductions  
26 in harvest from state trust lands caused by the decisions being challenged in this suit are the

1 equivalent of the total wood supply needed for one of AFRC’s members’ mills, and the loss of that  
2 harvest is likely to cause the closure of at least one of AFRC’s members’ mills. In several previous  
3 instances, when DNR and the Board have taken actions consistent with their fiduciary duties but  
4 have been challenged by parties seeking to reduce harvest from state lands, AFRC has been granted  
5 status as an intervenor of right to defend DNR’s and the Board’s decisions because of its members’  
6 dependence on harvests from state lands. AFRC has also joined with trust beneficiaries in previous  
7 litigation to challenge DNR and Board decisions that are inconsistent with the State’s fiduciary  
8 duties.

9         20. Defendant the State of Washington (“State”) was granted the “federal grant lands”  
10 by the federal government at statehood and holds those lands in trust for the named beneficiaries  
11 set out in the Enabling Act. In the 1930s, the State began requiring the Counties to deed the Forest  
12 Board Transfer Lands (now technically “State Forestlands”) to the State, to be held in trust for the  
13 benefit of the counties that deeded them and their junior taxing districts. The State is thus the  
14 trustee of both the constitutional trusts and the Forest Board Transfer Lands trusts.

15         21. Defendant Washington Department of Natural Resources (“DNR”) is an  
16 administrative agency of the State of Washington created by and organized under RCW Chapter  
17 43.30. The Washington State Legislature has delegated the state’s fiduciary duties for managing  
18 state trust forestlands to DNR consistent with the trust mandate, common law fiduciary duties, and  
19 all other applicable laws. RCW 79.22.040.

20         22. Defendant Washington Board of Natural Resources (“Board”) is established by  
21 RCW 43.30.030 and is required to establish policies related to the acquisition, management, and  
22 disposition of all lands and resources within DNR's jurisdiction. RCW 43.30.215. In performing  
23 such duties, the Board is responsible for managing state trust forestlands in a manner that is  
24 consistent with the trust mandate, common law fiduciary duties, and all other applicable laws.



1 over, and continuing to pay property taxes on, the logged parcels. The failure to regenerate the  
2 lands to create a future flow of wood to Washington’s forest products industry, which at the time  
3 was the largest industry in the state, was viewed as an existential threat to the future health of the  
4 state’s economy. Across the region and state, this period experienced broad adoption of the  
5 modern forest management approach known as sustained-yield management, where harvests are  
6 planned not to exceed the land’s growth. In order to create a permanent and consistent source of  
7 income to the counties and their junior taxing districts and ensure a future consistent flow of wood  
8 to Washington’s forest products mills, the Legislature required the counties to transfer the cutover  
9 lands to the State Forest Board, the predecessor to DNR, to be regenerated and managed in trust  
10 for the benefit of the counties and their junior taxing districts.

11 28. A third, albeit smaller, category of state trust forest lands is known as the “state  
12 forest purchase lands.” These were lands that were purchased by or gifted to the state and then  
13 placed into trust to provide funding for counties and their junior taxing districts.

14 29. The legislature created DNR in 1957 and delegated to it the management of  
15 Washington’s trust forest lands. RCW 43.30.010, 43.30.215, 43.30.411. As trustee, DNR must  
16 produce revenue for trust beneficiaries while protecting the land and preserving its  
17 productivity. The forest trust lands are primarily valuable for their ability to grow timber crops.  
18 DNR generates revenue from these lands primarily through timber sales, which are auctions for  
19 the right to log particular parcels of land, or from “sort sales,” in which DNR pays a logger to  
20 harvest and sort the logs and sells the logs. DNR retains ownership of the land under either  
21 approach. Once the timber is removed, the forest is replanted, regrown, and subsequently  
22 harvested again on a sustainable rotation. DNR is required by statute to manage the state trust  
23 forest lands on a sustained-yield basis; this is done to ensure that there is a consistent supply of  
24 timber available for harvest and as a result a consistent flow of revenue to the beneficiaries.  
25 Revenue generation for the beneficiaries is the dominant purpose for which these lands are to be  
26

1 managed. All other uses of the land are permissible only to the extent they are consistent with and  
2 do not reduce the revenues from this dominant purpose. RCW 79.10.120.

3 30. The annual revenue generated from DNR timber sales is well in excess of \$100  
4 million. After payment of a management fee to DNR, this revenue is distributed to trust  
5 beneficiaries, ranging from major institutions like the University of Washington to small rural  
6 school districts such as the Concrete, Quillayute Valley, and Naselle-Grays River School Districts.  
7 The trusts are not unified. Instead, a beneficiary's revenue depends on DNR's management of the  
8 specific parcels of trust land that are held for that beneficiary. DNR's fiduciary duties for specific  
9 parcels will run only to beneficiaries of that parcel.

10 31. In the case of counties and their junior taxing districts, they are dependent on the  
11 harvesting of DNR timber located within their jurisdictional boundaries. This creates a direct  
12 connection between the finances of rural counties and the management of DNR lands located  
13 within their boundaries. Many of the plaintiffs lack the large tax bases and diversified economies  
14 that support the basic public services taken for granted in other parts of Washington. In many  
15 cases, this situation is a direct result of the predominance of public land in those counties. As a  
16 result, trust revenues play a direct and outsized role in ensuring that public services are available  
17 in these rural communities, and any reduction in trust land revenues results in equivalent decreases  
18 in basic public services such as road maintenance, after-school programing, and emergency  
19 response. Plaintiffs in this case will face significant financial harm, resulting in the laying off  
20 employees and a decrease in public services, as a result of decreases in DNR harvest levels that  
21 result in a lowering of trust revenues.

22 32. Reductions in state trust land harvest levels have additional negative impacts on  
23 rural communities beyond the direct losses of revenues paid to beneficiaries. The timber industry  
24 remains the economic foundation of much of rural western Washington, and the industry provides  
25 family-wage employment to foresters, loggers, truck drivers, mill workers, and others. In many  
26 rural communities, there exist few other opportunities for family-wage employment. Inadequate

1 log supply for mills results in mill closure, which results in loss of these important rural jobs.  
2 Failure to properly manage the trust lands consistent with the trust mandate will result in a ripple  
3 effect of negative socioeconomic consequences throughout rural western Washington, including  
4 both losses of public services and economic opportunities, and the further erosion of the social  
5 fabric of struggling communities.

6 33. This deterioration of Washington’s rural communities is not theoretical. Since the  
7 early 1990s there has been a major reduction in the availability of timber in the Pacific Northwest,  
8 largely as a result of shifts in the management of the federal forests away from timber production.  
9 For example, over 80% of federal forest land west of the Cascades in Oregon, Washington, and  
10 California has been placed into no-harvest “reserves.” These reductions have had major negative  
11 impacts on the rural communities that rely on timber jobs. A shift in the management of the state  
12 trust lands to reduce timber production in order to purportedly foster other objectives will only  
13 further erode the health and vitality of affected rural communities.

14 **B. DNR’s Sustainable Harvest Calculation**

15 34. As the foundation of its trust management, RCW 79.10.300 through .340 requires  
16 DNR to manage forests under its jurisdiction on a sustained-yield basis. Each decade DNR must  
17 calculate a sustainable harvest level for the forest land under its management, and the Board must  
18 adopt the sustainable harvest level to be followed for the coming decade. The sustained-yield plan  
19 must provide for “management of the forest to provide harvesting on a continuing basis without  
20 major prolonged curtailment or cessation of harvest.” RCW 79.10.310. This is consistent with  
21 the generally accepted definition of sustained yield, which is “the achievement and maintenance  
22 in perpetuity of a high-level annual or regular periodic output of the various renewable resources  
23 without impairment of the productivity of the land.” Robert Deal ed., *Dictionary of Forestry* 183  
24 (2d ed. 2018). The plan must also include the harvest of arrearages providing the greatest return  
25 to the trust based on economic conditions then existing and forecast, as well as analyzing and  
26



1 disclosing impact on the environment of harvesting the additional timber. DNR must offer for sale  
2 the sustained yield as calculated in the sustainable harvest calculation.

3 35. In 2004, based on DNR's recommendation, the Board voted to set a sustainable  
4 harvest level of 5.97 billion board feet for the 2004-2015 planning decade. In 2006, as a result of  
5 changes in DNR policy and as part of a litigation settlement, the 2004-2015 sustainable harvest  
6 level was revised downward to 5.5 billion board feet. As of December 3, 2019, DNR had an  
7 accumulated arrearage from the 2004-2015 planning period of at least 462 million board feet.

8 36. DNR failed to set a sustainable harvest level for the 2015-2024 planning decade  
9 until December 3, 2019. The December 3, 2019 decadal sustainable harvest level dropped to 4.27  
10 billion board feet (4.65 billion once a portion of the arrearage was added back in), a more than 25  
11 percent reduction over the previous decade's level. Using conservative timber valuations, this  
12 represents a reduction of over \$200 million in trust beneficiary payments over the course of the  
13 planning decade.

14 37. The reduction in the sustainable harvest level has not been the result of prior  
15 overharvesting of trust land, nor the absence of available timber on the landscape. Instead, DNR  
16 has dropped the sustainable harvest level as a result of its own failure to prudently manage the  
17 forest lands with an undivided loyalty to the interests of the trust beneficiaries. Breaches of DNR's  
18 fiduciary duties have included, among other things, decisions by DNR to exclude lands from active  
19 management; decisions by DNR to not meaningfully survey the land base to ensure that its timber  
20 inventory is accurate; decisions by DNR to rely on modeling assumptions that are biased towards  
21 maintaining long-term forest cover instead of maximizing the revenues to the beneficiaries;  
22 decisions by DNR to prioritize the speculative non-economic interests of distant future generations  
23 over the interests of the current generations; and a failure to manage the forestlands consistent with  
24 the standard of care utilized by a reasonable, careful, and prudent forest-trust manager.

25 38. DNR relies upon a computer model to make decisions about harvest levels on the  
26 trust land base. This computer model, known as the Forest Estate Model, contains a number of

1 errors and assumptions that result in an inaccurate and overly conservative sustainable harvest  
2 calculation output. By failing to meaningfully acknowledge, explain, and address the model's  
3 errors and incorrect assumptions, DNR has breached its fiduciary duties by endorsing a flawed  
4 sustainable harvest calculation that improperly deprives beneficiaries of significant trust value.

5 39. The foundation of DNR's model is DNR's inventory data. DNR does not  
6 meaningfully survey its forestlands to determine the quality or volume of timber in its inventory.  
7 Instead, DNR has chosen to rely almost exclusively on a computer program coded with decades-  
8 old information related to the age-class, stocking, and harvest history of the managed land base,  
9 and remote sensing data from Light Detection and Ranging ("LIDAR") surveys. DNR has no  
10 adequate process to confirm that the data being used in its model is in fact reflective of facts on  
11 the ground. Forest conditions on the ground routinely diverge from what is used as input to DNR's  
12 Forest Estate Model. DNR has been informed of the inaccuracies in the data utilized by its model,  
13 but DNR has taken no significant action to rectify these errors. Any reasonably diligent forestland  
14 manager would take steps to ensure that it had adequate and current inventory data and that the  
15 data utilized for planning purposes was accurate, and a failure to take steps to ensure the accuracy  
16 of the model inputs constitutes a breach of fiduciary obligations.

17 40. Since its last decadal harvest level calculation, DNR also modified the Forest Estate  
18 Model to apply overly conservative management approaches intended to increase forest cover over  
19 the next 50 years, at the expense of current-generation beneficiaries.

20 41. DNR's Forest Estate Model purportedly aims to maximize the net present value of  
21 the timber investment growing on the landscape. In order to calculate net present value, the model  
22 requires a discount rate be applied so that future values can be discounted to present values. The  
23 selection of a discount rate is one of the critical decisions that must be made by a forest manager.  
24 Selection of too low a discount rate improperly pushes harvests into the future, increases harvest  
25 rotations far beyond what is economically efficient, and results in current generations being  
26 deprived of revenue. Any diligent forest asset manager would recognize the importance of the

1 discount rate and undertake sufficient analysis to determine what the proper discount rate to be  
2 applied would be in light of the purposes for which the land was to be managed.

3 42. In 2004, DNR used a 5% discount rate as part of its sustainable harvest level  
4 calculation. A 5% discount rate would be low for private forest land managers but is not  
5 inconsistent with what public timber managers use when attempting to balance multiple uses on  
6 public land. However, DNR has no authority to manage trust land for multiple uses unless it can  
7 provide compensation to the trusts for any loss of revenue. DNR must manage trust lands with the  
8 financial obligations to the beneficiaries as the dominant purpose of management. RCW  
9 79.10.120. As such, the discount rate utilized should be similar to that utilized by a private timber  
10 land manager.

11 43. In December 2016, DNR released the Draft Environmental Impact Statement  
12 (“DEIS”) for the Sustainable Harvest Calculation that dropped the discount rate used by DNR for  
13 planning purposes from 5% to 2%. DNR provided no comparison of its proposed 2% discount  
14 rate to rates used by other land managers, nor did it provide any meaningful analysis of why 2%  
15 was proper. The selection of a 2% discount rate caused DNR’s sustainable harvest level to  
16 dramatically fall, and improperly deferred harvests into the future. DNR justified this rate by  
17 noting that it believed it had an obligation to prioritize future generations over present generations,  
18 citing to an inapplicable academic article discussing “social” discount rates. The article did not  
19 involve the management of a trust asset for income beneficiaries, such as the trust land managed  
20 by DNR.

21 44. After issuance of the DEIS, DNR retained a professor at the University of  
22 Washington’s College of the Environment specializing in forest management tools, Dr. Sándor  
23 Tóth, to review the Forest Estate Model’s computational framework. Dr. Tóth’s review did not  
24 investigate the quality and reliability of the input data that DNR utilized, but instead simply  
25 examined the computational assumptions included in DNR’s model. Dr. Tóth found four key  
26 flaws in DNR’s model, and expressly highlighted the discount rate being used as improper and

1 inconsistent with DNR's obligations to the trust beneficiaries. After a review of public forest  
2 managers, Dr. Tóth found no discount rate below 4% being used by any public forest manager,  
3 even those that unlike DNR may manage for multiple uses. Dr. Tóth laid out a method by which  
4 DNR could calculate the proper discount rate to be used so as to avoid violating its trust obligation.

5 45. After receipt of Dr. Tóth's report, DNR failed to follow the report's  
6 recommendations to fix the model's fundamental discount rate problem. Upon information and  
7 belief, all DNR did was increase the discount rate from 2% to 3% and cited to the same inapplicable  
8 literature it had previously used to support the 2% discount rate. At a public hearing in November  
9 2019, DNR acknowledged that this shift was not the result of following Dr. Tóth's  
10 recommendation to determine a proper discount rate, nor the result of any study to determine what  
11 the rate should be. At 3%, DNR's discount rate remains lower than the rate used by any other  
12 public landowner identified by Dr. Tóth. DNR's decision to significantly lower its discount rate  
13 from 5% to 3% was arbitrary, and apparently largely driven by a desire to prioritize long term  
14 forest cover by reducing the frequency of harvests on the land base. This action violates DNR's  
15 fiduciary obligation of prudent management to the beneficiaries as well as its adopted policy of  
16 promoting intergenerational equity.

17 46. On information and belief, DNR did not make any changes to respond to the three  
18 other flaws identified by Dr. Tóth. Each of those flaws constitutes a breach of DNR's statutory  
19 and fiduciary obligations.

20 47. As a result of the above actions, DNR's sustainable harvest calculation has been  
21 improperly lowered in a manner that negatively impacts all trust beneficiaries. DNR's model also  
22 forecasts a continuing decrease in timber harvests on DNR lands for the next five decades. The  
23 violations are in addition to those detailed below, as well as any others that may be revealed  
24 through discovery on the breach of trust claims.

25 48. DNR's Sustainable Harvest Calculation process was largely conducted behind  
26 closed doors, and neither the process nor its impacts were ever explained to the beneficiaries or

1 the public. The beneficiaries and the public were not given any means by which they could  
2 determine the impact or the outcome of specific assumptions and failures by DNR to obtain  
3 adequate inventory data. This failure occurred despite numerous beneficiaries (as well as the City  
4 of Forks, AFRC, and others) actively seeking additional information about the process and the  
5 decision's impacts.

6 49. The DEIS for the Sustainable Harvest Calculation was released in December 2016.  
7 After release of this draft, DNR communicated to beneficiaries that the process could not go  
8 forward until the Murrelet Strategy was finalized, and as a result the Sustainable Harvest decision-  
9 making process was largely put on hold. Nearly three years later, in October 2019, DNR released  
10 its FEIS for the Sustainable Harvest Calculation. After it released its FEIS, DNR stated that it  
11 intended to make a decision on December 3, 2019, less than six weeks later and would not delay  
12 that decision for any reason. Upon review of the FEIS, numerous beneficiaries became concerned  
13 by the significant drops in harvest levels, and the severe impact that these reductions would have  
14 on their abilities to provide public services. Numerous beneficiaries voiced their concerns  
15 regarding the proposed Sustainable Harvest Calculation between October 2019 and December  
16 2019 (as well as in 2016). These concerns primarily focused around the inability of outside  
17 observers to understand how DNR reached its conclusions and the potential financial impacts that  
18 the decision would have. Numerous beneficiaries asked DNR to delay its decision to allow them  
19 to investigate the model and determine its validity. Beneficiaries also repeatedly told DNR that  
20 they did not understand what impact the calculation would have on their finances or their abilities  
21 to provide public services moving forward. Despite numerous beneficiaries identifying flaws in  
22 DNR's methodology and asking for financial impact information to be provided, DNR ignored the  
23 beneficiaries' wishes and proceeded to push the decision through on a highly compressed timeline.  
24 DNR never explained or justified its sustainable harvest methodology to the beneficiaries. Despite  
25 being unable to explain the Sustainable Harvest Calculation to the beneficiaries and not having  
26

1 evaluated the impacts of the decision on public services provided by the beneficiaries, DNR pushed  
2 the decision forward over the objections of various beneficiaries.

3 50. Because of the lack of transparency in DNR's Sustainable Harvest Calculation,  
4 combined with the known deficiencies in the inventory data that provides input to DNR's Forest  
5 Estate Model, and the lack of transparency to the model itself, it is difficult to pinpoint exactly  
6 which factors led the results of DNR's modeling to be so low. It is easy, however, to conclude  
7 that under prudent professional management, the trust land DNR manages should be producing  
8 significantly more timber volume and revenue. DNR's failure to manage the trust lands to produce  
9 the revenue which would be generated using prudent management is a breach of its fiduciary  
10 obligations.

11 **C. Marbled Murrelet Long-Term Conservation Strategy**

12 51. In 1997, DNR submitted a Habitat Conservation Plan ("HCP") to the United States  
13 Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS"), and in  
14 return was granted an Incidental Take Permit covering various species listed under the ESA,  
15 including the Marbled Murrelet. One of the purposes of the HCP was to provide additional support  
16 for threatened and endangered forest-dependent species during the decades when federal forest  
17 lands will be re-growing habitat under the Northwest Forest Plan. The HCP committed DNR to  
18 setting aside 567,000 acres of trust land for the benefit of species listed under the ESA, removing  
19 more than 40 percent of the trust land it manages in trust for income beneficiaries from commercial  
20 forestry production for the duration of the HCP.

21 52. The Incidental Take Permit exempts DNR forestry activities from the ESA's  
22 Section 9 take prohibition, 16 U.S.C. § 1538, and authorizes commercial forestry activities to  
23 continue without threat of violations of the ESA. The HCP and the Incidental Take Permit form a  
24 contract between DNR and the federal government that the state would protect habitat for various  
25 threatened species in the manner specified in the HCP, in exchange for operational certainty that  
26 it could proceed with commercial forest operations on the remainder of the trust land base, even if

1 such commercial forestry resulted in incidental take of listed species. The certainty to continue its  
2 operations that DNR received in turn provided a level of certainty to trust beneficiaries that their  
3 trust lands would provide a consistent stream of revenue, and to AFRC members that their mills  
4 would have a continuing supply of timber necessary to keep them operating. This certainty is  
5 embedded in the HCP Handbook, which explains, “as long as the permittee is properly  
6 implementing the HCP, the [federal] Services will not impose additional requirements or  
7 restrictions.”<sup>2</sup> In other words, “a deal is a deal.”<sup>3</sup> To cement this point, the Service’s 1994 “No  
8 Surprises” policy is incorporated in the documents for the HCP.<sup>4</sup>

9         53. The marbled murrelet was first listed as threatened under the ESA in 1992. The  
10 murrelet spends a majority of its life living on near-shore marine waters and migrates inland only  
11 to nest on the horizontal branches of large trees. Beyond nesting, the bird makes no use of  
12 terrestrial (non-marine) habitats. When the HCP was being negotiated in 1997 relatively little was  
13 known about the bird’s terrestrial habitat needs. Recognizing the lack of available science on the  
14 habitat needs of the murrelet, the 1997 HCP included an interim murrelet strategy that was very  
15 conservative and set aside all forest lands that the drafters thought could conceivably be utilized  
16 by the murrelet, until additional research provided a foundation from which a final murrelet  
17 conservation plan could be developed. The Marbled Murrelet Strategy is the adoption of the final  
18 plan that replaces the 1997 interim strategy.

19         54. Since 1997 much has been learned about the murrelet. During nesting, murrelets  
20 must fly to and from their marine foraging areas to bring whole fish to their chick. Those flights,  
21 of up to 40 miles or more, are a significant drain on the energy of the adults attempting to feed  
22 their young. Recent studies have shown that the decrease in murrelet populations in Washington  
23

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24 <sup>2</sup> HCP Handbook at 1-3 (Dec. 21, 2016), *available at* [https://www.fws.gov/endangered/what-we-do/hcp\\_handbook-](https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html)  
25 [chapters.html](https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html).

26 <sup>3</sup> *Id.*

<sup>4</sup> HCP FEIS, Oct. 25, 1996, at A6-1 to A6-4.

1 since 1997 is most likely caused by conditions at sea, where populations of forage fish have  
2 plummeted, forcing murrelets to feed lower on the trophic scale. The effect of feeding lower on  
3 the trophic scale is that since each prey fish provides fewer calories, murrelets have greater  
4 difficulty obtaining enough food to maintain body health necessary for breeding, and when they  
5 attempt to nest, they are often unable to bring adequate food to their chick. As a result, there is no  
6 reason to think the current population of murrelets is limited by available nest sites; the population  
7 is limited because, as recent research shows, most murrelets never attempt to nest, if they do  
8 attempt to nest, their egg often fails to hatch, and if the egg hatches, their chick often dies of  
9 malnutrition.

10         55. We now know that the murrelet is dependent on late-successional and old-growth  
11 forests. It does not use managed commercial forestlands or second-growth forests lacking legacy  
12 trees, which describes the vast majority of the trust lands managed by DNR. This old-growth  
13 dependence arises because murrelets are poor flyers and lack the ability to construct nests. Thus,  
14 to “nest,” the bird requires a mossy depression to naturally form on a horizontal limb that is large  
15 enough to safely hold the egg and prevent it from rolling off. These depressions, known as  
16 platforms, must be on horizontal branches that are a minimum of seven inches in diameter to have  
17 a big enough depression so that the egg does not roll off or the chick does not fall off in a  
18 windstorm. The broad branches must be a minimum of 50 feet off the forest floor so as to allow  
19 the murrelets to generate enough speed for flight after jumping off the branch (the murrelet  
20 generally runs across the water to generate speed for take-off, and is not a nimble flier that can  
21 easily launch into the air). The platforms should have tree canopy above them to protect the chick  
22 during rainstorms and to provide cover from predators. Additionally, nesting murrelets need open  
23 flight paths that allow them to approach and leave a nesting platform at high speeds without having  
24 to maneuver through a tightly crowded forest canopy. Because the requirements for landing,  
25 takeoff and nesting are rooted in the basic biology of the murrelet, murrelets cannot adapt to use  
26 forests that have some, but not all, of the required nest stand characteristics. Murrelet nesting has



1 not been observed in stands that do not have some elements at least 180 years old. None of the  
2 DNR lands at issue have stands this old, and they will not have them even 50 years from now at  
3 the end of the HCP's term.

4 56. The only forests that provide marbled murrelets the type of complex structure that  
5 they require are late-successional and old-growth forests. Previously-harvested commercial  
6 timberlands do not provide marbled murrelet habitat. No replanted commercial forests have been  
7 observed to attain the structural complexity necessary to become murrelet habitat. This is largely  
8 because it takes centuries for trees to grow horizontal limbs that are high enough and of sufficient  
9 diameter for murrelet nesting. Even if Washington's commercial timberlands were given centuries  
10 to grow, they still may not achieve the type of structural complexity that is required because they  
11 have been planted as dense, single species plantations. In plantations, trees are planted at such a  
12 density that due to overcrowding and competition for sunlight, the trees do not grow significant  
13 horizontal limbs. The result is that commercial forests grow a large number of straight trees that  
14 have no large diameter branches. In order for overstocked commercial forests to obtain structural  
15 complexity, a large number of the trees have to naturally die off or otherwise be removed so as to  
16 open up the forest canopy and allow the growth of horizontal limbs. Absent human intervention,  
17 it will take hundreds of years for most of DNR's plantations to develop the late-successional forest  
18 characteristics that are essential to the murrelet. Thus, not only do commercial forests fail to  
19 provide marbled murrelets habitat today, but if left alone (as the Murrelet Strategy proposes to do)  
20 rather than actively managed, these forests will not become habitat until long after DNR's HCP  
21 has expired.

22 57. The state trust forest lands managed by DNR contain relatively few areas of late-  
23 successional and old-growth forest. In accordance with the Department's *Policy for Sustainable*  
24 *Forests*, all of the remaining DNR-managed old-growth forests are reserved from commercial  
25 harvest. Much of the old-growth forest is also set aside under the 1997 HCP as habitat for other  
26 endangered species. DNR has done a robust old-growth survey to ensure that it is adequately

1 conserving its remaining old-growth inventory. The most effective way to conserve the marbled  
2 murrelet's terrestrial habitat is to focus on the remaining old-growth that provides the late-  
3 successional environment that murrelets need, a conservation action that has already occurred.

4 58. In addition to DNR's old-growth survey, and as part of the research needed to create  
5 a marbled murrelet long term conservation strategy, DNR undertook extensive surveys to identify  
6 those areas on DNR land that the murrelets were actually using. Between 1998 and 2002 DNR  
7 spent significant resources studying its lands to identify all areas that were actually occupied by  
8 murrelets. As a result, DNR knows the limited areas where the murrelet population nests on DNR  
9 lands.

10 59. In December 2016, DNR and the FWS jointly published the DEIS for the Marbled  
11 Murrelet Long-Term Conservation Strategy. The DEIS considered six alternatives (Alternatives  
12 A-F) that would set aside various amounts of trust land for the murrelet, taking it out of commercial  
13 production for the benefit of trust beneficiaries and instead holding it solely to provide habitat for  
14 marbled murrelets. In the DEIS, DNR and the FWS represented that all of the alternatives being  
15 considered met the purpose and need of both agencies. The alternative that aligned most closely  
16 with DNR's trust mandate was Alternative B. In addition to the 567,000 acres of land already set  
17 aside for habitat purposes under DNR's HCP, Alternative B set aside for conservation all of the  
18 stands of timber that DNR's extensive surveying found to be occupied by murrelets but were not  
19 already protected for the remaining duration of the HCP – an additional 9,000 acres. Under  
20 Alternative B, as part of the total HCP, 576,000 acres, or 42% of the western Washington state  
21 trust land base, would be reserved from commercial harvest activity.

22 60. In September 2018, DNR published the Revised Draft Environmental Impact  
23 Statement ("RDEIS") for the Marbled Murrelet Long-Term Conservation Strategy. The RDEIS  
24 analyzed two additional alternatives, one an alternative based on comments received from various  
25 other agencies (Alternative G), and a second alternative (Alternative H) that was created in  
26 response from feedback from the Board and which became the Board's preferred alternative. The

1 preferred Alternative H included approximately 37,000 additional acres of conservation for the  
2 murrelet, beyond the 567,000 acres already set aside for habitat protection under DNR's HCP.  
3 The additional acres being taken out of commercial timber production include tens of thousands  
4 of acres that are not now murrelet habitat and will not become habitat during the remaining life of  
5 the HCP, if ever. In other words, the preferred alternative sets aside additional acreage that is *four*  
6 *times* the necessary area identified in Alternative B. The Draft Environmental Impact Statement  
7 noted that even under Alternative B the volume of murrelet habitat would increase over the period  
8 of the HCP.

9         61. In September 2019, DNR published the FEIS for the Marbled Murrelet Long-Term  
10 Conservation Strategy. Following the publication of the FEIS, DNR and the Board put the marbled  
11 murrelet long term conservation strategy on a fast track to decision. Despite repeated calls from  
12 trust beneficiaries that the process had failed to properly consider the public service impacts on  
13 their communities or the science of the bird, the Board voted to adopt a slightly modified  
14 Alternative H as the HCP Amendment at its December 3, 2019 board meeting, which reserves 441  
15 more acres than the 37,000 additional set-aside acres described in the FEIS. The result of this  
16 selection is that tens of thousands of trust acres were taken out of production and are no longer  
17 being managed to benefit the beneficiaries.

18         62. The adoption of Alternative H constitutes a breach of the Board's fiduciary  
19 obligations to the plaintiffs, because it constitutes a use of trust assets for a purpose that is  
20 inconsistent with the trust's mandate. The 1997 HCP predicted that the ultimate Murrelet Strategy  
21 would "make a significant contribution to maintaining and protecting marbled murrelet  
22 populations in western Washington." Alternative B does so because it protects all of the occupied  
23 stands that were identified after in-depth surveys conducted by DNR in the early 2000s. Some of  
24 these are unlikely to be occupied today due to population decreases caused by at-sea conditions,  
25 but would be protected to ensure future murrelets have areas to nest if the population rebounds.  
26 The occupied stands protected by Alternative B are in addition to DNR's protection of 567,000

1 acres for other conservation purposes, and DNR’s policies that set aside DNR’s entire inventory  
2 of old growth, which are the forest upon which the murrelet depends.

3 63. As trustee, DNR should have pursued Alternative B, which was the alternative that  
4 surrendered commercial production on the fewest number of acres, and thus maximized the value  
5 of the trust. Defendants violated their fiduciary duties by failing to adequately pursue Alternative  
6 B. On December 3, 2019, when the Board voted to adopt Alternative H, DNR indicated in writing  
7 that it was “uncertain” if Alternative B satisfied the requirements of the ESA. Thus, DNR failed  
8 to adequately investigate whether Alternative B complied with the ESA’s requirements. DNR and  
9 the Board could not make a decision in the best interest of the beneficiaries without fully  
10 investigating this key issue.

11 64. Another key flaw in the Murrelet Strategy is DNR’s assumption that it was required  
12 to provide mitigation for “taking” murrelets as a result of its forestry activities. DNR used this  
13 mitigation requirement as a justification for setting aside additional lands, but this justification is  
14 misplaced. Neither the Murrelet Strategy’s FEIS nor DEIS identifies any level of take actually  
15 occurring. Furthermore, because murrelets do not use commercial forests, the harvesting of  
16 second- and third-growth unoccupied stands on DNR-managed lands does not result in any “take”  
17 under the ESA. Because there is no “take,” DNR was not required to mitigate for take. As a result,  
18 any lands set aside as mitigation were not required to be set aside under the ESA, and results in an  
19 improper reduction in the corpus of the trust to the detriment of the trust beneficiaries. Absent a  
20 showing by DNR or the FWS that forestry activities on trust lands are actually “taking” murrelets,  
21 there is no reason why lands should be set aside as mitigation for that unproven take.

22 65. DNR’s acceptance of a full mitigation requirement represents a failure to hold FWS  
23 to the terms of the HCP, and therefore a breach of its duty to the beneficiaries. Nothing in the  
24 HCP requires full mitigation, and nothing in the ESA overrides the HCP.

25 66. Even assuming that DNR was required to provide mitigation for take as a result of  
26 harvesting murrelet habitat, DNR’s methodology for determining where habitat exists is fatally

1 flawed. To identify habitat, DNR relied on a “P-Stage model” instead of actual field surveys to  
2 classify habitat. The “model” is little more than a chart of stand age and dominant species. The  
3 P-stage model was never properly calibrated (field tested) and a field review of the model’s  
4 findings shows that it consistently identifies as “habitat” stands that do not contain essential  
5 components which murrelets require for nesting habitat. The result is that the model is improperly  
6 requiring trust beneficiaries to provide mitigation for harvesting forest stands that are not and  
7 cannot be used by the murrelet.

8         67. DNR has been made aware that its P-Stage model is systematically requiring  
9 mitigation for the harvest of non-murrelet habitat, and beneficiaries have requested that DNR  
10 conduct a meaningful ground-truthing of the stands that are being identified by the model as  
11 “habitat” to determine whether they contain the essential components of murrelet habitat. Despite  
12 repeated requests that DNR actually examine the land base for murrelet habitat, DNR has refused  
13 to conduct a meaningful field survey. Even a cursory on-the-ground review by a biologist or  
14 silviculturalist reveals that thousands of acres of the lands being “mitigated for” are not in fact  
15 murrelet habitat, and that the lands being set aside do not provide murrelet habitat. By failing to  
16 field review its forests to avoid providing meaningless and ineffective mitigation, DNR has  
17 violated its fiduciary obligations to act with undivided loyalty to the sole best interest of the  
18 beneficiaries, and has also facilitated an improper erosion of the corpus of the trust.

19         68. The mitigation calculations used by DNR adopt a double standard that costs the  
20 beneficiaries significant dollars. When alerted to the issue, DNR failed to take action to protect  
21 the beneficiaries’ interests. Specifically, under the mitigation calculations DNR presented to FWS,  
22 the trusts are being required to provide mitigation for the potential future harvest of approximately  
23 8,550 acres of narrow slivers of murrelet “habitat.” While requiring the trusts to give up land to  
24 mitigate the potential harvest of these lands, the model gives the trusts zero mitigation “credit” for  
25 the approximately 28,000 acres of similar, narrow stringers that have already been set aside. It is  
26 a clear double standard to require mitigation for the harvest of slivers, but also fail to give the trusts

1 credit for prior efforts to similar areas. DNR did not adequately address the double standard but  
2 instead went forward with a plainly one-sided plan to the detriment of the beneficiaries.

3 69. DNR attempts to justify its decision to adopt Alternative H by a “population  
4 viability analysis.” A careful review of the population viability analysis shows that there is no  
5 significant difference between the viability of murrelet populations in Washington whether  
6 Alternative B or Alternative H is adopted. Moreover, the analysis rests entirely on the assumption  
7 that terrestrial habitat rather than food sources is the limiting factor for murrelet populations, an  
8 assumption that as shown above lacks scientific support. DNR’s reliance on the population  
9 viability analysis is a breach of fiduciary duty and is arbitrary and capricious.

10 **D. State Environmental Policy Act**

11 70. DNR’s and the Board’s decisions to select a Long-Term Murrelet Conservation  
12 Strategy and set a Sustainable Harvest Calculation are subject to the requirements of Washington’s  
13 State Environmental Policy Act, RCW Ch. 43.21C. SEPA is a “procedural” statute “that ensures  
14 state agencies, among others, consider environmental impacts and alternatives before taking  
15 certain actions.” *Cornelius v. Wash. Dep't of Ecology*, 182 Wn.2d 574, 598 (2015).

16 71. RCW 43.21C.030 requires that each recommendation for a major action  
17 significantly affecting the quality of the environment be accompanied by a detailed statement on  
18 the environmental impact of the proposed action, and any adverse impacts that cannot be  
19 adequately mitigated.

20 72. In an effort to comply with these requirements for the Long Term Murrelet  
21 Strategy, DNR and the FWS published a Draft Environmental Impact Statement (“Murrelet  
22 DEIS”) in December 2016, a Revised Draft Environmental Impact Statement (“Murrelet RDEIS”) in  
23 September 2018, and a Final Environmental Impact Statement (“Murrelet FEIS”) in September  
24 2019. DNR took comments on both the DEIS and RDEIS, and some of the Plaintiffs in this matter  
25 provided comments.  
26

1           73. In an effort to comply with these requirements for the Sustainable Harvest  
2 Calculation, DNR published a Sustainable Harvest DEIS in December 2016, and a Sustainable  
3 Harvest FEIS in October 2019. DNR took comments on the Sustainable Harvest DEIS, and some  
4 of the plaintiffs in this matter provided comments.

5           74. SEPA requires an analysis of the impacts a decision will have on both the natural  
6 and the built environment. This analysis must include, among other things, consideration of the  
7 impacts a decision will have on public services and utilities, including but not limited to impacts  
8 on fire departments, police departments, and schools, as well as other public services. WAC 197-  
9 11-444. SEPA also requires an analysis of the impacts on roads and other traffic infrastructure.  
10 SEPA also requires an agency to respond adequately to public comment. WAC 197-11-560.

11           75. The counties and junior taxing districts that have brought this lawsuit rely on timber  
12 revenues to provide a full range of public services in their jurisdictions. For rural counties such as  
13 Wahkiakum, Pacific, and Skamania, timber revenues may make up over 20% of a county's entire  
14 operating budget. These plaintiffs lack reliable alternative sources of revenue. Due to variable  
15 timing for timber revenues from state trust lands, these counties often have to borrow money to  
16 fund their public safety departments, road crews, and emergency services in years when timber  
17 revenue is low, with timber revenues during years with higher harvests used to repay the loans and  
18 keep the government afloat. There simply is no excess spending that can be cut, and no alternative  
19 sources of revenue for these public bodies' budgets. The drop in revenues over the coming decade  
20 as a result of the Sustainable Harvest Calculation decision will result in further layoffs and  
21 corresponding reductions in public services in county plaintiffs. At present, county plaintiffs are  
22 unable to provide the levels of services they wish to provide, and any increases in timber revenues  
23 would similarly increase the level of public services that could be provided. The Murrelet Strategy  
24 will have a compounding effect on the revenues of several of the plaintiffs, including most notably  
25 Pacific and Wahkiakum Counties, and will further depress their ability to deliver essential public  
26 services.





1 **First Cause of Action**

2 **(Breach of Trust/Fiduciary Duty)**

3 81. Plaintiffs reallege paragraphs 1-80 above.

4 82. The State, DNR, and the Board of Natural Resources, (collectively “Defendants”) are trustees of the various state land trusts described herein. Plaintiffs include beneficiaries of those trusts.

7 83. The trusts are real and enforceable trusts that impose upon the Defendants the same fiduciary duties applicable to private trustees, as well as the specific statutory duties applicable to DNR. Defendants are obligated to pursue the interests of the beneficiaries in the management of the trust lands above all other objectives, no matter how laudable those other objectives may be.

11 84. The fiduciary duties owed by the Defendants to the beneficiaries include but are not limited to:

- 13 a. making the trust property productive;
- 14 b. preserving the corpus of the trust;
- 15 c. exercising reasonable care and skill in managing the trust;
- 16 d. carefully investigating any claims against the trust corpus;
- 17 e. full disclosure to the beneficiaries;
- 18 f. acting prudently;
- 19 g. acting with undivided loyalty to the trust beneficiaries; and
- 20 h. acting impartially with respect to current and future trust beneficiaries.

21 85. The Defendants’ adoption of the Long-Term Conservation Strategy for the Marbled Murrelet constitutes a violation of all of the above fiduciary duties. Among other reasons, the decision constitutes a breach of trust because it ceded large portions of the trust’s corpus for purposes outside of the trust mandate, and because Defendants refused to take reasonable and readily available steps to ensure that it set aside only the amount of trust lands necessary to satisfy the requirements of the ESA.





1 would have on public services, in the relevant EISs, and by failing to adequately respond to public  
2 comment in the relevant FEISs.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs request the following relief:

5 1. That the Court issue a writ directing the Defendants to certify and return to the  
6 Court copies of any and all documents or records in the possession or control of Defendants, and  
7 their agents or employees, that are in any way related to DNR's recommendation and the Board's  
8 December 3, 2019 decision to set a sustainable harvest level for the 2015 to 2024 planning decade.

9 2. That the Court issue a writ directing the Defendants to certify and return to the  
10 Court copies of any and all documents or records in the possession or control of Defendants, and  
11 their agents or employees, that are in any way related to DNR's recommendation and the Board's  
12 December 3, 2019 decision to select a long term conservation strategy for the marbled murrelet.

13 3. That upon trial of the case, the Court declare that the Defendants violated their  
14 fiduciary duties to the Plaintiffs in connection with their selection of a sustainable harvest level for  
15 the 2015 to 2024 planning decade, and that the sustainable harvest level must be vacated and set  
16 aside.

17 4. That upon trial of the case, the Court declare that the Defendants violated their  
18 fiduciary duties to the Plaintiffs in connection with their selection of a long-term conservation  
19 strategy for the marbled murrelet and that the long-term conservation strategy must be vacated and  
20 set aside.

21 5. That upon trial of the case, the Court declare that the Defendants' selection of a  
22 sustainable harvest level for the 2015 to 2024 planning decade was arbitrary and capricious, or  
23 otherwise not in accordance with law.

24 6. That upon trial of the case, the Court declare that the Defendants' selection of a  
25 long-term conservation strategy for the marbled murrelet was arbitrary and capricious, or  
26 otherwise not in accordance with law.

1           7.       That upon trial of the case, the Court declare that the Sustainable Harvest FEIS  
2 violated the State Environmental Policy Act by failing to adequately disclose impacts on public  
3 services in the supporting environmental impact statement.

4           8.       That upon trial of the case, the Court declare that the Marbled Murrelet FEIS  
5 violated the State Environmental Policy Act by failing to adequately disclose impact on public  
6 services in the supporting environmental impact statement.

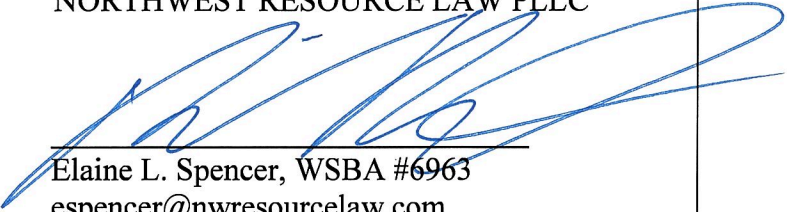
7           9.       That the Court declare invalid, or issue a writ invalidating, the Board's  
8 determination of a sustainable harvest level for the 2015-2024, and remand the determination to  
9 DNR and the Board with instructions to vacate the SHC the Board adopted, to direct DNR to  
10 develop a plan to promptly inventory its forest to correct the data deficiencies, and in the interim  
11 to recalculate the SHC using its existing data but a discount rate of not less than 5% and correcting  
12 other errors identified in the trial of the case.

13          10.       That the Court declare invalid, or issue a writ invalidating, the Board's  
14 determination of a marbled murrelet long-term conservation strategy, and remand to the Board  
15 with instructions to adopt Alternative B forthwith.

16          11.       That the Court enter all other declaratory or injunctive relief as the Court deems  
17 just and proper.

1 DATED this 2nd day of January, 2020.

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17 4833-5128-5168, v. 2