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No. 99183-9

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

CONSERVATION NORTHWEST, et al.,

Appellants,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, et
al.,

Respondents,

and

WAHKIAKUM COUNTY, et al.,

Intervenor-Respondents.

**BRIEF OF AMICUS CURIAE
SKAGIT COUNTY**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Skagit County (“County”) joins and endorses the Amicus Curiae brief of Washington State Association of Counties (“WSAC”), submitting this amicus brief to alert the Court to Skagit County’s specific interests and concerns at stake in this matter, identifying several additional issues and authorities.

During the Great Depression, numerous Skagit County forestland owners defaulted on tax obligations and otherwise abandoned their land, causing Skagit County by various means to come into ownership of approximately 84,628 acres of commercial timberland. The State undertook to manage these lands in trust for the benefit of Skagit County and its junior taxing districts (rural schools, hospitals, fire departments and others), with the trust relationship reflected in the deeds by which the land was transferred to the State, as well as being codified by statute. RCW 79.22.040. The financial arrangement is that 25% of the proceeds from commercial activity on these lands are kept

by the State as a management fee, with 75% distributed to the County and its junior taxing districts. RCW 79.64.110(a).

While this category of trust lands is variously referred to as “state forestlands”, “forest transfer lands” or “forest board lands” in other pleadings and documents, the most accurate description of these lands is “County Trust Lands”, given that they are lands granted by and explicitly held in trust for Skagit County. Accordingly, they will be referred to as “County Trust Lands” herein.

Within Skagit County, there are approximately 890,416 forestland acres in total.¹ Of this, 529,677 acres – roughly 60% of the total forestland in Skagit County – is restricted under state and federal law. Thus, the majority of forestland in Skagit County is principally devoted to habitat, biodiversity, recreation, tourism, and other activities besides commercial forestry.²

¹ Washington Forest Protection Association database, <https://data.workingforests.org/#Skagit> (last visited September 1, 2021)

² *Id.*

The remaining 40% of the forestland within Skagit County, approximately 360,738 acres, is working forest owned by private and public landowners, managed principally for productive tree crops, carbon sequestration and other revenue-generating activity, subject to a wide range of environmental laws and regulations.³

As such, the 84,628 acres of County Trust Lands comprise roughly a quarter (25%) of the total working forestland in Skagit County.⁴

The County Trust Lands are a significant component of our community's effort to maintain a sustainable forestry industry in Skagit County. Much like the agricultural land base that Skagit County has worked so hard to protect from development and other incompatible uses, the viability of the forestry industry itself require a critical mass of working lands to

³ *Id.*

⁴ Skagit County's amicus brief deals only with the County Trust Lands, and we defer to the WSAC amicus brief as to the federally-granted trust lands.

keep lumber mills and other forest industry infrastructure operating and viable. As such, both land and infrastructure are indispensable and intertwined components of a viable local forestry industry.

The direct revenue produced by the County Trust Lands is significant. From 2009-2018, Sedro-Woolley School District received \$30,496,673 in trust land revenue; Concrete School District received \$2,507,933; the County Road Fund received \$13,507,805; the North Central Rural Library District received \$1,531,093; and the Skagit County Emergency Medical Services (“EMS”) District received \$2,758,256. In total, Skagit County and its junior taxing districts received \$76,428,459 over that time period. In a rural county, these amounts are important to overall budgets and finance plans.

Beyond the direct revenue involved, the Skagit County forestry industry supports approximately 3,242 total jobs, furnishing approximately \$170 million in annual wages to the

community, as well as generating some \$5.6 million in taxes and fees.⁵

The Appellants claim that their desire to fight climate change motivates this ambitious lawsuit, and that may well be the case.⁶ But if there is opportunity to be derived from carbon sequestration on County Trust Lands – which is an evolving business model subject to market forces and governmental regulation, among other things – it is potential business opportunity that rightly belongs to Skagit County and its junior taxing districts, not the general public of the State of Washington, let alone the Appellants.

A sustainable forestry industry is a deeply rooted part of Skagit County's history, economy and identity, and represents the future our community has planned for itself pursuant to Skagit County's Comprehensive Plan, adopted pursuant to the Washington Growth Management Act, Chapter 36.70A RCW

⁵ Washington Forest Protection Association database, <https://data.workingforests.org/#Skagit> (last visited September 1, 2021)

⁶ See, e.g., Appellants Opening Brief at 9.

(“GMA”), which, generally speaking, required Skagit County to help stop the suburban sprawl that was rapidly consuming our natural resources land base. “The regional physical form required by the [GMA] is a compact urban landscape, well designed and well furnished with amenities, encompassed by natural resource lands and a rural landscape.” *Bremerton et al v. King County*, CPSGHMB Case No. 95-3-0039c Final Decision and Order 31 (October 6, 1995).

Skagit County’s Comprehensive Plan describes our community’s intention to maintain commercial forest lands:

Skagit County is committed to preserving and enhancing the forest land base and promoting a strong forestry industry. The intent of these goals and policies is to ensure that forest lands of “long-term commercial significance” are conserved and managed to provide for sustainable forest yields, job stability, ecological values and the strengthening of a viable commercial forest industry in Skagit County. Conservation of forest land resources must be achieved through measures designed to preserve the land base, reduce the conversion of forest lands to other uses, prevent incompatible development on or adjacent to resource lands, and provide incentives to managing forest lands of all sizes for forestry.

Skagit County Comprehensive Plan, p.126 (2021)⁷

Consistent with the foregoing, Skagit County zoned the preponderance of the working forest land in Skagit County as Industrial Forest, consisting of approximately 319,500 acres both public and private, which prohibits virtually all development:

The purpose of the Industrial Forest— Natural Resource Lands district is to ensure that forest lands of long-term commercial significance are conserved and managed to provide sustainable forest yields, job stability, ecological values and the continuation of a viable commercial forest industry in Skagit County.

Skagit County Code 14.16.410.

Virtually all of the 84,628 County Trust Lands at issue in this litigation are zoned Industrial Forest, representing our community's consensus, obtained in the manner prescribed by state law, that a portion of the forest land within Skagit County should remain principally dedicated to commercial forestry.

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<https://www.skagitcounty.net/PlanningAndPermit/Documents/CompPlan2016/comp-plan-2016-adopted-text-only.pdf> (last visited September 1, 2021).

It is a holistic vision involving long-range stewardship of the landscape by a modest commercial forestry that constitutes an integral part of the fabric of our rural community.

The fact that visitors to Skagit County see working farms and forestland generally free of development is the result of neither happenstance nor external forces, but rather is the product of deliberate policy decisions and sacrifice by the people of Skagit County, spanning across generations.

By contrast, since the GMA was adopted in 1990, King County and its surrounding environs have invited a massive level of population growth on what were formerly working farms and forests, pushing residential, commercial and industrial development in all directions.

Absent the highly restrictive zoning that Skagit County has adopted under the GMA with respect to its natural resource lands, the 40% of Skagit County's forests that are currently working forests would be under significantly heightened development pressure from surrounding urban centers, as

would Skagit County's remaining agricultural lands. This is because without revenue derived from forestry and farming, the only meaningful opportunity by which landowners can generate revenue is to sell off their land piece-by-piece for development, which in turn creates tremendous political pressure to allow development. Such an outcome would be contrary to the intent of the people of Skagit County.

Instead, the people of Skagit County have decided that sustainable forestry is to remain a part of our community's future, and Skagit County would never have consented to the transfer of the County Trust Lands to the State to be held in trust but for that continued understanding.

The Appellants would have the Court upend all of this, offering no clear notion as to what might replace the local revenue, economy and community involved, furthermore failing to recognize that the public interest for which the Appellants claim to speak has been clearly and democratically established through Skagit County's Comprehensive Plan.

While it is trendy to suggest that digital commerce will soon entirely replace “old fashioned” natural resource economies that produce primary products such as food and lumber, Skagit County, looking to the long term, has consciously chosen to preserve our natural resource land base and industries against the model of perpetual growth and development on which the dominant culture appears to rely.

Skagit County’s interest in this matter involves ensuring that the forestland our community deeded to the State to be held in trust as working forest will remain working forest, as it has been for the past eighty years since it was deeded to the State – notwithstanding the opaque plans and ambitions of the Seattle-based nonprofit organizations that brought this matter before the Court.

II. ARGUMENT AND AUTHORITY

Abstraction is the enemy wherever it is found. The abstractions of sustainability can ruin the world just as surely as the abstractions of industrial economics. Local life may be as much endangered by those who would “save the planet” as by those who would “conquer the world.” For “saving the planet” calls for abstract purposes and central powers that cannot know – and thus will destroy – the integrity of local nature and local community.⁸

The trust relationship established when Skagit County deeded the County Trust Lands to the State has been affirmed by this Court’s prior holding in *Skamania County v. State*, 102 Wn. 2d 127, 132 (1984), which “impose[s] upon the State the same fiduciary duties applicable to private trustees.”

As set forth at length in WSAC’s well-written amicus brief, Appellants improperly attempt to bootstrap claims related to the federally-granted trust lands onto the County Trust Lands, with virtually no legal support or justification. Skagit County

⁸ Wendell Berry, *Sex, Economy, Freedom, and Community: Eight Essays*, p.22 (1992).

opposes the Appellants' argument, endorsing and adopting WSAC's brief and arguments to that end.

Should this Court nevertheless agree with the Appellants' interpretation as to the County Trust Lands, it will constitute a judicial determination that the settlor's (i.e., Skagit County's) basic intent upon the creation of the trust (i.e., a principal focus on the funding of local services and infrastructure) is impossible to perform.

The appropriate remedy in such a circumstance is not, as the Appellants would suggest, to redesignate the entire public of the State of Washington as the appropriate beneficiary, but rather it is to terminate the trust and distribute the trust assets to the beneficiaries. RCW 11.98.145(2) ("Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it"); RCW 11.98.070(32) (Upon determination that trust is no longer able to fulfill its purposes, the proper remedy is "distribution of the trust to the current income

beneficiary or beneficiaries of the trust....”); *Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 33 Wn.2d 255, 263 (1949)(citing 54 Am.Jur. 85, Trusts, § 86; 3 Pomeroy's Equity Jurisprudence, 5th Ed., 950, § 991c)(“If the purpose of a trust becomes impossible of accomplishment, it is proper to terminate it.”); see also *Ellis v. Ellis*, 66 P.2nd 738 (Cal. App. 1937)(Where the purpose of a trust can no longer be accomplished equity will terminate it on application of a beneficiary); *In re Marriage of Epperson*, 107 P.3d 1268 (Montana 2005)(Court may terminate trust if continuation would defeat or substantially impair the trust purpose); *Barringer v. Gunderson*, 402 P.2d 470, 478 (Nev. 1965)(“If a trust fails, it has been held, a court has no power except to enforce a reversion.”); *In re Dowell's Estate*, 270 P.2d 1098 (Okla. 1954)(Where the trust purpose has become impossible of accomplishment the trust will be terminated by the court).

Should this Court determine that Appellants' arguments are correct with respect to the County Trust Lands, it will render Skagit County's original intent in the creation of the trust relationship impossible, and, thus, the County Trust Lands must be returned to Skagit County for its own competent management.

III. CONCLUSION

Skagit County respectfully urges the Court to affirm the trial court.

RESPECTFULLY SUBMITTED this 2nd day of September, 2021.

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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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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I. IDENTITY OF MOVING PARTY

Skagit County, by and through its attorney, William W. Honea, asks this Court for the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Skagit County asks this Court for permission to appear as amicus curiae on behalf of Respondents, and to file the contemporaneously submitted amicus curiae brief.

III. GROUND FOR RELIEF

A. **RAP 10.6(b) Statement**

RAP 10.6 permits the filing of a brief by amicus curiae. Pursuant to RAP 10.6(b), Skagit County provides the following statement concerning the four factors set forth in that rule:

1. Skagit County's Interests and Role

In this matter, the Appellants seek to fundamentally alter the trustee-beneficiary relationship between the State

of Washington and county-beneficiaries as to lands transferred from the counties to the State to be held and managed in trust. Skagit County is the second largest such county-beneficiary in the State of Washington, with 84,628 acres held in trust by the State for the benefit of the County and its junior taxing districts.¹ The revenue produced by the lands in question form a substantial portion of the budgets of Skagit County and its junior taxing districts, including schools, rural fire departments, and hospital districts, and this case threatens that essential revenue.

2. Skagit County's Familiarity with the Issues Raised in this Appeal

Skagit County is highly familiar with the issues raised in this appeal, having been deeply involved in them for decades due to our trust relationship with the State. Furthermore, the issues raised in this appeal have a direct

¹ Washington State Department of Natural Resources, *Trust Land Performance Assessment Project: Charting a Course for the Future, Legislative Report*, January 21, 2021, at page 418 https://www.dnr.wa.gov/publications/em_tlpa_lege_report_complete.pdf (last visited September 2, 2021). Only Clallam County, with 93,052 acres held in trust, is larger.

and immediate relationship to other ongoing litigation in which Skagit County is the principal plaintiff. Skagit County brought suit seeking to address concerns with the management of its trust lands on December 30, 2019 in the matter of *Skagit County et al v. State et al*, Skagit County Superior Court Cause No. 19-2-01469-29. The Appellants filed the instant matter three days later, on January 2, 2020, in Thurston County Superior Court. While the State has ably defended against the Appellants' claims thus far in the Thurston County matter, the elevation of the matter to the Washington Supreme Court and the risk of an adverse precedential decision requires that Skagit County express its own specific interests.

3. Issues Addressed by Amicus Curiae

In its attached amicus brief proposed for submission to the Court, Skagit County addresses the highly detrimental policy and economic implications for Skagit County and its junior taxing districts should the Appellants' arguments prevail in this matter, as well as the

close relationship between Skagit County's Growth Management Act-required Comprehensive Plan and the trust lands at issue. Given the significant adverse impacts to Skagit County and its junior taxing districts that are implicated by the Appellants' arguments, Skagit County urges the Court to reject the Appellants' argument and affirm the trial court. Should the Court nevertheless adopt the Appellants' argument, Skagit County's amicus brief explains that this would render impossible the County's principal intent in forming the trust, citing extensive legal authority for the proposition that the appropriate legal response to such an outcome would be reversion of the trust corpus to the settlor and beneficiary, i.e., Skagit County.

4. Need for Additional Argument

Each of the issues and arguments raised in Section 3 above are highly relevant to this Court's decision, and are not raised by other parties or amici.

IV. CONCLUSION

For the reasons stated herein, Skagit County requests the Court allow the County to appear as amicus curiae on behalf of the Respondents.

Respectfully submitted this 2nd day of September, 2021.

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William W. Honea

SKAGIT COUNTY PROSECUTOR

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