

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF JEFFERSON

3 OLYMPIC FOREST COALITION, )  
4 SEATTLE AUDUBON SOCIETY and )  
5 SIERRA CLUB, )  
6 )  
7 Appellants, )

8 vs. )

No. 14-2-00055-2

9 WASHINGTON STATE DEPARTMENT )  
10 OF NATURAL RESOURCES and the )  
11 BOARD OF NATURAL RESOURCES, )  
12 )  
13 Respondents, )

14 and )

15 AMERICAN FOREST RESOURCE )  
16 COUNCIL and INTERFOR, U.S., )  
17 )  
18 Intervenor. )

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19 VERBATIM REPORT OF PROCEEDINGS  
20 JUDGE'S ORAL DECISION  
21 HEARING OF JUNE 13, 2014

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22 APPEARANCES:

23 Presiding: THE HONORABLE KEITH HARPER

24 For the Appellants: Wyatt Golding and Peter Goldman,  
25 Washington Forest Law Center

For the Respondents: Paul Lawrence and Sarah Johnson,  
Pacifica Law Group

For the Intervenors: Elaine Spencer and Diane Meyers,  
Graham & Dunn  
David Neupert, Platt Irwin Law Firm

CD Transcription by: Laurel L. Hall (CCR No. 2277)

1 PORT TOWNSEND, WASHINGTON

2 FRIDAY, JUNE 13, 2014

3 3:58 p.m.

4 --ooOoo--

5  
6 THE COURT: Okay. Obviously, within the short  
7 period of time that I had to look at all this, I didn't go  
8 through the thousands of pages of the record and everything.  
9 I relied on -- very much on the citations to that or the  
10 references to that of the parties in their briefs, and I did  
11 look at the declarations and the facts and so forth set forth  
12 in those. But anyway, so -- and whoever mentioned it, I  
13 think it was maybe Mr. Golding initially -- I mean, yeah, I  
14 mean, this is a difficult situation because they're supposed  
15 to start logging tomorrow, and here we are the day before and  
16 this was just filed seven days ago or something like that,  
17 and the last reply, I think, I received this morning or --  
18 well, yeah, this morning. So apparently these are big issues  
19 for those of you who deal with this stuff all the time, and  
20 I'm in a position where I get to decide this today with --  
21 under those kind of circumstances.

22 So I say all that because I have no illusion that  
23 I'm going to make everybody happy with what I'm going to do  
24 here. There's going to be some people that are going to be  
25 extremely disappointed or angry or whatever the case may be,

1 and, well, that's the way it is, because to make a decision  
2 today, I don't have the opportunity to look through an entire  
3 record and everything else.

4 But I did spend a considerable amount of time  
5 reading this through. I've had some experience with SEPA in  
6 the past, so I have an understanding of how that works and  
7 everything. And a lot of what I believe and the basis for my  
8 decision is going to be, in large part, on what appears to be  
9 the most credible and to make most sense. And if I make a  
10 mistake, I'm sure that somebody is going to appeal it as  
11 quickly as possible so that the logging can either go forward  
12 or be stopped or whatever the case may be.

13 So having said all that, I mean -- and to cut to the  
14 chase and not make this any longer than it has to be,  
15 basically, I'm going along with the analysis of DNR as set  
16 forth in their brief. I believe, from everything I've read  
17 and what I understand, first of all, that the area here of  
18 these sales is not within the actual habitat of these birds  
19 and that the habitat is beyond the buffers.

20 I believe that SEPA was set up in such a way as  
21 described by DNR -- well, and also by the Intervenor, but I  
22 followed through DNR's discussion maybe a little bit better  
23 than I did some of the other. But it seems to me like this  
24 regulatory scheme was established in such a way so that SEPA  
25 review was not necessary for each of these timber sales.

1           And I'm not going to try to go through and recite  
2 all of this. I've read it and then I've listened to you lay  
3 it out here today. But it seems to me that this HCP was  
4 established, an environmental review was done in connection  
5 with that, and this process was established to be able to  
6 classify this activity into one of four classes.

7           In this situation, these sales and proposed harvests  
8 were classified as Class 3 back in October and December.  
9 Those classifications were not challenged and they could have  
10 been. And so given that they were determined to be Class 3  
11 activities, then they became categorically exempt so long as  
12 the activity complied with the HCP. As near as I can tell, I  
13 believe the activities comply with the HCP at this point in  
14 time. The -- and so as a consequence, I don't believe that a  
15 separate SEPA review is required for these sales as suggested  
16 by the Appellants.

17           The -- as far as the elements of what's required for  
18 a preliminary injunction, I struggle with the standing  
19 argument. I mean, I read through the declarations and  
20 understand the interests that the Appellants are claiming and  
21 I struggle with that, but I'm not in a position to say today  
22 that no, these people do not have standing as far as being  
23 able to come in here and ask for this relief.

24           As far as a clear, legal or equitable right and  
25 likelihood of success on the merits, for the reasons I just

1 said, right now I'm not in a position to say that Appellants  
2 would likely succeed. And the authority cited suggests that,  
3 gee, and if in doubt, then a preliminary injunction is not  
4 appropriate. I understand the Appellants' argument that, oh,  
5 gee, the environment, damage to that is irreparable and  
6 usually injunctions are granted in environmental cases. But  
7 still, I mean, I have to believe that the Appellants are  
8 likely to be successful on the merits, and I'm just not in a  
9 position in good faith to say that today.

10 The -- I mean, it would be easy, I guess, for me  
11 just to say, well, geez, I'm not sure, bla, bla, bla, so  
12 let's just hold onto these trees longer. That's not the  
13 criteria that I believe I have to follow and apply here. In  
14 other words, oh, gee, as a default position and when in  
15 doubt, grant the injunction and protect the trees. Given  
16 what I'm going to talk about here in a moment, I don't think  
17 that's appropriate.

18 I understand the logic of that from the Appellants'  
19 standpoint and -- but when you're -- you know, a preliminary  
20 injunction is an extraordinary remedy, and when you're asking  
21 for that and -- it takes more than just sort of me being in  
22 doubt and saying, well, I'm not sure what to do, so, gee, I  
23 think I'll just grant it. I can't do that.

24 I also -- well, let me just go through in order  
25 here. And I don't know how this affects your later request

1 for a full hearing on the merits and everything. I mean,  
2 like I say, the decision I'm making and what I'm saying today  
3 about SEPA and all that is based on what I've had before me  
4 for purposes of this hearing and not for purposes of a  
5 full-blown hearing on the merits, if that comes to pass.

6 Okay, the -- well -- the proposed sales appear to  
7 me to be, as I said, consistent with the HCP and the  
8 procedural requirements of SEPA, and they're exempt as such.

9 The Appellants are arguing that this EIS that was  
10 done back in 1996 is stale, and basically that was the  
11 essence of their argument and their brief and everything, in  
12 my view, and I agree with DNR that that's not -- that that  
13 EIS is not particularly relevant to this particular sale.

14 And I agree that -- I mean, if there's a dispute  
15 about the HCP and, you know, some of these other things, that  
16 there would be other avenues to challenge that, I agree with  
17 the Respondents and Intervenors that this is not the type of  
18 litigation to do that. For example, the HCP being outdated  
19 or not -- or, you know, a comprehensive strategy not being  
20 developed quickly enough or something like that.

21 Balancing the equities and laches is sort of an  
22 overlapping argument to me, and quite frankly, on this issue  
23 I follow DNR. After going through the classification process  
24 and then the review and then the auction and the other step  
25 in there either before or after the auction, and then

1 entering into the contract -- and something here suggested  
2 that the contract was delayed for 14 days to see if  
3 Appellants were going to file for a preliminary injunction,  
4 and one wasn't sought, one wasn't sought, one wasn't sought.

5 And their position is, well, geez, okay, they  
6 haven't enjoined us, and we're not going to just let this  
7 lawsuit scare us off. We have a right to move forward, so  
8 they did. And they kept moving forward and moving forward,  
9 and then seven days ago an injunction is filed for, and now  
10 we have the hearing the day before.

11 They've set forth in their declarations and  
12 everything the time, the expense, and everything else that  
13 they've put out during this process to get to this point. An  
14 injunction could have been filed, apparently -- I mean, I  
15 don't know, a couple of months ago, and that would have  
16 completely changed the positioning of this case in contrast  
17 to what it is today, and that wasn't done.

18 And so if I'm going to balance the equities here  
19 between the Respondents and, you know, the State, the  
20 beneficiaries, Interfor and everything else versus the  
21 Appellants, to me they weigh in favor of the Respondents and  
22 the Intervenors at this point in time. And I think laches is  
23 applicable too for the reasons that were set forth by  
24 Ms. Spencer.

25 And the request for the injunction here is to

1 require DNR to suspend or cancel this contract, and the best  
2 I could determine in reading the authority on that and the  
3 Appellants' reply is, yeah, I'm not convinced that DNR has  
4 a -- based on what I've read, and the contract's not in front  
5 of me, but -- and largely maybe because of that, I'm not  
6 convinced DNR can just go out and cancel that contract based  
7 on what's going on here.

8           The bond I'm not going to address because it's not  
9 going to be an issue.

10           And the fact that DNR went through a checklist and  
11 everything, it's similar to the Clallam case concerning  
12 fluoridated water. They elected to do it, to go through that  
13 process, to get public comment and all the other things that  
14 they did; but ultimately, I mean, as far as I can tell, like  
15 my decision is, my decision anyway is, is that they didn't  
16 have to do that. And just because they chose to do it  
17 doesn't mean that they either thought they had to or that  
18 they necessarily had to.

19           The -- you know, as far as the legal merits go,  
20 again, my determination at this point is, is these harvests  
21 not only appear to comply with the HCP but also the science  
22 team report, from what I read of that. And like I say, these  
23 sales are not within the habitat or -- and with the buffers  
24 and everything, they're not adjacent to the habitat.

25           Okay. So that's my decision. The request for a

1 preliminary injunction is denied, and I don't know what you  
2 need in additional findings or anything, but to -- I mean,  
3 like I say, to the extent that it's necessary or helpful, the  
4 logic I'm applying and the arguments I'm adopting are those  
5 that were set forth primarily by DNR in its opposition and  
6 also that of the Intervenors.

7 So have I missed anything, any --

8 UNIDENTIFIED WOMAN: Your Honor, we had submitted a  
9 proposed order. Should we present it?

10 THE COURT: Do you have an original?

11 UNIDENTIFIED WOMAN: Yes.

12 THE COURT: Okay.

13 UNIDENTIFIED MAN: Is it the same as ours or --

14 UNIDENTIFIED WOMAN: Oh, did you submit one too?  
15 I'm sorry. I'll sit down.

16 UNIDENTIFIED MAN: Your Honor, we'll take a look at  
17 these.

18 THE COURT: What?

19 THE CLERK: They didn't offer the exhibits --

20 THE COURT: That's okay.

21 UNIDENTIFIED MAN: We're trying to -- because each  
22 of our proposed orders doesn't fully encompass everything  
23 that you said, so we're trying to figure out a way to get it  
24 into one order. We can either take a couple minutes or if  
25 you --

1 THE COURT: I take it you need an order entered  
2 today if activity is going to start tomorrow?

3 UNIDENTIFIED MAN: We also have a generic -- it's  
4 denied order, if that is going to be acceptable.

5 THE COURT: I mean, yeah, I don't expect that  
6 everything I said is going to be set forth in the order. I  
7 mean, I tried to hit on the major things in my oral decision.

8 UNIDENTIFIED MAN: The generic, that's simpler.  
9 We've got the record.

10 THE COURT: The reason I referenced DNR's position  
11 and Intervenors in their briefs and why I'm following most of  
12 that is, if any party needs some further findings of fact and  
13 conclusions of law and everything else, that's primarily  
14 where it would draw from. So that's the only reason I'm  
15 saying that. If that's not going to be necessary, then it's  
16 no big deal. Anyway...

17 UNIDENTIFIED MAN: That's fine, your Honor. I  
18 don't -- I don't know if there's going to be an appeal or  
19 not, so...

20 THE COURT: I did want to comment, for whatever it's  
21 worth, I appreciated all the material that you all submitted,  
22 particularly the briefs and everything and the authorities.  
23 I mean, obviously, everybody spent a great deal of time on  
24 this within a short period of time. So for whatever that's  
25 worth, I just wanted to compliment everybody for that, and I

1 appreciated everything that was submitted.

2 So anything else today?

3 UNIDENTIFIED MAN: That's it, your Honor. Thank  
4 you.

5 UNIDENTIFIED MAN: Thank you, your Honor.

6 (Whereupon, at 4:20 p.m., the proceeding was  
7 concluded.)

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