



COURTROOM TO HEADRIG
HOW AFRC'S LEGAL PROGRAM SUPPORTS ACTIVE
MANAGEMENT

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Legal Program Overview



Offense

DNR trust mandate
NSO Critical Habitat
O&C Act



Defense

Protect agency tools
Develop legal precedent
Defend timber volume
Defend our members

Offensive Litigation

- DNR TRUST LANDS
- NSO CRITICAL HABITAT
- O&C ACT LITIGATION

2019 Sustainable Harvest Calculation

**STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES
BOARD OF NATURAL RESOURCES**

RESOLUTION NO. 1560

A RESOLUTION establishing the decadal Sustainable Harvest Level for the planning decade for forested State Trust lands in Western Washington and policies and tasks consistent therewith, consistent with the policy on Recalculation of the Sustainable Harvest Level as adopted by the Board of Natural Resources (BOARD) in Resolution 1134 and the Policy for Sustainable Forests (December 2006). The planning decade is fiscal year 2015 through fiscal year 2024.

BE IT RESOLVED BY THE BOARD OF NATURAL RESOURCES, STATE OF WASHINGTON, THAT:

SECTION 1. RCW 79.10.320 directs the state Department of Natural Resources (Department) to periodically adjust acreages to be included in a sustainable yield management program and calculate a sustainable harvest level. RCW 79.10.300(5) defines sustainable harvest level as, “ ... the volume of timber scheduled for sale from state-owned lands during a planning decade as calculated by the Department and approved by the Board.”

Marbled Murrelet Long-Term Conservation Strategy



Single Case Brought on Behalf of a Coalition in Skagit County

TRUST LANDS SUPPORT SCHOOLS AND COUNTY SERVICES

What are state trust lands?

The Department of Natural Resources manages 3 million acres of state trust lands in Washington. State trust lands are distinctive in that they are managed to produce non-tax revenue for specific beneficiaries.

Just before Washington became a state in 1889, Congress passed the Omnibus Enabling Act of 1889, which granted the new state millions of acres of land to support public institutions. Today, these trust lands are an ongoing source of land-based financial support to the various beneficiaries, including public kindergarten through Grade 12 (K-12) schools, state universities, buildings on the capitol campus, and correctional facilities. By far the largest of these federally granted trusts is the Common School trust with approximately 1.8 million acres of forestland, agricultural lands and other properties. Revenue generated on these lands helps fund K-12 school construction projects across the state.

Status of Current Litigation

▶ Thurston County

- Constitutional Writ of Certiorari – Arbitrary and Capricious Agency Action
- Case is limited to a hearing on the Record
- Proceedings stayed pending outcome of *Conservation NW* after we moved to supplement the record

▶ Skagit County

- Breach of Trust/Fiduciary Duty
- State Environmental Policy Act – No meaningful analysis on impacts of MMLTCS and SHC on public services
- Stipulated stay while parties pursue settlement discussions

Deficiencies in the MMLTCS

- ▶ **MMLTCS overprotects in a manner inconsistent with the State's trust obligations, and inconsistent with the vision of the original HCP**
- ▶ **Compared to Private Safe Harbor Agreements:**
 - MMLTCS requires mitigation for take of stands that will not become habitat during the LTCS
 - Mitigation required for harvest of P-stage 0.25 or greater (nearly 55% of required mitigation)
 - Nearly all P-stage 0.25 would not be considered habitat under an SHA
- ▶ **Why didn't DNR push back in negotiations with FWS to ensure its trust obligations were satisfied?**

SHC Problems

- ▶ **Black box model resulting in major reductions in harvest levels**
- ▶ **Inventory data severely deficient**
- ▶ **GSI layers are inaccurate**
- ▶ **No spatial planning**
- ▶ **Discount rate overly conservative**
- ▶ **Growth and yield curves are conservative and not based in fact**

Result: model outputs that do not provide workable harvest units or allow land manager to set a sustainable harvest level

Conservation Northwest Litigation

- ▶ **CNW seeks to overturn 100+ years of practice and precedent**
- ▶ **CNW asserts:**
 - Art. XVI, § 1 of the Washington State Constitution requires the state to hold all public lands in trust for all the people of the state.
 - The Washington Enabling Act of 1889 did not create a trust
- ▶ **AFRC and coalition of beneficiaries intervened to protect the trusts**
- ▶ **Superior court fully dismissed CNW's claims as inconsistent with the trust mandate**
- ▶ **Supreme Court took direct review**
- ▶ **Supreme Court briefing completed July 2021**
- ▶ **Oral argument scheduled for October 2021**

Conservation Northwest Litigation

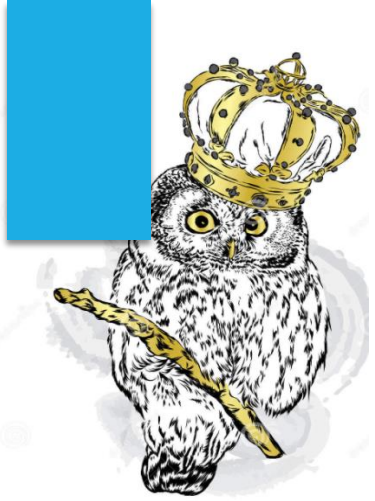
- ▶ **1984 Washington Supreme Court Decision in *Skamania County v. State*:**
 - “The federal land grant trusts were created specifically to benefit certain named beneficiaries.”
 - Such trusts “are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.”
 - “A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests.”



Northern Spotted Owl (NSO)

NSO – Critical Habitat (CH)

1. 1992 CH Rule: 6,887,000 acres
2. 2008 CH Rule: 5,312,300 acres **(-1,574,700)**
3. 2012 CH Rule: 9,577,969 acres **+4,265,669**
4. 2021 CH Rule: 6,105,905 acres **(-3,472,064) ?**
5. 7/2021 Proposal: 9,373,172 acres **+3,267,267 ?**



“To put the agency’s action in perspective, the designated critical habitat area [under the 2012 Rule] is roughly twice the size of the State of New Jersey. . . . [The] designation means that a huge swath of forest lands in the Pacific Northwest will be substantially off-limits for timber harvesting.”

- *Carpenters Indus. Council v. Zinke*, 854 F.3d 1 (D.C. Cir. 2017) (Kavanaugh, J.).

NSO – Recent Developments

- ▶ **April 2020 – Challenge to 2012 CH Rule settled**
 - Settlement: FWS must submit final revised critical habitat rule or withdraw proposed rule by Dec. 23, 2020
- ▶ **August 2020 – Proposed CH Revision Rule issued**
 - 204,653 acres proposed for exclusion; comments invited on additional areas
- ▶ **October 2020 – AFRC comment letter on proposed rule submitted**
 - Increased timber harvest from 1.7M-acre exclusion = ***\$100 million in GDP, \$66 million in worker earnings, 1,286 jobs annually***
 - CH exclusions also benefit forest health
 - Cannot designate non-habitat as CH
 - Designation inconsistent with O&C Act
- ▶ **January 2021 – Final NSO CH Revision Rule issued (-3,472,064 acres)**



NSO – Recent Developments

- ▶ **March 1, 2021 – Delay Rule issued**
- ▶ **March 5, 2021 – Delay Rule Challenge filed**
 - *AFRC, AOCC, Douglas County, Lewis County, Siskiyou County, Skamania County v. Williams (DDC)*
 - Motion for summary judgment filed week later: (1) failure to provide notice & comment; (2) arbitrary & capricious; and (3) violates the O&C Act.
- ▶ **March 23, 2021 - Environmental groups challenged the Exclusion Rule**
- ▶ **April 30, 2021 – Further Delay Rule issued**
- ▶ **July 20, 2021 – Proposed Withdraw Rule issued +3,267,267 → 9,373,172 acres?**
 - FWS proposes to “withdraw” the 2021 Rule & instead exclude ~200K acres from the 2012 designation
 - **Comments due September 20, 2021**



O&C Act Litigation



AFRC cases

- RMP Challenge
- "Swanson III"
- Monument



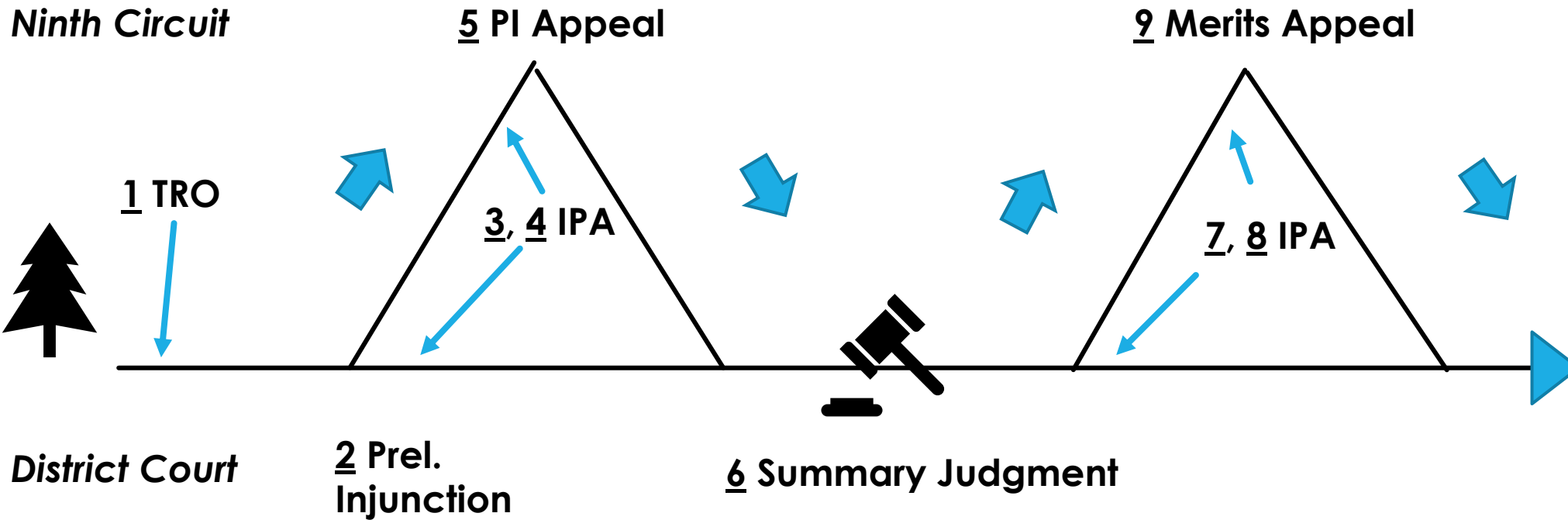
Others

- AOCC
- Murphy Co.

Defensive Litigation

- Protecting Agency Tools
- Species & Habitat
- Forest Plans
- Regulatory Reforms
- Developing Legal Precedent

The Litigation Process



Litigation Overview

United States Forest Service

Region 1

- 38 Timber Sales
- 408 MMBF

Region 4

- 0 Projects

Region 5

- 35 Projects
- 50.5 MMBF

Region 6

- 21 Timber Sales
- 15,568 acres

Defensive Litigation

Protecting Agency Tools

- Road Maintenance CE
- Timber Stand Improvement CE

Road Maintenance CE

- **Ranch Fire Hazard Tree Removal Project (Mendocino NF)**



Timber Stand Improvement CE

- **Tecuya Ridge Shaded Fuel Break Project (Los Padres NF)**
- **Cuddy Valley Forest Health/Fuels Reduction Project (Los Padres NF)**



Defensive Litigation

Species & Habitat

- California Spotted Owl
- Red Tree Vole

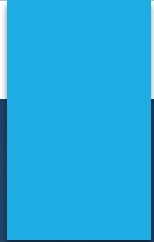


Image source: New York Times

California Spotted Owl



Image source: Eugene Weekly

Red Tree Vole

Defensive Litigation

Forest Plans

- Flathead Revised Forest Plan

Defensive Litigation

Regulatory Reforms

- CEQ NEPA Regulations
- Forest Service NEPA Regulations
- ESA Regulations

Regulatory Reforms

CEQ NEPA Regulations

- CEQ regulations were adopted in July 2020. Five legal challenges were filed in the Western District of Virginia, the Southern District of New York, two cases in the Northern District of California, and the District of Columbia
- AFRC, along with a national industry coalition, intervened in all five cases
- Judge Jones in Western District of Virginia dismissed; Plaintiffs filed an appeal

Regulatory Reforms

USFS NEPA Regulations

- Forest Service adopted NEPA regs issued November 19, 2020
- Lawsuit filed against FS regs January 8 in Virginia
- AFRC, FFRC, and ALC intervened

Regulatory Reforms

ESA Regulations

- Services revised regulations to implement ESA section 4, section 7, and section 4(d)
- Three cases filed by environmental groups in the Northern District of California
- AFRC, FFRC and national industry coalition moved to intervene, which was granted on May 18, 2020.

Proposed Rulemaking

- The Service announced in early June that it would seek to reverse several of the ESA regulations

Developing Legal Precedent

- *United States Forest Serv. v. Cowpasture River Pres. Ass'n*
- *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*
- *Massachusetts Lobstermen's Association v. Gina Raimondo*



Questions?

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