

FILED
SUPREME COURT
STATE OF WASHINGTON
9/3/2021 1:12 PM
BY ERIN L. LENNON
CLERK

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
THE ASSOCIATION OF WASHINGTON BUSINESS

Robert A. Battles
WSBA No. 22163
ASSOCIATION OF
WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-160

Attorneys for Amicus Curiae
Association of Washington Business

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
<u>I. INTRODUCTION</u>	1
<u>II. IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i></u>	2
<u>III. ISSUES OF CONCERN TO <i>AMICUS CURIAE</i></u>	4
<u>IV. STATEMENT OF THE CASE</u>	4
<u>V. ARGUMENT</u>	4
<u>VI. CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page(s)

Cases

County of Skamania v. State, 102 Wn.2d 127 (1984).....1,5,6

Federal Way v. Koenig, 167 Wn.2d 341 (2009)7

In re Rights to Waters of Stranger Creek, 77 Wn.2d 649,
653, 466 P.2d 508 (1970)7

Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597,
115 L. Ed. 2d 720 (1991)7

PUD No. 1 of Okanogan County v. State, 182 Wn.2d 519
(2015)).....1

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930
(2004)7

State v. University of Alaska, 624 P.2d 807, 813-14 (Alaska
1981)6

State ex rel. Ebke v. Board of Educ. Lands & Funds, 154
Neb. 244, 47 N.W.2d 520, 525-26 (1951)6

Other Authorities

Restatement (*Second*) of *Trusts* (1959)5

Restatement (*Third*) of *Trusts* (1990)5

I. INTRODUCTION

For over a century and a half, Washington state's "trust lands" have been carefully managed "working forests" that reflect our state's unique climate and geography. Those working forests have helped the forest products industry play a central role in Washington's economy. Today, the forest products sector is the third-largest manufacturing industry in Washington, providing sustained employment in many rural communities. Because this industry is part of manufacturing it creates jobs. Manufacturing supports additional employment elsewhere in the economy.

Manufacturing has one of the highest job multipliers in any industry. Manufacturing involves an extensive supply chain, supporting jobs and wages among these businesses. Manufacturing workers, along with workers among suppliers, spend a large share of their income on household goods and services in the economy, such as on groceries and restaurants, spurring additional employment in the economy. This means that beyond the direct jobs the forest industry creates additional jobs that add to the vitality of the State.

Washington Department of Natural Resources ("DNR") has the fiduciary responsibility of managing these state trust lands to ensure they provide revenue to the trust beneficiaries. The Washington Supreme Court has confirmed these principles for over a century, including major decisions

in *County of Skamania v. State*, 102 Wn.2d 127 (1984), and *PUD No. 1 of Okanogan County v. State*, 182 Wn.2d 519 (2015).

Conservation Northwest (“CNW”) would have this Court adopt policy arguments and impose their own particular policy prescriptions for forest management in preference to the careful practices followed by the elected stewards that have guided the use of trust lands for, literally, generations. CNW would ignore a century of legal precedent, destroy the trust mandate, end sustained-yield forestry on DNR lands and reduce investments in forest products manufacturing infrastructure.

AWB members rely on judicial precedent because long-standing precedent offers a stable environment that allows for predictability and safe planning. The state agencies that have relied on long-standing precedent regarding these trust also need and want predictability and safe planning. Unless the legislature, through the legislative process, changes the law, businesses as well as every citizen in the state should be able to rely on the law as established by *stare decisis*.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Washington Business (“AWB”) is Washington State’s principal representative of the state’s business community. AWB is the state’s oldest and largest general business membership federation, representing the interests of approximately 7,000 Washington companies

who, in turn, employ over 700,000 employees, approximately one-quarter of the state's workforce. AWB serves as both the state's Chamber of Commerce and the manufacturing and technology association. AWB members are located throughout Washington, represent a broad array of industries, and range from sole proprietors to large, Washington-based corporations that do business across the country and around the world. While its membership includes major employers, 90 percent of AWB members employ fewer than 100 people, and more than half of AWB's members employ fewer than ten. AWB members include all types of employers that conduct business both in and out of state.

AWB members have a vested interest in the outcome of this matter. This Court has recognized that education is one of the paramount duties of the State. To implement that duty, the State relies, in part, on trust lands to fund a portion of those costs. The remainder comes from the state general fund. It is also a fact that Washington state employers pay a higher portion of state taxes than do individuals. By removing access to state trust lands for funding school and other local governments, CNW would shift a disproportionate portion of Washington's tax burden onto Washington business to cover those lost revenues. AWB members rely on the consistent application of laws; when a court chooses to ignore well established precedent it creates uncertainty and confusion. The Appellants would have

this Court ignore precedent without regard for the disruptions it would cause.

III. ISSUES OF CONCERN TO AMICUS CURIAE

AWB will focus primarily on the role of stare decisis as why the trial court's dismissal of the Complaint should be affirmed. AWB members should not be subject to a substantial disruption of the state's tax system because the appellant would have this Court ignore long-standing precedent and impose appellant's policy prescription on elected leaders. AWB respectfully asks this Court to affirm the trial court decision that dismissed the underlying Complaint based on long-standing legal precedent.

IV. STATEMENT OF FACTS

AWB adopts and joins in the Statement of the Case in the Brief of Beneficiary Respondents filed by Wahkiakum County, et al. Intervenor-Defendants/Appellees in this matter

V. ARGUMENT

AWB notes its agreement with Intervenor-Defendants/Appellees arguments set forth in its Brief of Beneficiary Respondents and incorporates those arguments. AWB will focus primarily on the issue of stare decisis.

In *County of Skamania v. State*, 102 Wn.2d 127 (1984), the Washington Supreme Court reiterated what had been the law for almost 100 years, that state trust lands are subject to “real, enforceable trusts.” *Id.* CNW would have this court throw out that decision based on a fictional account of statehood and a willful misreading of the Washington Constitution.

The Washington Supreme Court stated in *Skamania* that the federal grant land trusts “impose upon the State the same fiduciary duties applicable to private trustees”. *Id.* at 132. The Court held that when the State enacts laws governing trust assets, its actions will be subject to fiduciary principles. The Court found that the legislature duties are narrower in such a setting than when the Legislature exercises its police powers. *Id.* at 133.

The duties of a trustee are set forth in the Restatement (*Second*) of *Trusts* (1959) and *Restatement (Third) of Trusts* (1990). *Restatement (Second) of Trusts* §§ 169-185; *Restatement (Third) of Trusts* §§ 170-171, 181, 183-185. The initial duty identified therein is indeed the primary duty: a duty of undivided loyalty to administer the trust on behalf of beneficiaries. *Restatement (Second) of Trusts*, §§ 169-185; *Restatement (Third) of Trusts*, §§ 170-171, 181, 183-185.

Thus, it is unsurprising that our Court – and the courts of sister states facing the same question – have recognized this primary duty in trust land

cases, “undivided loyalty” to the trust beneficiaries. *See Skamania*, 102 Wn.2d at 137 (the state as trustee may not use trust assets to pursue other state goals); *see also State ex rel. Ebke v. Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520, 525-26 (1951) (state may not enact legislation for the benefit of lessees of public school lands at the expense of the beneficiaries of the trust); *State v. University of Alaska*, 624 P.2d 807, 813-14 (Alaska 1981) (state breached duty to administer trust solely in interest of beneficiaries by failing to compensate trust for value of university land included in state park).

The Court in *Skamania* stated that the state violated the duty to manage trust assets prudently by releasing, through the Forest Products Industry Recovery Act (“FPIRA”), valuable contract rights held by DNR on the trusts' behalf. The Court concluded that “no prudent trustee could conclude that the unilateral termination of these contracts was in the best interests of the trusts”. *Skamania*, 102 Wn.2d at 139.

In this case CNW, like the parties who would have benefited through the PPIA in *Skamania*, would have this Court ignore the requirement for “undivided loyalty” to the trust beneficiaries as was established by the original land grants and subsequent legislation.

Doing so is entirely inconsistent with the principles this Court has laid down regarding stare decisis. This Court has been clear in *City of*

Federal Way v. Koenig, 167 Wn.2d 341 (2009) that “the principle of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). The United States Supreme Court went further and stated that “the respect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

Citizens in Washington rely on the principle of stare decisis. To allow this “land grab” by CNW will not only undermine our forest industry but will also arbitrarily diminish the income from the trust lands the government agencies (e.g. education) have relied upon for several decades, forcing the State and local jurisdictions to change the way tax revenues are apportioned for no reason other than CNW’s disagreement with the practices followed by Washington’s elected stewards over trust lands. Doing so will indeed impair the actual and perceived integrity of the judicial process, of which the United States Supreme Court was so rightly concerned.

The fiduciary duty of DNR is to ensure that it will provide revenue to beneficiaries and sustain certain fiber supply from state timberlands. DNR timberlands are among the most tightly and sustainably regulated in the world; all western Washington forest lands are covered by the State Lands Habitat Conservation Plan, which has set aside large reserves for sensitive species.

The raid on the land trusts would abandon Washington's working forests with complete disregard for forest health, wildfire mitigation risk, and the economy of our rural communities.

VI. CONCLUSION

For the reasons stated above, AWB urges this Court to affirm the trial court's dismissal of the Complaint.

RESPECTFULLY SUBMITTED this 3rd day of September, 2021.



Robert A. Battles
WSBA No. 22163
ASSOCIATION OF
WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-1600

*Attorneys for Amicus Curiae
Association of Washington Business*

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 3, 2021, I served a true and correct copy of the foregoing document on counsel of record, by sending the same via Email and electronic notification via the Secure eFiling Portal for the Washington State Appellate Courts to the following:

Wyatt F. Golding
Brian Gruber
Ziontz Chestnut
2101 Fourth Ave, Suite 1230
Seattle, WA 98121
wgolding@ziontzchestnut.com
bgruber@ziontzchestnut.com
abrady@ziontzchestnut.com
lbartholet@ziontzchestnut.com

Peter Goldman
Washington Forest Law Center
4132 California Ave SW
Seattle, WA 98116
pgoldman@wflc.org

Larson E. Fite
American Forest Resource
Council
lfite@amforest.org

Patricia H. O'Brien
Martha F. Wehling
Office of the Attorney General of
Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
patricia.obrien@atg.wa.gov
marth.wehling@atg.wa.gov
RESOLyEF@atg.wa.gov

Elaine L. Spencer
David O. Bechtold
Northwest Resource Law PLLC
espencer@nwresource.com
dbechtold@nwresource.com

Christopher T. Wion
Summit Law Group
chrisw@summitlaw.com

DATED: September 3, 2021.


ROBERT A. BATTLES WSBA # 22163

ASSOCIATION OF WASHINGTON BUSINESS

September 03, 2021 - 1:12 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99183-9
Appellate Court Case Title: Conservation Northwest et al. v. Commissioner of Public Lands et al.
Superior Court Case Number: 20-2-01051-8

The following documents have been uploaded:

- 991839_Briefs_20210903130315SC408495_6554.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was 99183-9 AWB Amicus Brief.pdf
- 991839_Motion_20210903130315SC408495_7532.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 99183-9 AWB Motion to File Amicus.pdf

A copy of the uploaded files will be sent to:

- Patricia.OBrien@atg.wa.gov
- RESOlyEF@atg.wa.gov
- chrisw@summitlaw.com
- dbechtold@nwresourcelaw.com
- deniseb@summitlaw.com
- espencer@nwresourcelaw.com
- martha.wehling@atg.wa.gov
- msullivan@corrchronin.com
- nbishop@corrchronin.com
- pgoldman@wflc.org
- terry.pruit@ATG.WA.GOV
- tkaps@wflc.org
- wgolding@ziontchestnut.com
- will.honea@gmail.com
- willh@co.skagit.wa.us

Comments:

Attached please find the following documents that have been filed with the Supreme Court in the above matter. ❖
MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE ASSOCIATION OF WASHINGTON
BUSINESS ❖ BRIEF OF AMICUS CURIAE THE ASSOCIATION OF WASHINGTON BUSINESS Please let me
know if you have any questions.

Sender Name: Robert Battles - Email: bobb@awb.org
Address:
1414 CHERRY ST SE
OLYMPIA, WA, 98501-2341
Phone: 360-943-1600

Note: The Filing Id is 20210903130315SC408495