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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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CONSERVATION NORTHWEST, et al.,  
Appellants,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, et  
al.,  
Respondents,

and

WAHKIAKUM COUNTY, et al.,  
Intervenor-Respondents.

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**BRIEF OF AMICUS CURIAE**  
**WASHINGTON STATE ASSOCIATION OF COUNTIES**

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## I. INTRODUCTION

Of Washington’s 22 million acres of forest, the State holds in trust about 2.1 million for public schools, universities, timberland counties, and other beneficiaries designated by state and federal statutes.<sup>1</sup> In the last 25 years, those “State Trust Lands” have generated over \$4.3 billion in revenue for the beneficiaries.<sup>2</sup> Counties and other public entities critically rely on that income to fund essential services like firefighting, health care, and education.

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<sup>1</sup> Wash. Dep’t of Nat. Res., *Trust Lands Performance Assessment Project Legislative Report 2020*, App’x B., at 9–10 (Jan. 2021), [https://www.dnr.wa.gov/publications/em\\_tlpa\\_lege\\_report\\_complete.pdf](https://www.dnr.wa.gov/publications/em_tlpa_lege_report_complete.pdf) (“*Legislative Report*”); U.S. Forest Serv., *Resource Monitoring and Assessment, Washington*, <https://www.fs.fed.us/pnw/rma/fia-topics/state-stats/Washington/index.php#:~:text=About%202022%20million%20acres%20of,Coast%20Range%2C%20and%20Western%20Cascades> (last visited Sept. 2, 2021).

<sup>2</sup> *Legislative Report* at 17. The economic and other data cited herein represent “legislative facts” of which this Court may take judicial notice—that is, “social, economic, and scientific facts that simply supply premises in the process of legal reasoning.” *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (quotation marks and citation omitted).



Appellants Conservation Northwest, et al. (collectively, “CNW”), would have this Court repudiate the State’s trust obligations to those beneficiaries by overruling a core principle it articulated nearly 40 years ago: that Congress created “federal land grant trusts . . . specifically to benefit certain named beneficiaries,” which “impose upon the state the same fiduciary duties applicable to private trustees.” *Skamania Cnty. v. State*, 102 Wn.2d 127, 132, 685 P.2d 576 (1984). That *Skamania* principle is not only precedential but correct, for the reasons explained by Respondents Commissioner Hilary Franz, et al. (collectively, “the Commissioner”) and Intervenor-Respondents Wahkiakum County, et al. (collectively, “Wahkiakum”). *See* Comm’r Br. at 17–29; Wahkiakum Br. at 14–29. Offering little more than a law review article’s novel reading of Article XVI of the Washington Constitution, CNW asks the Court to overrule *Skamania*, dissolve the trusts, and command the Department of Natural

Resources (“DNR”) to manage the State Trust Lands according to an amorphous “public interest” standard. Appellants’ Opening Br. (“CNW Br.”) at 1, 19 n.3.

Even setting aside the harmful practical consequences of CNW’s proposal to transform forestland management by constitutionalizing state environmental policy, its argument is legally flawed for multiple reasons. This amicus brief focuses on two. First, CNW repeatedly conflates the two distinct types of State Trust Lands: The “federally granted lands” are 1.5 million acres of forestland Congress granted Washington upon statehood for common schools and other beneficiaries.<sup>3</sup> In contrast, the “state forestlands” are 590,000 acres that timberland counties deeded to the State in the 1920s and 1930s, which are now held in trust for those same counties.<sup>4</sup> The federally granted lands’ trusts arise from both Article XVI of the state

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<sup>3</sup> *Legislative Report* at 9–10; AGO 96-11 at 7.

<sup>4</sup> *Legislative Report* at 10; AGO 96-11 at 58–59.

constitution and a federal statute, the Omnibus Enabling Act of 1889, 25 Stat. 676 (“Enabling Act”). In contrast, the state forestlands’ trusts arise from a state statute, RCW 79.22.040. Thus, even if CNW’s quixotic readings of Article XVI and the Enabling Act were right (and they are not), it would affect the federally granted lands only, and not implicate the state forestlands at all.

Second, CNW asks this Court to effectively overrule *Skamania* without addressing any of the fundamental considerations of *stare decisis*. Those principles include (1) the “super-strong” weight accorded statutory precedents, including *Skamania*’s interpretation of the Enabling Act, a federal statute; (2) *Skamania*’s consistency with the decisions of every other court to consider whether the Enabling Act creates common-law trust duties; and (3) the significant reliance interests overruling *Skamania* would upset by depriving beneficiaries of nearly \$100 million in annual revenue, damaging rural economies, and

throwing DNR forest management practices into chaos. Those factors counsel in favor of adhering to *Skamania* and affirming the trial court.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association of Counties (“WSAC”) is a voluntary, nonprofit association serving all of Washington’s 39 counties. Its members include elected county commissioners, councilmembers, and executives. Created in 1906, WSAC provides a variety of services to its members, including advocacy. WSAC also serves as an umbrella for affiliate organizations representing public health officials, emergency managers, and others.

This appeal concerns the legal status of 2.1 million of acres of forestlands long held in trust by the State for designated public beneficiaries. The State holds more than 25% of those acres—the state forestlands—in trust for 21 of WSAC’s member counties, which together typically receive

between \$50 and \$75 million in revenue annually.<sup>5</sup> As the collective voice for those beneficiary counties, WSAC has an interest in ensuring they—and junior taxing entities like school districts that the counties support—receive the continuous stream of income from trust assets to which they are legally entitled.

### **III. STATEMENT OF FACTS**

#### **A. The Federally Granted Lands**

The largest share of the State Trust Lands—1.5 million acres—was granted to Washington by the federal government at statehood in 1889.<sup>6</sup> The Enabling Act laid the foundation for statehood of Montana, North Dakota, South Dakota, and Washington, transferring to them millions of

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<sup>5</sup> The beneficiary counties are: Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, King, Kitsap, Kittitas, Klickitat, Lewis, Mason, Okanogan, Pacific, Pierce, Skagit, Skamania, Snohomish, Stevens, Thurston, Wahkiakum, and Whatcom Counties.

<sup>6</sup> AGO 96-11 at 7; DNR, *Policy for Sustainable Forests* 12 (Dec. 2006), [https://www.dnr.wa.gov/publications/lm\\_psf\\_policy\\_sustainable\\_forests.pdf](https://www.dnr.wa.gov/publications/lm_psf_policy_sustainable_forests.pdf) (“*Sustainable Forests*”).

acres of federal land for the support of “common schools” and other public purposes, and imposing conditions on how the lands must be “held, appropriated, and disposed of.” 25 Stat. at 681. After ratifying a constitution accepting the Enabling Act’s terms and conditions, Washington entered the union as the 42nd state. *See Romine v. State*, 7 Wash. 215, 218 (1893).

This Court, and “[e]very [other] court that has considered the issue,” has determined that the Enabling Act established “real, enforceable trusts” for the benefit of Washington’s common schools and the other “named beneficiaries.” *Skamania*, 102 Wn.2d at 132; *see also United States v. McLain*, No. CR 08-138-BLG-RFC, 2011 WL 611875, at \*2 (D. Mont. Feb. 11, 2011); *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968), *aff’d*, 435 F.2d 561 (9th Cir. 1970) (per curiam); *Montanans for Responsible Use of the Sch. Trust v. Darkenwald*, 328 Mont. 105, 108, 119 P.3d 27 (2005);

*Kanaly v. State*, 368 N.W.2d 819, 823 (S.D. 1985); *State v. Bd. of Univ. & Sch. Lands*, 65 N.D. 687, 262 N.W. 60, 66 (1935). Nearly 100 years ago, the Washington Legislature recognized that the federally granted lands were “held in trust for the support of the common schools” and other named beneficiaries. Laws of 1927, ch. 255, § 1 (recodified as amended at RCW 79.02.010(15)). Common-law trust duties bind DNR in managing the federally granted lands, including to act with “undivided loyalty” to the beneficiaries and to manage trust assets “prudently.” *Skamania*, 102 Wn.2d at 134, 138. Article XVI also restricts the State’s authority with respect to the sale or disposition of federally granted lands, such as by requiring it to seek full market value. *Id.* at 139.

In 2019, the federally granted lands generated over \$94 million in revenue for the trust beneficiaries, about two-thirds of which went to the common school construction

fund.<sup>7</sup> The remaining revenue went to state universities (\$13.9 million), state prisons and Western State Hospital (\$2.7 million), and construction of government buildings at the capitol campus (\$9.8 million).<sup>8</sup> DNR retains about 30 percent of the trust revenue to fund its management of the federally granted lands.<sup>9</sup>

While timberland counties do not receive revenue directly from the federally granted lands, they indirectly benefit from the trusts in several ways. First, 80 percent of all Washington timber excise taxes collected goes to the county where the timber was harvested. *See* RCW 84.33.041, .046, .051(1), .081. The tax applies to any timber harvested, regardless of whether the land is private or

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<sup>7</sup> DNR, *2019 Annual Report* 12, [https://www.dnr.wa.gov/publications/em\\_annual\\_report\\_2019.pdf](https://www.dnr.wa.gov/publications/em_annual_report_2019.pdf) (“*Annual Report*”).

<sup>8</sup> *Id.* at 12–19.

<sup>9</sup> *Id.* at 10–11; *see also* RCW 79.64.020, .030.



public.<sup>10</sup> In 2020, counties collected nearly \$8.6 million in timber excise taxes on public lands alone,<sup>11</sup> the majority of which almost certainly came from federally granted lands.<sup>12</sup>

Second, the federally granted lands help sustain timberland counties' economies, generating well-paying jobs and providing a foundation for the local tax base.<sup>13</sup> In

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<sup>10</sup> DNR, *Understanding Washington's Timber Excise Tax* (Nov. 2020), <https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/ForestTax/TimberExciseTax.pdf>.

<sup>11</sup> DNR, *Forest Tax – Harvest Statistics, 2020 Final Public Harvest Stats*, <https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/ForestTax/harvest/PUYRSMY-QA2020.xlsx> (last visited Sept. 2, 2021). The amount of timber excise taxes collected is ascertainable by multiplying the total value of the harvest (\$215,971,321.10) by 0.04 (for the 4 percent tax rate allocated to the county).

<sup>12</sup> Because 80 percent of the public land timber harvest comes from state-owned lands, of which the federally granted lands represent about 78 percent, it is reasonable to assume that most of the public land timber harvest came from federally granted lands. See DNR, *2017 Washington Timber Harvest Report* (Aug. 2018), at iv–v, [https://www.dnr.wa.gov/publications/em\\_obe\\_wa\\_timber\\_harvest\\_2017\\_final3.pdf](https://www.dnr.wa.gov/publications/em_obe_wa_timber_harvest_2017_final3.pdf); *Legislative Report* at 9–10.

<sup>13</sup> See, e.g., CR 686.

2017, the forest products industry accounted for more than 100,000 jobs and \$5.5 billion in wages in Washington State. The industry is especially important in rural western counties like Clallam (1,968 jobs; population 77,155), Cowlitz (9,314 jobs; population 110,730), and Grays Harbor (4,398 jobs; population 75,636).<sup>14</sup> Jobs in the timber industry generally pay better than others requiring equivalent education or training.<sup>15</sup> In this way, the federally

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<sup>14</sup> Mason, Bruce & Girard, Inc., *Contribution of Working Forests to the Washington State Economy: 2017*, at 9 (Aug. 2018), <https://data.workingforests.org/doc/MB&G%20Working%20Forest%20Industry%20Econ%20Impacts%202017.pdf>; U.S. Census Bur., Quickfacts, <https://www.census.gov/quickfacts/> (last visited Sept. 2, 2021).

<sup>15</sup> See, e.g., Bur. of Labor Statistics, Occupational Employment and Wages, May 2020, Foresters, Mar. 31, 2021, <https://www.bls.gov/oes/current/oes191032.htm> (average wage for foresters is \$31.73 per hour); see also Mason, Bruce & Girard, Inc., et al., *Financial and Economic Impacts of Marbled Murrelet Conservation Strategies on Lands Managed by the Washington Department of Natural Resources*, at 78, 86 (June 30, 2021), <https://www.wsac.org/wp-content/uploads/2021/08/Final-MMEIS-Report.pdf> (from

granted lands not only earn income for schools and other beneficiaries, but also help sustain the tax base in Western Washington's rural counties.

## **B. The State Forestlands**

The second category of State Trust Lands are the state forestlands (previously known as the “forest board transfer lands”), which are held in trust by virtue of state statute. Privately owned in the 1920s, these forests had largely been logged over, burned, and abandoned.<sup>16</sup> Timberland counties foreclosed on the lands for property tax delinquency but lacked the resources to manage them.<sup>17</sup> The Legislature had the counties deed the lands to the State to manage and hold

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2015 to 2019 in Washington, average wages and benefits were \$86,529 per worker in sawmill sector and \$115,456 in pulp and paper sector).

<sup>16</sup> AGO 96-11 at 59; DNR, Forest and Trust Lands, <https://www.dnr.wa.gov/managed-lands/forest-and-trust-lands> (last visited Sept. 2, 2021).

<sup>17</sup> DNR, History of state lands managed by DNR, <https://mrsc.org/getmedia/36b324aa-1df9-4e71-8193-f9405c810b65/w3TrustLandhistory.aspx> (last visited Sept. 2, 2021).

for them “in trust.” RCW 79.22.040.<sup>18</sup> Thus, the statute requires “that proceeds from the management of these lands go to the grantor counties, after deducting administrative expenses.” *Skamania*, 102 Wn.2d at 129. Specifically, DNR retains 25% of the proceeds from the state forestlands, while the timberland counties receive 75% of revenue. RCW 79.64.100, 110(1)(a). Junior taxing districts generally receive the lion’s share of county trust revenue, which goes to support essential district services like schools, fire protection, and hospitals.<sup>19</sup> In this way, timberland school

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<sup>18</sup> The state forestlands also include approximately 80,000 acres acquired by the State through either purchase or gift. *Sustainable Forests* at 13. Although these “purchase lands” are not technically held in trust, 25% of the revenue derived from them goes to the counties in which they are located. RCW 79.22.050; AGO 96-11 at 60; *Legislative Report* at 11. This brief uses the term “state forestlands” to refer to the 590,000 acres of “purchase lands” and “transfer lands” collectively.

<sup>19</sup> DNR, Beneficiaries, <https://www.dnr.wa.gov/beneficiaries> (last visited Sept. 2, 2021); *Legislative Report* at 10; *see also* RCW 79.64.110(1)(a)(ii) (moneys from state forestlands “are to be paid, distributed, and prorated . . . to the various funds

districts depend on trust revenue from *both* the state forestlands and the federally granted lands—which together help meet the State’s “paramount duty . . . to make ample provision for the education of all children within its borders.” Const. art. IX, § 1; *see also McCleary v. State*, 173 Wn.2d 477, 528, 269 P.3d 227 (2012) (“[P]roperty-poor districts, even if they maximize their local levy capacity, will often fall short of funding a constitutionally adequate education.”).

Since 2012, the state forestlands have generated over \$600 million in revenue for the timberland counties, as Figure 1 shows below.

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in the same manner as general taxes are paid and distributed”).

**Fig. 1: Revenue from State Forestlands (2012–21)<sup>20</sup>**

County	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021 Jan-June
Clallam	4,738,336	5,643,329	8,487,731	3,376,506	7,938,764	6,543,420	2,987,754	6,611,511	5,617,183	2,732,397
Clark	8,528,782	7,191,261	6,388,518	5,846,269	4,791,957	5,192,493	1,486,670	2,577,304	2,605,749	2,858,731
Cowlitz	1,557,816	1,598,498	1,067,106	4,025,043	1,358,909	1,358,770	1,417,984	68,780	1,706,749	456,825
Grays Harbor	2,168,671	1,075,212	875,687	1,245,311	2,838,170	1,881,541	1,151,469	1,608,663	2,503,031	501,990
Jefferson	740,481	661,568	1,085,477	2,906,961	1,603,428	1,085,544	2,573,648	1,632,243	3,495,847	190,772
King	1,112,153	741,392	2,818,269	952,755	2,397,790	905,021	1,245,122	4,708,952	1,613,241	3,947,561
Kitsap	877,589	743,958	293,314	851,397	824,969	1,130,540	556,973	1,566,788	444,966	269,202
Klickitat	559,355	289,623	215,737	352,380	26,797	25,551	10,947	518	(891)	1,709,037
Lewis	3,439,911	4,280,541	8,677,045	4,053,711	5,416,025	5,411,157	7,666,065	12,440,080	12,926,965	3,307,899
Mason	2,024,430	1,337,166	3,067,093	8,005,336	3,621,960	2,810,189	6,970,807	4,512,364	2,476,195	4,274,899
Pacific	441,369	3,446,724	1,267,286	1,227,526	2,653,344	1,387,737	3,505,380	4,651,968	1,511,182	1,032,673
Pierce	178,426	121,558	222,815	32,691	335,489	437,463	1,307,281	767,430	0	0
Skagit	9,093,422	5,976,604	7,452,783	7,425,535	8,592,232	14,533,379	15,534,103	11,695,390	8,582,680	5,139,038
Skamania	926,532	1,367,876	2,415,852	1,234,445	2,131,536	1,566,271	2,930,483	4,148,517	1,215,912	697,109
Snohomish	5,682,380	11,786,058	9,251,851	7,256,233	5,652,325	7,678,567	6,178,109	7,627,248	8,056,729	4,647,558
Stevens	64,654	69,322	70,725	63,533	94,918	90,768	110,709	96,010	103,852	27,254
Thurston	1,660,728	5,017,407	2,999,025	4,368,240	8,747,144	2,947,101	3,065,897	5,787,365	9,220,953	4,916,251
Wahkiakum	1,956,441	1,742,003	1,631,697	802,706	2,026,441	1,443,199	3,146,937	2,583,841	1,374,372	935,468
Whatcom	4,468,281	3,763,694	2,178,129	4,022,292	2,061,161	1,481,660	3,077,070	4,279,585	3,872,826	404,950
<b>Totals</b>	<b>\$71,520,698</b>	<b>\$50,219,757</b>	<b>\$56,853,794</b>	<b>\$60,466,140</b>	<b>\$58,048,870</b>	<b>\$63,113,359</b>	<b>\$ 57,910,371</b>	<b>\$ 77,364,557</b>	<b>\$ 67,327,541</b>	<b>\$38,049,614</b>

This trust revenue is critical to the timberland counties, their junior taxing districts, and the rural communities they serve. For example, the \$4.1 million Skamania County received in trust revenue in 2019 comprised 20 percent of its general expense budget, funding services such as law enforcement, courts, senior services,

<sup>20</sup> DNR, Table 1-10 Year Revenue History (Calendar Years), July 20, 2021, [https://www.dnr.wa.gov/publications/fm\\_county\\_income\\_table.pdf](https://www.dnr.wa.gov/publications/fm_county_income_table.pdf) (“DNR Revenue Table”).

food banks, and domestic violence prevention.<sup>21</sup> Clallam County's \$6.6 million in 2019 trust revenue represented almost 13 percent of its general expense fund.<sup>22</sup> Wahkiakum County estimates that the trust revenue it has received in the past decade—\$17.6 million in total—has accounted for 25% of its annual budget.<sup>23</sup> And, in the same period, Skamania County's \$18.6 million in trust revenue has represented approximately 17% of its annual budget.<sup>24</sup>

When trust revenues dip, it can cause painful cuts to vital local government services. For example, when in 2017 Mason County received nearly \$800,000 less trust revenue than in 2016, it was forced to lay off county employees.<sup>25</sup>

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<sup>21</sup> *Legislative Report* at 16.

<sup>22</sup> DNR Revenue Table; Clallam County 2019 General Fund Budget, [http://www.clallam.net/bocc/documents/BudgetSum\\_GF\\_017.pdf](http://www.clallam.net/bocc/documents/BudgetSum_GF_017.pdf) (last visited Sept. 2, 2021) (showing total general fund expenditures of \$42.5 million in 2019).

<sup>23</sup> CP 720; DNR Revenue Table.

<sup>24</sup> CP 727; DNR Revenue Table.

<sup>25</sup> CP 723.

### **C. DNR’s Management of the State Trust Lands**

Although the State Trust Lands consist of two distinct trusts, DNR manages both types of state trust lands under the same statutory directives, *see* ch. 79.10 RCW, the same laws of general applicability—including the Endangered Species Act, 16 U.S.C. §§ 1531–44, and the Forest Practices Act, ch. 76.09 RCW—and the same Board of Natural Resources policies, all while bound by its common-law fiduciary obligations.<sup>26</sup> In addition to DNR’s trust duties, state law requires it to manage all forests under its jurisdiction “on a sustained yield basis,” RCW 79.10.320, which means “to provide harvesting on a continuing basis without major prolonged curtailment or cessation of harvest,” RCW 79.10.310. To that end, DNR policy promotes the “continual flow of economic, ecological and social benefits into the foreseeable future, including revenue

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<sup>26</sup> DNR, Forest and Trust Lands, <https://www.dnr.wa.gov/managed-lands/forest-and-trust-lands> (last visited Sept. 2, 2021).



to support our public schools and institutions, creation of wildlife habitat, clean air and water, and outdoor recreation.”<sup>27</sup>

To maintain a healthy ecosystem in perpetuity, one of DNR’s “primary fiduciary responsibilities is to protect trust assets from catastrophic loss due to wildfire.”<sup>28</sup> With unprecedented wildfires devastating northwest forests in recent years,<sup>29</sup> in 2019 DNR developed a strategic plan to reduce wildfire hazards.<sup>30</sup> Central to this program is “active management,” such as using strategic thinning and

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<sup>27</sup> DNR, Policy for Sustainable Forests on State Trust Lands, <https://www.dnr.wa.gov/programs-and-services/forest-resources/habitat-conservation/policy-sustainable-forests-state-trust> (last visited Sept. 2, 2021).

<sup>28</sup> *Sustainable Forests* at 32.

<sup>29</sup> E.g., *Unprecedented Pacific Northwest fires burn hundreds of homes*, L.A. Times, Sept. 9, 2020, <https://www.latimes.com/world-nation/story/2020-09-09/unprecedented-pacific-northwest-fires-burn-hundreds-of-homes>.

<sup>30</sup> DNR, *Washington State Wildland Fire Protection 10-Year Strategic Plan* at 26 (2d ed. Aug. 2019), [https://www.dnr.wa.gov/publications/rp\\_wildfire\\_strategic\\_plan.pdf](https://www.dnr.wa.gov/publications/rp_wildfire_strategic_plan.pdf).

prescribed burns to remove dead, dry trees that make dangerous fuel for fires.<sup>31</sup>

Active management also addresses a primary cause of Washington’s worsening wildfires—climate change—by facilitating sequestration of carbon.<sup>32</sup> Trees remove carbon dioxide from the atmosphere and store it in their wood.<sup>33</sup> The greenhouse gas stays trapped in wood products made from harvested trees.<sup>34</sup> But when unhealthy trees rot and die, carbon dioxide is released back into the air, driving climate

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<sup>31</sup> Beth Rands, U.S. Forest Service, *Making Forests Stronger through Active Management* (Feb. 22, 2019), <https://www.fs.usda.gov/features/making-forests-stronger-through-active-management>; see also RCW 79.10.520, .530.

<sup>32</sup> Ctr. for Energy & Climate Solutions, Wildfires and Climate Change, <https://www.c2es.org/content/wildfires-and-climate-change/> (last visited Sept. 2, 2021).

<sup>33</sup> Jean-Francois Bastin et al., *The global tree restoration potential*, *Science*, July 5, 2019, <https://science.sciencemag.org/content/365/6448/76>.

<sup>34</sup> U.S. Forest Serv., Carbon Sequestration, <https://www.fs.fed.us/ecosystems/services/carbon.shtml> (last visited Sept. 2, 2021).

change.<sup>35</sup> When wildfires consume those trees, the combustion exacerbates emissions of carbon dioxide, methane and nitrous oxide, creating a “climate feedback loop.”<sup>36</sup> Active forest management by DNR—which is funded predominantly by the agency’s share of revenue from state trust lands—helps break that vicious cycle.<sup>37</sup>

#### IV. ARGUMENT

##### A. The State Forestlands Are Not At Issue

CNW largely ignores the distinction between the federally granted lands and the state forestlands, confusingly using the term “State lands” to refer collectively to all State Trust Lands. *See* CNW Br. at 7. Painting with

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<sup>35</sup> Craig Welch, *The grand old trees of the world are dying, leaving forests younger and shorter*, Nat’l Geographic, May 28, 2020, <https://www.nationalgeographic.com/science/article/grand-old-trees-are-dying-leaving-forests-younger-shorter>.

<sup>36</sup> World Resources Institute, *6 Graphics Explain the Climate Feedback Loop Fueling US Fires*, Sept. 16, 2020, <https://www.wri.org/insights/6-graphics-explain-climate-feedback-loop-fueling-us-fires>.

<sup>37</sup> *Annual Report* at 4.

that broad brush, CNW asks this Court to hold that all “State lands are held in trust for the public interest of all the citizens of Washington—not in a private trust.” CNW Br. at 50. Easily lost in CNW’s arguments concerning the Enabling Act and Article XVI is that they do not apply at all to the state forestlands’ trusts, which are creatures of state statute. Although CNW’s Reply appears to concede that point, this Court should make clear that the state forestlands’ trust status remains unchanged.

**1. Article XVI does not apply to the state forestlands**

CNW’s position is that Article XVI effectively places the State Trust Lands in a “public trust ‘for all the people,’” CNW Br. at 11, rather than a common-law trust for the beneficiaries specified in the Enabling Act. That argument directly contradicts *Skamania*, which held “that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.” 102 Wn. at 132. For the reasons explained below, and in the

Commissioner's and Wahkiakum's briefs, this Court should adhere to *Skamania*.

But should this Court decide to overrule it and dissolve the federally granted lands' trusts, it would not affect the state forestlands. That is so because Article XVI applies only to the lands granted by the United States. *See, e.g.,* Const. art. XVI, § 1 (referring specifically to “lands which the state holds by grant from the United States”); Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 224 (2d ed. 2013) (“[Article XVI, s]ection 1 deals with state lands that, under federal land grants, were given for specific beneficiaries.”). The state forestlands were granted not by the federal government, but by the very counties for which the lands are now held in trust. AGO 96-11 at 59. These lands therefore lie outside the ambit of Article XVI. They remain in trust for the county beneficiaries as a matter of state statutory law. *See* RCW 79.22.010, .040. Even if this Court were to reinterpret

Article XVI and the Enabling Act to dissolve the federally granted lands' trusts, it should specify that the state forestlands' trusts remain valid and unaltered.

**2. CNW concedes that the state forestlands are not at issue**

Although CNW generally ignores the distinction between the federally granted lands and the state forestlands, it does not contend that Article XVI somehow vitiates the state forestlands' trusts or renders their statutory trust instrument unconstitutional. To the contrary, CNW concedes that its novel interpretation of Article XVI does *not* "directly" implicate the state forestlands (or "county lands," as CNW calls them). *See* CNW Br. at 49 ("[T]he constitution only directly determines the management of lands granted to the State at Statehood."); Reply at 49 ("Timber sale revenues from county lands are most directly matters of statute, not the interpretation of art. XVI, § 1 at issue in this case."). The Commissioner and Wahkiakum both agree that "[t]he trust governing the state forestlands

exists independently of the Enabling Act, article XVI, and the statutes implementing the federal land grant trusts.” Comm’r Br. at 34; *accord* Wahkiakum Br. at 47. In other words, it should be undisputed that the state forestlands’ trusts are not at issue.

Yet CNW suggests in passing that the Legislature would have to “amend[] this [state forestlands’ trust] statute . . . in response to any ruling from this Court” reinterpreting Article XVI to revoke the federally granted lands’ trust. CNW Br. at 49. CNW mistakenly assumes that DNR’s management of the state forestlands is tied “to the same management standard [as the federally granted lands] by statute, RCW 79.22.040.” *Id.*; *see also* Reply at 8. That assertion simply misreads the statute, which requires land deeded by a county to the State pursuant to RCW 79.22.010 to “be held in trust and administered and protected by the department in the same manner as other *state forestlands*.” RCW 79.22.040 (emphasis added). The term “state

forestlands” means “lands acquired under RCW 79.22.010, 79.22.040, and 79.22.020,” RCW 79.02.010(14)—that is, the very definition this brief uses. In contrast, the term “state lands” means “lands held in trust for the support of the common schools” and the other Enabling Act beneficiaries, RCW 79.02.010(15)(a)–(g)—in other words, the federally granted lands. CNW is thus incorrect that DNR must “manage the county ‘state forest lands’ in the same manner as DNR manages the ‘state lands,’” and that Article XVI somehow “indirectly impacts” the state forestlands. Reply at 8.

Even if it were sound, CNW’s reimagined reading of Article XVI does not implicate the state forestlands, which are held in trust independently of the federally granted lands.

**B. *Stare Decisis* Weighs Against Overruling *Skamania***

This Court has long understood the Enabling Act “as creating an enforceable trust with concomitant fiduciary



duties on the State.” *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 182 Wn.2d 519, 547, 342 P.3d 308 (2015) (citing *Skamania*, 102 Wn.2d at 132–33). The only way for this Court to adopt CNW’s theory that “the Enabling Act did not create a trust of any kind,” CNW Br. at 29, is to overrule *Skamania*’s statement that the “federal land grant trusts were created specifically to benefit certain named beneficiaries,” 102 Wn.2d at 132. This reversal would run roughshod over the doctrine of *stare decisis*, which “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Specifically, three *stare decisis* principles counsel against overruling *Skamania*: (1) the doctrine’s special force in the statutory context; (2) courts’ reluctance to split with other courts over the interpretation of a federal statute; and (3) the strong reliance interests in doctrinal continuity.

**1. Statutory rulings demand “super-strong”  
*stare decisis***

Most straightforwardly, *Skamania*'s construction of the Enabling Act to impose private trust obligations on the State has enhanced precedential value because it is a matter of statutory interpretation. “[C]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.” *State v. Blake*, 197 Wn.2d 170, 190–91, 481 P.3d 521 (2021) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, 109 S. Ct. 2363 (1989)); *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1364 (1988) (noting “the super-strong presumption against overruling statutory precedents”). Not only this Court, but federal courts and the highest courts of the three other states admitted to the union by the Enabling Act have uniformly interpreted the statute to create

common-law trusts. And though Congress has amended the Enabling Act many times, it has retained the operative trust language. *See* *Wahkiakum Br.* at 17–19. Congress “is presumed to be aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Blake*, 197 Wn.2d at 190 (quotation marks and citations omitted).

**2. Overruling *Skamania* would create a split with other courts**

Second, adopting CNW’s position would not just entail overruling this Court’s own precedents, but also create a split over the construction of the Enabling Act with at least six other courts. In deciding whether to abandon a precedent, courts consider its “consistency with related decisions.” *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499, 203 L. Ed. 2d 768 (2019). Multiple federal district courts, the Ninth Circuit, and the supreme courts of

Montana, North Dakota, and South Dakota have all concluded, like *Skamania*, that the Enabling Act created real, enforceable trusts on behalf of the designated beneficiaries. *Supra* at 7–8. To be sure, absent a U.S. Supreme Court decision directly on point,<sup>38</sup> this Court has an independent authority to interpret federal statutes, notwithstanding the decisions of other state courts of last resort or lower federal courts. *See Home Ins. Co. of New York v. N. Pac. Ry. Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943). But such decisions are still entitled to “great weight,” *id.*, particularly when “[c]ourts throughout the country—both state and federal—have reached a consensus,” *W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207

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<sup>38</sup> *But cf. Montana v. Rice*, 204 U.S. 291, 295 (1907) (“The United States granted to the state of Montana 100,000 acres of the public lands for a normal school, to be *held*, appropriated, and disposed of for such purpose, in such manner as the legislature should provide.”) (emphasis added).

(2014). CNW has given this Court no sound reason to suddenly depart from judicial consensus over the Enabling Act.

### **3. Reliance interests support *stare decisis***

Finally, and perhaps most importantly, overruling *Skamania* would upset the profound reliance interests in the federally granted land trusts. ““*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision.”” *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 729 n.9, 381 P.3d 32 (2016) (quoting *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202, 112 S. Ct. 560 (1991)). Indeed, “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.” *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597 (1991).

Here, the reliance interests at stake are significant and widespread. The Legislature recognized long ago that the

federally granted lands are held in trust, Laws of 1927, ch. 255, § 1, and—with that principle repeatedly affirmed by this Court—has in the intervening years adopted numerous statutes governing management of the State Trust Lands. *See, e.g.,* RCW 79.10.120; RCW 79.71.050; RCW 79.10.520, .530. Rural school districts and other trust beneficiaries depend on the income stream from the federally granted lands. Timberland counties benefit from the federally granted lands through both the forest excise taxes they collect and the timber sector’s contributions to the local economy and tax base. *Id.*

Finally, DNR itself not only funds its own budget with trust revenue, but for decades has managed the State Trust Lands with the understanding that they are held in trust. Against that backdrop, DNR has developed a comprehensive regulatory scheme that seeks to balance its fiduciary obligations to current and future beneficiaries with conservation, ecological, and other values. It would “inflict

considerable harm on settled expectations if [this Court] were to abandon” *Skamania* now. *Deggs*, 186 Wn.2d at 729 n.9.

Beyond the economic impact, revoking the federally granted lands’ trusts would inject chaos into DNR’s land management practices and open a Pandora’s box of constitutional-environmental litigation. Instead of managing all State Trust Lands under a unified framework, CNW would have DNR adopt a dual system: DNR would manage nearly 600,000 acres of state forestlands as it currently does under a sustained yield model with revenue supporting the county beneficiaries. At the same time, the 1.8 million acres of federally granted lands would be subject to CNW’s amorphous “public interest” standard, thereby constitutionalizing every forest management choice DNR makes. *See* CNW Br. at 1.

As one Washingtonian jurist (and environmentalist) noted long ago, however, the concept of the “public

interest’ has so many differing shades of meaning as to be quite meaningless on the environmental front.” *Sierra Club v. Morton*, 405 U.S. 727, 745, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (Douglas, J., dissenting). How much timber harvesting is allowed on federally granted lands? Which public entities may benefit from any timber revenue? What balance must be struck between conservation, recreation, wildfire prevention, carbon sequestration, and other forest management objectives? Does the Legislature have the power to alter that balance, and if so, how will it fund the management costs of forest health treatments, road maintenance, and trail construction?

Under CNW’s “public interest” theory, those questions—and many others—would enter the province of state constitutional law, opening the litigation floodgates to Article XVI-based challenges to virtually every conceivable DNR policy decision, and turning this Court into a sort of super-forest practices board. Abandoning *Skamania* would



not only depart from core *stare decisis* principles, but inject confusion into state management of over 2 million acres of Washington forests.

## V. CONCLUSION

WSAC respectfully urges the Court to affirm the trial court.

## CERTIFICATE OF COMPLIANCE

This brief contains 4,951 words, excluding the items exempted by RAP 18.17(b).

RESPECTFULLY SUBMITTED this 3rd day of September, 2021.

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