

NO. 99183-9

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 *AMICI CURIAE* EARTH LAW CENTER, 350
SEATTLE, 350 EVERETT, 350 WEST SOUND CLIMATE
ACTION, KITSAP ENVIRONMENTAL COALITION,
AND EMERGENCY CONSERVATION COMMITTEE-
PNW IN SUPPORT OF APPELLANTS**

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INTEREST OF AMICI CURIAE

The interests of *Amici* are set forth in the Motion for Leave to File Amicus Brief and are incorporated herein by reference.

INTRODUCTION

The severe impacts of climate change are well documented.¹ As the climate crisis reaches a point of no return,

¹ Alisher Mirzabev, et al., *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (Priyadarshi R. Shukla et al. eds., 2019), <https://www.ipcc.ch/site/assets/uploads/2019/11/SRCCL-Full-Report-Compiled-191128.pdf> [<https://perma.cc/6MRW-VCPN>]; see *Cole v. Collier*, No. 4:14-CV-1698, 2017 WL 3049540, at *31 (S.D. Tex. July 19, 2017) (taking judicial notice that “climate scientists forecast with a high degree of confidence that average temperatures in the U.S. will rise throughout this century and that heat waves will become more frequent, more severe, and more prolonged.”) (quoting Daniel W. E. Holt, *Heat in U.S. Prisons and Jails: Corrections and the Challenge of Climate Change*, COLUMBIA LAW SCHOOL SABIN CENTER FOR CLIMATE CHANGE LAW, (Aug. 2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf).

science tells us that the actions we take today and in the immediate future will make a difference for our future generations. It is indisputable that all people, and all living beings, will benefit from practices that realize the abundance that comes from a healthy forest ecosystem.

Humanity and all ecosystems on Earth are at a critical juncture. The climate mitigation benefits of mature and old growth forests are critical to mitigating the impacts of climate change. Yet, the Department of Land and Natural Resources (DNR) continues to allow the logging of mature forests, including some old growth, and does not have any enforceable policies that adequately consider carbon-reducing methods of forest management on state lands.² The manner in which DNR has interpreted its trust mandate artificially constrains it from accounting for the public interest and responding to the climate crisis in a way that would benefit all the people of Washington.

² *Amici* adopt the same meaning as Appellants in using the term “state lands”. Appellants’ Opening Brief, at 7.

Once logged, these mature forests cannot be replaced in the time frame necessary to help mitigate the most severe impacts of climate change. These are the circumstances we face today, and that must be taken into account in interpreting the Washington State Constitution and in defining the scope of DNR's duties. Fortunately, the Court can look to the plain language of Art. XVI, § 1, principles of constitutional interpretation, and principles of trust law to clarify that DNR is not beholden to placing short term profits over the long term health of our ecosystems and economy. Ultimately, the ideas of resource extraction and dominion over nature must yield to the recognition that humans and the natural world are intimately interconnected and that it is our responsibility to live in a balanced relationship with Mother Earth.

Amici illustrate some of the detrimental impacts of DNR's current, and misguided interpretation of its trust obligations, followed by discussion of the necessity and workability of properly interpreting Art. XVI, § 1's "all the

people” language to mean that DNR’s management of state lands must account for the interests of all of Washington’s inhabitants. *Amici* further argue that even if *County of Skamania v. State*, 102 Wn.2d 127, 685 P.2d 576 (1984) (*Skamania*) requires DNR to manage state lands for certain trust beneficiaries; it is bound to prioritize climate change factors in fulfilling its trustee duties. DNR’s current interpretation of its trust obligations as requiring a focus on maximizing short-term timber revenue yields illogical results considering the threat of climate change.

STATEMENT OF THE CASE³

³ *Acknowledgment Regarding Indigenous Sovereignty and the Inherent Rights of Nature*: This case calls upon the Court to interpret certain provisions of Washington’s Enabling Act and Washington’s Constitution. But accepted canons of construction cannot expose the injustice inherent in words written by white male settlers some 130 years ago. More fundamental than our colonial legal framework are the inherent rights of the Indigenous Peoples who have walked, since time immemorial, on these lands, and the rights of Nature itself, with the corresponding human responsibilities to ensure that all life has the chance to flourish. The sacred relationship between

Amici generally concurs in the statement set forth in Appellants' Opening Brief.

ARGUMENT

I. DNR's Constrained Interpretation of Article XVI, Section 1 Results in Forest Management Practices Detrimental to the Climate's Health and to the Survival and Well-Being of Current and Future Generations

The question before the Court is the nature and scope of DNR's trust obligations, not whether, or how, it is fulfilling those obligations. That said, an understanding of a few of DNR's practices counter to climate mitigation provides context. For instance, DNR acknowledges that it is still logging some old growth, including in the Olympic Experimental State

humans and Mother Earth is out of balance. The type of land exploitation and profit-maximization endorsed by DNR has led us to a place where we struggle to protect the last mature and old growth forests on what are now called state lands. *Amici* respectfully ask the Court to keep these fundamental truths in mind when considering the issues before it, remembering to place those issues in the larger context of historical injustices and the undeniable realities of the climate crisis.

Forest.⁴ DNR similarly permits logging of mature, structurally complex forests.⁵

Mature and old growth forests sequester carbon at a rate of 30–70% more carbon than logged and degraded forests.⁶ The complexity of these forests is irreplaceable, particularly in the extremely short time frame required to mitigate the most severe impacts of climate change.⁷ This is why two former DNR Commissioners are calling for the creation of the Washington

⁴ Wash. Dep't of Nat. Res., Policy for Sustainable Forests, at 34 (Dec. 2006), https://www.dnr.wa.gov/publications/lm_psf_policy_sustainable_forests.pdf.

⁵ The Center for Responsible Forestry tracks timber sales threatening mature and old growth forests. Its website contains detailed information about each sale, along with numerous photographs. See Center for Responsible Forestry, *Timber Sales*, <https://www.c4rf.org/timber-sales> (visited on September 3, 2021).

⁶ Mackey, B., et al., *Policy Options for the World's Primary Forests in Multilateral Environmental Agreements*, CONSERVATION LETTERS 8, 139-147 (2015), <https://doi.org/10.1111/conl.12120>; Appellants' Reply Br. at 45, citing CP 387-89.

⁷ Dominick A Dellasala, et al., *Primary Forests Are Undervalued in the Climate Emergency*, 6 BIOSCIENCE 70, 445 (June 2020), <https://doi.org/10.1093/biosci/biaa030>.

State Ecological Reserve, which retires 5 percent per year of westside forest lands from commercial harvest over 20 years.⁸

“Sustained yield” is central to DNR’s management policy. State law defines sustained yield as “management of the forest to provide harvesting on a continuing basis without major prolonged curtailment or cessation of harvest.” RCW 79.10.310. This concept feeds into the misconception that storing carbon in forest products is adequate to address climate change.⁹ In the industrial forest model, so long as growth is greater than mortality, then net sequestration will be a negative emissions. This oversimplification ignores forest climate science. The industrial model is rooted in a shifting baseline

⁸ Mapes, Lynda V., *Amid Climate Crisis, A Proposal to Save Washington State Forests for Carbon Storage, Not Logging*, SEATTLE TIMES (March 21, 2021), <https://www.seattletimes.com/seattle-news/environment/amid-climate-crisis-a-proposal-to-save-washington-state-forests-for-carbon-storage-not-logging/>.

⁹ See RCW 70A.45.090(1)(a) (finding the “forest products sector ... currently operates as a significant net sequesterer of carbon”).

perspective in which the timber industry uses reforestation as its baseline. The proper baseline is the original carbon dense forest that was capturing carbon for centuries. The industry model thus fails to address the carbon debt created by cutting down the original old growth forest whose carbon is still in the atmosphere. Forests on a 35-40 year short rotation cycle are incomparable to the carbon stores of older forests, living hundreds of years. While live trees continue to sequester carbon and keep it from being released in the atmosphere, clear-cuts and short rotation logging leave carbon sequestration dead zones until the trees come back.¹⁰ Protecting long-term carbon stores in older forests and preventing additional carbon flux from logging is absolutely critical in a climate emergency.¹¹

¹⁰ Hudiburg, Tara W., et al., *Meeting GHG reduction targets requires accounting for all forest sector emissions*, ENV'T. RSCH. LETTERS 14:9, Abstract (Aug. 2019).

¹¹ Harris, N.L., et al. *Attribution of net carbon change by disturbance type across forest lands of the conterminous United States*, CARBON BALANCE MANAGE 11:24, 12 (2016), <https://doi.org/10.1186/s13021-016-0066-5> (discussing significant emissions from forest logging).

Similarly, the Intervenor-Respondents claim that the “laws, policies, and discretionary agreements by the trustee have set aside large portions of the trust land base. It is only after all those laws, policies, and agreements have been satisfied that DNR then attempts to maximize the revenues from the remainder.” (Intervenor-Resp. Brief at p. 14). This is a dramatic oversimplification. As explained in DNR’s Policy for Sustainable Forests, citing to the Multiple Use Concept described in RCW 79.10.120, “DNR is to provide for other public uses when those uses are compatible with the obligations of trust management. . . . If such uses are not compatible with the fiduciary obligations in the management of trust land, they may be permitted only if there is compensation to satisfy the trust’s financial obligation.”¹² Thus, the purported private trust mandate may be wielded (albeit incorrectly) to hinder forest management in a way that mitigates climate change. Indeed,

¹² Wash. Dep’t of Nat. Res., *supra* note 4, at 34.

schools and counties have sued DNR for alleged breaches of its fiduciary duties.¹³ Clarification of DNR’s trust responsibilities would thus benefit DNR.¹⁴

II. DNR Can Manage State Lands for “All the People”

Intervenor-Respondents contend that interpreting “all the people” to mean that DNR must account for the broader public interest creates an unworkable standard. (Intervenor-Resp. Brief at p. 48). Intervenor-Respondents’ concerns are without merit.

¹³ See *Skagit County et al. v. State of Washington et al.*, Case No. 19-2-01469-29 (Skagit County Superior Court).

¹⁴ For instance, DNR is experimenting with forest management methods that provide revenue to trust beneficiaries in an ecologically responsible manner while strengthening forest resiliency in light of the climate crisis. Bernard T. Bormann, et al., *T3 Watershed Experiment Overview Plan*, DEP’T OF NAT. RES. AND UNIV. OF WASH. (2021), <https://drive.google.com/file/d/1UCqI9N5ERyF14LJEyjLSlwtjuK-elfTl/view>; see generally University of Washington, *T3 Watershed Experiment*, OLYMPIC NAT. RES. CTR., <http://depts.washington.edu/sefsonrc/index.php/t3-watershed-experiment/>. Yet, the manner in which DNR currently interprets the trust mandate prohibits application of certain sustainable models developed by the experiment. See Bernard T Bormann, et al., at 10.

Government agencies and courts are well-equipped to balance competing interests when a variety of public interests are at stake. *See Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Nat. Res.*, 124 Wash. App. 441, 448 (2004) (“DNR must protect various public interests in state-owned tidelands, shore lands and navigable water beds.”); *Kauai Springs, Inc. v. Plan. Comm'n of Cty. of Kauai*, 133 Haw. 141, 177 (2014) (“Kauai’s General Plan provides that Kauai’s county governments will ‘practice careful stewardship of the island's land and waters’ and manage the ‘high mountains, forested watershed areas, the ocean and coral reefs, [and] beaches ... as part of the public lands trust.’”) (citation omitted).

Courts in other states have interpreted “all the people” language as it pertains to state lands. In Pennsylvania, for instance, the Constitution recognizes that “Pennsylvania’s public natural resources are the common property of all the people”, Pa. Const. Art. 1, § 27, thereby creating “a public trust of public natural resources for the benefit of all the people” that

the Commonwealth must “conserve and maintain”. *Pa. Env't Def. Found. v. Commonwealth*, 640 Pa. 55, 97–98 (2017). Hawaii’s Constitution Art. XI, § 1 provides, in part, “[a]ll public natural resources are held in trust by the State for the benefit of the people” meaning that “[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai‘i rests with the courts of this state”. *In re Waiola O Molokai, Inc.*, 103 Haw. 401, 421(2004).

Clarifying that state lands are managed for “all the people” thus creates a workable standard.

III. The Plain Language Reading of Article XVI, Section 1 as Requiring Management of State Lands for “All the People” is Consistent with Fundamental Rights

The plain language reading of Article XVI, § 1 as requiring management of state lands for “all the people” should be read in the spirit and context of fundamental and inalienable rights, including those enumerated in Article I of the Washington

Constitution.¹⁵ Guiding the Court’s analysis should be the recognition that a stable climate is a prerequisite to the enjoyment of all other rights.

Contrary to DNR’s contention that “[n]o ‘fundamental right’ is impacted” (DNR Brief at p. 29), DNR’s management of state lands implicates at least three fundamental rights. Art. IX, § 1, discussed below, secures the fundamental right to education. The right to a healthful and peaceful environment and to a stable climate system is secured by Art. I, §§ 3 and 30.¹⁶

¹⁵ *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 930-31 (2017) (“[T]he General Assembly derives its power from Article III of the Pennsylvania Constitution which grants broad and flexible police powers... These powers, however, are expressly limited by fundamental rights reserved to the people in Article I of our Constitution.”) (citations omitted)).

¹⁶ *Amici* recognize that in *Aji P. by & through Piper v. State*, 16 Wash. App. 2d 177, 480 P.3d 438 (Feb. 8, 2021), the appellate court found no such right. That case is subject to a Petition for Review pending as of the date of this filing.

The fundamental right to live in a balanced relationship with the Earth is also secured by Art. 1, § 30 as a right retained by the people.¹⁷

In *Aji P.*, 480 P.3d at 454, the court, citing case law from 1902, interpreted Article 1, § 30 as pertaining to rights that the constitution does not express but that “inherently exist in all civilized and free states”, *State v. Clark*, 30 Wash. 439, 443-44 (1902). The plaintiffs argued that one of the rights retained by the people was to a healthful and peaceful environment. The court found that the plaintiffs failed to point to legal or social history to support these asserted rights, and reasoned, “[w]ithout a showing of how the asserted right inherently exists and has existed in civilized states, the Youths’ contention fails.” *Aji P.*, 480 P.3d at 454. While *Amici* find fault with the court’s reasoning for a number of reasons, for purposes of this brief, *Amici* raise concerns about use of the term “civilized states”.

¹⁷ We understand this may be a novel argument.

This phrase would seem to imply a standard based on a Western construct in which “civilization” is roughly equated with destruction and domination of the natural world.¹⁸

Such a narrow construct risks ignoring the fundamental and inherent rights of the original and sovereign inhabitants of what is now called Washington State. In other words, when considering what rights were retained by the people, the Court must consider the values, beliefs, and rights of all of the people, in particular the land’s original inhabitants. Living in right relationship with the Earth was, and is, an important way of being that may clearly be described in the constitutional framework as a “right retained by the people”.¹⁹

¹⁸ There are countless examples of a manifest destiny colonial mindset. For instance, President Theodore Roosevelt, in the context of advocating maximum multi-purpose development of the nation’s rivers said: “Our river systems are better adapted to the needs of the people than those of any other country . . . Every stream should be used to the utmost.” U.S. Congress, Preliminary Report of the Inland Waterways Commission, 60th Cong., 1st Sess., 1908 S.Doc. No. 325, pp. iii-iv.

¹⁹ See Amicus Curiae Memorandum of The Swinomish Indian Tribal Community, Quinault Indian Nation, and Suquamish

Recognizing that DNR must manage state lands for “all the people” would protect these fundamental rights better than DNR’s interpretation of its fiduciary obligations as a private trustee.²⁰

IV. Article XVI, Section 1 Must Be Interpreted in a Manner that Accounts for the Climate Crisis

Tribe in the *Aji P.* case for an Indigenous perspective on the matter. *Amici* acknowledge that recognition of the inherent rights of Indigenous Peoples through a Western legal construct may very well fall short of honoring Indigenous ways of relating.

²⁰ Other constructs to advance fundamental rights, a detailed discussion of which is beyond the scope of this brief, include recognition of the inherent rights of Nature as has been done in numerous places throughout the world. *See* United Nations, *Rights of Nature Law and Policy*, HARMONY WITH NATURE, <http://www.harmonywithnatureun.org/rightsOfNature/> (visited Aug. 31, 2021); Chip Colwell, *What if nature, like corporations, had the rights of a person?*, THE GUARDIAN, <https://www.theguardian.com/commentisfree/2016/oct/12/nature-corporations-people-zuni-environment-mount-taylor> (visited Aug. 31, 2021). A coalition of twelve 350.org-affiliated groups in Washington state recognizes the rights of Nature and all living beings as part of its core values: “We support sound policies and truly democratic political structures that respect and advance the rights of Nature and all living beings.” *See* 350WA, *Our Mission*, <https://www.350wa.org/mission-and-values> (visited Aug. 31, 2021).

The constitution must be interpreted “in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning... [T]he constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness.” *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 94 (1978); *M’Culloch v. State*, 17 U.S. 316 (1819) (a constitution is “intended to endure for ages to come” and “to be adapted to the various crises of human affairs.”). The climate crisis is exactly the kind of problem that requires constitutional interpretation in accordance with the demands of modern society.

This would not be the first time this Court interpreted the Constitution’s language in light of modern demands. Art. IX, § 1 says: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders....”. This Court interpreted that provision to mean that

“the State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the marketplace of ideas.” *Seattle School Dist. No. 1*, at 94. The Court based its interpretation on modern circumstances: “[T]he phrase ‘make ample provision for . . . education’ has remained unchanged since its enactment. Yet, to suggest that the State fulfills its duty to make such provision by merely providing more acceptable educational facilities than those of 1889 is utter nonsense. We cannot ignore the fact that times have changed and that which may have been ‘ample’ in 1889 may be wholly unsuited for children confronted with contemporary demands wholly unknown to the constitutional convention.” *Id.* This contemporary interpretation imposed a duty on the legislature to fund all public education in the state through a general and uniform system. *Id.* at 97.

Here, our “ample provision for... education” is “all the people” and “full market value.” The Framers in 1889 could no more have predicted modern educational facilities than they could have the climate crisis. Scientists and world leaders agree anthropogenic climate change is real and causing increasingly severe disruptions in our environment.²¹ Globally, temperatures increased about 1.8°F from 1901 to 2016,²² and the Pacific Northwest warmed 2.0°F.²³

A. The Climate Crisis Causes Economic Losses that Disproportionately Affect Rural Counties and Children.

A myopic focus on the impact to rural communities as a result of decreased timber revenues is misplaced. Climate disruptions bring economic consequences, with rural counties

²¹ U.S. Glob. Change Rsch. Program, *USGCRP, 2018: Impacts, Risks, and Adaptation in the United States - Fourth National Climate Assessment*, Volume II: Report-in-Brief, 512–71 (2018); Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

²² U.S. Glob. Change Rsch. Program, *supra* note 21.

²³ U.S. Glob. Change Rsch. Program, *supra* note 21, at 1041.

suffering the worst effects.²⁴ During 2020, Washington lost more acreage to fire in one day than in the past twelve fire seasons and suffered approximately \$35 million in damages to utilities and infrastructure.²⁵ That same year DNR spent over \$20 million fighting wildfire.²⁶ All impacted counties, including Skamania and Mason, are classified as rural counties.²⁷

Climate change, by reducing snowpack and truncating the season, threatens snow-based recreation and the revenue it produces.²⁸ Low-snowfall years reduce ski resort revenues by \$189 million dollars and job availability by over 2,000

²⁴ U.S. Glob. Change Rsch. Program, *supra* note 21, at 1038.

²⁵ George Geissler, *Impacts and Costs of Wildfire Season 2020*, WASH. DEP'T OF NAT. RES., (2020) at 14, https://www.dnr.wa.gov/sites/default/files/publications/rp_fh_2020_wildfire_slides.pdf.

²⁶ Wash. Dep't of Nat. Res. - Wildfire Div., *Wildfire Season 2020*, WASH. DEP'T OF NAT. RES. (December 1, 2020), https://www.dnr.wa.gov/publications/rp_fire_annual_report_2020.pdf.

²⁷ *Id.*; see also Wash. Dep't of Health, *Rural and Urban Counties* (April 2017), <https://www.doh.wa.gov/Portals/1/Documents/Pubs/609003.pdf>

²⁸ U.S. Glob. Change Rsch. Program, *supra* note 21, at 1043.

positions.²⁹ Without rapid mitigation, snow-based recreation revenues in the Northwest will decline up to 70%.³⁰ Because winter recreation primarily takes place in the Cascade range and northeastern portion of the state, these economic impacts disproportionately impact Washington's rural counties.³¹

Intervenor-Respondents fail to recognize how climate change especially harms children, who over their lifetimes will face increasing temperatures, sea levels, pollution, and fires.³² Children are at higher risk of heat stroke and are disproportionately affected by toxic exposure because they ingest more contaminants relative to their body size.³³ Children

²⁹ U.S. Glob. Change Rsch. Program, *supra* note 21.

³⁰ U.S. Glob. Change Rsch. Program, *supra* note 21, at 43, 1043.

³¹ Wash. Dep't of Health, *supra* note 27; Wash. State Parks, *Washington State Parks - Winter Recreation Map*, <https://wa-stateparks.maps.arcgis.com/apps/webappviewer/index.html?id=ed8a4d41515741a4b83c00d516cff869> (visited September 3, 2021).

³² U.S. Glob. Change Rsch. Program, *supra* note 21, at 1059.

³³ U.S. Glob. Change Rsch. Program, *supra* note 21, at 542, 1059.

face an increasing likelihood of anxiety, depression and post-traumatic stress disorder due to disruptive severe weather events like wildfires.³⁴ The 2020 wildfires closed school districts across the state and caused more distress for children and educators in an already tumultuous year.³⁵

Washington has an constitutional duty “to make ample provision for the education of all children residing within its borders,” with education defined as “an *opportunity* to obtain the knowledge.” *McCleary v. State*, 173 Wash. 2d 477, 483 (2012); *Seattle Sch. Dist.*, at 520 (emphasis added). The climate crisis threatens children’s opportunity to obtain knowledge by

³⁴ U.S. Glob. Change Rsch. Program, *supra* note 21.

³⁵ Megan Carroll, *Some eastern Washington school districts closed due to wildfires, power outages*, KREM (September 8, 2020), <https://www.krem.com/article/news/local/list-eastern-washington-schools-closed-wildfires-power-outages/293-23ad1d2e-de14-430c-aefb-78b7f83716ec>; Allison Needles, *Schools across Pierce County cancel classes Tuesday due to fires, power outages*, THE NEWS TRIBUNE (September 8, 2020), <https://www.thenewstribune.com/news/local/article245559310.html>.

disrupting in-class instruction³⁶, damaging school infrastructure³⁷, and decreasing student academic performance.³⁸ Clarifying DNR’s responsibility to implement forest management practices that mitigate climate change ensures all children, both current and future, can enjoy their constitutional right to education.

B. Ecologically Responsible Forest Management Generates Revenue and Creates Forest Resilience.

Managing lands in an ecologically responsible manner promotes tourism and outdoor recreation, increases property tax revenue, and strengthens rural economic resiliency. Tourism in Washington directly supports over 10,000 jobs and provides

³⁶ *Id.*

³⁷ Geissler, *supra* note 25, at 7; U.S. Global Change Research Program, *supra* note 21, at 24.

³⁸ Johns Hopkins University, *Depression, Anxiety & Emotional Distress*, STUDENT ASSISTANCE PROGRAM, https://jhsap.org/self_help_resources/depression_anxiety_emotional_distress/ (visited September 3, 2021).

\$62.5 million yearly in state and local taxes.³⁹ Washingtonians value outdoor recreation.⁴⁰ Outdoor recreation directly supports over 200,000 jobs and provides \$2.3 billion yearly in state and local taxes.⁴¹ Together, tourism and outdoor recreation support rural counties by attracting new residents and growing county income. Conserving land indirectly supports Washington’s schools by increasing property tax revenue. In Jefferson, Challam, and Kitsap county, conserved lands contribute an additional \$616,000,000 in home value.⁴² This translates to an additional \$6,110,000 in annual property tax revenue, with 56% of this revenue going to schools.⁴³

³⁹ The Trust for Public Land, *The Economic Benefits of Conserved Lands, Trails, and Parks on the North Olympic Peninsula*, 51 (January 2021).

⁴⁰ *Id.* at 45 (“72% of Washington Residents participate in outdoor recreation”).

⁴¹ *Id.* at 51.

⁴² *Id.* at 30.

⁴³ *Id.*; see also Wash. State Dep’t of Revenue, *Homeowner’s Guide to Property Tax*, 3, (June 2021), https://dor.wa.gov/sites/default/files/legacy/docs/pubs/prop_tax/homeown.pdf.

DNR asserts that “all the people” means “all the people of the state benefit from an educational system and public institutions” (DNR Brief at p. 48), but no one benefits from disruptions to in-class instruction⁴⁴, damage to infrastructure⁴⁵, and decreases in forest health and productivity that climate change brings.⁴⁶

V. Even Under *Skamania*, DNR’s Trust Obligations Require it to Implement Practices to Mitigate Climate Change

DNR interprets *Skamania* as imposing upon it the duties of a private trustee in both managing and disposing of state lands. Appellants’ argument that *Skamania*’s private trust rationale was *dicta* and does not apply to the management of public lands is well taken. Even if there is a private trust mandate, DNR incorrectly interprets its duties to trust beneficiaries (of

⁴⁴ Carroll, *supra* note 35; Needles, *supra* note 35.

⁴⁵ Geissler, *supra* note 21; U.S. Global Change Research Program, *supra* note 21, at 24.

⁴⁶ U.S. Glob. Change Rsch. Program, *supra* note 21, at 240.

undivided loyalty, to act with prudence, and to dispose of assets for “full market value”) as requiring the management and disposition of the land for maximum revenue.⁴⁷

The Court should clarify that neither *Skamania* nor law applicable to private trusts requires DNR to manage or dispose of land for maximum revenue as narrowly defined by traditional “market value” concepts. Rather, DNR must consider ecosystem services values, including climate change benefits of certain management techniques, as necessary to fulfilling its obligation to preserve the trust assets in perpetuity, even if it means less revenue in the short term.⁴⁸ As set forth in Part IV, the Court should interpret the Constitution’s language in accordance with the demands of modern society. Common

⁴⁷ Appellants’ Reply Br. at 5, 45, citing CP 28, 101, 147.

⁴⁸ DNR is aware of the billions of dollars in ecosystem services - which are defined as natural capital assets such as breathable air, a drinkable water supply, and fertile soil, that are “critical to human survival and the basis of all other economic activity” - provided by state lands. See K. Cousins, et al., *Trust Land Performance Assessment: Non-Market Environmental Benefits and Values*, EARTH ECONOMICS, 6 (2020).

law trust principles similarly confirm that fiduciary practices cannot remain static - “[t]rust investment law should reflect and accommodate current knowledge and concepts” - and that a trustee is required to preserve the assets of the trust for perpetuity, which includes the duty to protect trust property from loss or damage.⁴⁹

DNR’s fiduciary duties require it to conduct a comprehensive analysis of relevant risks in its management strategy, with the overall goal of preserving the principal assets of the trust for perpetuity.⁵⁰ Climate change stresses forests, increasing losses due to fire and insect-caused mortality.⁵¹

⁴⁹ Restatement (Third) of Trusts §76 cmt. (2007).

⁵⁰ As part of a comprehensive cost-benefit analysis of “full market value”, companies, investors, hedge funds, and government agencies are all conducting analyses of the costs of climate catastrophe. See Rick E. Hansen, *Climate Change Disclosure by SEC Registrants: Revisiting the Sec's 2010 Interpretive Release*, 6 BROOK. J. CORP. FIN. & COM. L. 487, 490 (2012).

⁵¹ U.S. Env’t Prot. Agency, *Climate Impacts in the Northwest*, CLIMATE CHANGE IMPACTS, <https://19january2017snapshot.epa.gov/climate->

These stressors create uncertainty in timber markets and affect timber prices by reducing timber volume and quality.⁵² These costs are borne directly by the trust beneficiaries. The portion of timber revenue allotted to each respective beneficiary cannot compare to the cost of disregarding the value of the state lands in mitigating climate catastrophes⁵³

Moreover, *Skamania* did not analyze the blanket proposition that private trust principles apply to federal land grant trusts. *Skamania*, 102 Wn.2d at 130. If there were a private trust, *certain* trust principles may apply, but it does an injustice to the state's unique position to ignore its fundamental

impacts/climate-impacts-northwest_.html#Reference%202 (visited September 3, 2021).

⁵² U.S. Glob. Change Rsch. Program, *supra* note 21, at 234, 242.

⁵³ In 2018, Jayni Foley Hein, now a member of the White House Council on Environmental Quality, made a similar argument with regard to the Department of Interior's land management practices, arguing that the DOI must interpret "fair market value" in light of its obligation to harmonize revenue production with climate change costs. Jayni Foley Hein, *Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 HARV. ENVTL. L. REV. 1, 6 (2018).

obligations to inhabitants beyond specific trust beneficiaries. *Skamania* “merely [held] that when the state enacts laws governing trust assets, its actions will be tested by fiduciary principles.” *Skamania*, 102 Wn.2d at 133. In the context of Art. XVI, § 1’s “all the people” language, the Court should find something akin to a quasi-public trust, recognizing that, while revenues may flow to certain beneficiaries, applicable fiduciary principles impose a duty upon DNR to take a broader view of the values of state lands and deliver more benefit for all. To hold otherwise would run contrary to the Constitution’s express language and ignore DNR’s obligations to manage state lands to build climate resilience.

CONCLUSION

Amici request that the Court recognize that DNR must manage state lands for the benefit of all of Washington’s inhabitants. Alternatively, *Amici* request that the Court clarify that *Skamania* does not prevent DNR from implementing

ecologically responsible forest management practices, including the protection and cultivation of mature forests, as part of its trust obligations. Indeed, DNR is obligated to manage state lands to mitigate climate change.

CERTIFICATE OF COMPLIANCE

I certify that the word count of this Amici Curiae brief is 4,912 words.

Respectfully submitted this 3rd day of September 2021.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 3, 2021, through the Washington State Appellate Court's eFiling Portal.

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 3rd day of September, 2021.

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