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SUPREME COURT OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a Washington municipal corporation; BARRY CHRISMAN and KERRY CHRISMAN, individually and as husband and wife,

Appellants,

v.

THE STATE OF WASHINGTON, SIERRA PACIFIC INDUSTRIES DBA SIERRA PACIFIC INDUSTRIES, INC., a California corporation, PRECISION FORESTRY, INC., a Washington corporation, and ABC CORPORATIONS 1-10,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

AMICUS CURIAE MEMORANDUM OF WASHINGTON FOREST PROTECTION ASSOCIATION, WASHINGTON ASSOCIATION OF LAND TRUSTS, WASHINGTON STATE ASSOCIATION OF COUNTIES, WASHINGTON FARM FORESTRY ASSOCIATION, THE CONSERVATION FUND, AMERICAN FOREST RESOURCE COUNCIL, AND WASHINGTON FARM BUREAU LEGAL FOUNDATION IN SUPPORT OF PETITIONS FOR REVIEW

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I. INTRODUCTION

Washington's forests provide countless benefits. They support a key sector of the economy, deliver clean drinking water, serve as recreational outlets, fund public services, support rural communities, sequester atmospheric carbon, and provide habitat for wildlife. Sustainably delivering all of these benefits requires landowners to balance when, where, and how to harvest trees.

Leaving certain trees standing after a timber harvest can benefit public resources such as drinking water and wildlife habitat. However, those same trees pose increased risk of falling and causing injury because they become more susceptible to natural forces when the surrounding trees are removed. To address this tension and promote conservation, the legislature enacted RCW 76.09.330 in 1987 to ensure that landowners would not be liable for injuries caused by trees left unharvested to protect public resources. Subsequently, in 1992 and 1999, it amended the statute to further guarantee these

protections. The intent of RCW 76.09.330 is clear: landowners who leave trees standing to benefit public resources shall not be liable if those trees subsequently fall and cause injuries.

The opinion at issue, *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. State*, __ Wn. App. 2d __, 534 P.3d 1210 (Wash. Ct. App. 2023) (the "Opinion"), eviscerates these protections and exposes landowners to significant liability for implementing forest practices designed to protect public resources. Unless corrected, the Opinion will disincentivize landowners from providing additional environmental protections or allowing public access while increasing the risk of forestlands being converted to other land uses. *Amici* humbly request the Court grant review.

II. IDENTITY AND INTEREST OF *AMICI*

The identities and diverse interests of *amici* are detailed in the motion for leave to file this memorandum.

III. STATEMENT OF THE CASE

Amici rely on Petitioners' statements, and provide the following.

A. RCW 76.09.330 Is Part of Landmark Agreements Related to Forest Management in Washington.

RCW 76.09.330 arises from a celebrated collaborative process that Washington has used to refine forest management regulations for the past 40 years, and that it continues to utilize today. In 1986, the State, Native American tribes, the forest products industry, and environmental advocates participated in a dispute resolution process aimed at resolving contentious forest management issues.[1] That process resulted in the 1987 Timber/Fish/Wildlife Agreement ("TFW Agreement"), which

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[1] Washington State Department of Natural Resources, *et al.*, *Timber/Fish/Wildlife Agreement, A Better Future in Our Woods and Streams, Final Report* (1987), 1, https://www.dnr.wa.gov/publications/fp_tfw_agrmnt_1987.pdf.

established a framework for collaboratively addressing forest management issues moving forward.[2]

The TFW Agreement also included new requirements for leaving trees standing to benefit public resources such as salmon habitat and clean water.[3] It recognized that downed trees serve critical environmental functions and that left trees should be encouraged to fall.[4] To protect landowners, the TFW Agreement included the following commitment: "The trees left as a result of these regulations may blow down or fall into the streams, in fact that is the goal for most of the leave requirements, this falling shall be regarded as a natural occurrence and shall not lead to increased landowner liability."[5] The TFW Agreement's commitments became law through

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[2] *Id.* at 2-3.

[3] *See, e.g.*, *id.* at 24-30, 54-55.

[4] *See, e.g.*, *id.* at 24-25, 30.

[5] *Id.* at 26.

passage of Senate Bill 5845, which created RCW 76.09.330 to protect landowners. Laws of 1987, ch. 95 § 7.

RCW 76.09.330 has been strengthened on two occasions: first, in 1992, to incentivize the protection of productive forestlands and to curtail their conversion to other land uses. Laws of 1992, ch. 52 § 5.

The second strengthening arose from another landmark agreement. In 1996, following various Endangered Species Act listings and given increased Clean Water Act concerns, the TFW Agreement parties returned to the negotiating table.[6] That negotiation concluded in 1999 with the publication of the Forest and Fish Report ("F&F Report") which identified "biologically sound and economically practical solutions that will improve

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[6] Washington State Department of Natural Resources, *et al.*, *Forests and Fish Report* (1999), 2-3, https://www.dnr.wa.gov/publications/fp_rules_forestsandfish.pdf.

and protect riparian habitat on nonfederal forest lands."[7] It again increased the number of trees required to be left to benefit public resources.

Senate Bill 2091 was passed to implement the F&F Report, and it contained RCW 76.09.330's current language. Laws of 1999, Spec. Sess., ch. 4 § 602. Courts have recognized that the 1999 amendments made clear that the statute's immunity applies with a "very broad sweep." *Ruiz v. State*, 154 Wn. App. 454, 460, 225 P.3d 458 (2010).

RCW 76.09.330 has played a critical role in landowners agreeing to provide resource protections in the above processes, and in many other contexts.[8]

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[7] *Id.* at 2.

[8] *Amici* Washington Forest Protection Association and Washington Farm Forestry Association are signatories of the TFW Agreement and F&F Report.

B. Where Trees Should Be Left to Benefit Public Resources Is Variable, and Permitting Conditions Are Legally Binding.

Washington's forests are complex, and determining how to design a timber harvest can be equally complex. This complexity first arises from the diversity of forests found in Washington—a forest in southeastern Washington is profoundly different from one on the Olympic Peninsula. Unsurprisingly, different public resource considerations must be given in different regions.

Many forests also contain unique resources that require special consideration. For example, some forests are home to endangered species, provide drinking water supplies, or have special recreational or cultural sites. These considerations impact how harvests are designed. Furthermore, Washington's forests are managed to achieve a vast range of landowner objectives. A commercial timber company and a conservation-driven land trust will often take different approaches to designing and permitting harvests.

Given these intricacies, Washington's forest practice regulations are designed to provide flexibility to landowners in designing harvests, while also ensuring that every harvest provides baseline levels of protection. RCW 76.09.010(2)(d). While there are minimum prescriptive requirements, there is not a required one-size-fits-all approach to protecting public resources, nor would having one be advisable. If leaving additional trees is prudent to benefit public resources, then landowners are permitted and encouraged to do so.

Even if a landowner attempts to harvest every tree they legally can, the layout of the resulting harvest will still vary based on decisions left to landowner discretion. This is reflected in the Washington State Department of Natural Resources' ("DNR") *Forest Practices Illustrated*, which is a

simplified (and visual) articulation of state regulations.[9] For example, there are "zones" within each riparian management area that have different leave tree requirements.[10] In the outer zones, where selectively harvesting trees is permitted, the patterns in which trees are retained is left to landowner discretion.[11] The upshot is that harvest patterns almost always vary. Other leave tree requirements similarly incorporate landowner discretion.[12]

Additionally, there are numerous site-specific determinations and measurements that inform where trees are left. For example, landowners need to determine: What is the

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[9] Washington State Department of Natural Resources, *Forest Practices Illustrated, A Simplified Guide to Forest Practices Rules in Washington State* (2021), https://www.dnr.wa.gov/publications/fp_fpi_complete.pdf.

[10] *Id.* at 72-79.

[11] *See, e.g.*, *id.* at 73.

[12] *See, e.g.*, *id.* at 24 (cultural resources), 94 (wetlands), 104 (wildlife habitat and unstable slopes).

bankfull width of a stream?[13] Is there a channel migration zone?[14] How much basal area exists?[15] Where does a stream's perennial flow stop?[16] Are there associated seeps, springs, or wetlands?[17] How many trees need to be left for upland wildlife?[18] Are there unstable geologic features?[19] These determinations are being made in thickly vegetated environments that often make it challenging to pinpoint the exact trees that must be left to precisely comply with regulations. Given this, landowners routinely make conservative calls to ensure compliance. The result is that trees

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[13] *Id.* at 68.

[14] *Id.* at 60.

[15] *Id.* at 61-62.

[16] *Id.* at 68, 78.

[17] *Id.* at 115.

[18] *Id.* at 103, 119-20.

[19] *Id.* at 30.

are regularly left standing to protect public resources that could likely be legally harvested.

Moreover, many landowners operate under additional layers of regulation. For example, many landowners (including DNR) operate pursuant to permits issued under Section 10 of the United States Endangered Species Act.[20] These permits typically require landowners to leave trees to benefit endangered species that could be harvested under state law. These permits, and numerous other unique harvest planning tools, allow landowners to substitute unique prescriptions for protecting public resources in place of those identified by baseline state regulation. *See, e.g.*, RCW 76.09.063; RCW 76.09.350; RCW 77.55.121; WAC 222-16-100. Finally,

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[20] *Permits for Native Endangered and Threatened Species*, U.S. FISH & WILDLIFE SERVICE, https://www.fws.gov/library/collections/permits-native-endangered-and-threatened-species; *ESA Section 10 Habitat Conservation NEPA Documents*, NOAA FISHERIES, https://www.fisheries.noaa.gov/west-coast/laws-and-policies/esa-section-10-habitat-conservation-nepa-documents.

alternative plans, which are reviewed by interdisciplinary teams, are always available to address unique situations. WAC 222-12-0401(4).

Many landowners also simply choose to leave more trees standing to benefit public resources in certain situations. Forests provide a vast range of environmental, social, and cultural benefits, and there are many situations where landowners choose to be more conservative in designing and permitting harvests.

Ultimately, designing and permitting a harvest always requires balancing considerations to ensure public resources are protected. The decisions that are made in that balancing are articulated in the forest practice permit application that is submitted to DNR. Every harvest application submitted to DNR identifies which trees will be left to benefit public resources. Once a permit is approved by DNR, the landowner becomes legally required to leave identified trees standing—regardless of baseline state regulations.

Here, the tree that injured Plaintiff was identified by DNR as needing to be left to protect public resources and was permitted accordingly. Nevertheless, DNR (as the landowner) now faces significant potential liability for leaving that tree to protect a nearby stream.

IV. ARGUMENT

Review is proper for two reasons. First, the conflict between the Opinion and the *Ruiz* decision demands review under RAP 13.4(b)(2). *Amici* rely on Petitioners to explain this conflict. Second, the petitions involve issues of substantial public interest under RAP 13.4(b)(4), as discussed below.

A. The Holding that Immunity Only Applies to Trees Strictly Required to Be Left by Regulation Is Incorrect and Contrary to Public Policy.

The Opinion incorrectly holds that RCW 76.09.330's "immunity attaches only where a forestland owner must leave a tree standing in order to comply with the relevant regulations." 534 P.3d at 1220. In so holding, the Opinion recites Plaintiffs' factual assertion that DNR left trees standing in a 162-foot

riparian management zone—instead of a 140-foot zone. *Id.* Additionally, Plaintiffs argued that DNR incorrectly started measuring from a channel migration zone, instead of the stream's ordinary high-water mark, which also increased the number of trees left. *Id.*

Distilled, the Opinion held that if facts determined at trial show that DNR could have harvested the injuring tree through minimalist application of Washington's harvest regulations, then DNR is not immune for leaving the tree standing. *Id.* It held this even though DNR's permitting process had unquestionably determined that the tree should be left to protect public resources. *Id.* at 1221. Consequently, the Opinion mandates that if a landowner wants to maintain immunity for leaving trees standing, they must cut every single tree they legally can, even if it is determined that leaving additional trees is appropriate given public resource considerations.

Put directly, the Opinion incentivizes landowners to stop independently evaluating whether additional public resource

protections are appropriate, and to instead cut every tree possible. That is bad land stewardship and bad public policy.

The Opinion also disincentives landowners from working with the federal government and nonprofit organizations to implement strategies to benefit public resources in particular areas. The 162-foot riparian zone challenged as inappropriate was required by DNR's permit with the federal government to protect endangered species. *Id.* at 1220. In adopting the position that only trees required to be left under Washington's baseline regulations are immunized, the court has told landowners that agreeing to provide more protections for public resources with the federal government (or any other organization) will expose them to liabilities.

The impacts of the Opinion are obvious—public resources will be given less protection, public access will be restricted as associated liabilities grow, costs of doing business will increase, and some forestlands will be converted to other uses (such as urban development) as the risks of forest

management rise. The Opinion is entirely inconsistent with the clear intent of, and policy rationale for, RCW 76.09.330.

B. Holding Landowners Liable for Not Preventing Trees from Falling Is Contradictory to the Policy Rationale for RCW 76.09.330.

The Opinion not only holds that a landowner can be liable for not cutting more trees, but in a glaring contradiction also holds that landowners can be liable for not discretionarily leaving more trees standing. The Opinion places landowners in a catch-22 where they will always face potential liability for tree falls because they either 1) should have cut the tree that fell, or 2) left more trees standing to protect the tree that fell. The Opinion's internal inconsistency eviscerates RCW 76.09.330's protections.

Specifically, the Opinion holds that the decision to not leave additional trees in a "wind buffer" to protect the tree that fell was "distinct from the decision to leave the RMZ trees standing," and that RCW 76.09.330 only applied to the limited decision to leave the tree, and not the decision of whether to

protect it. 534 P.3d at 1218-19. This greenlights claims against landowners for not adequately protecting trees that were left standing to protect public resources. That holding directly conflicts with RCW 76.09.330's text and legislative history, which reveal that the leave trees are intended to fall to serve environmental functions. It is absurd to hold a landowner liable for not protecting a tree that the legislature encourages to fall. The Opinion is in direct conflict with the environmental rationale and legislative intent of RCW 76.09.330.

C. Holding Timber Sale Purchasers and Operators Liable for Leave Trees Renders RCW 76.09.330 Meaningless in Practice.

The Opinion also eviscerates RCW 76.09.330 by permitting lawsuits against timber sale purchasers and operators. Often a landowner will design and permit a timber harvest, sell that permitted harvest to a purchaser (typically a mill), and then an operator (logger) will conduct the harvest. Typically, the landowner identifies which trees should be

retained, but in many cases purchasers and operators will also decide whether to leave a tree.

Here, Plaintiffs sued the landowner, purchaser, and operator, and the Opinion held that the purchaser and operator could not claim RCW 76.09.330's immunity because they were not landowners. This creates another massive loophole in RCW 76.09.330. The statute's immunity becomes essentially meaningless if a plaintiff can simply sue a landowner's purchaser or contractor for leaving trees standing.

The Opinion also ignores that both purchasers and operators are "forestland owners" as defined by the statute—"'Forestland owner' means any person in actual control of forestland, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner…." RCW 76.09.020(16). Both purchasers and operators have interests sufficient to qualify as forestland owners and are equally immunized.

V. CONCLUSION

Amici humbly request review be granted.

RESPECTFULLY SUBMITTED this 25th day of January, 2024.

I certify that this memorandum is 2,500 words, in compliance with RAP 18.17.

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Conservation Fund, American Forest Resource Council, and Washington Farm Bureau Legal Foundation

DECLARATION OF SERVICE

I declare that on January 25, 2024, I caused the following to be filed in the Washington State Supreme Court and a true copy of the same to be served electronically on the parties via the Appellate Court's electronic filing portal.

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

DATED this 25th day of January, 2024, in Seattle, Washington.

s/ Eliza Hinkes
Eliza Hinkes
Paralegal

NORTHWEST RESOURCE LAW PLLC

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