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NO. 36453-4

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DAVID SCHULZ, et al.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Washington State Department of Natural Resources (DNR) acted in good faith and for the public benefit when responding to four lightning-caused fires that, despite DNR's fire suppression efforts, ultimately merged into the Carlton Complex fire and burned over 250,000 acres. Because the fires allegedly originated on DNR land, Plaintiffs claim DNR was negligent "as a landowner" for its efforts to suppress the fires. But the acts they allege to be negligent—not allocating sufficient firefighting resources early enough—did not implicate DNR's landowner duties, and were instead actions exclusively performed within DNR's fire suppression capacity. This Court should affirm summary judgment in favor of DNR because RCW 76.04.016 forbids DNR's public firefighting capacity from giving rise to an actionable individualized duty.

DNR is charged with protecting over 13 million acres of private and public land from the threat of wildland fires. Forest landowners who do not provide their own fire protection services are required to pay annual assessments for DNR's fire protection services. Nonfederal public forest landowners, including DNR in its capacity as a land manager, are statutorily required to pay for and utilize DNR's fire protection services.

In recognition of DNR's vast responsibility, and in response to a Washington Supreme Court decision that imposed liability on DNR for its

failure to suppress a lightning-caused fire, *see Oberg v. Dep't of Nat. Res.*, 114 Wn.2d 278, 787 P.2d 918 (1990), the Legislature enacted RCW 76.04.016. That statute precludes the imposition of an individualized duty for DNR's fire suppression activities: "[W]hen acting, in good faith, in its statutory capacity as a fire prevention and suppression agency," DNR "is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public."

RCW 76.04.016 applies whenever DNR is acting in its fire suppression capacity, regardless of whether on private or public land, including land managed by DNR in its proprietary capacity. Thus, it squarely applies to this case, where several groups of landowners who lost property in the Carlton Complex fire sued DNR, claiming its fire suppression efforts were inadequate. This Court should affirm the trial court's order granting summary judgment to DNR.

II. COUNTERSTATEMENT OF THE ISSUE

RCW 76.04.016 provides that DNR "when acting, in good faith, in its statutory capacity as a fire prevention and suppression agency, is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public." Does that statute preclude imposing an individualized duty on DNR, actionable in tort, when DNR provides fire suppression services to land under its statutory

protection, regardless of whether the land is also managed by DNR in its proprietary capacity?

III. COUNTERSTATEMENT OF CASE

A. DNR Fights Wildland Fires on Public and Private Land for the Benefit of the Public

DNR is Washington’s largest on-call fire department. CP 198. It has the “direct charge of and supervision of all matters pertaining to the forest fire service of the state.” RCW 76.04.015.¹ DNR’s primary statutory fire prevention and suppression mission, second only to saving lives, is protecting forest resources and suppressing forest wildfires. RCW 76.04.167(2). When performing its statutory fire suppression and prevention responsibilities, DNR “is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public.” RCW 76.04.016.

In total, DNR protects over 13 million acres of forestlands. CP 198. DNR’s fire prevention and suppression jurisdiction includes publicly- and privately-owned property. RCW 76.04.005(5), .610; CP 198. Its areas of fire suppression responsibility are divided into “forest protection zones,” which collectively cover all forestland across the state, but exclude forestland protected by owner or by agreement with rural or municipal

¹ Chapter 76.04 is attached as Appendix A.

districts. RCW 76.04.165, .610(1)(a). More broadly, DNR provides localized services through regional offices, which are further divided into districts. CP 197; RCW 76.04.610(4).

Forestland owners who do not provide their own DNR-approved protection against the spread of fire are required to pay forest fire protection assessments and receive DNR's fire suppression services. RCW 76.04.610(1)(a). Persons or entities electing to pay forest fire protection assessments are "participating landowners," RCW 76.04.005(18), whose lands are included within "Department protected lands." RCW 76.04.005(5). Nonfederal public entities owning or administering forestland do not have a choice to provide their own fire protection; they are required to be participating landowners, pay the assessment, and receive DNR's fire protection. RCW 76.04.610(7).

DNR's fire prevention and suppression program is funded through a combination of sources including the forest protection assessment account, landowner contingency account, and legislative appropriation. RCW 76.04.167, .610, .630. Those funds are separate from the funding DNR receives to manage public lands in its proprietary capacity. CP 198.

B. DNR Also Manages Certain Public Lands and, Like Other Participating Landowners, Pays Assessments for DNR Fire Suppression Services

In a completely separate capacity from that related to its forest fire prevention and suppression responsibilities, DNR also manages millions of acres of state trust land, state-owned aquatic lands, and natural areas that protect native ecosystems. CP 198; *see generally* RCW 79.02 (“Public Lands Management—General”). This includes more than three million acres of state trust lands for the benefit of certain trust beneficiaries. CP 198. In that capacity, DNR is also a forest landowner subject to DNR regulation under Washington’s forest protection laws, just like other public and private forest landowners. RCW 76.04.005(12).

As a public body, DNR in its capacity as a land manager does not have the option to provide its own fire protection under RCW 76.04.600. Rather, it is required to pay forest fire protection assessments and receive DNR fire suppression services. RCW 76.04.610(7); CP 199.

C. DNR’s Fire Suppression Arm, in Conjunction with Its Partner Agencies, Responded to the Carlton Complex Fire and Numerous Other Actual and Potential Fires in July 2014

On July 14–15, 2014, a lightning storm ignited at least four fires in South Okanagan County. CP 201. They were named the Stokes Road, Golden Hike, French Creek, and Cougar Flats fires. *Id.* These fires were later complexed together and collectively called the Carlton Complex fire.

CP 201. Each of the four fires at issue in this case originated on land within DNR's fire suppression jurisdiction located in the South Okanogan District of its Northeast Region. CP 197. The Northeast Region consists of Okanogan, Ferry, Stevens, Pend Oreille, and Spokane Counties, as well as the northern half of Lincoln County. CP 197. For purposes of its summary judgment motion only, DNR did not contest that any of the four lightning-caused fires also started on DNR-managed land. CP 27. As explained earlier, lands managed by DNR are part of "Department protected lands" just as any other public or private lands subject to forest fire protection assessments. RCW 76.04.610(7), .005(5). They are statutorily required to receive DNR's statutory fire suppression protection. RCW 76.04.610(7).

The Northeast Washington Interagency Communications Center (NEWICC) is the interagency dispatch center providing dispatching and logistical support to wildland fire suppression forces on lands in the northeast corner of Washington State protected by DNR, the federal Bureau of Land Management, United States Forest Service, and United States Department of Fish and Wildlife. CP 207-08, 334, 348, 358, 369. NEWICC receives reports of wildland fires either directly or through 911 call centers. CP 208. NEWICC then broadcasts the reports to all fire suppression ground resources in the field in the applicable area, requests estimated time of

arrival, and dispatches the closest available engines to respond. CP 208. NEWICC continues to provide dispatch and logistical support as a fire progresses. CP 207–11. NEWICC can only dispatch resources that are assigned to its area and made available to it for dispatch. CP 208. It has no control over what specific resources each agency makes available for interagency dispatch. CP 207. NEWICC may also request and dispatch out-of-area resources after a fire expands beyond the initial attack stage, if such resources are made available to it for dispatch. CP 209.

When responding to multiple requests for resources for multiple fires, NEWICC must prioritize those requests based upon whether structures and lives are threatened. CP 208. Firefighters on the ground must likewise prioritize firefighting needs and resources based on a number of factors, including whether structures and lives are threatened, firefighter safety, and the need to ensure initial attack resources are available to respond to new fires. CP 74–75, 201–02, 215.

Beginning in the early afternoon of July 14, NEWICC received separate reports for each of the four fires that eventually merged to form the Carlton Complex fire.² Between July 13 and 16, NEWICC and its

² NEWICC received reports on the Stokes Road, Golden Hike, and Cougar Flats fires on July 14. CP 210, 334, 348, 358. It identified the French Creek fire as a separate ignition on July 15. CP 210, 369. A smoke check based on a report made on July 14 in the nearby vicinity concluded the smoke reported was coming from the Stokes Road fire, referenced as “Incident 487” on the computer aided dispatch logs. CP 366.

constituent agencies responded to 81 incidents, including 41 wildland fires (including the four fires at issue in this case) and 36 smoke checks. CP 210. A total of 74 wildland fires were reported to have started in Washington and Oregon on July 14 alone, in addition to 12 ongoing large fires still uncontained at the time. CP 210. Needless to say, DNR and its firefighting partners' resources were stretched. CP 201, 210–11, 214–16.

As of July 14, 2014, DNR's local firefighting ground units in the South Okanogan District consisted of seven engines, each with two to three firefighters. CP 210. Because of the severe fire conditions in Eastern Washington at that time, fire managers in the South Okanogan District also requested and received three additional engines from regions west of the Cascades prior to July 14. CP 210, 282. The requesting and positioning of out-of-area resources by fire agencies in anticipation of severe fire conditions is known as "pre-positioning." CP 280–81. In total, there were 10 engines available for NEWICC to dispatch on initial attack to the Carlton Complex fire and any other incidents that might arise in that area at the time. CP 210. By the afternoon of July 14, all 10 of these ground units, in addition to four aircraft, were trained on the three fires reported in the South Okanogan District that day. CP 210.

Plaintiffs mischaracterize DNR's fire suppression resources, and, by extension, the role of NEWICC, the dispatch center, by suggesting that they

are “landowner[] fire suppression efforts.” Appell. Br. at 9–10. As the record shows, and as is irrefutably provided in statute, DNR utilizes fire suppression resources and the NEWICC dispatch center to fight fires threatening “Department protected lands.” RCW 76.04.005(5), .610; CP 198, 207. “Department protected lands” is not at all defined by whether DNR owns the land, but rather whether the forest landowners are required to pay DNR forest fire protection assessments. RCW 76.04.005(5), .610; CP 198, 207. It covers all 13 million acres of privately- and publicly-owned forestland subject to DNR’s fire suppression authority. CP 198.

Likewise, Plaintiffs incorrectly describe “initial attack” and “pre-positioning” as landowner actions. Appell. Br. at 9. The record does not support that description and unanimously defines these terms as actions taken by fire agencies in fire suppression efforts. *See, e.g.*, CP 267 (“Well, initial attack is the suppression of the fire.”), 280 (Pre-positioning “is usually made at a fire manager’s level”), 290 (“Initial attack is our [speaking on behalf of the dispatch center]’s priority.”).

The fires at issue in this case were first spotted by fire lookouts, firefighters, and others, who reported them directly to the NEWICC dispatch center. CP 210, 214–15, 334, 348, 358, 369. DNR was not conducting any activities on its land during that time. *Id.* DNR’s fire suppression services, in turn, responded because the fires started on or

threatened “Department protected lands,” which are defined as lands subject to the forest fire protection assessment. CP 198–99; RCW 76.04.005(5), .610. *See also* RCW 76.04.015(3)(b), .155, .165, .167. Since DNR personnel were not conducting any activity on DNR-managed land at the time these fires ignited, and the fires were spotted by others and reported directly to dispatch, there simply was no opportunity, or need, for DNR as a land manager to take any action at all in response to the fires.

Thus, DNR’s response to the four fires at issue here did not depend on whether DNR also owned the land in its proprietary capacity. State law requires DNR in its fire suppression capacity to respond to a fire threatening a participating landowner’s land no matter whether the fire starts on DNR-managed land or any other Department protected lands. RCW 76.04.610, .005(5). And that is what DNR did here.

D. Over 300 Landowners Filed Suit Against DNR, Challenging the Actions It Took in Suppressing the Carlton Complex Fire

Starting in November 2015, over 300 landowners represented by the same attorneys collectively filed five separate actions against DNR for property damage caused by the Carlton Complex fire. CP 1–6, 498–509, 537–46, 575–81, 605–11. All of the actions were ultimately consolidated because they involved essentially the same claims. CP 15–19. The landowners do not contend that DNR started any of these lightning-caused

fires that merged to form the Carlton Complex. CP 1–6, 498–509, 537–46, 575–81, 605–11. The landowners base their claims against DNR entirely on allegations that DNR was negligent in its efforts to suppress the fires, thereby causing fire to spread from DNR-managed lands to neighboring properties. CP 1–6, 498–509, 537–46, 575–81, 605–11.

Following substantial discovery in this case, DNR moved for summary judgment and dismissal based on the lack of any actionable duty pursuant to RCW 76.04.016 and the public duty doctrine. CP 20–47, 50. DNR explained in its motion that even though the Plaintiff landowners purported to base their claims on DNR’s duty as an owner of forestland, Plaintiffs were really challenging DNR’s decisionmaking and actions performed in its statutory capacity as a fire prevention and suppression agency. *See, e.g.*, CP 24, 30–31. Plaintiffs challenged only events that were exclusively within DNR’s statutory fire suppression capacity, such as allegedly failing to request aircraft from partner fire agencies in anticipation of worsening fire conditions. CP 24, 31, 412. DNR argued that alleged acts of negligence falling under its statutory fire suppression capacity could not give rise to a duty in tort under the plain language of RCW 76.04.016. *Id.* DNR explained that Plaintiffs raised no allegations of negligence concerning DNR’s landowner responsibilities, such as negligently starting

the fires in the first place, failing to report them, or unreasonably storing flammable materials on its property. CP 31, 412, 416–18.

The trial court granted summary judgment and dismissal to DNR based on RCW 76.04.016. CP 448–54. It also denied the Plaintiffs’ motion for reconsideration. CP 481–82. Plaintiffs appealed. CP 483–86.

IV. STANDARD OF REVIEW

In reviewing an order for summary judgment, this Court engages in the same inquiry as the trial court. *Munich v. Skagit Emergency Commc ’ns Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012). Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The Court considers all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.*

“A moving defendant meets the initial burden of demonstrating no genuine issue of material fact by pointing out that there is an absence of evidence to support the plaintiff’s case.” *Friends of Moon Creek v. Diamond Lake Improvement, Ass’n, Inc.*, 2 Wn. App. 2d 484, 494, 409 P.3d 1084 (2018) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *overruled in part on other grounds by* 130 Wn.2d 160, 922 P.2d 59 (1996)). “If a moving defendant makes this initial showing, then the plaintiff must set forth specific facts demonstrating a genuine issue

for trial.” *Id.* The “complete failure of proof concerning an essential element . . . renders all other facts immaterial.” *Id.* (quoting *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))).

“An essential element in any negligence action is the existence of a legal duty that the defendant owes the plaintiff.” *H.B.H. v. State*, 192 Wn.2d 154, 168, 429 P.3d 484 (2018). Whether “an actionable duty was owed to the plaintiff is a threshold determination” that is a question of law the Court reviews de novo. *Munich*, 175 Wn.2d at 877.

The meaning and application of a statute is also a legal question that the Court reviews de novo. *Matter of K.J.B.*, 187 Wn.2d 592, 596–97, 387 P.3d 1072 (2017). The “fundamental goal” is to “discern and implement the legislature’s intent.” *Id.* (quoting *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). Where “the statute’s meaning is plain on its face, then the court must give effect to that plain meaning.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). Courts discern plain meaning “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* at 11. “[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative

history.” *Id.* at 12. “Plain language that is not ambiguous does not require construction.” *Matter of K.J.B.*, 187 Wn.2d at 597.

V. ARGUMENT

DNR owes a statutory duty to the public to act to suppress wildland fires, but not to Plaintiffs individually. RCW 76.04.016. Plaintiffs contend DNR, in its capacity as a landowner, was negligent by failing to (1) pre-position more out-of-region fire suppression resources before the fires even started, and (2) respond to the fires with more suppression resources, more quickly. But those actions are unquestionably part of DNR’s statutory fire suppression capacity. State law explicitly precludes the imposition of an individualized duty on DNR, actionable in tort, when acting in its statutory fire suppression and prevention capacity. RCW 76.04.016. Plaintiffs have failed to identify, let alone offer evidence, of an allegedly negligent act or failure to act that falls under DNR’s capacity as a landowner. Accordingly, there is no duty implicated in this case that is not precluded by RCW 76.04.016, and summary judgment and dismissal was appropriate.

A. **DNR’s Statutory Fire Prevention and Suppression Activities Are Distinct From Its Landowner Obligations, and Do Not Give Rise to Individualized Actionable Tort Duties**

DNR operates as both a fire suppression agency and a manager of public lands, but only the latter function may give rise to individualized

duties. RCW 76.04.016. Moreover, DNR's fire suppression capacity is entirely distinct from DNR's land management capacity.

1. RCW 76.04.016 precludes the imposition of individualized duties against DNR for its fire suppression response

Since 1993, the Legislature has unequivocally and unambiguously provided that no individualized duty may be imposed against DNR for its fire prevention and suppression activities:

The department when acting, in good faith, in its statutory capacity as a fire prevention and suppression agency, *is carrying out duties owed to the public in general and not to any individual person* or class of persons separate and apart from the public. Nothing contained in this title, including but not limited to any provision dealing with payment or collection of forest protection or fire suppression assessments, may be construed to evidence a legislative intent that the duty to prevent and suppress forest fires is owed to any individual person or class of persons separate and apart from the public in general. This section does not alter the department's duties and responsibilities as a landowner.

Laws of 1993, ch. 196, § 1 (codified in RCW 76.04.016 (emphasis added)).³

The plain language of the statute invokes the public duty doctrine, used by courts as a focusing tool to separate governmental duties performed for the benefit of the public at large—which do not give rise to actionable tort duties—from actions that trigger duties owed to individuals and can give rise to tortious conduct. *See generally Munich*, 175 Wn.2d at 877.

³ Attached as Appendix B.

“The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 170–71, 759 P.2d 447 (1988) (citation omitted). In other words, public officials should not be dissuaded from taking on or carrying out duties intended to benefit the public in general due to potential exposure to liability. *Id.*; see also *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 561–62, 104 P.3d 677 (2004), as amended (Jan. 25, 2005).

The public duty doctrine generally applies to governmental functions but not to proprietary ones. *Sunshine Heifers, LLC v. Wash. Dep’t of Agr.*, 188 Wn. App. 960, 967, 355 P.3d 1204 (2015). It is used “to ensure that governments are not saddled with greater liability than private actors as they conduct the people’s business.” *Munich*, 175 Wn.2d at 886 (Chambers, J., concurring with four additional Justices). “Consequently, where a public entity acts in a dual capacity, application of the public duty doctrine depends on the particular function being challenged.” *Stiefel v. City of Kent*, 132 Wn. App. 523, 530, 132 P.3d 1111 (2006). “The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003).

Firefighting is perhaps the most clear-cut example of a public duty performed for the common good that does not ordinarily give rise to an individualized actionable tort duty. *See, e.g., Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001) (where firefighting would ordinarily not give rise to individualized duties, considering and rejecting only whether there were specific statements of assurance sufficient to create individual duty); *Pope v. Douglas Cty. Pub. Util. Dist. No. 1*, 158 Wn. App. 23, 241 P.3d 797 (2010) (allegation that firefighter negligently started backfire falls within public duty doctrine and was not sufficient to create individualized duty); *see also Lakoduk v. Cruger*, 47 Wn.2d 286, 289, 287 P.2d 338 (1955) (firefighter responding to request for aid performing public duty). “It is well established that the creation, maintenance, and operation of a fire department and all reasonably incident duties are a governmental function.” *Stiefel*, 132 Wn. App. at 529–30.

Consistent with the rationale underlying the public duty doctrine, RCW 76.04.016 precludes the imposition of actionable duties against DNR when performing statutory fire suppression and prevention responsibilities. When DNR is performing those functions, it is, by statute, acting only for the benefit of the public as a whole, and not for individual landowners that may be impacted by wildland fires.

RCW 76.04.016 is well within the Legislature’s constitutional authority to “direct by law, in what manner, and in what courts, suits may be brought against” DNR as an agency of the State. *See* Const. art. II, § 26. Here, the Legislature has exercised its constitutional authority to limit DNR’s actionable duties with respect to wildland fires. Specifically, while DNR may have separate duties as a landowner, DNR’s statutory fire suppression activities do not give rise to individualized actionable duties. *See* RCW 76.04.016.

2. DNR’s public fire suppression duties are completely distinct from its landowner duties

When DNR responds to wildland fires on land it is statutorily required to protect (i.e., those subject to forest fire protection assessments), it is acting entirely within its fire suppression capacity. RCW 76.04.610, .016; CP 198–99. DNR’s statutory fire suppression duty extends to *any* land subject to a forest fire protection assessment, including land managed by DNR in its proprietary capacity. RCW 76.04.005(5), .610(7); CP 199. Moreover, DNR’s public firefighting responsibility is exactly the same whether it is responding to a fire on DNR-managed land or any other land entitled to its statutory protection. RCW 76.04.610(7). Thus, when DNR responds to fires in its statutory fire suppression capacity, including fires starting on DNR-managed land, it is performing statutory public duties

completely separate from those which may be imposed on individual landowners. RCW 76.04.016.

By contrast, landowners, including DNR in its capacity as a land manager, have a number of different obligations under RCW Title 76. These responsibilities are regulated by DNR in its separate, regulatory capacity. *See, e.g.*, RCW 76.04 (Forest Protection); RCW 76.06 (Forest Insect and Disease Control); RCW 76.09 (Forest Practices). None of these landowner requirements encompass DNR's professional firefighting response to fires threatening land under its statutory protection.

Specific to mitigating the risk of fires, landowners and their agents have certain obligations under RCW 76.04 that largely relate to the manner and method of conducting operations on their land, such as growing and harvesting forest products, clearing land, and taking actions that intentionally or unintentionally start fires. *See* RCW 76.04.005(15) (defining "landowner operation"). Landowners are required, for example, to dispose of forest debris in a manner that does not increase fire risks. RCW 76.04.650, .660. RCW 76.04 imposes a number of additional duties on landowners. *See, e.g.*, RCW 76.04.205 (requiring precautions before burning flammable materials on Department protected lands), .215 (same with respect to mill wood waste), .235 (restricting dumping of mill waste and forest debris), .246 (prohibiting use of blasting fuse), .325 (limiting

logging, land clearing, or other operations which may cause a fire to start during certain conditions), .405 (prohibiting use of certain engines or other spark-emitting equipment during certain times of year), .435 (prohibiting deposit of fire or live coals), .455 (prohibiting discarding of lighted or smoking flammable materials), .465 (providing for felling of certain standing dead trees), .486 (requiring burning permit recipient to provide personnel and equipment for suppression of fire), .700 (requiring campfire to be extinguished), .710 (prohibiting wilful setting of fires that endanger forestlands), .730 (prohibiting negligently allowing fire to spread to the property of another), .740 (prohibiting reckless burning). Landowners must also report any fires to 911 or to DNR fire suppression. *See, e.g.*, RCW 76.04.445. The failure to comply with statutory landowner obligations might be evidence of landowner negligence. *See* RCW 5.40.050 (discussing evidence of negligence and negligence per se).

Landowner negligence that causes fire to spread onto and damage neighboring lands may result in statutory or common law liability. RCW 76.04.495, .760; *Stephens v. Mut. Lumber Co.*, 103 Wash. 1, 6, 173 P. 1031 (1918).⁴ The general duty of landowners to prevent the spread of fire from their lands is to exercise “reasonable effort” and “ordinary

⁴ Landowner negligence may also result in statutory liability to reimburse DNR and other fire agencies for fire suppression expenditures. *See* RCW 76.04.495, .750.

prudence” once they know of the existence of a fire on their land. *Stephens*, 103 Wash. at 6. Landowners have been held liable for “carelessly and negligently permit[ing] to accumulate and remain” a “large amount of dry grass, weeds, brush, logs, lumber, and other refuse of a highly combustible nature.” *Abrams v. Seattle & M. Ry. Co.*, 27 Wash. 507, 508–09, 68 P. 78 (1902). They have also been subjected to liability for starting fires during dry weather patterns and leaving no one to guard the fires. *See Keuhn v. Dix*, 42 Wash. 532, 534, 85 P. 43 (1906). There are no statutes or cases holding landowners to the standard of professional firefighting agencies for failing to contain fires on their land.⁵ Rather, DNR’s statutory fire

⁵ *See, e.g., Criscola v. Guglielmelli*, 50 Wn.2d 29, 30, 308 P.2d 239 (1957) (purposefully-set fire to burn trash surrounded by combustible materials left unattended); *Prince v. Chehalis Sav. & Loan Ass’n*, 186 Wash. 372, 377, 58 P.2d 290 (1936) (negligence for condition and use of building, including grease and oil on ground), *adhered to on reh’g en banc*, 186 Wash. 372, 61 P.2d 1374 (1936); *Walters v. Mason Cty. Logging Co.*, 139 Wash. 265, 246 P. 749 (1926) (sustaining trial court’s vacation of jury verdict finding negligence where landowner exercised reasonable care once he had notice of fire to respond to fire starting in area where logging had previously occurred); *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 235, 212 P. 174 (1923) (landowner who allowed combustible material to accrue liable for fire spreading when he tried to abate the nuisance); *Jordan v. Spokane, P. & S. Ry. Co.*, 109 Wash. 476, 478, 186 P. 875 (1920) (evidence fire was set by defendant during unusually dry season, on land of a combustible nature and permitted to spread rapidly); *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 321, 184 P. 323 (1919) (no negligence where fire started by logging operations was contained and lay dormant until wind caused fire to escape and do damage); *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 563, 164 P. 200 (1917) (despite being warned by fire ranger and neighbor of fire, and fire ranger’s opinion that landowner could have subdued fire at that time, landowner made “very little effort” to stop the fire on the second and third days following its ignition); *Aune v. Austin-Williams Timber Co.*, 52 Wash. 356, 356, 100 P. 746 (1909) (defendant conducting logging operations negligently started fire with equipment, plaintiff’s recovery limited when plaintiff knew fire raging but made no effort to combat it); *Fireman’s Fund Ins. Co. v. N. Pac. Ry. Co.*, 46 Wash. 635, 91 P. 13 (1907) (railway company alleged to permit large amounts of dry, combustible material to accumulate on right of way, where defective locomotive emitted sparks and set fire); *Wick*

suppression capacity is completely separate from the obligations of landowners, including DNR, to take due care to prevent the spread of fire from their land.

In sum, RCW 76.04.016 unambiguously precludes the imposition of an individualized duty on DNR for its statutory fire suppression response, including when it responds to fires spreading from DNR-managed lands. Moreover, DNR's duties as a landowner are completely distinct from its public duties as a fire suppression agency.

B. *Oberg*, Which Preceded RCW 76.04.016, Does Not Control Here

Plaintiffs rely heavily on the Washington Supreme Court's decision in *Oberg*, 114 Wn.2d 278, to advocate for why DNR has an actionable landowner duty with respect to its fire suppression response in this case. Appell. Br. at 2–5, 25–31, 43–44, 49. In *Oberg*, the Court found DNR liable for its response to the lightning-caused Barker Mountain Fire, which started

v. *Tacoma E. R. Co.*, 40 Wash. 408, 410, 82 P. 711 (1905) (allegations that landowner accumulated combustible material and ignited fire on property, but failed to use reasonable efforts to extinguish fires); *LeClercq Marine Const. Inc. v. Leco, Inc.*, 12 F.3d 1107, 1993 WL 495605 (9th Cir. 1993) (unpublished, but cited by Plaintiffs at CP 470) (landlord stored flammable and combustible materials near area renting out to multiple families using wood burning stoves) (attached as Appendix C); *Chicago, M., St. P. & P. R. Co. v. Poarch*, 292 F.2d 449, 451 (9th Cir. 1961) (negligence in maintaining condition of property creating fire hazard); *Arnhold v. U.S.*, 284 F.2d 326 (9th Cir. 1960) (fire started by locomotive, fire suppression response was contractually required). *But see Oberg*, 114 Wn.2d 278 (affirming liability based on “intermixed” duties as landowner and fire suppression agency for DNR's response to a wildland fire). As explained later in this brief, this aspect of *Oberg* was abrogated by RCW 76.04.016, and, in any event, was based on a unique procedural posture not present in this case.

on and spread from DNR-managed land. *Oberg*, 114 Wn.2d at 279, 286–87, 289. But, by its own terms, *Oberg* was a “narrow” holding based on the “peculiar state of [the] record and the unique dual, specific duties statutorily placed on DNR.” *Id.* at 284. The Court in that case found that although it “would be wise and prudent [for the Legislature] to separate clearly the duties of DNR as a landowner and as a firefighter,” the Legislature had “not done so,” but, instead, “intermixed these duties.” *Id.* at 285.

In response to *Oberg*, the Legislature enacted RCW 76.04.016, which patently separates DNR’s function as a landowner from that as a firefighting agency, and precludes DNR from owing an individualized duty for its fire suppression activities. Thus, *Oberg* was addressed by a later-enacted statute, and simply does not apply to the statutory scheme at issue here. Additionally, none of the peculiarities identified in *Oberg*, which followed a jury finding of negligence and included several key DNR concessions, are present in this case.

1. In response to *Oberg*, RCW 76.04.016 separated DNR’s fire suppression capacity from its landowner capacity

Following the *Oberg* decision, in which the Court suggested that the Legislature could have—but failed to—“separate clearly the duties of DNR as a landowner and as a firefighter,” the Legislature enacted

RCW 76.04.016. That statute expressly distinguishes DNR's fire prevention and suppression responsibility from its land management role, allowing for the possibility of individual tort duties to attach only to the latter capacity. RCW 76.04.016. The law now unambiguously provides that DNR is performing a distinct public governmental function when carrying out its statutory responsibility to prevent and suppress wildland fires, one that does not create duties to individuals or classes of individuals. *Id.* Thus, regardless of how *Oberg* analyzed DNR's fire suppression response under the public duty doctrine prior to 1993, those activities are now completely separate from DNR's land management responsibilities, and do not give rise to actionable tort duties.

DNR agrees with Plaintiffs that RCW 76.04.016 is unambiguous, Appell. Br. at 35, so the Court need not go beyond the plain language of the statute to discern the Legislature's intent. *See Dep't of Ecology*, 146 Wn.2d at 9–12. Nonetheless, the legislative history also supports the conclusion that DNR's fire suppression activities cannot give rise to an individualized duty. As an explanation for the necessity of amending the law, the Final Bill Report noted:

A recent State Supreme Court decision held the department liable for property damage caused by the Barker Mountain fire which started on department lands. The court rejected the department's argument that the department had only a public duty and not a duty to individual landowners. . . . This

decision will make the department vulnerable to future negligence law suits when the department is acting in its fire fighting and suppression capacity.

CP 177 (Final Bill Report, SSB 5025 (1993) at 1); *see also Rozner v. City of Bellevue*, 116 Wn.2d 342, 345, 804 P.2d 24 (1991) (using final bill report as evidence of legislative intent). To fix this issue:

A public duty doctrine [was] established for the Department of Natural Resources when the department is acting in its fire fighting and suppression capacity. This duty is owed to the public in general and not to any individual or class of persons separate from the general public. Payment of forest protection and fire suppression assessments will not create a special department duty toward those who pay the assessments.

CP 178; *see also* CP 195 (Legislative Digest and History of Bills of the Senate and House of Representatives, 53rd Leg. (May 4, 1994) (“Clarifying forest fire fighting duties. . . . Declares that the department of natural resources, when acting in its statutory capacity as a fire prevention and suppression agency, is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public.”)); *see also Roberts v. Dudley*, 140 Wn.2d 58, 85, 993 P.2d 901 (2000) (considering legislative digest in discerning legislative intent).

With its enactment of RCW 76.04.016, the Legislature expressly reinstated the distinction found lacking in *Oberg*. RCW 76.04.016 acknowledges and differentiates DNR’s activities as a fire suppression agency from those of a land manager, without reference to whether it is

responding to a fire on its own land or any other land under its statutory protection. RCW 76.04.016. Thus, the law now makes clear that DNR performs statutory fire prevention and suppression services for the benefit of the public as a whole on any land statutorily protected by DNR.

Plaintiffs concede that the Legislature passed RCW 76.04.016 in direct response to and in abrogation of the *Oberg* decision. Appell. Br. at 30 (“RCW 76.04.016 Abrogated DNR’s Duty”); *see also* Const. art. II, § 26 (vesting Legislature with authority to “direct by law, in what manner, and in what courts, suits may be brought against the state”). Indeed, the Legislature has “the power to supersede, abrogate, or modify the common law.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008). As Plaintiffs acknowledge in their brief, the first sentence of RCW 76.04.016 invokes the public duty doctrine with respect to DNR’s fire suppression actions, and “prevents DNR from” owing a duty in that respect. Appell. Br. at 31.

Despite this agreement, Plaintiffs attempt to artificially deconstruct *Oberg* into distinct duties in hopes of conjuring one that might remain following RCW 76.04.016 and apply to this case. According to Plaintiffs, the only duty found by the *Oberg* Court that offended the Legislature was one based on the payment or collection of forest fire protection assessments. Appell. Br. at 30. But that reasoning belies the very language of the statute

and the *Oberg* decision it addressed, and defies long-standing rules of statutory construction.

The plain wording of the statute rejects more than a duty based merely on forest protection and fire suppression assessments. The first sentence makes sure that DNR’s fire suppression activities are off the table when it comes to actionable tort duties: “The department when acting, in good faith, in its statutory capacity as a fire prevention and suppression agency, is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public.”

The statute drives the point home by clarifying that:

[n]othing contained in this title, *including but not limited to* any provision dealing with payment or collection of forest protection or fire suppression assessments, may be construed to evidence a legislative intent that the duty to prevent and suppress forest fires is owed to any individual person or class of persons separate and apart from the public in general.

RCW 76.04.016 (emphasis added). If the Legislature intended to abrogate the imposition of a duty founded only upon assessments, it could have easily—and far more succinctly—said so.

More importantly, the Legislature would not have used the term “including but not limited to” if it intended to abrogate only a duty founded upon forest fire protection assessments. Nor would it have so broadly stated that “nothing” in RCW Title 76 is intended to impose upon DNR a duty to any individuals or class of persons to prevent or suppress forest fires.

Plaintiffs' suggestion to the contrary violates the rule that statutes must be construed in a way that gives all of their words meaning and effect. *See Kittitas Cty. v. Kittitas Cty. Conserv. Coal.*, 176 Wn. App. 38, 51, 308 P.3d 745 (2013).

Plaintiffs' artificial limitation on RCW 76.04.016 also ignores the rule that laws must be read in "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). None of the laws defining DNR's fire suppression response do so by differentiating DNR's suppression response to fire originating on DNR land from its response to any other fire threatening DNR protected land. *See generally* RCW 76.04.

RCW 76.04.155, for example, authorizes DNR to "employ a sufficient number of persons to extinguish or prevent the spreading of any fire that may be in danger of damaging or destroying *any timber or other property on department protected lands.*" RCW 76.04.155 (emphasis added). As discussed previously, "Department protected lands" means "*all lands subject to the forest protection assessment under RCW 76.04.610,*" including land managed by DNR. RCW 76.04.005(5) (emphasis added). DNR is required to respond to a fire threatening Department protected lands without regard to whether the fire spread from land managed by DNR or

any other landowner. RCW 76.04.610(7); CP 198–99. The law also provides that “the costs of fire protection” provided by DNR “be equitably shared between the forest protection assessment account and state contributions to ensure that there will be sufficient firefighters,” again without reference to whether the fires occur on DNR-managed land or other “Department protected lands.” RCW 76.04.167. The entire statutory scheme governing forest protection demonstrates that DNR’s statutory capacity as a fire prevention and suppression agency extends to its fire suppression actions on all land, including DNR-managed land. RCW 76.04.005(5), .155, .610; *see generally* RCW 76.04.

The proper interpretation of RCW 76.04.016 is that it means exactly what it says: DNR performs fire suppression services on behalf of the public as a whole. Statutorily-mandated fire suppression is entirely separate from DNR’s landowner capacity. No provision of RCW Title 76 is intended to impose upon DNR a duty to anyone but the public in general when engaged in its statutory fire suppression and prevention responsibilities, despite what *Oberg* had inferred in the past. Since the Legislature is presumed to have full knowledge of existing laws, the Legislature obviously knew it was invoking the decades-old public duty doctrine to declare that DNR owes no duty to any individual plaintiff or group of plaintiffs when it is acting in its firefighting capacity. *See, e.g., Maziar v. Dep’t of Corr.*, 183 Wn.2d 84, 88,

349 P.3d 826 (2015) (holding that courts must presume the Legislature enacts laws with full knowledge of existing law); *Taylor*, 111 Wn.2d at 163 (describing the public duty doctrine and recognizing that “to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general.”).

Plaintiffs attempt to support their interpretation of RCW 76.04.016 by resorting to an uncertified transcription of part of a recording from a hearing before the House Committee on Natural Resources and Parks. *See* Appell. Br. at 38–39; CP 240–41. Those snippets are not enough to overcome the plain reading of the statute or the legislative history offered by DNR. First, the statements are inadmissible both because they are unauthenticated and because they are hearsay.⁶ Second, a single legislator’s remarks are not controlling on any analysis of legislative history or conclusive as to a court’s interpretation of a statute. *In re Marriage of Ruff & Worthley*, 198 Wn. App. 419, 436, 393 P.3d 859 (2017). Third, some of the statements are simply uninformative, while others actually support DNR’s interpretation. In one excerpt, a plaintiffs’ lawyer apparently asks Committee Chair Wes Pruitt whether the then-bill would still allow

⁶ In fact, in one instance, the evidence is triple-hearsay, as it appears to be a representative of the Washington State Trial Lawyers Association telling Representative Pruitt what the Association was told by a DNR commissioner and her staff. *See* CP 240: 9–14.

negligence claims against DNR. Representative Pruitt reportedly responds that the bill would not exempt DNR from “any liability” but would instead address “this extra special duty that the *Oberg* Court imposed.” Appell. Br. at 38. The most logical inference from that is that the legislation was intended to undo the liability imposed on DNR in *Oberg*, which was based on DNR’s “intermixed” duties as a landowner and a fire suppression agency. *See Oberg*, 114 Wn.2d at 285.

Again quoting Representative Pruitt, Plaintiffs place special emphasis on his statement, “*This bill is intended to return to what would be the normal rule.*” Appell. Br. at 38 (emphasis original). The “normal rule” before *Oberg* was the public duty doctrine and not the extraordinary liability found by the *Oberg* Court. *See Cummins v. Lewis Cty.*, 156 Wn.2d 844, 862–67, 113 P.3d 458 (2006) (recounting history of public duty doctrine). Never before *Oberg*, and never since, has DNR been found to have an actionable tort duty for its firefighting response, regardless of whether on DNR-managed land or other land protected by DNR. The only logical conclusion is that the legislator was offering his understanding that DNR’s firefighting activities would once again fall within the realm of the public duty doctrine. *See Maziar*, 183 Wn.2d at 88.

RCW 76.04.016 specifically carves out DNR’s statutory fire suppression responsibilities and distinguishes them from the ordinary duties

of a landowner. It does so without any reference to whether those fire suppression duties are performed on DNR-managed land or any other land that falls under DNR's statutory protection. There is no legal, logical, or admissible basis to conclude that the Legislature intended to leave open any exception when DNR is acting in its fire protection and suppression capacity, regardless of whose land it is acting to protect.

2. *Oberg* was based on “intermixed” landowner and fire suppression duties and several concessions not present in this case

Even if not entirely abrogated by RCW 76.04.016, *Oberg* is not helpful in delineating the types of acts or omissions that fall under DNR's duties as a landowner as opposed to its public firefighting responsibility. In addition to concluding that the Legislature had blended DNR's duties as a landowner and a fire suppression agency to suppress fires spreading from its land, the *Oberg* Court also found critical that DNR had effectively conceded negligence in that case—and, thereby, a duty—by not appealing the sufficiency and admissibility of the evidence or the instructions underlying the jury's verdict. *See Oberg*, 114 Wn.2d at 280, 284–85, 288–89. As such, the *Oberg* decision did not need to describe the nature of either DNR's landowner or fire suppression duty individually, because at the time the duties were mixed, and, in any event, conceded.

Plaintiffs try to neatly parse *Oberg* as recognizing three separate, distinct DNR duties: (1) common law landowner, (2) statutory landowner, and (3) “DNR’s status as a fire suppression agency.” Appell. Br. at 25–29. Plaintiffs describe that third duty as “entirely detached from DNR’s status as a landowner,” arising “*solely* from DNR’s status as a fire suppression agency,” and applicable *only* when DNR fails “to take reasonable steps to prevent the spread of fire from land that was *not* owned by DNR if the fire damaged the property of an owner who paid DNR a special assessment to protect their property from fire.” Appell. Br. at 29. It is only this third duty that Plaintiffs claim implicates the public duty doctrine and was addressed by RCW 76.04.016. But *Oberg* cannot be compartmentalized in the manner suggested by Plaintiffs.

Contrary to Plaintiffs’ characterization, the *Oberg* Court did not define DNR’s statutory fire suppression duty as limited to those instances where DNR responds to fires spreading from non-DNR land. Any such characterization, in any event, would be contrary to statute. RCW 76.04.610(7). Rather, the *Oberg* Court specifically found that the Legislature had “intermixed” DNR’s landowner and statutory fire suppression duties. 114 Wn.2d at 285. The *Oberg* Court found the public duty doctrine “not applicable” to any part of that case, because landowners paying a forest fire protection assessment were a “particular and

circumscribed class of persons . . . to whom *multiple duties* were owed by DNR.” *Id.* at 285 (emphasis added). This conclusion was based on a review of the entire “statutory scheme” in RCW 76.04 and elsewhere. *Id.* Looking at the statutory scheme as a whole, the *Oberg* Court explicitly rejected any relevant distinction between DNR in its landowner capacity and DNR in its firefighting capacity, instead finding legislative intent to protect forest landowners through DNR’s statutory fire suppression response. *Id.* at 285–86, 289. The Court commented that the Legislature could have, but failed to, clearly separate DNR’s capacity as a landowner from that as a fire suppression agency:

Perhaps it would be wise and prudent to separate clearly the duties of DNR as a landowner and as a firefighter. *The Legislature has not done so, and in fact, has intermixed these duties.* . . . After placing these original duties upon the landowner and including DNR within the landowner category, the Legislature then mandates that DNR shall provide adequate protection if the landowner does not. If a fire starts and proper action is not taken to prevent its spread, DNR is ordered by statute to summarily suppress it.

Id. at 285 (emphasis added). Thus, because the Court believed the Legislature had amalgamated DNR’s duties as a landowner and as a fire suppression agency, the *Oberg* decision did not specifically address whether DNR’s landowner duties, on their own, could encompass the types of allegations at issue in this case. *Id.* As explained earlier, the Legislature responded to this concern by enacting RCW 76.04.016, specifically

separating out DNR's statutory fire suppression capacity from its landowner capacity.

The *Oberg* decision also did not describe or opine on the scope or extent of DNR's duties because, in that case, DNR "admit[ted] it [had] statutory fire fighting duties and common law and statutory duties as a landowner." *Id.* at 280–81. DNR admitted in that case it would have been liable for the escape of the fire "under normal circumstances," and had already conceded multiple duties in that case, including that it had a "duty of fire protection to those forest landowners who pay the forest protection and fire suppression assessments." *Id.* at 281. The Court was unsatisfied with DNR's argument that it would have been liable for its response to the Barker Mountain fire if there were only one fire, but since there were multiple fires, it had no duty. *Id.* The *Oberg* Court also found compelling that DNR did not challenge jury instructions defining the duties, and did not challenge the admissibility or sufficiency of evidence underlying the verdict. *Id.* at 280. As a result, the Court found DNR breached its duties as a matter of law, whatever the scope of those duties may be, based on the "unchallenged jury's answers." *Id.* at 283; *see also id.* at 288. Thus, the Court made the "inescapable" conclusion was that DNR "was negligent, [and] admits it was negligent." *Id.* at 289.

These concessions permeate the Court’s decision in several respects. *See id.* at 284 (“We emphasize the narrowness of this holding because of the peculiar state of this record.”), 288–89. In at least two separate places in its decision, the Court found that DNR’s concession of negligence meant DNR was actually seeking immunity, or a defense to liability, rather than recognition that there was no individually actionable duty. *Id.* at 280 (“The essence of DNR’s position is that the public duty doctrine prevents liability from attaching to its negligence.”), 289 (“The Legislature has abolished defendant’s sovereign immunity, RCW 4.92.090, yet it is immunity which defendant seeks.”). The Court concluded: DNR could “only escape its judgment liability by this court holding it immune.” *Id.* at 289.

The Court also used DNR’s concessions in that case to reject the argument that emergency firefighting decisions should not, as a matter of public policy, be subject to “after-the-fact, courtroom scrutiny.” *Id.* at 288–89. Specifically, by choosing “*not* to challenge the evidence supporting the jury’s finding of negligence,” and choosing “*not* to challenge the instructions under which the jury found that negligence,” the Court found DNR had “tacitly admit[ted] the soundness and fairness of the jury’s scrutiny of its emergency fire fighting decisions” in that case. *Id.* at 288–89 (emphases in original).

The issue on appeal in *Oberg* was, by the Court's own characterization, entirely different than the issue here. As the *Oberg* Court stressed, immunity is very different from the lack of a duty. *Id.* Here, DNR has made no concessions or arguments similar to the ones the Court found significant in *Oberg*. DNR does not concede it was negligent as a landowner or as a fire suppression agency for any of the many fires it was responding to during the relevant time. DNR acknowledges it has landowner duties, but those landowner duties are not implicated by the acts and omissions Plaintiffs allege as negligence here. The question in this case, unlike in *Oberg*, is whether DNR has an actionable duty in the first place with respect to its statutory fire suppression response. It does not: RCW 76.04.016 and the public duty doctrine preclude imposition of an actionable duty against DNR in its fire prevention and suppression capacity.

The Ninth Circuit's *Arnhold* case, cited in *Oberg*, is likewise not helpful here. *See Oberg*, 114 Wn.2d at 283–84 (citing *Arnhold v. U.S.*, 284 F.2d 326, 328 (9th Cir. 1960)). The land owner/occupier duty the court imposed there was to “exercise ordinary and reasonable care to prevent spread of the fire to the damage of others.” *Arnhold*, 284 F.2d at 330. The phrase “ ‘immediate vigorous action’ to control all fires breaking out,” came not from any party's landowner duty, but from the United States' voluntarily-undertaken contractual duty. *Id.* at 328. In addition, *Arnhold*

was decided in 1960: over 30 years before RCW 76.04.016 was enacted, and prior to judicial recognition of the public duty doctrine. *See Cummins*, 156 Wn.2d at 862–67 (recounting history of public duty doctrine, first judicially recognized following abolishment of sovereign immunity in 1961). *Arnhold* is not controlling or persuasive here.

In sum, based on the “peculiar state of [the] record”, *Oberg* ultimately declined to find that DNR had *immunity* for its fire suppression actions. 114 Wn.2d at 284. Due to the scope of the appeal, the decision also recognized—but did not define—multiple duties of DNR with respect to the spread of fire based on “intermixed” statutory and common law obligations. *Id.* at 285. The *Oberg* Court did not go into whether the alleged acts of negligence fell under DNR’s statutory fire suppression duty to the exclusion of its landowner duty, or vice versa, because the Court found DNR had duties under either capacity, the Legislature had mingled those duties, and DNR admitted negligence under both. *Id.* at 281. The Legislature responded by enacting RCW 76.04.016, and clearly carving out DNR’s fire suppression responsibilities from any potentially actionable landowner duty. For all these reasons, *Oberg* does not control and Plaintiffs’ claims were properly dismissed pursuant to RCW 76.04.016.

C. Plaintiffs' Lawsuit Implicates Only DNR's Fire Suppression Response to the Carlton Complex Fire, Not Any Action or Inaction as a Landowner

In response to DNR's motion for summary judgment based on RCW 76.04.016 and the public duty doctrine, Plaintiffs needed to identify acts they claimed were negligent that concerned a duty by DNR in its capacity as a landowner. *Friends of Moon Creek*, 2 Wn. App. 2d at 494; RCW 76.04.016. Plaintiffs failed to identify any. Indeed, Plaintiff landowners do not contest that DNR's fire suppression response is generally subject to RCW 76.04.016 and the public duty doctrine, and, accordingly, does not give rise to an actionable, individualized tort duty. Appell. Br. at 3, 29–31, 41. Plaintiffs nevertheless claim this case is different because the fires allegedly started on DNR-managed land, thus supposedly triggering DNR's "concomitant" duty as a landowner to take reasonable care to prevent the spread of fire from its land. *Id.* at 3, 41. But the only actions they claim violated DNR's landowner duty of care are the judgment calls made by firefighters and dispatch workers, which were made by DNR and its partner agencies exclusively in their capacities as fire suppression agencies. CP 198–99. Plaintiff landowners never identify any other act or opportunity for action they claim was negligent. This failure is critical, and fatal, to their claims.

1. Plaintiffs' allegations of negligence focus exclusively on DNR's statutory fire suppression response

Plaintiffs challenge only DNR's fulfillment of its statutory fire suppression duties, not its duties as a landowner. In their complaints, Plaintiffs alleged that DNR was negligent in its manner of responding to the fires and performing fire suppression activities. CP 1–6, 498–509, 537–46, 575–81, 605–11. More specifically, in response to DNR's motion for summary judgment, and on appeal here, Plaintiffs claim DNR was negligent in failing to “pre-position” additional outside fire suppression resources in anticipation of fire activity, pre-order additional initial attack resources the nights before they were needed, and generally allocate resources to the various fires DNR was attacking in accordance with the priority Plaintiffs believe should have been afforded. Appell. Br. at 7–18; CP 222–32, 242–43 (“Plaintiffs allege DNR failed to exercise ‘urgent speed, vigorous attack and great thoroughness in reaching and putting out’ the four fires that eventually formed the Carlton Complex.” (Quoting *Arnhold*, 284 F.2d at 329)). These are all acts performed by DNR exclusively in its statutory fire suppression capacity. CP 198–99; RCW 76.04.015(3)(b), .165(2), .167(2), .610(1)(a). And these are all acts DNR performs regardless of whether a fire starts on DNR-managed land or any other land subject to a forest fire

protection assessment. CP 198–99, 207; RCW 76.04.610. Plaintiffs’ allegations are not, as a matter of law, allegations of landowner liability.

While certain landowner acts or omissions might result in landowner liability, no such conduct is alleged by Plaintiffs in this case. Here, there are no allegations (or evidence supporting such allegations) that DNR land managers even knew the fires existed before DNR fire suppression and its partner fire agencies responded. Nor did Plaintiffs offer any evidence that DNR was conducting landowner operations or was otherwise present on the land and somehow failed to report the fires when they ignited. There are likewise no allegations that DNR maintained its property in such a way as to encourage the spread of fire. The undisputed facts in this case are that DNR first learned of the fires through calls to 911 or dispatch, and DNR fire suppression responded accordingly. CP 199, 201, 210, 214. Plaintiffs point to no authority that requires landowners to take additional actions to stop the spread of fire when fire suppression services are already underway, particularly when the landowners did not start the fire, are not present for the ignition of the fire, and are not conducting any landowner activities. Thus, Plaintiffs fail to implicate any landowner duties by complaining only about actions exclusively within DNR’s statutory fire suppression capacity.

2. The fact that DNR is both a land manager and a fire suppression agency does not mean its landowner duty encompasses its public fire suppression duty

Plaintiffs' theory of the case seems to be that because DNR is both a land manager and a fire suppression agency, DNR's landowner obligations extend to that of a fire suppression agency. But the general duty of landowners to prevent the spread of fire from their lands is to exercise "reasonable effort" and "ordinary prudence" once they know of the existence of a fire on their land. *Stephens*, 103 Wash. at 6. A firefighting department's resource allocation decisions cannot be imputed to a landowner's standard of care, just because the fire started from or spread from that landowner's property. Except, perhaps, for *Oberg*, no case has ever suggested a landowner has a duty equal to that of a fire suppression agency. When confronted with a natural disaster such as a lightning-caused fire where emergency services are already en route or on scene, it is entirely reasonable for a landowner to let emergency services do their job.

If Plaintiffs' claims were allowed to stand as landowner claims, DNR would be subject to a standard far beyond that required of any other landowner, and far beyond that required in the exercise of "ordinary care." *See Stephens*, 103 Wash. at 6. *See also Woodward v. Taylor*, 184 Wn.2d 911, 920, 366 P.3d 432 (2016) (reciting general negligence standard of care as "degree of care which an ordinarily careful and prudent

person would exercise under the same or similar circumstances or conditions” (citation omitted)); *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 221, 802 P.2d 1360 (1991) (landowners are “not an insurer as to all those who may be affected by activity involving the possessor’s premises”); *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn. App. 647, 658, 24 P.3d 1098 (2001) (landowner owed no duty to neighboring landowners to stabilize slope where it had no notice of hazard produced by alteration to natural condition of land).

Land ownership does not bring with it a duty to strategically pre-position heavy firefighting equipment gathered from around the state or requested from other government agencies under interagency cooperation agreements. Landowners do not dispatch air-attack resources. Landowners do not set up interstate Incident Management Teams.⁷ Smokejumpers do not radio landowners for permission to investigate potential new fires.⁸

⁷ Most of Plaintiffs’ criticism about DNR’s fire suppression response seems to be about how DNR categorized the fires in their early stages. DNR and its partner agencies use a complexity analysis to determine and assign the appropriate level of fire suppression resources to respond to wildland fires. CP 199–200. Wildfire incidents are categorized based on their perceived complexity on a scale of 1 to 5, with type 5 incidents being the least complex. *Id.* Incident Management Teams are the firefighters that respond to the fire, and they designate fires using the same scale. *Id.* Incidents designated Type 3, 2, and 1, generally require more resources and consist of incident management team members from multiple fire suppression agencies. *Id.*

⁸ Smokejumpers are employed by the United States Forest Service to parachute in and provide initial attack to fires in remote areas. *See generally* United States Forest Service, “Smoke Jumpers,” <https://www.fs.fed.us/science-technology/fire/smokejumpers> (last visited Apr. 11, 2019). Plaintiffs alleged that DNR “declined” an offer by a group of smokejumpers to “investigate” a report of smoke that they claim was ultimately determined to be the French Creek fire. Appell. Br. at 14–15. As explained by NEWICC’s dispatch

These are the activities of firefighting agencies, plain and simple. These are the types of things that DNR does, in the words of RCW 76.04.016, in its “statutory capacity as a fire prevention and suppression agency.” And these are the exact types of things that the Legislature decided are part of DNR’s duty to the public at large, and thus covered by the public duty doctrine. Yet these are the things Plaintiffs allege were performed negligently in this case.

Two analogous examples are helpful to explain why Plaintiffs’ theory is not logical. Under the first example, someone trips and injures his head while walking down a hospital corridor, due to no circumstances that suggest landowner premises liability. The person then receives emergency treatment by the very same hospital, and claims the medical treatment failed to meet the applicable standard of care. The existence of a medical malpractice claim does not implicate the hospital’s duty as a premises owner. *Cf. Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 635–36, 383 P.3d 1053 (2016) (school bus driver’s failure to protect student from bullying implicated school’s duty to supervise students, not its heightened duty as the operator of common carrier, because alleged negligence was not connected to operation of school bus).

manager, “DNR has no control over smokejumpers. The smokejumpers are a national resource, and as such they were on order to the Pittsburg fire. We would not be able to divert them.” CP 294.

Second, consider a fire at a municipal fire chief's home. The fire chief is not home, but is on vacation. She learns from a phone call by the neighbor that the house is on fire, 911 has been called, and the fire department (at which the chief works) is en route. The fire chief has no obligation as a landowner to take any additional actions. Even if the fire chief were home, she has no obligation as a landowner to take any additional actions once the fire department is on scene. Under Plaintiffs' theory, however, the chief would owe a duty for any negligence by the fire department while attempting to suppress the fire, if it spread and damaged a neighbor's property. Analogous here, this could include a claim that the fire department improperly prioritized protecting a different neighboring house instead of the house that ultimately suffered damage due to fire spread. This is untenable, and runs directly counter to the very purpose behind the public duty doctrine. *Cf. B. W. King, Inc. v. Town of W. New York*, 49 N.J. 318, 327–28, 230 A.2d 133 (1967) (finding municipal fire department's failure to extinguish fire could not be imputed to municipality as landowner, and “ ‘reasonable means to prevent the spread of fire’ does not require any further action on the part of the owner upon obtaining notice of the existence of a fire [other] than alerting the proper public authority charged with the duty of extinguishing fires”).

If Plaintiffs are allowed to re-characterize this negligent firefighting case as a case of landowner liability, then the mere fact that DNR happens to operate the State’s forest firefighting service would mean this particular landowner should be held to a different standard than every other landowner in the state. That position simply cannot be reconciled with the principle that state agencies are liable for damages arising out of their tortious conduct to the same extent as if they were private persons or corporations. *See Munich*, 175 Wn.2d at 878; RCW 4.92.090.

3. The fact that DNR is both a land manager and a fire suppression agency does not mean it is performing both functions simultaneously when responding to wildland fires

Plaintiffs are also wrong to characterize DNR’s fire suppression response to the Carlton Complex fire as the “simultaneous” action of DNR as a landowner and DNR as a fire suppression agency. *See* Appell. Br. at 42. The undisputed facts establish only that DNR in its fire suppression capacity was aware of and responded to the underlying fires. CP 198–99.⁹

⁹ As noted earlier, DNR does not agree with Plaintiffs’ characterization of the facts, which often lack sufficient support in the record. *See* Resp. Br. *supra* at 8–9. Plaintiffs also cite to their own summary judgment briefing, rather than to evidence, for factual support. *See, e.g.*, Appell. Br. at 9 (citing CP 223), 10 (citing CP 224–25 multiple times). This is improper. *See Beltran v. Dept. of Soc. & Health Servs.*, 98 Wn. App. 245, 253 n.1, 989 P.2d 604 (1999) (noting the appellant “improperly cit[ed] to trial court briefs in support of her factual assertions, rather than to independent documents in the record”). But since this appeal raises a question of law with respect to DNR’s public duty as a fire suppressing agency, and Plaintiffs’ proffered facts, even if accurate, relate to allegedly negligent firefighting, any factual differences are not material to the outcome of this appeal.

The only actions that have been challenged in this case were those of DNR in its statutory fire suppression capacity, made pursuant to express statutory authority in RCW 76.04.015, .016, .155, .165, .167, .175, .177, and .610.

For similar reasons, the cases cited by Plaintiffs for the proposition that an agency can be liable in its capacity as a landowner even though it also has governmental responsibilities do not support Plaintiffs' request for relief. *See* Appell. Br. at 42–43 (citing *Okeson*, 150 Wn.2d at 550–51, *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998), and *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995)). *Okeson* merely stands for the noncontroversial proposition that governmental functions are generally acts performed for the common good, while proprietary functions are generally performed for the special benefit or profit of the agency. 150 Wn.2d at 550. In fact, *Okeson* directly contradicts Plaintiffs' argument here that DNR was simultaneously performing private landowner and public firefighting duties. *Id.* at 551. In *Okeson*, the Court concluded that an act “cannot be a proprietary function for some purposes, but a government function for others.” *Id.* Similarly here, fighting a massive complex of four fires cannot be a governmental function for some purposes, but a proprietary function for others. Rather, it is an entirely governmental function.

DiBlasi is similarly unhelpful to Plaintiffs. There, the Court found that the City could be responsible as a landowner for an artificial alteration

to its property (i.e., a street) that caused surface water to collect, concentrate, or channel in a manner different from its natural flow onto an adjoining landowner's property. 136 Wn.2d at 882. The City could not, however, be held liable to an adjoining landowner for failing to do something completely different: repair a tension crack to streets it provided for public use. *Id.* Finally, *Johnson* merely acknowledges the well-settled law that public entities can have duties with respect to conditions on the premises to persons present on their property via their status as invitees (which the State in that case did not dispute). 77 Wn. App. at 940.

None of these cases demonstrate specific actions that are, at the same time, both public and private duties. Rather, they all recognize that public entities have some duties that stem from their status as landowners or contractors, and some that derive from their public agency function. Consistent with those cases, DNR here acknowledges its status as a landowner could implicate duties to adjoining landowners if, for example, it was aware of a fire on its land and failed to report it to fire suppression agencies. But that does not mean DNR has an actionable tort duty with respect to its completely separate statutory fire suppression response.

Plaintiff landowners have not identified any acts or failures to act that fall under DNR's landowner duty to take reasonable steps to prevent the spread of fire, and accordingly, have failed to implicate that duty at all.

Instead, they focus entirely on DNR’s statutorily-required fire suppression actions. Those actions are explicitly carved out in RCW 76.04.016, and cannot give rise to actionable tort duties.

D. The Question of Whether RCW 76.04.760 Supersedes the Common Law Cause of Action for Negligent Fire Spread Was Not Briefed Below, Is Not Ripe, and Should Not Be Decided in This Appeal

Plaintiffs direct the last portion of their brief to challenging the trial court’s finding that RCW 76.04.760 superseded the common law cause of action for negligence in the context of fire damage to forestland. Appell. Br. at 45–48, 50. This Court should not address this issue, because it was not part of DNR’s motion for summary judgment, and thus was not briefed by either party in the summary judgment materials. CP 23–47, 219–245, 411–425.¹⁰ RAP 2.5(a). Plaintiffs are correct that DNR did not offer any evidence tending to show that all of their property falls under “public or private forested lands” covered by that statute, such that the issue would be ripe for review. This Court need not, and should not, consider this issue. DNR’s argument was and continues to be that under any negligence cause of action—statutory or common law—Plaintiffs are not complaining about acts or responsibilities that fall under DNR’s landowner duties. Thus,

¹⁰ During rebuttal on oral argument at summary judgment, DNR did mistakenly state that Plaintiffs did not plead common law negligence. VRP 45–46. But DNR did not argue that the Court should dismiss Plaintiffs’ common law negligence claim because it is superseded by RCW 76.04.760.

DNR's motion assumes the availability of both statutory and common law causes of action for landowner negligence, but argues that the acts Plaintiffs allege to be negligent trigger neither.¹¹ This Court's review is de novo.

The Court should not address the issue of whether RCW 76.04.760 supersedes a common law cause of action for negligence.

VI. CONCLUSION

RCW 76.04.016 precludes imposition of an actionable individualized duty when DNR acts in its statutory fire suppression capacity, regardless of who owns the land from which the fire originated. The law and the undisputed facts in this case compel a conclusion that DNR was acting only in its statutory fire suppression capacity when responding to the Carlton Complex fire. For this reason, DNR respectfully requests that this Court affirm the trial court's order granting summary judgment and dismissal to DNR.

¹¹ Additionally, the question of whether a statute (such as RCW 76.04.730) creates a cause of action, and how a statutory cause of action (such as RCW 76.04.760) impacts other statutory and common law causes of action, warrants serious consideration outside the scope of the motion below and this appeal. If the Court concludes this is a question of law that it must decide despite the fact that it was not briefed below, DNR respectfully requests the opportunity to provide supplemental briefing on these issues.

RESPECTFULLY SUBMITTED this 6th day of May 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the appellate CM/ECF system, which will send notification of such filing to all parties of record. True and correct copies of the foregoing documents were also served via email upon the following parties:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of May 2019.

s/ Nicole Beck-Thorne

NICOLE BECK-THORNE
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Appendix A

Chapter Listing | RCW Dispositions

Chapter 76.04 RCW

FOREST PROTECTION

Sections

ADMINISTRATION

- 76.04.005** Definitions.
- 76.04.015** Fire protection powers and duties of department—Enforcement—Investigation—Administration.
- 76.04.016** Fire prevention and suppression capacity—Duties owed to public in general—Legislative intent.
- 76.04.021** Department must accommodate livestock owner's request to retrieve or care for animals at risk due to a wildfire—Liability.
- 76.04.025** Federal funds.
- 76.04.035** Wardens—Appointment—Duties.
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- 76.04.065** Arrests without warrants.
- 76.04.075** Rules—Penalty.
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- 76.04.205** Burning permits.

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- 76.04.305** Closed to entry—Designation.
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- 76.04.465** Certain snags to be felled currently with logging.
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- 76.04.486** Escaped slash burns—Obligations.
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- 76.04.600** Owners to protect forests.
- 76.04.610** Forest fire protection assessment.
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- 76.04.650** Disposal of forest debris—Permission to allow trees to fall on another's land.
- 76.04.660** Additional fire hazards—Extreme fire hazard areas—Abatement, isolation or reduction—Summary action—Recovery of costs—Inspection of property.

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- 76.04.700** Failure to extinguish campfire.
- 76.04.710** Wilful setting of fire.
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- 76.04.750** Uncontrolled fire a public nuisance—Suppression—Duties—Summary action—Recovery of costs.
- 76.04.760** Civil actions—Forested lands—Fire damage.
- 76.04.770** Authorization to enter privately or publicly owned land to extinguish or control a wildland fire—Limitation of liability.
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NOTES:

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Excessive steam in boilers, penalty: RCW 70.54.080.

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Treble damages for removal of trees: RCW 64.12.030 and 79.02.320.

76.04.005

Definitions.

As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise.

- (1) "Additional fire hazard" means a condition existing on any land in the state:
- (a) Covered wholly or in part by forest debris which is likely to further the spread of fire and thereby endanger life or property; or
 - (b) When, due to the effects of disturbance agents, broken, down, dead, or dying trees exist on forestland in sufficient quantity to be likely to further the spread of fire within areas covered by a forest health hazard warning or order issued by the commissioner of public lands under RCW 76.06.180. The term "additional fire hazard" does not include green trees or snags left standing in upland or riparian areas under the provisions of RCW 76.04.465 or chapter 76.09 RCW.
- (2) "Closed season" means the period between April 15th and October 15th, unless the department designates different dates because of prevailing fire weather conditions.
- (3) "Commissioner" means the commissioner of public lands.
- (4) "Department" means the department of natural resources, or its authorized representatives, as defined in chapter 43.30 RCW.
- (5) "Department protected lands" means all lands subject to the forest protection assessment under RCW 76.04.610 or covered under contract or agreement pursuant to RCW 76.04.135 by the department.
- (6) "Disturbance agent" means those forces that damage or kill significant numbers of forest trees, such as insects, diseases, windstorms, ice storms, and fires.
- (7) "Emergency fire costs" means those costs incurred or approved by the department for emergency forest fire suppression, including the employment of personnel, rental of

equipment, and purchase of supplies over and above costs regularly budgeted and provided for nonemergency fire expenses for the biennium in which the costs occur.

(8) "Exploding target" means a device that is designed or marketed to ignite or explode when struck by firearm ammunition or other projectiles.

(9) "Forest debris" includes forest slash, chips, and any other vegetative residue resulting from activities on forestland.

(10) "Forest fire service" includes all wardens, rangers, and other persons employed especially for preventing or fighting forest fires.

(11) "Forestland" means any unimproved lands which have enough trees, standing or down, or flammable material, to constitute in the judgment of the department, a fire menace to life or property. Sagebrush and grass areas east of the summit of the Cascade mountains may be considered forestlands when such areas are adjacent to or intermingled with areas supporting tree growth. Forestland, for protection purposes, does not include structures.

(12) "Forest landowner," "owner of forestland," "landowner," or "owner" means the owner or the person in possession of any public or private forestland.

(13) "Forest material" means forest slash, chips, timber, standing or down, or other vegetation.

(14) "Incendiary ammunition" means ammunition that is designed to ignite or explode upon impact with or penetration of a target or designed to trace its course in the air with a trail of smoke, chemical incandescence, or fire.

(15) "Landowner operation" means every activity, and supporting activities, of a forest landowner and the landowner's agents, employees, or independent contractors or permittees in the management and use of forestland subject to the forest protection assessment under RCW **76.04.610** for the primary benefit of the owner. The term includes, but is not limited to, the growing and harvesting of forest products, the development of transportation systems, the utilization of minerals or other natural resources, and the clearing of land. The term does not include recreational and/or residential activities not associated with these enumerated activities.

(16) "Local fire suppression assets" means firefighting equipment that is located in close proximity to the wildland fire and that meets department standards and requirements.

(17) "Local wildland fire liaison" means the person appointed by the commissioner to serve as the local wildland fire liaison as provided in RCW **43.30.111**.

(18) "Participating landowner" means an owner of forestland whose land is subject to the forest protection assessment under RCW **76.04.610**.

(19) "Sky lantern" means an unmanned self-contained luminary device that uses heated air produced by an open flame or produced by another source to become or remain airborne.

(20) "Slash" means organic forest debris such as tree tops, limbs, brush, and other dead flammable material remaining on forestland as a result of a landowner operation.

(21) "Slash burning" means the planned and controlled burning of forest debris on forestlands by broadcast burning, underburning, pile burning, or other means, for the purposes of silviculture, hazard abatement, or reduction and prevention or elimination of a fire hazard.

(22) "Suppression" means all activities involved in the containment and control of forest fires, including the patrolling thereof until such fires are extinguished or considered by the department to pose no further threat to life or property.

(23) "Unimproved lands" means those lands that will support grass, brush and tree growth, or other flammable material when such lands are not cleared or cultivated and, in the opinion of the department, are a fire menace to life and property.

[2015 c 182 § 7. Prior: 2014 c 90 § 1; 2007 c 480 § 12; 1992 c 52 § 24; 1986 c 100 § 1.]

NOTES:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

76.04.015

Fire protection powers and duties of department—Enforcement—Investigation—Administration.

(1) The department may, at its discretion, appoint trained personnel possessing the necessary qualifications to carry out the duties and supporting functions of the department and may determine their respective salaries.

(2) The department shall have direct charge of and supervision of all matters pertaining to the forest fire service of the state.

(3) The department shall:

(a) Enforce all laws within this chapter;

(b) Be empowered to take charge of and, consistent with RCW 76.04.021, direct the work of suppressing forest fires;

(c)(i) Investigate the origin and cause of all forest fires to determine whether either a criminal act or negligence by any person, firm, or corporation caused the starting, spreading, or existence of the fire. In conducting investigations, the department shall work cooperatively, to the extent possible, with utilities, property owners, and other interested parties to identify and preserve evidence. Except as provided otherwise in this subsection, the department in conducting investigations is authorized, without court order, to take possession or control of relevant evidence found in plain view and belonging to any person, firm, or corporation. To the extent possible, the department shall notify the person, firm, or corporation of its intent to take possession or control of the evidence. The person, firm, or corporation shall be afforded reasonable opportunity to view the evidence and, before the department takes possession or control of the evidence, also shall be afforded reasonable opportunity to examine, document, and photograph it. If the person, firm, or corporation objects in writing to the department's taking possession or control of the evidence, the department must either return the evidence within seven days after the day on which the department is provided with the written objections or obtain a court order authorizing the continued possession or control.

(ii) Absent a court order authorizing otherwise, the department may not take possession or control of evidence over the objection of the owner of the evidence if the evidence is used by the owner in conducting a business or in providing an electric utility service and the department's taking possession or control of the evidence would substantially and materially interfere with the operation of the business or provision of electric utility service.

(iii) Absent a court order authorizing otherwise, the department may not take possession or control of evidence over the objection of an electric utility when the evidence is not owned by the utility but has caused damage to property owned by the utility. However, this subsection (3)(c)(iii) does not apply if the department has notified the utility of its intent to take possession or control of the evidence and provided the utility with reasonable time to examine, document, and photograph the evidence.

(iv) Only personnel qualified to work on electrical equipment may take possession or control of evidence owned or controlled by an electric utility;

(d) Furnish notices or information to the public calling attention to forest fire dangers and the penalties for violation of this chapter;

(e) Be familiar with all timbered and cut-over areas of the state;

(f) Maximize the effective utilization of local fire suppression assets consistent with RCW **76.04.181**; and

(g) Regulate and control the official actions of its employees, the wardens, and the rangers.

(4) The department may:

(a) Authorize all needful and proper expenditures for forest protection;

(b) Adopt rules consistent with this section for the prevention, control, and suppression of forest fires as it considers necessary including but not limited to: Fire equipment and materials; use of personnel; and fire prevention standards and operating conditions including a provision for reducing these conditions where justified by local factors such as location and weather;

(c) Remove at will the commission of any ranger or suspend the authority of any warden;

(d) Inquire into:

(i) The extent, kind, value, and condition of all timberlands within the state;

(ii) The extent to which timberlands are being destroyed by fire and the damage thereon;

(e) Provide fire detection, prevention, presuppression, or suppression services on nonforested public lands managed by the department or another state agency, but only to the extent that providing these services does not interfere with or detract from the obligations set forth in subsection (3) of this section. If the department provides fire detection, prevention, presuppression, or suppression services on nonforested public lands managed by another state agency, the department must be fully reimbursed for the work through a cooperative agreement as provided for in RCW **76.04.135**(1).

(5) Any rules adopted under this section for the suppression of forest fires must include a mechanism by which a local fire mobilization radio frequency, consistent with RCW **43.43.963**, is identified and made available during the initial response to any forest fire that crosses jurisdictional lines so that all responders have access to communications during the response. Different initial response frequencies may be identified and used as appropriate in different geographic response areas. If the fire radio communication needs escalate beyond the capability of the identified local radio frequency, the use of other available designated interoperability radio frequencies may be used.

(6) When the department considers it to be in the best interest of the state, it may cooperate with any agency of another state, the United States or any agency thereof, the Dominion of Canada or any agency or province thereof, and any county, town, corporation, individual, or Indian tribe within the state of Washington in forest firefighting and patrol.

[2016 c 109 § 1; 2015 c 182 § 5; 2012 c 38 § 1; 2010 c 38 § 1; 1993 c 196 § 3; 1986 c 100 § 2.]

76.04.016

Fire prevention and suppression capacity—Duties owed to public in general—Legislative intent.

The department when acting, in good faith, in its statutory capacity as a fire prevention and suppression agency, is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public. Nothing contained in this title, including but not limited to any provision dealing with payment or collection of forest protection or fire suppression assessments, may be construed to evidence a legislative intent that the duty to prevent and suppress forest fires is owed to any individual person or class of persons separate and apart from the public in general. This section does not alter the department's duties and responsibilities as a landowner.

[1993 c 196 § 1.]

76.04.021

Department must accommodate livestock owner's request to retrieve or care for animals at risk due to a wildfire—Liability.

(1)(a) The department must make every reasonable effort to accommodate a livestock owner's request to retrieve or care for animals in his or her charge that are at risk due to a wildfire.

(b) The department may only prohibit livestock owners, or the owner's employees or agents, from retrieving or caring for livestock that are lawfully present on the public lands during any fire suppression response if doing so is reasonably necessary to prevent interference with a direct, active fire response.

(2) The department must incorporate the implementation of this section into any prefire season training or coordination conducted in local communities that contain active grazing areas.

(3)(a) The owner of livestock lawfully present on public lands assumes full liability for any damages incurred to himself or herself, and any employees or agents in his or her charge, if public lands are accessed to retrieve or care for livestock during the time of a fire suppression response by the department affecting the public lands in question.

(b) No civil liability may be imposed by any court on the state, the department, or another political subdivision of the state for any direct or indirect adverse impacts, including injury or death, resulting from:

(i) The department's reasonable efforts under this section to accommodate a livestock owner, or the owner's employees or agents, to retrieve or care for animals in his or her charge that are at risk due to a wildfire; or

(ii) A livestock owner, or the owner's employees or agents, accessing public lands to retrieve or care for livestock during the time of a fire suppression response by the department affecting the public lands in question.

[2016 c 109 § 2.]

76.04.025

Federal funds.

The department shall receive and disburse any and all moneys contributed, allotted, or paid by the United States under the authority of any act of Congress for use in cooperation with the state of Washington in protecting and developing forests.

[1986 c 100 § 3.]

76.04.035

Wardens—Appointment—Duties.

(1) The department may appoint any of its employees as wardens, at the times and localities as it considers the public welfare demands, within any area of the state where there is forestland requiring protection.

(2) The duties of wardens shall be:

- (a) To provide forest fire prevention and protection information to the public;
 - (b) To investigate discovered or reported fires on forestlands and take appropriate action;
 - (c) To patrol their areas as necessary;
 - (d) To visit all parts of their area, and frequented places and camps as far as possible, and warn campers or other users and visitors of fire hazards;
 - (e) To see that all locomotives and all steam, internal combustion, and other spark-emitting equipment are provided with spark arresters and adequate devices for preventing the escape of fire or sparks in accordance with the law;
 - (f) To see that operations or activities on forestland have all required fire prevention and suppression equipment or devices as required by law;
 - (g) To extinguish wildfires;
 - (h) To set back-fires to control fires;
 - (i) To summons, impress, and employ help in controlling wildfires;
 - (j) To see that all laws for the protection of forests are enforced;
 - (k) To investigate, arrest, and initiate prosecution of all offenders of this chapter or other chapters as allowed by law; and
 - (l) To perform all other duties as prescribed by law and as the department directs.
- (3) All wardens and rangers shall render reports to the department on blanks or forms, or in the manner and at the times as may be ordered, giving a summary of how employed, the area visited, expenses incurred, and other information as required by the department.

(4) The department may suspend the authority of any warden who may be incompetent or unwilling to discharge properly the duties of the office.

(5) The department shall determine the placement of the wardens and, upon its request to the county commissioners of any county, the county commissioners shall designate and furnish the wardens with suitably equipped office quarters in the county courthouse.

(6) The authority of the wardens regarding the prevention, suppression, and control of forest fires, summoning, impressing, or employing help, or making arrests for violations of this chapter may extend to any part of the state.

[1986 c 100 § 4.]

76.04.045

Rangers—Appointment—Ex officio rangers—Compensation.

(1) All Washington state patrol officers, fish and wildlife officers, deputy state fire marshals, and state park rangers, while in their respective jurisdictions, shall be ex officio rangers.

(2) Employees of the United States forest service, when recommended by their forest supervisor, and citizens of the state advantageously located may, at the discretion of the department, be commissioned as rangers and vested with the certain powers and duties of wardens as specified in this chapter and as directed by the department.

(3) Rangers shall receive no compensation for their services except when employed in cooperation with the state and under the provisions of this chapter and shall not create any indebtedness or incur any liability on behalf of the state: PROVIDED, That rangers actually engaged in extinguishing or preventing the spread of fire on forestland or elsewhere that may endanger forestland shall, when their accounts for such service have been approved by the department, be entitled to receive compensation for such services at a rate to be fixed by the department.

(4) The department may cancel the commission of any ranger or authority granted to any ex officio ranger who may be incompetent or unwilling to discharge properly the duties of the office.

[2001 c 253 § 9; 1986 c 100 § 5.]

76.04.055

Service of notices.

Any notice required by law to be served by the department, warden, or ranger shall be sufficient if a written or printed copy thereof is delivered, mailed, telegraphed, or electronically transmitted by the department, warden, or ranger to the person to receive the notice or to his or her responsible agent. If the name or address of the person or agent is unknown and cannot be obtained by reasonable diligence, the notice may be served by posting the copy in a conspicuous place upon the premises concerned by the notice.

[1986 c 100 § 6.]

76.04.065**Arrests without warrants.**

Department employees appointed as wardens, persons commissioned as rangers, and all police officers may arrest persons violating this chapter, without warrant, as prescribed by law.

[1986 c 100 § 7.]

76.04.075**Rules—Penalty.**

Any person who violates any of the orders or rules adopted under this chapter for the protection of forests from fires is guilty of a misdemeanor and subject to the penalties for a misdemeanor under RCW **9A.20.021**, unless another penalty is provided.

[1986 c 100 § 8.]

76.04.085**Penalty for violations.**

Unless specified otherwise, violations of the provisions of this chapter shall be a misdemeanor and subject to the penalties for a misdemeanor under RCW **9A.20.021**.

[1986 c 100 § 9.]

76.04.095**Cooperative protection.**

When any responsible protective agency or agencies composed of timber owners other than the state agrees to undertake systematic forest protection in cooperation with the state and such cooperation appears to the department to be more advantageous to the state than the state-provided forest fire services, the department may designate suitable areas to be official cooperative districts and substitute cooperative services for the state-provided services. The department may cooperate in the compensation for expenses of preventing and controlling fire in cooperative districts to the extent it considers equitable on behalf of the state.

[1986 c 100 § 10.]

76.04.105

Contracts for protection and development.

The department may enter into contracts and undertakings with private corporations for the protection and development of the forestlands within the state, subject to the provisions of this chapter.

[1986 c 100 § 11.]

76.04.115

Articles of incorporation—Requirements.

Before any private corporation may enter into any contract under RCW **76.04.105**, there shall be incorporated into the articles of incorporation or charter of such corporation a provision requiring that the corporation, out of its earnings or earned surplus, and in a manner satisfactory to the department, annually set apart funds to discharge any contract entered into between such corporation and the department.

[1986 c 100 § 12.]

76.04.125

Requisites of contract.

Any undertaking for the protection and development of the forestlands of the state under RCW **76.04.105** shall be regulated and controlled by a contract to be entered into between the private corporation and the department. The contract shall outline the lands involved and the conditions and details of the undertaking, including an exact specification of the amount of funds to be made available by the corporation and the time and manner of disbursement. Before entering into any such contract, the department shall be satisfied that the private corporation is financially solvent and will be able to carry out the project outlined in the contract. The department shall have charge of the project for the protection and development of the forestlands described in the contract, and any expense incurred by the department under any such contract shall be payable solely by the corporation from the funds provided by it for these purposes. The state of Washington shall not in any event be responsible to any person, firm, company, or corporation for any indebtedness created by any corporation under a contract pursuant to RCW **76.04.105**.

[1986 c 100 § 13.]

76.04.135**Cooperative agreements—Public agencies—Transfer of ownership of department-owned firefighting vehicle, procedure.**

(1) For the purpose of promoting and facilitating cooperation among fire protection agencies, including the department, and between the department and other agencies that manage lands owned by the state, and to more adequately protect life, property, and the natural resources of the state, the department may enter into a contract or agreement with a municipality, county, state, or federal agency to provide fire detection, prevention, presuppression, or suppression services on property which they are responsible to protect or manage.

(2) Contracts or agreements under subsection (1) of this section may contain provisions for the exchange of services on a cooperative basis or services in return for cash payment or other compensation.

(3) No charges may be made when the department determines that under a cooperative contract or agreement the assistance received from a municipality, county, or federal agency on state protected lands equals that provided by the state on municipal, county, or federal lands.

(4) The department may transfer ownership of depreciated firefighting vehicles and related equipment upon terms subject to mutual agreement to local fire districts in wildfire prone areas in all areas of the state, as determined by the department, and where the median household income is below the state average. These vehicle and equipment transfers are exempt from the requirements in RCW [43.19.1919](#)(1). The department must notify the chairs and ranking members of the legislative committees with jurisdiction regarding these transfers at least ten days prior to transfer of the equipment.

[[2017 c 280 § 2](#); [2012 c 38 § 2](#); [1986 c 100 § 14](#).]

NOTES:

Effective date—2017 c 280: See note following RCW [43.30.575](#).

76.04.155**Firefighting—Employment—Assistance.**

(1) The department may employ a sufficient number of persons to extinguish or prevent the spreading of any fire that may be in danger of damaging or destroying any timber or other property on department protected lands. The department may provide needed tools and supplies and may provide transportation when necessary for persons so employed.

(2) Every person so employed is entitled to compensation at a rate to be fixed by the department. The department shall, upon request, show the person the number of hours worked by that person and the rate established for payment. After approval of the department, that person is entitled to receive payment from the state.

(3) It is unlawful to fail to render assistance when called upon by the department to aid in guarding or extinguishing any fire.

[1986 c 100 § 16.]

76.04.165

Legislative declaration—Forest protection zones.

(1) The legislature finds and declares that forestlands within the state are increasingly being used for residential purposes; that the risk to life and property is increasing from forest fires which may destroy developed property; that, based on the primary missions for the respective fire control agencies established in this chapter, adjustment of the geographic areas of responsibility has not kept pace with the increasing use of forestlands for residential purposes; and that the department should work with the state's other fire control agencies to define geographic areas of responsibility that are more consistent with their respective primary missions.

(2) To accomplish the purposes of subsection (1) of this section, the department shall establish a procedure to clarify its geographic areas of responsibility. The areas of department protection shall be called forest protection zones. The forest protection zones shall include all forestland which the department is obligated to protect but shall not include forestland within rural fire districts or municipal fire districts which affected local fire control agencies agree, by mutual consent with the department, is not appropriate for department protection. Forestland not included within a forest protection zone established by mutual agreement of the department and a rural fire district or a municipal fire district shall not be assessed under RCW 76.04.610 or 76.04.630.

(3) After the department and any affected local fire protection agencies have agreed on the boundary of a forest protection zone, the department shall establish the boundary by rule under chapter 34.05 RCW.

(4) Except by agreement of the affected parties, the establishment of forest protection zones shall not alter any mutual aid agreement.

[1995 c 151 § 2; 1988 c 273 § 2.]

76.04.167

Legislative declaration—Equitable sharing of forest fire protection costs—Coordinated forest fire protection and suppression.

(1) The legislature hereby finds and declares that:

(a) Forest wildfires are a threat to public health and safety and can cause catastrophic damage to public and private resources, including clean air, clean water, fish and wildlife habitat, timber resources, forest soils, scenic beauty, recreational opportunities, economic and employment opportunities, structures, and other improvements;

(b) Forest landowners and the public have a shared interest in protecting forests and forest resources by preventing and suppressing forest wildfires;

(c) A recent independent analysis of the state fire program considered it imperative to restore a more equitable split between the general fund and forest protection assessments;

(d) Without a substantial increase in forest protection funds, the state's citizens will be paying much more money for emergency fire suppression; and

(e) It is therefore the intent of the legislature that the costs of fire protection be equitably shared between the forest protection assessment account and state contributions to ensure that there will be sufficient firefighters who are equipped and trained to respond quickly to fires in order to keep fires small and manage those large fires that do occur. In recognition of increases in landowner assessments, the legislature declares its intent that increases in the state's share for forest protection should be provided to stabilize the funding for the forest protection program, and that sufficient state funds should be committed to the forest protection program so that the recommendations contained in the 1997 tridata report can be implemented on an equitable basis.

(2) The legislature hereby finds and declares that it is in the public interest to establish and maintain a complete, cooperative, and coordinated forest fire protection and suppression program for the state; that, second only to saving lives, the primary mission of the department is protecting forest resources and suppressing forest wildfires; that a primary mission of rural fire districts and municipal fire departments is protecting improved property and suppressing structural fires; and that the most effective way to protect structures is for the department to focus its efforts and resources on aggressively suppressing forest wildfires.

(3) The legislature also acknowledges the natural role of fire in forest ecosystems, and finds and declares it in the public interest to use fire under controlled conditions to prevent wildfires by maintaining healthy forests and eliminating sources of fuel.

[2001 c 279 § 1; 1995 c 151 § 1.]

76.04.175

Fire suppression equipment—Comparison of costs.

(1) The department shall, by June 1 of each year, establish a list of fire suppression equipment, such as portable showers, kitchens, water tanks, dozers, and hauling equipment, provided by the department so that the cost by unit or category can be determined and can be compared to the expense of utilizing private vendors.

(2) The department shall establish a roster of quotes by vendors who are able to provide equipment to respond to incidents involving wildfires on department-protected lands. The department shall use these quotes from private vendors to make a comparison with the costs established in subsection (1) of this section. The department shall utilize the most effective and efficient resource available for responding to wildfires.

[1995 c 113 § 2.]

NOTES:

Finding—Intent—1995 c 113: "The legislature finds that it is frequently in the best interest of the state to utilize fire suppression equipment from private vendors whenever

possible in responding to incidents involving wildfires on department-protected lands. It is the intent of the legislature to encourage the department of natural resources to utilize kitchen, shower, and other fire suppression equipment from private vendors as allowed in RCW **76.04.015(4)(b)**, when such utilization will be most effective and efficient." [**1995 c 113 § 1.**]

76.04.177**Fire suppression equipment—Requirement to utilize private equipment.**

Before constructing or purchasing any equipment listed in RCW **76.04.175(1)** for wildfire suppression, the department shall compare the per use cost of the equipment to be purchased or constructed with the per use cost of utilizing private equipment. If utilizing private equipment is more effective and efficient, the department may not construct or purchase the equipment but shall utilize the equipment from the lowest responsive bidder.

[**1995 c 113 § 3.**]

NOTES:

Finding—Intent—1995 c 113: See note following RCW **76.04.175.**

76.04.179**Wildland fire advisory committee.**

(1) The commissioner must appoint and maintain a wildland fire advisory committee to generally advise the commissioner on all matters related to wildland firefighting in the state. This includes, but is not limited to, developing recommendations regarding department capital budget requests related to wildland firefighting and developing strategies to enhance the safe and effective use of private and public wildland firefighting resources.

(2) The commissioner may appoint members to the wildland fire advisory committee as the commissioner determines is the most helpful in the discharge of the commissioner's duties. However, at a minimum, the commissioner must invite the following:

(a) Two county commissioners, one from east of the crest of the Cascade mountains and one from west of the crest of the Cascade mountains;

(b) Two owners of industrial land, one an owner of timberland and one an owner of rangeland;

(c) The state fire marshal or a representative of the state fire marshal's office;

(d) Two individuals with the title of fire chief, one from a community located east of the crest of the Cascade mountains and one from a community located west of the crest of the Cascade mountains;

(e) An individual with the title of fire commissioner whose authority is pursuant to chapter **52.14** RCW;

- (f) A representative of a federal wildland firefighting agency;
 - (g) A representative of a tribal nation;
 - (h) A representative of a statewide environmental organization;
 - (i) A representative of a state land trust beneficiary; and
 - (j) A small forest landowner.
- (3) The local wildland fire liaison serves as the administrative chair for the wildland fire advisory committee.
- (4) The department must provide staff support for all committee meetings.
- (5) The wildland fire advisory committee must meet at the call of the administrative chair for any purpose that directly relates to the duties set forth in subsection (1) of this section or as is otherwise requested by the commissioner or the administrative chair.
- (6) Each member of the wildland fire advisory committee serves without compensation but may be reimbursed for travel expenses as authorized in RCW **43.03.050** and **43.03.060**.
- (7) The members of the wildland fire advisory committee, or individuals acting on their behalf, are immune from civil liability for official acts performed in the course of their duties.
- (8) All requirements in this section are subject to the availability of amounts appropriated for the specific purposes described.

[**2015 c 182 § 3.**]

76.04.181

Maximizing the utilization of local fire suppression assets—Department's duty.

- (1) To maximize the effective utilization of local fire suppression assets, the department is required to:
- (a) Actively engage in ongoing prefire season outreach and recruitment of qualified wildland fire suppression contractors and equipment owners who have valid incident qualifications for the type of contracted work to be performed and compile and annually update a master list of the qualified contractors. In order to be included on a master list of qualified wildland fire suppression contractors:
 - (i) Contractors providing fire engines, tenders, crews, or similar resources must have training and qualifications sufficient for federal wildland fire contractor eligibility, including possessing a valid incident qualification card, commonly called a red card; and
 - (ii) Contractors other than those identified in (a)(i) of this subsection must have training and qualifications evidenced by possession of a valid department qualification and safety document, commonly called a blue card, issued to people cooperating with the department pursuant to an agreement;
 - (b) Provide timely advance notification of the dates and locations of department blue card training to all potential wildland fire suppression contractors known to the department and make the training available in several locations that are reasonably convenient for contractors;
 - (c) Organize the lists of qualified wildland fire suppression contractors to identify the counties where the contractors are located and make the lists, and the availability status of the contractors on the list, available to emergency dispatchers, county legislative authorities, emergency management departments, and local fire districts;

(d) Cooperate with federal wildland firefighting agencies to prioritize, based on predicted need, the efficient use of local resources in close proximity to wildland fire incidents, including local private wildland suppression contractors;

(e) Enter into preemptive agreements with landowners and other contractors in possession of firefighting capability that may be utilized in wildland fire suppression efforts, including the use of bulldozers, fallers, fuel tenders, potable water tenders, water sprayers, wash trailers, refrigeration units, and buses; and

(f) Conduct outreach to provide basic incident command system and wildland fire safety training to landowners in possession of firefighting capability to help ensure that any wildland fire suppression actions taken by private landowners on their own land are accomplished safely and in coordination with any related incident command structure.

(2) The local wildland fire liaison may play an active role in the outreach and recruitment of wildland fire suppression contractors under subsection (1) of this section. This effort may include, but is not limited to, reaching out to local fire districts and collecting their knowledge to identify potential fire suppression contractors.

(3) Nothing in subsection (1) of this section prohibits the department from:

(a) Engaging, as needed, local private wildland fire suppression contractors not included on the master list or subject to a preemptive agreement; or

(b) Conducting safety training on the site of a wildland fire in order to utilize available contractors not included on a master list of qualified wildland fire suppression contractors.

(4) When entering into preemptive agreements with landowners and other contractors under this section, the department must:

(a) Ensure that all equipment and personnel satisfy department standards, including any applicable safety training certifications required by the department of labor and industries;

(b) Ensure that all contractors are, when engaged in fire suppression activities, under the supervision of recognized wildland fire personnel;

(c) Verify that the agreements have been finalized with an agreed upon standard operating rate identified before being included on the master list of qualified contractors; and

(d) Inspect, or verify the inspection of, any equipment included in the agreement to ensure that all safety and dependability standards are satisfied.

(5) The department may authorize operational field personnel to carry additional personal protection equipment in order to loan the equipment to private fire suppression contractors as needed.

(6) No civil liability may be imposed by any court on the state or its officers and employees for any adverse impacts resulting from training or personal protection equipment provided by the department or preemptive agreements entered into by the department under the provisions of this section except upon proof of gross negligence or willful or wanton misconduct.

(5) [(7)] All requirements in this section are subject to the availability of amounts appropriated for the specific purposes described.

[2017 c 104 § 1; 2015 c 182 § 6.]

NOTES:

Effective date—2017 c 104: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect June 30, 2017." [**2017 c 104 § 4.**]

76.04.183

Prescribed burn manager certification program—Rule-making authority.

(1) Subject to availability of amounts appropriated for this specific purpose, the department must create a prescribed burn manager certification program for those who practice prescribed burning in the state. The certification program must include training on all relevant aspects of prescribed fire in Washington including, but not limited to, the following: Legal requirements; safety; weather; fire behavior; smoke management; prescribed fire techniques; public relations; planning; and contingencies.

(2) The department may not require certification under the program created under subsection (1) of this section for burn permit approval under this chapter. Nothing in this section may be construed as creating a mandatory prescribed burn manager certification requirement to conduct prescribed burning in Washington.

(3) No civil or criminal liability may be imposed by any court, the state, or its officers and employees, on a prescribed burn manager certified under the program created under subsection (1) of this section, for any direct or proximate adverse impacts resulting from a prescribed fire conducted under the provisions of this chapter except upon proof of gross negligence or willful or wanton misconduct.

(4) The department may adopt rules to create the prescribed burn manager certification program and to set periodic renewal criteria. The rules should be developed in consultation with prescribed burn programs in other states. The department may also adopt rules to establish a decertification process for certified prescribed burn managers who commit a violation under this chapter or rules adopted under this chapter. The department may, in its own discretion, develop an equivalency test for experienced prescribed burn managers.

(5) Certified prescribed burn managers may be issued burn permits with modified requirements in recognition of their training and skills. In such cases, normal smoke management and fire risk parameters apply.

[**2018 c 172 § 1.**]

76.04.205

Burning permits.

(1) Except in certain areas designated by the department or as permitted under rules adopted by the department, a person shall have a valid written burning permit obtained from the department to burn:

- (a) Any flammable material on any lands under the protection of the department; or
- (b) Refuse or waste forest material on forestlands protected by the department.

(2) To be valid a permit must be signed by both the department and the permittee. Conditions may be imposed in the permit for the protection of life, property, or air quality and [the department] may suspend or revoke the permits when conditions warrant. A permit shall be effective only under the conditions and for the period stated therein. Signing of the permit shall indicate the permittee's agreement to and acceptance of the conditions of the permit.

(3) The department may inspect or cause to be inspected the area involved and may issue a burning permit if:

(a) All requirements relating to firefighting equipment, the work to be done, and precautions to be taken before commencing the burning have been met;

(b) No unreasonable danger will result; and

(c) Burning will be done in compliance with air quality standards established by chapter **70.94 RCW**.

(4) The department, authorized employees thereof, or any warden or ranger may refuse, revoke, or postpone the use of permits to burn when necessary for the safety of adjacent property or when necessary in their judgment to prevent air pollution as provided in chapter **70.94 RCW**.

[**1986 c 100 § 17.**]

76.04.215

Burning mill wood waste—Arresters.

(1) It is unlawful for anyone manufacturing lumber or shingles, or other forest products, to destroy wood waste material by burning within one-fourth of one mile of any forest material without properly confining the place of the burning and without further safeguarding the surrounding property against danger from the burning by such additional devices as the department may require.

(2) It is unlawful for anyone to destroy any wood waste material by fire within any burner or destructor operated within one-fourth of one mile of any forest material, or to operate any power-producing plant using in connection therewith any smokestack, chimney, or other spark-emitting outlet, without installing and maintaining on such burner, or destructor, or on such smokestack, chimney, or other spark-emitting outlet, a safe and suitable device for arresting sparks.

[**1986 c 100 § 18.**]

76.04.235

Dumping mill waste, forest debris—Penalty.

(1) No person may dump mill waste from forest products, or forest debris of any kind, in quantities that the department declares to constitute a forest fire hazard on or threatening forestlands located in this state without first obtaining a written permit issued by the department on such terms and conditions determined by the department pursuant to rules

enacted to protect forestlands from fire. The permit is in addition to any other permit required by law.

(2) Any person who dumps such mill waste, or forest debris, without a permit, or in violation of a permit is guilty of a gross misdemeanor and subject to the penalties for a gross misdemeanor under RCW **9A.20.021** and may further be required to remove all materials dumped.

[**1986 c 100 § 19.**]

76.04.246

Use of blasting fuse.

It is unlawful to use fuse for blasting on any area of logging slash or area of actual logging operation without a permit during the closed season. Upon the issuance of a written permit by the department or warden or ranger, fuse may be used during the closed season under the conditions specified in the permit.

[**1986 c 100 § 20.**]

76.04.305

Closed to entry—Designation.

(1) When, in the opinion of the department, any forestland is particularly exposed to fire danger, the department may designate such land as a region of extra fire hazard subject to closure, and the department shall adopt rules for the protection thereof.

(2) All such rules shall be published in such newspapers of general circulation in the counties wherein such region is situated and for such length of time as the department may determine.

(3) When in the opinion of the department it becomes necessary to close the region to entry, posters carrying the wording "Region of extra fire hazard-CLOSED TO ENTRY-except as provided by RCW **76.04.305**" and indicating the beginning and ending dates of the closures shall be posted on the public highways entering the regions.

(4) The rules shall be in force from the time specified therein, but when in the opinion of the department such forest region continues to be exposed to fire danger, or ceases to be so exposed, the department may extend, suspend, or terminate the closure by proclamation.

(5) This section does not authorize the department to prohibit the conduct of industrial operations, public work, or access of permanent residents to their own property within the closed area, but no one legally entering the region of extra fire hazard may use the area for recreational purposes which are prohibited to the general public under the terms of this section.

[**1986 c 100 § 21.**]

76.04.315**Suspension of burning permits/privileges.**

In times and localities of unusual fire danger, the department may issue an order suspending any or all burning permits or privileges authorized by RCW **76.04.205** and may prohibit absolutely the use of fire in such locations.

[**1986 c 100 § 22.**]

76.04.325**Closure of forest operations or forestlands.**

(1) When in the opinion of the department weather conditions arise which present an extreme fire hazard, whereby life and property may be endangered, the department may issue an order shutting down all logging, land clearing, or other industrial operations which may cause a fire to start. The shutdown shall be for the periods and regions designated in the order. During shutdowns, all persons are excluded from logging operating areas and areas of logging slash, except those present in the interest of fire protection.

(2) When in the opinion of the department extreme fire weather exists, whereby forestlands may be endangered, the department may issue an order restricting access to and activities on forestlands. The order shall describe the regions and extent of restrictions necessary to protect forestlands. During the period in which the order is in effect, all persons may be excluded from the regions described, except those persons present in the interest of fire protection.

(3) Each day's violation of an order under this section shall constitute a separate offense.

[**1986 c 100 § 23.**]

76.04.405**Steam, internal combustion, or electrical engines and other spark-emitting equipment regulated.**

It is unlawful during the closed season for any person to operate any steam, internal combustion, or electric engine, or any other spark-emitting equipment or device, on any forestland or in any place where, in the opinion of the department, fire could spread to forestland, without first complying with the requirements as may be established by the department by rule pursuant to this chapter.

[**1986 c 100 § 24.**]

76.04.415**Penalty for violations—Work stoppage notice.**

(1) Every person upon receipt of written notice issued by the department that such person has or is violating any of the provisions of RCW **76.04.215**, **76.04.305**, **76.04.405**, or **76.04.650** or any rule adopted by the department concerning fire prevention and fire suppression preparedness shall cease operations until compliance with the provisions of the sections or rules specified in such notice.

(2) The department may specify in the notice of violation the special conditions and precautions under which the operation would be allowed to continue until the end of that working day.

[**1986 c 100 § 25.**]

76.04.425**Unauthorized entry into sealed fire tool box.**

It is unlawful to enter into a sealed fire tool box without authorization.

[**1986 c 100 § 26.**]

76.04.435**Deposit of fire or live coals.**

No person operating a railroad may permit to be deposited by any employee, and no one may deposit fire or live coals, upon the right-of-way within one-fourth of one mile of any forest material, during the closed season, unless the fire or live coals are immediately extinguished.

[**1986 c 100 § 27.**]

76.04.445**Reports of fire.**

(1) Any person engaged in any activity on forestlands shall immediately report to the department, in person or by radio, telephone, or telegraph, any fires on forestlands.

(2) Railroad companies and other public carriers operating on or through forestlands shall immediately report to the department, in person or by radio, telephone, or telegraph, any fires on or adjacent to their right-of-way or route.

[**1986 c 100 § 28.**]

76.04.455**Discarding lighted material or smoking flammable material—Discharge, release, or detonation of certain materials—Receptacles in conveyances—Posting a copy of this section.**

(1)(a) Except as otherwise provided in this subsection, it is unlawful for any person to, during the closed season:

(i) Discard any lighted tobacco, cigars, cigarettes, matches, fireworks, charcoal, or other lighted material, discharge any incendiary ammunition, release a sky lantern, or detonate an exploding target on or over any forest, brush, range, or grain areas; or

(ii) Smoke any flammable material when in forest or brush areas except on roads, cleared landings, gravel pits, or any similar area free of flammable material.

(b) The prohibitions contained in this subsection do not apply to the detonation of nonflammable exploding targets on any forest, brush, range, or grain areas if the person detonating the nonflammable exploding target:

(i) Has lawful possession and control of the land in question; or

(ii) Has prior written permission for the activity from the person who owns or has lawful possession and control of the land in question.

(c) The prohibitions contained in this subsection do not apply to suppression actions authorized or conducted by the department under the authority of this chapter.

(2)(a) Except as otherwise provided in this subsection, it is unlawful for any person to, during any time outside of the closed season, discharge any incendiary ammunition, release a sky lantern, or detonate an exploding target on or over any forest, brush, range, or grain areas.

(b) The prohibitions contained in this subsection do not apply if the person conducting the otherwise prohibited action:

(i) Has lawful possession and control of the land in question; or

(ii) Has prior written permission for the activity from the person who owns or has lawful possession and control of the land in question.

(3) Every conveyance operated through or above forest, range, brush, or grain areas must be equipped in each compartment with a suitable receptacle for the disposition of lighted tobacco, cigars, cigarettes, matches, or other flammable material.

(4) Every person operating a public conveyance through or above forest, range, brush, or grain areas shall post a copy of this section in a conspicuous place within the smoking compartment of the conveyance; and every person operating a saw mill or a logging camp in any such areas shall post a copy of this section in a conspicuous place upon the ground or buildings of the milling or logging operation.

[2014 c 90 § 2; 1986 c 100 § 29.]

76.04.465**Certain snags to be felled currently with logging.**

Standing dead trees constitute a substantial deterrent to effective fire control action in forest areas, but are also an important and essential habitat for many species of wildlife. To insure continued existence of these wildlife species and continued forest growth while minimizing the risk of destruction by conflagration, only certain snags must be felled currently with the logging. The department shall adopt rules relating to effective fire control action to require that only certain snags be felled, taking into consideration the need to protect the wildlife habitat.

[1986 c 100 § 30.]

76.04.475**Reimbursement for costs of suppression action.**

Any person, firm, or corporation, public or private, obligated to take suppression action on any forest fire is entitled to reimbursement for reasonable costs incurred, subject to the following:

(1) No reimbursement is allowed under this section to a person, firm, or corporation whose negligence is responsible for the starting or existence of any fire for which costs may be recoverable pursuant to law. Reimbursement for fires resulting from slash burns are subject to RCW **76.04.486**.

(2) If the fire is started in the course of or as a result of land clearing operations, right-of-way clearing, or a landowner operation, the person, firm, or corporation conducting the operation shall supply:

(a) At no cost to the department, all equipment and able-bodied persons under contract, control, employment, or ownership that are requested by the department and are reasonably available until midnight of the day on which the fire started; and

(b) After midnight of the day on which the fire started, at no cost to the department, all equipment and able-bodied persons under contract, control, employment, or ownership that were within a one-half mile radius of the fire at the time of discovery, until the fire is declared out by the department. In no case may the person, firm, or corporation provide less than one suitable bulldozer and five able-bodied persons, or other equipment accepted by the department as equivalent, unless the department determines less is needed for the purpose of suppressing the fire; and

(c) If the person, firm, or corporation has no personnel or equipment within one-half mile of the fire, payment shall be made to the department for the minimum requirement of one suitable bulldozer and five able-bodied persons, for the duration of the fire; and

(d) If, after midnight of the day on which the fire started, additional personnel and equipment are requested by the department, the person, firm, or corporation shall supply the personnel and equipment under contract, control, employment, or ownership outside the one-half mile radius, if reasonably available, but shall be reimbursed for such personnel and equipment as provided in subsection (4) of this section.

(3) When a fire which occurred in the course of or as a result of land clearing operations, right-of-way clearing, or a landowner operation, which had previously been

suppressed, rekindles, the person, firm, or corporation shall supply the same personnel and equipment, under the same conditions, as were required at the time of the original fire.

(4) Claims for reimbursement shall be submitted within a reasonable time to the department which shall upon verifying the amounts therein and the necessity thereof authorize payment at such rates as established by the department for wages and equipment rental.

[1986 c 100 § 31.]

76.04.486

Escaped slash burns—Obligations.

(1) All personnel and equipment required by the burning permit issued for a slash burn may be required by the department, at the permittee's expense, for suppression of a fire resulting from the slash burn until the fire is declared out by the department. In no case may the permittee provide less than one suitable bulldozer and five persons capable of taking suppression action. In addition, if a slash burn becomes an uncontrolled fire the department may recover from the landowner the actual costs incurred in suppressing the fire. The amount collected from the landowner shall be limited to and calculated at the rate of one dollar per acre for the landowner's total forestlands protected by the department, up to a maximum charge of fifty thousand dollars per escaped slash burn.

(2) The landowner contingency forest fire suppression account shall be used to pay and the permittee shall not be responsible for fire suppression expenditures greater than fifty thousand dollars or the total amount calculated for forestlands owned as determined in subsection (1) of this section for each escaped slash burn.

(3) All expenses incurred in suppressing a fire resulting from a slash burn in which negligence was involved shall be the obligation of the landowner.

[1986 c 100 § 32.]

76.04.495

Negligent starting of fires or allowance of extreme fire hazard or debris—Liability—Recovery of reasonable expenses—Lien.

(1) Any person, firm, or corporation: (a) Whose negligence is responsible for the starting or existence of a fire which spreads on forestland; or (b) who creates or allows an extreme fire hazard under RCW 76.04.660 to exist and which hazard contributes to the spread of a fire; or (c) who allows forest debris subject to RCW 76.04.650 to exist and which debris contributes to the spread of fire, shall be liable for any reasonable expenses made necessary by (a), (b), or (c) of this subsection. The state, a municipality, a forest protective association, or any fire protection agency of the United States may recover such reasonable expenses in fighting the fire, together with costs of investigation and litigation including reasonable attorneys' fees and taxable court costs, if the expense was authorized or subsequently approved by the department. The authority granted under this subsection allowing the

recovery of reasonable expenses incurred by fire protection agencies of the United States shall apply only to such expenses incurred after June 30, 1993.

(2) The department or agency incurring such expense shall have a lien for the same against any property of the person, firm, or corporation liable under subsection (1) of this section by filing a claim of lien naming the person, firm, or corporation, describing the property against which the lien is claimed, specifying the amount expended on the lands on which the firefighting took place and the period during which the expenses were incurred, and signing the claim with post office address. No claim of lien is valid unless filed, with the county auditor of the county in which the property sought to be charged is located, within a period of ninety days after the expenses of the claimant are incurred. The lien may be foreclosed in the same manner as a mechanic's lien is foreclosed under the statutes of the state of Washington.

[1993 c 196 § 2; 1986 c 100 § 33.]

76.04.600

Owners to protect forests.

Every owner of forestland in the state of Washington shall furnish or provide, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the department.

[1986 c 100 § 34.]

76.04.610

Forest fire protection assessment.

(1)(a) If any owner of forestland within a forest protection zone neglects or fails to provide adequate fire protection as required by RCW **76.04.600**, the department shall provide such protection and shall annually impose the following assessments on each parcel of such land: (i) A flat fee assessment of seventeen dollars and fifty cents; and (ii) twenty-seven cents on each acre exceeding fifty acres.

(b) Assessors may, at their option, collect the assessment on tax exempt lands. If the assessor elects not to collect the assessment, the department may bill the landowner directly.

(2) An owner who has paid assessments on two or more parcels, each containing fewer than fifty acres and each within the same county, may obtain the following refund:

(a) If all the parcels together contain less than fifty acres, then the refund is equal to the flat fee assessments paid, reduced by the total of (i) seventeen dollars and (ii) the total of the amounts retained by the county from such assessments under subsection (5) of this section.

(b) If all the parcels together contain fifty or more acres, then the refund is equal to the flat fee assessments paid, reduced by the total of (i) seventeen dollars, (ii) twenty-seven cents for each acre exceeding fifty acres, and (iii) the total of the amounts retained by the county from such assessments under subsection (5) of this section.

Applications for refunds shall be submitted to the department on a form prescribed by the department and in the same year in which the assessments were paid. The department may not provide refunds to applicants who do not provide verification that all assessments and property taxes on the property have been paid. Applications may be made by mail.

In addition to the procedures under this subsection, property owners with multiple parcels in a single county who qualify for a refund under this section may apply to the department on an application listing all the parcels owned in order to have the assessment computed on all parcels but billed to a single parcel. Property owners with the following number of parcels may apply to the department in the year indicated:

Year	Number of Parcels
2002	10 or more parcels
2003	8 or more parcels
2004 and thereafter	6 or more parcels

The department must compute the correct assessment and allocate one parcel in the county to use to collect the assessment. The county must then bill the forest fire protection assessment on that one allocated identified parcel. The landowner is responsible for notifying the department of any changes in parcel ownership.

(3) Beginning January 1, 1991, under the administration and at the discretion of the department up to two hundred thousand dollars per year of this assessment shall be used in support of those rural fire districts assisting the department in fire protection services on forestlands.

(4) For the purpose of this chapter, the department may divide the forestlands of the state, or any part thereof, into districts, for fire protection and assessment purposes, may classify lands according to the character of timber prevailing, and the fire hazard existing, and place unprotected lands under the administration of the proper district. Amounts paid or contracted to be paid by the department for protection of forestlands from funds at its disposal shall be a lien upon the property protected, unless reimbursed by the owner within ten days after October 1st of the year in which they were incurred. The department shall be prepared to make statement thereof, upon request, to a forest owner whose own protection has not been previously approved as to its adequacy, the department shall report the same to the assessor of the county in which the property is situated. The assessor shall extend the amounts upon the tax rolls covering the property, and upon authorization from the department shall levy the forest protection assessment against the amounts of unimproved land as shown in each ownership on the county assessor's records. The assessor may then segregate on the records to provide that the improved land and improvements thereon carry the millage levy designed to support the rural fire protection districts as provided for in RCW 52.16.170.

(5) The amounts assessed shall be collected at the time, in the same manner, by the same procedure, and with the same penalties attached that general state and county taxes on the same property are collected, except that errors in assessments may be corrected at any time by the department certifying them to the treasurer of the county in which the land involved is situated. Assessments shall be known and designated as assessments of the year in which the amounts became reimbursable. Upon the collection of assessments the county treasurer shall place fifty cents of the total assessments paid on a parcel for fire protection into the county current expense fund to defray the costs of listing, billing, and collecting these assessments. The treasurer shall then transmit the balance to the department. Collections shall be applied against expenses incurred in carrying out the provisions of this section, including necessary and reasonable administrative costs incurred by the department in the

enforcement of these provisions. The department may also expend sums collected from owners of forestlands or received from any other source for necessary administrative costs in connection with the enforcement of RCW 76.04.660. During the 2017-2019 fiscal biennium, the legislature may appropriate moneys from the account for department of natural resources wildfire response and forest health activities.

(6) When land against which forest protection assessments are outstanding is acquired for delinquent taxes and sold at public auction, the state shall have a prior lien on the proceeds of sale over and above the amount necessary to satisfy the county's delinquent tax judgment. The county treasurer, in case the proceeds of sale exceed the amount of the delinquent tax judgment, shall immediately remit to the department the amount of the outstanding forest protection assessments.

(7) All nonfederal public bodies owning or administering forestland included in a forest protection zone shall pay the forest protection assessments provided in this section and the special forest fire suppression account assessments under RCW 76.04.630. The forest protection assessments and special forest fire suppression account assessments shall be payable by nonfederal public bodies from available funds within thirty days following receipt of the written notice from the department which is given after October 1st of the year in which the protection was provided. Unpaid assessments are not a lien against the nonfederal publicly owned land but shall constitute a debt by the nonfederal public body to the department and are subject to interest charges at the legal rate. During the 2011-2013 fiscal biennium, the forest fire protection assessment account may be appropriated to The Evergreen State College for analysis and recommendations to improve the efficiency and effectiveness of the state's mechanisms for funding fire prevention and suppression activities.

(8) A public body, having failed to previously pay the forest protection assessments required of it by this section, which fails to suppress a fire on or originating from forestlands owned or administered by it, is liable for the costs of suppression incurred by the department or its agent and is not entitled to reimbursement of costs incurred by the public body in the suppression activities.

(9) The department may adopt rules to implement this section, including, but not limited to, rules on levying and collecting forest protection assessments.

[2018 c 299 § 912; 2012 2nd sp.s. c 7 § 922; 2007 c 110 § 1; 2004 c 216 § 1; 2001 c 279 § 2; 1993 c 36 § 1; 1989 c 362 § 1; 1988 c 273 § 3; 1986 c 100 § 35.]

NOTES:

Effective date—2018 c 299: See note following RCW 43.41.433.

Effective date—2012 2nd sp.s. c 7: See note following RCW 2.68.020.

Effective date—1993 c 36: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [April 15, 1993]." [1993 c 36 § 3.]

76.04.620**State funds—Loans—Recovery of funds from the landowner contingency forest fire suppression account.**

Biennial general fund appropriations to the department of natural resources normally provide funds for the purpose of paying the emergency fire costs and expenses incurred and/or approved by the department in forest fire suppression or in reacting to any potential forest fire situation. When a determination is made that the fire started in the course of or as a result of a landowner operation, moneys expended from such appropriations in the suppression of the fire shall be recovered from the landowner contingency forest fire suppression account. The department shall transmit to the state treasurer for deposit in the general fund any such moneys which are later recovered. Moneys recovered during the biennium in which they are expended may be spent for purposes set forth in this section during the same biennium, without reappropriation. Loans between the general fund and the landowner contingency forest fire suppression account are authorized for emergency fire suppression. The loans shall not exceed the amount appropriated for emergency forest fire suppression costs and shall bear interest at the then current rate of interest as determined by the state treasurer.

[1986 c 100 § 36.]

76.04.630**Landowner contingency forest fire suppression account—Expenditures—Assessments.**

There is created a landowner contingency forest fire suppression account in the state treasury. Moneys in the account may be spent only as provided in this section. Disbursements from the account shall be on authorization of the commissioner of public lands or the commissioner's designee. The account is subject to the allotment procedure provided under chapter 43.88 RCW, but no appropriation is required for disbursements.

The department may expend from this account the amounts as may be available and as it considers appropriate for the payment of emergency fire costs resulting from a participating landowner fire. The department may, when moneys are available from the landowner contingency forest fire suppression account, expend moneys for summarily abating, isolating, or reducing an extreme fire hazard under RCW 76.04.660. All moneys recovered as a result of the department's actions, from the owner or person responsible, under RCW 76.04.660 shall be deposited in the landowner contingency forest fire suppression account.

When a determination is made that the fire was started by other than a landowner operation, moneys expended from this account in the suppression of such fire shall be recovered from the general fund appropriations as may be available for emergency fire suppression costs. The department shall deposit in the landowner contingency forest fire suppression account moneys paid out of the account which are later recovered, less reasonable costs of recovery.

This account shall be established and renewed by an annual special forest fire suppression account assessment paid by participating landowners at a rate to be established by the department. In establishing assessments, the department shall seek to establish and thereafter reestablish a balance in the account of three million dollars. The department may establish a flat fee assessment of no more than seven dollars and fifty cents for participating landowners owning parcels of fifty acres or less. For participating landowners owning parcels larger than fifty acres, the department may charge the flat fee assessment plus a per acre assessment for every acre over fifty acres. The per acre assessment established by the department may not exceed fifteen cents per acre per year. The assessments may differ to equitably distribute the assessment based on emergency fire suppression cost experience necessitated by landowner operations. Amounts assessed for this account shall be a lien upon the forestlands with respect to which the assessment is made and may be collected as directed by the department in the same manner as forest protection assessments. Payment of emergency costs from this account shall in no way restrict the right of the department to recover costs pursuant to RCW **76.04.495** or other laws.

When the department determines that a forest fire was started in the course of or as a result of a landowner operation, the determination shall be final, unless, within ninety days of the notification, or an interested party serves a request for a hearing before the department. The hearing shall constitute an adjudicative proceeding under chapter **34.05** RCW, the administrative procedure act, and an appeal shall be in accordance with RCW **34.05.510** through **34.05.598**.

[**2010 1st sp.s. c 7 § 129**; **1993 c 36 § 2**; **1991 sp.s. c 13 § 31**. Prior: **1989 c 362 § 2**; **1989 c 175 § 162**; **1986 c 100 § 37**.]

NOTES:

Effective date—2010 1st sp.s. c 26; 2010 1st sp.s. c 7: See note following RCW **43.03.027**.

Effective date—1993 c 36: See note following RCW **76.04.610**.

Effective dates—Severability—1991 sp.s. c 13: See notes following RCW **18.08.240**.

Effective date—1989 c 175: See note following RCW **34.05.010**.

76.04.650

Disposal of forest debris—Permission to allow trees to fall on another's land.

Everyone clearing land or clearing right-of-way for railroad, public highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right-of-way, shall pile and burn or dispose of by other satisfactory means, all forest debris cut

thereon, as rapidly as the clearing or cutting progresses, or at such other times as the department may specify, and if during the closed season, in compliance with the law requiring burning permits.

No person clearing any land or right-of-way, or in cutting or logging timber for any purpose, may fell, or permit to be felled, any trees so that they may fall onto land owned by another without first obtaining permission from the owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state shall be observed in all clearings of right-of-way or other land on behalf of the state itself or any county thereof, either directly or by contract, and, unless unavoidable emergency prevents, provision shall be made by all officials directing the work for withholding a sufficient portion of the payment therefor until the disposal is completed, to insure the completion of the disposal in compliance with this section.

[1986 c 100 § 38.]

76.04.660

Additional fire hazards—Extreme fire hazard areas—Abatement, isolation or reduction—Summary action—Recovery of costs—Inspection of property.

(1) The owner of land on which there is an additional fire hazard, when the hazard is the result of a landowner operation or the land is within an area covered by a forest health hazard warning issued under RCW **76.06.180**, shall take reasonable measures to reduce the danger of fire spreading from the area and may abate the hazard by burning or other satisfactory means.

(2) An extreme fire hazard shall exist within areas covered by a forest health hazard order issued by the commissioner of public lands under RCW **76.06.180** in which there is an additional fire hazard caused by disturbance agents and the landowner has failed to take such action as required by the forest health hazard order. The duties and liability of such landowner under this chapter are as described in subsections (5), (6), and (7) of this section.

(3) The department shall adopt rules defining areas of extreme fire hazard that the owner and person responsible shall abate. The areas shall include but are not limited to high risk areas such as where life or buildings may be endangered, areas adjacent to public highways, and areas of frequent public use.

(4) The department may adopt rules defining other conditions of extreme fire hazard with a high potential for fire spreading to lands in other ownerships. The department may prescribe additional measures that shall be taken by the owner and person responsible to isolate or reduce the extreme fire hazard.

(5) The owner or person responsible for the existence of the extreme fire hazard is required to abate, isolate, or reduce the hazard. The duty to abate, isolate, or reduce, and liability under this chapter, arise upon creation of the extreme fire hazard. Liability shall include but not be limited to all fire suppression expenses incurred by the department, regardless of fire cause.

(6) If the owner or person responsible for the existence of the extreme fire hazard or forest debris subject to RCW **76.04.650** refuses, neglects, or unsuccessfully attempts to

abate, isolate, or reduce the same, the department may summarily abate, isolate, or reduce the hazard as required by this chapter and recover twice the actual cost thereof from the owner or person responsible. Landowner contingency forest fire suppression account moneys may be used by the department, when available, for this purpose. Moneys recovered by the department pursuant to this section shall be returned to the landowner contingency forest fire suppression account.

(7) Such costs shall include all salaries and expenses of people and equipment incurred therein, including those of the department. All such costs shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien.

(8) The summary action may be taken only after ten days' notice in writing has been given to the owner or reputed owner of the land on which the extreme fire hazard or forest debris subject to RCW 76.04.650 exists. The notice shall include a suggested method of abatement and estimated cost thereof. The notice shall be by personal service or by registered or certified mail addressed to the owner or reputed owner at the owner's last known place of residence.

(9) A landowner or manager may make a written request to the department to inspect their property and provide a written notice that they have complied with a forest health hazard warning or forest health hazard order, or otherwise adequately abated, isolated, or reduced an additional or extreme fire hazard. An additional or extreme fire hazard shall be considered to continue to exist unless and until the department, in its sole discretion, issues such notice.

[2010 1st sp.s. c 7 § 130; 2007 c 480 § 13; 1986 c 100 § 39.]

NOTES:

Effective date—2010 1st sp.s. c 26; 2010 1st sp.s. c 7: See note following RCW 43.03.027.

76.04.700

Failure to extinguish campfire.

It is unlawful for any person to start any fire upon any camping ground and upon leaving the camping ground fail to extinguish the fire.

[1986 c 100 § 40.]

76.04.710

Wilful setting of fire.

It is unlawful for any person to wilfully start a fire, whether on his or her land or the land of another, whereby forestlands or the property of another is endangered, under

circumstances not amounting to arson in either the first or second degree or reckless burning in either the first or second degree.

[1986 c 100 § 41.]

76.04.720

Removal of notices.

It is unlawful for any person to wilfully and without authorization deface or remove any warning notice posted under the requirements of this chapter.

[1986 c 100 § 42.]

76.04.730

Negligent fire—Spread.

It is unlawful for any person to negligently allow fire originating on the person's own property to spread to the property of another.

[1986 c 100 § 43.]

76.04.740

Reckless burning.

(1) It is unlawful to knowingly cause a fire or explosion and thereby place forestlands in danger of destruction or damage.

(2) This section does not apply to acts amounting to reckless burning in the first degree under RCW **9A.48.040**.

(3) Terms used in this section shall have the meanings given to them in Title **9A** RCW.

(4) A violation of this section shall be punished as a gross misdemeanor under RCW **9A.20.021**.

[1986 c 100 § 44.]

76.04.750

Uncontrolled fire a public nuisance—Suppression—Duties—Summary action—Recovery of costs.

Any fire on or threatening any forestland burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of the fire, is a public

nuisance by reason of its menace to life and property. Any person engaged in any activity on such lands, having knowledge of the fire, notwithstanding the origin or subsequent spread thereof on his or her own or other forestlands, and the landowner, shall make every reasonable effort to suppress the fire. If the person has not suppressed the fire and the fire is on or threatening forestland within a forest protection zone, the department shall summarily suppress the fire. If the owner, lessee, other possessor of such land, or an agent or contractor of the owner, lessee, or possessor, having knowledge of the fire, has not made a reasonable effort to suppress the fire, the cost thereof may be recovered from the owner, lessee, or other possessor of the land and the cost of the work shall also constitute a lien upon the real property or chattels under the person's ownership. The lien may be filed by the department in the office of the county auditor and foreclosed in the same manner provided by law for the foreclosure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the department. In the absence of negligence, no costs, other than those provided in RCW 76.04.475, shall be recovered from any landowner for lands subject to the forest protection assessment with respect to the land on which the fire burns.

When a fire occurs in a land clearing, right-of-way clearing, or landowner operation it shall be fought to the full limit of the available employees and equipment, and the firefighting shall be continued with the necessary crews and equipment in such numbers as are, in the opinion of the department, sufficient to suppress the fire. The fire shall not be left without a firefighting crew or fire patrol until authority has been granted in writing by the department.

[1988 c 273 § 4; 1986 c 100 § 45.]

76.04.760

Civil actions—Forested lands—Fire damage.

(1) The owner of public or private forested lands may bring a civil action in superior court for property damage to public or private forested lands, including real and personal property on those lands, when the damage results from a fire that started on or spread from public or private forested lands.

(2) Liability under this section attaches to the extent that evidence demonstrates that:

(a) An action or inaction by a person relating to the start or spread of the fire from public or private forested lands constituted negligence or a higher degree of fault; and

(b) The action or inaction under (a) of this subsection was a proximate cause of the property damage.

(3) Recoverable damages under this section are limited to:

(a) Either: (i) The difference in the fair market value of the damaged property immediately before and after the fire. For real property, the state-certified general real estate appraiser must identify and analyze all relevant characteristics and uses of the property including cultural, recreational, and environmental characteristics and uses, to the extent such characteristics or uses contribute to the fair market value of the property based on the highest and best use of the property. The state-certified general real estate appraiser shall expressly address the assumptions and conditions used to evaluate such characteristics and uses, consistent with standards of professional appraisal practice adopted under chapter 18.140

RCW; or (ii) the reasonable cost of restoring the damaged property to the general condition it was in immediately before the fire, to the extent permitted by Washington law;

(b) The reasonable expenses incurred to suppress or extinguish the fire unless otherwise provided for in this chapter;

(c) Any other objectively verifiable monetary loss, that is not duplicative of the recovery specified under (a) or (b) of this subsection including, but not limited to: Out-of-pocket expenses; loss of earnings; loss of use of property; or loss of business or employment opportunities; and

(d) In actions brought by an Indian tribe for recovery of damages from injury to archaeological objects, archaeological sites, or historic archaeological resources, damages as measured in accordance with WAC 25-48-043 as it existed on June 12, 2014.

(4) This section provides the exclusive cause of action for property damage to public or private forested lands, including real and personal property on those lands, resulting from a fire that started on or spread from public or private forested lands.

(5) The definitions in this subsection only apply throughout this section relating to the specification of damages for fire damage to public and private forested lands, unless the context clearly requires otherwise, and do not apply to and are not intended as a source for interpretation of other sections of this chapter.

(a) "Fair market value" means the amount that a willing buyer would pay to a willing seller for property in an arms-length transaction if both parties were fully informed about all advantages and disadvantages of the property and neither party is acting under a compulsion to sell, as determined by: (i) For real property, a state-certified general real estate appraiser as defined under RCW **18.140.010**; and (ii) for personal property, an appraiser qualified to appraise the property based on training and experience. For real property, the state-certified general real estate appraiser must identify and analyze all relevant characteristics and uses of the property including cultural, recreational, and environmental characteristics and uses, to the extent such characteristics or uses contribute to the fair market value of the property based on the highest and best use of the property. The state-certified general real estate appraiser shall expressly address the assumptions and conditions used to evaluate such characteristics and uses, consistent with standards of professional appraisal practice adopted under chapter **18.140** RCW.

(b) "Forest tree species" means a tree species that is capable of producing logs, fiber, or other wood materials that are suitable for the production of lumber, sheeting, pulp, firewood, or other forest products.

(c) "Owner of public or private forested lands" means any person in actual control of public or private forested lands, whether the 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 the land in any manner.

(d) "Person" includes: An individual; a corporation; a public or private entity or organization; a local, state, or federal government or governmental entity; any business organization, including corporations and partnerships; or a group of two or more individuals acting with a common purpose.

(e) "Public or private forested lands" means any lands used or biologically capable of being used for growing forest tree species regardless of the existing use of the land except when the predominant physical use of the land at the time of the fire is not consistent with the growing, conservation, or preservation of forest tree species. Examples of inconsistent uses include, but are not limited to, buildings, airports, parking lots, mining, solid waste disposal,

croplands, orchards, vineyards, pastures, feedlots, communication sites, and home sites that may include up to ten acres. Public or private forested lands do not include state highways, county roads, railroad rights-of-way, and utility rights-of-way that cross over, under, or through such lands.

[**2014 c 81 § 1.**]

NOTES:

Authority of chapter—2014 c 81: "This act does not: Affect or preclude any action relating to the imposition of criminal or civil penalties as authorized by law; affect or preclude the recovery of fire suppression costs as authorized under chapter **76.04** RCW; affect or preclude an action under RCW **4.24.630** against a person who goes onto the land of another without authorization and wrongfully, intentionally, and unreasonably causes a fire resulting in property damage; affect or preclude an action under chapter **27.44** or **27.53** RCW; or affect the provisions of RCW **76.04.016.**" [**2014 c 81 § 4.**]

Application—2014 c 81: "This act applies prospectively only and not retroactively. It applies only to causes of action that arise on or after June 12, 2014." [**2014 c 81 § 5.**]

76.04.770

Authorization to enter privately or publicly owned land to extinguish or control a wildland fire—Limitation of liability.

(1)(a) An individual may, consistent with this section, enter privately owned or publicly owned land for the purposes of attempting to extinguish or control a wildland fire, regardless of whether the individual owns the land, when fighting the wildland fire in that particular time and location can be reasonably considered a public necessity due to an imminent danger.

(b) No civil or criminal liability may be imposed by any court on an individual acting pursuant to this section for any direct or proximate adverse impacts resulting from an individual's access to land for the purposes of attempting to extinguish or control a wildland fire when fighting the wildland fire in that particular time and location can be reasonably considered a public necessity, except upon proof of gross negligence or willful or wanton misconduct by the individual.

(c) An individual may enter land under this subsection (1) only if:

- (i) There is an active fire on or in near proximity to the land;
- (ii) The individual has a reasonable belief that the local fire conditions are creating an emergency situation and that there is an imminent danger of a fire growing or spreading to or from the parcel of land being entered;
- (iii) The individual has a reasonable belief that preventive measures will extinguish or control the wildfire;
- (iv) The individual has a reasonable belief that he or she is capable of taking preventive measures;

(v) The individual only undertakes measures that are reasonable and necessary until professional wildfire suppression personnel arrives;

(vi) The individual does not continue to take suppression actions after specific direction to cease from the landowner;

(vii) The individual takes preventive measures only for the period of time until efforts to control the wildfire have been assumed by professional wildfire suppression personnel, unless explicitly authorized by professional wildland firefighting personnel to remain engaged in suppressing the fire;

(viii) The individual follows the instructions of professional wildland firefighting personnel, including ceasing to engage in firefighting activities, when directed to do so by professional wildland firefighting personnel; and

(ix) The individual promptly notifies emergency personnel and the landowner, lessee, or occupant prior to entering the land or within a reasonable time after the individual attempts to extinguish or control the wildland fire.

(d) Nothing in this section authorizes any person to materially benefit from accessing land or retain any valuable materials that may be collected or harvested during the time the individual attempts to extinguish or control the wildland fire.

(e)(i) The authority to enter privately owned or publicly owned land under this subsection (1) is limited to the minimum necessary activities reasonably required to extinguish or control the wildland fire.

(ii) Activities that may be reasonable under this subsection (1) include, but are not limited to: Using hand tools to clear the ground of debris, operating readily available water hoses, clearing flammable materials from the vicinity of structures, unlocking or opening gates to assist firefighter access, and safely scouting and reporting fire behavior.

(iii) Activities that do not fall within the scope of this subsection (1)(e), due to the high potential for adverse consequences, include, but are not limited to: Lighting a fire in an attempt to stop the spread of another fire; using explosives as a firefighting technique; using aircraft for fire suppression; and directing other individuals to engage in firefighting.

(f) Nothing in this subsection (1) confers a legal or civil duty or obligation on a person to attempt to extinguish or control a wildfire.

(2)(a) No civil or criminal liability may be imposed by any court on the owner, lessee, or occupant of any land accessed as permitted under subsection (1) of this section for any direct or proximate adverse impacts resulting from the access to privately owned or publicly owned land allowed under subsection (1) of this section, except upon proof of willful or wanton misconduct by the owner, lessee, or occupant. The barriers to civil and criminal liability imposed by this subsection include, but are not limited to, impacts on:

(i) The individual accessing the privately owned or publicly owned land and the individual's personal property, including loss of life;

(ii) Any structures or land alterations constructed by individuals entering the privately owned or publicly owned land;

(iii) Other landholdings; and

(iv) Overall environmental resources.

(b) This subsection (2) does not apply in any case where liability for damages is provided under RCW **4.24.040**.

(3) Nothing in this section limits or otherwise effects any other statutory or common law provisions relating to land access or the control of a conflagration.

[2015 c 182 § 4.]

76.04.900

Captions—1986 c 100.

As used in this act subchapter and section captions constitute no part of the law.

[1986 c 100 § 60.]

Appendix B

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5025

Chapter 196, Laws of 1993

53rd Legislature
1993 Regular Session

NATURAL RESOURCES DEPARTMENT FOREST FIRE DUTIES AND AUTHORITY

EFFECTIVE DATE: 7/25/93

Passed by the Senate April 19, 1993
YEAS 38 NAYS 4

JOEL PRITCHARD

President of the Senate

Passed by the House April 13, 1993
YEAS 61 NAYS 35

BRIAN EBERSOLE

**Speaker of the
House of Representatives**

Approved May 6, 1993

MIKE LOWRY

Governor of the State of Washington

CERTIFICATE

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5025** as passed by the Senate and the House of Representatives on the dates hereon set forth.

MARTY BROWN

Secretary

FILED

May 6, 1993 - 1:14 p.m.

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 5025

AS AMENDED BY THE HOUSE

Passed Legislature - 1993 Regular Session

State of Washington 53rd Legislature 1993 Regular Session

By Senate Committee on Natural Resources (originally sponsored by Senator Owen)

Read first time 02/05/93.

1 AN ACT Relating to forest fires; amending RCW 76.04.495 and
2 76.04.015; and adding a new section to chapter 76.04 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** A new section is added to chapter 76.04 RCW
5 to read as follows:

6 The department when acting, in good faith, in its statutory
7 capacity as a fire prevention and suppression agency, is carrying out
8 duties owed to the public in general and not to any individual person
9 or class of persons separate and apart from the public. Nothing
10 contained in this title, including but not limited to any provision
11 dealing with payment or collection of forest protection or fire
12 suppression assessments, may be construed to evidence a legislative
13 intent that the duty to prevent and suppress forest fires is owed to
14 any individual person or class of persons separate and apart from the
15 public in general. This section does not alter the department's duties
16 and responsibilities as a landowner.

17 **Sec. 2.** RCW 76.04.495 and 1986 c 100 s 33 are each amended to read
18 as follows:

1 (1) Any person, firm, or corporation: (a) Whose negligence is
2 responsible for the starting or existence of a fire which spreads on
3 forest land; or (b) who creates or allows an extreme fire hazard under
4 RCW 76.04.660 to exist and which hazard contributes to the spread of a
5 fire; or (c) who allows forest debris subject to RCW 76.04.650 to exist
6 and which debris contributes to the spread of fire, shall be liable for
7 any reasonable expenses made necessary by (a), (b), or (c) of this
8 subsection (~~incurred by~~). The state, a municipality, (~~or~~) a forest
9 protective association, or any fire protection agency of the United
10 States may recover such reasonable expenses in fighting the fire,
11 together with costs of investigation and litigation including
12 reasonable attorneys' fees and taxable court costs, if the expense was
13 authorized or subsequently approved by the department. The authority
14 granted under this subsection allowing the recovery of reasonable
15 expenses incurred by fire protection agencies of the United States
16 shall apply only to such expenses incurred after June 30, 1993.

17 (2) The department or agency incurring such expense shall have a
18 lien for the same against any property of the person, firm, or
19 corporation liable under subsection (1) of this section by filing a
20 claim of lien naming the person, firm, or corporation, describing the
21 property against which the lien is claimed, specifying the amount
22 expended on the lands on which the fire fighting took place and the
23 period during which the expenses were incurred, and signing the claim
24 with post office address. No claim of lien is valid unless filed, with
25 the county auditor of the county in which the property sought to be
26 charged is located, within a period of ninety days after the expenses
27 of the claimant are incurred. The lien may be foreclosed in the same
28 manner as a mechanic's lien is foreclosed under the statutes of the
29 state of Washington.

30 **Sec. 3.** RCW 76.04.015 and 1986 c 100 s 2 are each amended to read
31 as follows:

32 (1) The department may, at its discretion, appoint trained
33 personnel possessing the necessary qualifications to carry out the
34 duties and supporting functions of the department and may determine
35 their respective salaries.

36 (2) The department shall have direct charge of and supervision of
37 all matters pertaining to the forest fire service of the state.

38 (3) The department shall:

1 (a) Enforce all laws within this chapter;

2 (b) Be empowered to take charge of and direct the work of
3 suppressing forest fires;

4 (c) Investigate the origin and cause of all forest fires to
5 determine whether either a criminal act or negligence by any person,
6 firm, or corporation caused the starting, spreading, or existence of
7 the fire. In conducting investigations, the department shall work
8 cooperatively, to the extent possible, with utilities, property owners,
9 and other interested parties to identify and preserve evidence. Except
10 as provided otherwise in this subsection, the department in conducting
11 investigations is authorized, without court order, to take possession
12 or control of relevant evidence found in plain view and belonging to
13 any person, firm, or corporation. To the extent possible, the
14 department shall notify the person, firm, or corporation of its intent
15 to take possession or control of the evidence. The person, firm, or
16 corporation shall be afforded reasonable opportunity to view the
17 evidence and, before the department takes possession or control of the
18 evidence, also shall be afforded reasonable opportunity to examine,
19 document, and photograph it. If the person, firm, or corporation
20 objects in writing to the department's taking possession or control of
21 the evidence, the department must either return the evidence within
22 seven days after the day on which the department is provided with the
23 written objections or obtain a court order authorizing the continued
24 possession or control.

25 Absent a court order authorizing otherwise, the department may not
26 take possession or control of evidence over the objection of the owner
27 of the evidence if: (i) The evidence is used by the owner in conducting
28 a business or in providing an electric utility service; and (ii) the
29 department's taking possession or control of the evidence would
30 substantially and materially interfere with the operation of the
31 business or provision of electric utility service.

32 Absent a court order authorizing otherwise, the department may not
33 take possession or control of evidence over the objection of an
34 electric utility when the evidence is not owned by the utility but has
35 caused damage to property owned by the utility. However, this
36 paragraph does not apply if the department has notified the utility of
37 its intent to take possession or control of the evidence and provided
38 the utility with reasonable time to examine, document, and photograph
39 the evidence.

1 Only personnel qualified to work on electrical equipment may take
2 possession or control of evidence owned or controlled by an electric
3 utility;

4 (d) Furnish notices or information to the public calling attention
5 to forest fire dangers and the penalties for violation of this chapter;

6 (e) Be familiar with all timbered and cut-over areas of the state;
7 and

8 (f) Regulate and control the official actions of its employees, the
9 wardens, and the rangers.

10 (4) The department may:

11 (a) Authorize all needful and proper expenditures for forest
12 protection;

13 (b) Adopt rules for the prevention, control, and suppression of
14 forest fires as it considers necessary including but not limited to:
15 Fire equipment and materials; use of personnel; and fire prevention
16 standards and operating conditions including a provision for reducing
17 these conditions where justified by local factors such as location and
18 weather;

19 (c) Remove at will the commission of any ranger or suspend the
20 authority of any warden;

21 (d) Inquire into:

22 (i) The extent, kind, value, and condition of all timber lands
23 within the state;

24 (ii) The extent to which timber lands are being destroyed by fire
25 and the damage thereon.

26 (5) When the department considers it to be in the best interest of
27 the state, it may cooperate with any agency of another state, the
28 United States or any agency thereof, the Dominion of Canada or any
29 agency or province thereof, and any county, town, corporation,
30 individual, or Indian tribe within the state of Washington in forest
31 fire fighting and patrol.

Passed the Senate April 19, 1993.

Passed the House April 13, 1993.

Approved by the Governor May 6, 1993.

Filed in Office of Secretary of State May 6, 1993.

Appendix C

12 F.3d 1107

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

LECLERCQ MARINE CONSTRUCTION
INCORPORATED; Samuel Leclercq; Royal
Insurance Co.; Highlands Insurance;
Albany Insurance Co., Plaintiffs-Appellees,

v.

LECO, INC., in its own name and doing
business as Leco Marine and Pioneer
Lumber and Treating, Defendant-Appellant,
and

William E. Legg, Defendant.

LECLERCQ MARINE CONSTRUCTION
INCORPORATED; Samuel Leclercq; Royal
Insurance Co.; Highlands Insurance;
Albany Insurance Co., Plaintiffs-Appellants,

v.

LECO, INC., in its own name and doing
business as Leco Marine and Pioneer
Lumber and Treating, Defendant-Appellee.
MONTICELLO INSURANCE COMPANY;
Unigard Insurance Company, Plaintiffs,

v.

LECO, INC., in its own name and doing
business as Leco Marine and Pioneer
Lumber and Treating, et al., Defendants.
William SLEEPER; Fred Dust; June Dust;
Peter Orton, Plaintiffs-Intervenors-Appellees,

v.

LECO, INC., Defendant-Intervenor-Appellant.
MONTICELLO INSURANCE COMPANY;
Unigard Insurance Company, Plaintiffs,
and
Commercial Union Insurance Company,
Plaintiff-Intervenor-Appellee,

v.

LECO, INC., in its own name and doing
business as Leco Marine and Pioneer
Lumber and Treating, et al., Defendants,
and

Leco, Inc., Defendant-Intervenor-Appellant.
Leclercq Marine Construction Incorporated;
Samuel Leclercq; Royal Insurance Co.; Highlands
Insurance; Albany Insurance Co., Plaintiffs.

ALLSTATE INSURANCE COMPANY,
Plaintiff-Intervenor-Appellant,

v.

LECO, INC., in its own name and doing
business as Leco Marine and Pioneer
Lumber and Treating, Defendant-Appellee.

LECLERCQ MARINE CONSTRUCTION
INCORPORATED; Samuel Leclercq; Royal
Insurance Co.; Highlands Insurance;
Albany Insurance Co., Plaintiffs-Appellees,

v.

LECO, INC., in its own name and doing
business as Leco Marine and Pioneer
Lumber and Treating, Defendant-Appellant,

v.

John E. BATES; Lisa McKenney; Aaron
Anderson, Plaintiffs-Intervenors-Appellees.

Nos. 92-35500, 92-35540, 92-35541,
92-35514, 92-36615, 92-36578.

|
Argued and Submitted Nov. 4, 1993.

|
Decided Nov. 29, 1993.

Appeal from the United States District Court, for the
Western District of Washington, D.C. Nos. CV-91-376-
R, CV-91-1619-BJR, CV-91-376-BJR and D.C. No.
CV-91-376-BJR; Barbara J. Rothstein, District Judge,
Presiding.

Synopsis

W.D.Wash.

REVERSED AND REMANDED.

Before: **GOODWIN**, **HUG** and **FERGUSON**, Circuit
Judges.

MEMORANDUM *

*1 Leco, Inc., a marina owner, appeals from a district court order holding it liable for the spread of a marina fire. We AFFIRM on all issues except Allstate's cross-appeal.

On December 20, 1990, a fire started on or near a boat owned by Joseph and Eda Johnson ("the Johnsons") which was moored at Leco, Inc. ("Leco")'s marina. Mr. Johnson, who lived on his boat, rescued his children, but the fire quickly spread to adjacent docks and boats moored in the area, as well as to property owned by plaintiff LeClercq Marine Construction, Inc. ("LeClercq"). The fire ultimately damaged or destroyed six buildings, one houseboat, several piers and thirty-five boats.

LeClercq filed an action against Leco and Leco's president, William E. Legg ("Legg"), in the United States District Court for the Western District of Washington, alleging maritime jurisdiction. Other plaintiffs, including owners of boats destroyed in Leco's marina and their insurers, intervened.

Plaintiffs settled with Legg early in the trial, signing a settlement agreement which specifically released Legg and his business, Pioneer Lumber, without releasing Leco. Leco's counsel was involved in the negotiations and did not object to the settlement. After the court approved the agreement, Leco moved for summary judgment on all claims, arguing that under Washington State law, a plaintiff who releases a solvent agent necessarily releases a principal as well. The district court denied Leco's motion with regard to compensatory damages, but dismissed plaintiffs' claims for punitive damages.

The trial of plaintiffs' remaining claims was bifurcated on the issues of liability and damages. After a seven day bench trial on liability, the court found that the fire started inside the Johnsons' boat, but that Leco was responsible for its spread. Because of freezing temperatures, Leco had turned off all water to the marina and failed to provide any other fire fighting equipment. The court found that the fire could have been contained had proper fire fighting equipment been available and that Leco had a duty to provide some type of fire fighting equipment, given the number of live-aboard tenants residing at the marina. It

held that Leco was liable for damages to property outside the immediate vicinity of the Johnson's boat, since this property would have been saved by proper fire fighting equipment.

After trial, the parties stipulated to damages, reserving the right to appeal liability. Final judgments were entered on May 18, 1992, May 21, 1992 and July 13, 1992.

I. MARITIME JURISDICTION

Leco first contends that the district court erred in taking jurisdiction under the federal maritime jurisdiction statute, 28 U.S.C. § 1333(1). We review de novo, *Reebock Int'l, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 554 (9th Cir.1992), and affirm. The district court properly took jurisdiction under *Sisson v. Ruby*, 497 U.S. 358 (1990). *Accord, Unigard Security Ins. v. Lakewood Eng'g & Mfg.*, 982 F.2d 363 (9th Cir.1992).

II. SETTLEMENT AGREEMENT

*2 Leco next contends that the district court erred in denying its motion for summary judgment based on the release of Legg. We review de novo, *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir.1992), viewing the evidence in the light most favorable to the non-moving party, *Fed. Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 969, 744, 747 (9th Cir.1992), and affirm.

Under both Washington state law and federal maritime law, an agreement to release one tortfeasor does not release another joint tortfeasor, absent a specific agreement to the contrary. *Avery v. United States*, 829 F.2d 817, 819-20 (9th Cir.1987); *Vanderpool v. Grange Ins. Ass'n*, 756 P.2d 111, 113-14 (Wash.1988) (en banc); see also *Restatement 2d of Torts* § 885(1) (1979); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). In the present case, the parties clearly intended to release Legg and Pioneer without releasing Leco. Both the settlement agreement and the court order adopting it specifically state that the plaintiffs did not intend to release Leco.

However, Leco correctly notes that Washington state courts have held that, under some circumstances, a tort plaintiff who releases an agent also releases a vicariously

liable principle. *Glover for Cobb v. Tacoma General Hosp.*, 658 P.2d 1230 (Wash.1983) (en banc). Since federal maritime courts have not addressed this issue, Leco argues that these cases are controlling.

This argument fails for several reasons. First, under Washington law, the settlement with Legg would, at most, extinguish Leco's liability for claims based on Legg's negligence. It would not eliminate liability for claims based on Leco's own negligence or the negligence of other Leco employees. *Schoening v. Grays Harbor Hosp.*, 698 P.2d 593 (Wash.Ct.App.1985). Leco has several other employees and could be vicariously liable for their actions as well as for Legg's.

Second, the Washington State rule is part of a specific statutory scheme which abolishes the common law right of indemnity between passive and active tortfeasors. *Vanderpool*, 756 P.2d at 113 (citing RCW 4.22.040(3)); *Glover*, 658 P.2d at 1237 (citing the Restatement 2d of Judgments § 51, Comment f (1982)). Washington courts have specifically limited the *Glover* rule to situations where treating the agent and principal separately would prejudice the principal. Thus, a Washington plaintiff who settles with an agent may still sue a principal if a court determines that the settlement was reasonable and the plaintiff was unable to recover completely from the agent. *Pickett v. Stephens-Nelsen, Inc.*, 717 P.2d 277, 280 (Wash.Ct.App.1986). Similarly, settling with a principal does not prevent a plaintiff from suing an agent since the policy considerations underlying the *Glover* rule do not apply. *Vanderpool*, 756 P.2d at 113.

Under federal maritime law, the right of indemnity still exists. *Newby v. FIV KIRSTEN GAIL*, 937 F.2d 1439, 1443-44 (9th Cir.1991). Thus, the policy considerations underlying the Washington rule are inapplicable. Plaintiffs could not extinguish Leco's right to collect from its agents merely by settling with them. Thus, under the logic of Washington's decisions, the settlement with Legg does not release Leco.

III. LECO'S DUTY TO PROVIDE FIRE EQUIPMENT

*3 Leco also argues that the district court erred in finding a duty to provide alternative fire fighting equipment during freezing weather. We disagree.

Leco correctly notes that liability cannot exist without a duty and that, although negligence and causation determinations are reviewed for clear error, the existence of a duty is a question of law, reviewed de novo. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir.1991); *Hasbro Indus. v. MIS CONSTANTINE*, 705 F.2d 339 (1983), cert. denied 464 U.S. 1013 (1983). Since federal maritime law is sketchy as to the liability for fire spread, we look to Washington case law and general common law principals. *Daigle v. Point Landing, Inc.*, 616 F.2d 825 (5th Cir.1980).

Contrary to Leco's assertions, this case law indicates that, at least under certain circumstances, landowners have a duty to control the spread of a fire on their land, even if they were not negligent in starting the fire. Early common law Washington cases recognize that landowners have a duty to control fires once they became aware of them. *Jordon v. Spokane*, 186 P. 875, 876 (Wash.1920); *Sandberg v. Cavanaugh*, 164 P. 200 (Wash.1917). More recent decisions based on statutory liability also recognize a common law duty to take reasonable precautions against fire. *Oberg v. Dep't of Natural Resources*, 787 P.2d 918, 921 (Wash.1990); *Arhnold v. United States*, 166 F.Supp. 373 (W.D.Wash.1958). A landowner has a duty not to create conditions that pose an unreasonable risk of fire. *Dealers Serv. and Supply Co. v. St. Louis Nat. Stockyards*, 508 N.E.2d 1241, 1244 (Ill.App.1987); *Coe v. United States*, 502 F.Supp. 881, 885 (D.Ore.1980); *B.W. King v. West New York*, 230 A.2d 133, 138 (N.J.1967).

The scope of this duty varies with the particular circumstances and the risk of fire. *Centraal Stikstof Verkoopkantoor v. Pensacola Port Auth.*, 205 F.Supp. 724, 727 (N.D.Fla.1962).¹ In the present case, Leco was renting residential space to multiple families; it knew these live-aboard tenants used wood burning stoves and that boat fuel is extremely combustible. Moreover, Leco stored large quantities of inflammable materials related to boats on the marina.² This situation poses an obvious danger to human life and property and the same policy considerations which justify requiring apartment building owners to install fire alarms, smoke detectors and fire extinguishers justify imposing a duty on Leco.³

Leco argues that a comprehensive statutory scheme regulates marinas and requires certain precautions, which,

under their statutory reading, do not include those suggested by the district court. It claims that tenants could not use the fire fighting equipment envisioned by the court, and that it would be dangerous to encourage them to do so. Finally, they note that other marinas in the area also shut off the water during freezing weather and do not supply alternative fire fighting equipment.

*4 Balancing these arguments, we agree with the district court that a duty should be imposed. As the plaintiffs point out, Leco's evidence about the custom of other marinas is relevant but not determinative. *TJ HOOPER*, 60 F.2d 737 (2d Cir.1932). Moreover, plaintiffs' witnesses testified that alternative fire fighting equipment can be provided and at least one private marina does so.⁴ Finally, under one plausible reading of the relevant statutes, Leco had a statutory as well as common law duty to provide alternative fire fighting equipment.⁵

Given the policy considerations and the obvious danger to human life posed by fire in a marina where families live on their boats, we affirm the district court's finding of a duty.

IV. LECO'S DUTY TO LECLERCQ

Leco's claim that the district court erred in finding a duty to the owner of the neighboring property is without merit. The case law cited in the previous section does not distinguish between a landowner's duty to neighboring landowners and her duties to tenants.⁶ Leco had a duty to provide alternative fire fighting equipment to its tenants and breached this duty, thus, it is liable both to the tenants whose losses were caused by its breach and to the owner of the adjoining property, LeClercq.

V. PROXIMATE CAUSATION

Leco also argues that the court erred in finding that Leco's failure to provide alternative fire fighting equipment was the proximate cause of the fire's spread. Pointing out that none of the live aboard tenants actually tried to put out the fire and that Mr. Johnson "crawled past several of his own fire extinguishers" when he rescued his son, Leco urges that none of the tenants would have made use of alternative fire fighting equipment had it been available.

Proximate causation is a factual question reviewed under a clearly erroneous standard. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir.1991). Applying this standard, we do not find that the court's conclusion was clearly erroneous.

Mr. Johnson obviously would not have run for the fire hoses instead of his child, but the court did not find that fire fighting equipment would have saved Mr. Johnson's boat; thus, Leco's statements about Mr. Johnson are irrelevant. The record supports the district court's conclusion that other tenants might have tried to douse the flames had equipment been available. After family members were safe, several tenants attempted to untie their boats. These tenants might well have used fire fighting equipment had it been available. Mr. Meyers testified that he considered trying to douse the flames, but remembered that the water was turned off. Several tenants testified that "in their opinion the fire most definitely could have been controlled had there been proper fire fighting equipment or even a garden hose available." In light of this evidence, the court's finding that Leco's failure to provide alternative fire fighting equipment caused the fire to spread is not clearly erroneous.

VI. PUNITIVE DAMAGES

*5 On cross-appeal, plaintiffs contend that the district court erred in granting summary judgment on the issue of punitive damages. Although a grant of summary judgment is ordinarily reviewed de novo, *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir.1992), a trial court's decision to award punitive damages is reviewed for abuse of discretion. *Bouman v. Block*, 940 F.2d 1211, 1234 (9th Cir.) cert. denied 112 S.Ct. 640 (1991).

Federal maritime law allows punitive damage awards on a "showing of conduct which manifests 'reckless or callous disregard' for the rights of others.... or gross negligence or actual malice or criminal indifference." *Churchill v. The FIV FJORD*, 892 F.2d 763, 772 (9th Cir.1988); *Evich v. Morris*, 819 F.2d 256, 258-59 (9th Cir.1987); *Proctectus Alpha Navigation Co. v. N. Pac. Grain Grower*, 767 F.2d 1379 (9th Cir.1985). The district court found that plaintiff's "allegations, viewed in a light most favorable to plaintiffs, do not show "reckless or callous disregard for plaintiffs' rights," nor "actual malice or criminal indifference."

Plaintiffs do not seriously contend that the district court failed to understand the law regarding punitive damages. Rather their main argument is that the court should have decided the punitive damage issue after plaintiffs' case rather than granting summary judgment. If so, the error is harmless. There is no right to punitive damages and all of plaintiffs' cases involve more egregious conduct than Leco's. Since plaintiffs have not shown that the district court abused its discretion in declining to award punitive damages, we affirm.

VII. THE PENNSYLVANIA RULE

Plaintiffs also contend that the district court erred in failing to apply The Pennsylvania rule, which was adopted by the Supreme Court to encourage ships to comply with safety rules. *The Pennsylvania*, 86 U.S. 1256 (1873). Under this rule, once a plaintiff shows a defendant violated safety codes, the burden shifts to the defendant to prove by clear and convincing evidence that the safety violations did not cause plaintiff's injuries. *Churchill v. FIV FJORD*, 892 F.2d 763, 772 (9th Cir.1988). Plaintiffs argue the court should have applied this rule both in determining the cause of the fire and in determining the cause of its the spread.

If the court made any such error, it is harmless. Any error in allocating the burden of proof for the cause of the fire's spread is obviously harmless, since the court held Leco liable for the fire's spread. Moreover, with regard to the fire's start, the court found that "it is overwhelmingly clear that the fire did not originate in the electrical outlets," but on the Johnsons' boat. Given this finding, the Pennsylvania rule is irrelevant. Even if the court had applied the Rule, it would not have found Leco's code violations caused the fire.

VII. ALLSTATE'S CROSS-APPEAL

Finally, Allstate argues that the district court erred in reducing its recovery from Leco by the amount received from Pioneer. We agree.

*6 After the liability trial, Allstate and Leco negotiated damages and ultimately agreed to a settlement of \$119,000. A letter from Leco's counsel to Allstate indicates that at the time of these negotiations, counsel was aware

that Allstate had settled with Pioneer. On May 5, 1992, Leco's attorney wrote and signed a stipulated agreement that Allstate was entitled to recover \$119,000.

After sending this document to Allstate's attorney, Leco's attorney "learned" that Allstate had settled with Pioneer Lumber for \$7,000. (Affidavit of Michael C. Hayden). He then contacted Allstate's attorneys and stated that Leco was entitled to reduce the \$119,000 figure by the \$7,000 Allstate had received from Pioneer. *Id.* Allstate's attorneys would not agree to reduce the settlement.⁷

Allstate moved the court for an order enforcing the stipulated order. Leco opposed this motion, arguing that the Uniform Contribution Among Joint Tortfeasors Act, RCA § 4.22.060(2) entitled it to an offset for amounts already paid by Pioneer. The district court agreed and entered a \$12,000 judgment in Allstate's favor on July 13, 1992.

This decision was incorrect. Leco and the district court cite case law and statutes entitling a codefendant to offset its liability against any amounts plaintiffs have received from codefendants. Leco's Reply Brief & District Court Order (citing RCA § 4.22.060(2), *Scott v. Cascade Structures*, 673 P.2d 179 (1983) (involving a jury award)). However, Allstate correctly argues that this case law applies to contested judgments, where the failure to award such an offset would enable a plaintiff to receive a double recovery. Interpreting a similar Alaska contribution statute, the Alaska Supreme Court found that the statute did not apply to stipulated settlements where the settling parties were both aware of the earlier judgment. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Ala.1980). Rather, courts should assume that the negotiating parties have already taken the previous settlement into account. *Id.* Since their ultimate figure represents a compromise, "[n]either the law ... nor common sense requires that one settlement be reduced by the amount of a prior settlement." *Id.* at 296.

Leco was aware Allstate had received a settlement from Pioneer long before it entered into settlement negotiations with Allstate. A letter from Leco's counsel at the beginning of these negotiations indicates that he was aware of the settlement. Leco's counsel was present in court when the court approved this settlement as reasonable and received a copy of the settlement agreement and order approving it. Leco does not argue that Allstate deliberately concealed

the Pioneer settlement during settlement negotiations and, at most, Leco's counsel was unaware of the precise amount of Allstate's recovery.

Thus, contract law applies. Leco's signed stipulation agreement constitutes an offer, which Leco's counsel then attempted to revoke. Whether he could still revoke at this time depends on whether Allstate had accepted the offer before counsel's phone call. Leco's counsel contends that he contacted Allstate's lawyers before they signed the agreement but presents no evidence supporting this

contention. The trial court did not make findings on this issue. Thus, we REVERSE and REMAND to allow the court to determine whether a contract existed. If the stipulated order was enforceable, Allstate is entitled to \$119,000. If not, Allstate is entitled to litigate damages or re-enter into settlement negotiations with Leco.

All Citations

12 F.3d 1107 (Table), 1993 WL 495605

Footnotes

- * This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [Ninth Circuit Rule 36-3](#).
- 1 See also [Almacenes Miramar, 649 F.2d 21 \(1st Cir.1981\)](#) (no liability for failing to provide a guard or fire extinguishers to a warehouse because an ordinary person would not have known that pharmaceuticals were highly combustible); [Coe, 502 F.Supp. at 885](#) (uncut grass not flammable enough to create a duty to provide fire equipment on premises).
- 2 See [Dealers Serv., 508 N.E.2d 1241](#) (landowner may be liable to adjoining property owner where he gave explicit permission for a local business to dump combustible material, was aware that others were dumping trash and refuse, yet failed to cut back flammable weeds); [B.W. King, 230 A.2d 133](#) (pier owner liable if "a reasonably prudent man would have employed some method of 'housekeeping' to remove or eliminate any such [coal dust] and any other flammable material" from his pier).
- 3 In addition, at the time the marina was built, Leco explicitly promised the Seattle Fire Department that it would install fire hoses and dry chemical portable fire extinguishers as well as sprinkler systems. In exchange for this promise, the Department allowed Leco to place Pier B and C fifteen feet apart, a deviation from the Building Code Requirement that there be a 16-foot space between buildings to prevent fire spread. The district court found that Leco "totally disregarded" its promise to provide a fire hose and "indeed denied that [the promise] even existed, a position the Court finds not credible." Leco never installed the sprinkler system and allowed the hoses to rot. No fire hose was present on the pier near the Johnsons' boat on the night of the fire. See, e.g., [Fireman's Fund Am. Ins. Co. v. Almacenes Miramar, 649 F.2d 21 \(1st Cir.1981\)](#) (landowner may be liable if she undertakes to provide fire protection and carries out this obligation negligently).
- 4 Leco's arguments that this evidence should have been excluded are without merit. The practices of one marina are relevant to show it was feasible to provide alternative fire fighting equipment.
- 5 The Uniform Fire Code requires compliance with NFPA 303 Standards for Marinas and Boatyards. The 1986 version of NFPA § 5-2.4 specifically requires that marina owners provide alternative fire fighting equipment during freezing conditions; however the 1990 version, which became effective several months before the fire, eliminates this language. However, plaintiffs have a colorable argument that the 1986 version in fact applies because the UFC incorporated the 1986 version, and was not amended to incorporate the 1990 version. If the 1986 version applies, Leco's liability is clear. See [Ober, 787 P.2d at 921](#) (landowner who fails to comply with forest fire prevention statute can be held liable for forest fire); [Proctectus Alpha, 767 F.2d 1379](#) (marina owner liable where his agent violated a Washington statute prohibiting obstruction of fire fighters); [Herberg v. Swartz, 578 P.2d 17 \(Wash.1978\)](#) (hotel owner liable where arson fire spread because of hotel's fire code violations).
- 6 See, e.g., [Dealers Serv., 508 N.E.3d at 1244](#) ("a landowner's possession and control of land gives a landowner a power of control ... which he must exercise for the protection of those outside the premises"); [Herberg, 578 P.2d at 21-22](#) ("trial court also correctly adopted the standards of RCW 70.62 as the duty owed by appellant [landowner] to respondent [neighbor]. That the legislature intended the same protective policy to extend to landowners in the immediate vicinity of the danger is based on the Act, the regulatory standards, and on common sense."); [Ober, 787 P.2d at 921](#) ("a land occupier has an affirmative obligation to use care to confine any fire on his premises, regardless of its origin, in favor of all persons off his premises who are subjected thereby to an unreasonable risk of damage due to escape of the fire"); [Jordon, 186 P. at 876](#) ("there is a measure of responsibility on the part of an owner [of land] ... which requires him to use reasonable effort

to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending to the starting of the fire, which may render him liable to his neighbor as for negligence”) (cites and internal quotations omitted).

7 Leco's attorney alleges that Allstate signed the stipulated agreement *after* receiving Leco's call about the Pioneer settlement. *Id.* at 36. No proof of this allegation has been submitted, however.

WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

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