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No. 91711-6
(Consolidated with Nos. 91725-6, 91726-4, and 91727-2)

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SUPREME COURT OF THE
STATE OF WASHINGTON

WILLIAM RALPH, individually,
Appellant,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL
RESOURCES, a Washington State Public Agency,
Respondent.

WILLIAM RALPH, individually,
Appellant,

vs.

WEYERHAEUSER COMPANY, a Washington Corporation; and
GREEN DIAMOND RESOURCE COMPANY, a Washington
Corporation,
Respondents.

WILLIAM FORTH, individually; GUY BAUMAN, individually;
EILEEN BAUMAN, individually; LINDA STANLEY, individually and
as personal representative IN RE THE ESTATE OF CORAL COTTON;
ROCHELLE STANLEY as personal representative IN RE THE ESTATE
OF CORAL COTTON; DONALD LEMASTER, individually; and
DAVID GIVENS, individually

Petitioners,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL
RESOURCES, a Washington State Public Agency; WEYERHAEUSER
COMPANY, a Washington Corporation; and GREEN DIAMOND
RESOURCE COMPANY, a Washington Corporation,
Respondents.

VIRGINIA CAREY, individually; JAMIE CAREY, individually;
PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a
Washington corporation,
Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL
RESOURCES, a Washington State Public Agency; WEYERHAEUSER
COMPANY, a Washington Corporation; and GREEN DIAMOND
RESOURCE COMPANY, a Washington Corporation,
Respondents.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The moving parties are Petitioners William Ralph; William Forth, et al; and Virginia Carey, et al.

II. DECISION

Petitioners in this consolidated proceeding respectfully request that this Court review the trial court orders in each of these four cases transferring venue from King County to Lewis County, entered on April 16, 2015, and April 21, 2015, appended hereto in the Appendix at 304-07, 313-14, 320-21, and 326-27.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the respective trial courts erred in ruling that, after defendants failed to affirmatively plead the defense of improper venue, failed to assert that affirmative defense in their previous CR 12 motions, and expressly argued against transfer of venue as a remedy, they had not waived the right to object to venue nearly four years after the fact?

2. Whether the respective trial courts erred in ruling that venue was proper in Lewis County, not King County, when multiple applicable statutes allowed for venue in each and a transfer to Lewis County did not serve the convenience of witnesses?

3. Whether the respective trial courts erred in ordering Petitioners to pay the costs of transferring venue when the case was properly filed in King County?

IV. STATEMENT OF THE CASE

The Petitioners in this consolidated proceeding are owners of real and personal property located in Lewis County, Washington.¹ The Chehalis River flooded in early December 2007 and damaged Petitioners' real and personal property located in Lewis County.² Between December 2010 and January 2011, Petitioners filed four separate tort actions in King County seeking compensation from Respondents Washington Department of Natural Resources ("Department"), Weyerhaeuser Company, and Green Diamond Resource Company ("Green Diamond") for the damage to Petitioners' property.³ Specifically, Appellant Ralph filed a tort action against the Department, *Ralph v. Washington Dep't of Nat'l Resources*, and a tort action against Weyerhaeuser and Green Diamond, *Ralph v. Weyerhaeuser, et al.*⁴ Petitioners Forth and Carey both filed actions naming all three Respondents as defendants, *Forth v. Weyerhaeuser, et al.*, and *Carey v. Weyerhaeuser, et al.*⁵

In *Ralph v. Weyerhaeuser, et al.*, Petitioners alleged in the "jurisdiction and venue" section that Weyerhaeuser and Green Diamond's principal places of business were located in King County.⁶ In *Ralph v.*

¹ *Ralph v. Dep't of Natural Res.*, 182 Wn.2d 242, 246, 343 P.3d 342 (2014); Appendix at 1-5, 14-16, 25-28, 40-43.

² *Id.*

³ Appendix at 1-50.

⁴ Appendix at 1-12, 13-23.

⁵ Appendix at 24-38, 39-50.

⁶ Appendix at 4.

Dep't of Nat'l Resources, Forth, and Carey, Petitioners alleged that venue was “appropriate” in King County.⁷

After appearing, Respondents/Defendants filed answers to Petitioners’ complaints in each case.⁸ In each answer, Respondents/Defendants failed to plead improper venue as an affirmative defense.⁹ Instead, in *Ralph v. Weyerhaeuser, et al.*, Weyerhaeuser and Green Diamond both admitted their principal places of business were located in King County with no further objection or mention of appropriate venue.¹⁰ In *Ralph v. Dep't of Nat'l Resources*, the Department denied without explanation that venue was appropriate in King County.¹¹ In *Forth* and *Carey*, Weyerhaeuser and Green Diamond denied venue was proper in King County “for lack of information.”¹² The Department again denied without explanation that venue was proper in King County and additionally “reserve[d] the right to move for a change of venue as permitted by court rule and statute.”¹³

Nor did Respondents move in any of the cases for a change of venue. Instead, in June 2011, Respondents moved under CR 12(b)(1) to dismiss each case for lack of subject matter jurisdiction, alleging that

⁷ Appendix at 16, 29, 43.

⁸ Appendix at 53-111.

⁹ *Id.*

¹⁰ Appendix at 103, 109.

¹¹ Appendix at 96.

¹² Appendix at 54, 59-60, 83, 90.

¹³ Appendix at 67, 75-76.

RCW 4.12.010(1) granted the Lewis County Superior Court exclusive subject matter jurisdiction over the cases.¹⁴

Respondents also expressly argued against transferring the cases to Lewis County. Specifically, in all four actions, Respondents made the following identical, affirmative representation to the respective trial courts: “Plaintiff may argue that the Court may cure this jurisdictional defect by transferring venue to Lewis County. This argument lacks merit.”¹⁵ In their oppositions to the motions to dismiss, Petitioners asserted that both jurisdiction and venue were proper in King County but, if the trial courts determined RCW 4.12.010 was applicable, it was best understood under existing precedent as a venue statute.¹⁶ Thus, a change of venue, not dismissal, was the applicable remedy for any error.¹⁷ However, in their reply briefing, Respondents again expressly rejected a venue change.¹⁸

The trial courts in *Ralph v. Weyerhaeuser, et al.*, *Ralph v. Dep’t. of Natural Resources*, and *Forth* entered orders dismissing those cases, from which Petitioners appealed; the trial court in *Carey* denied the motion to dismiss and stayed that matter pending the appeals in the related matters.¹⁹ After consolidating the three previous appeals, the Court of Appeals

¹⁴ *Ralph*, 182 Wn.2d at 246; Appendix at 112-117, 140-146, 169-176, 201-207.

¹⁵ Appendix at 115, 144, 173, 206.

¹⁶ Appendix at 121-131, 150-160, 180-191, 208-218.

¹⁷ Appendix at 130-131, 159-160, 190-91, 217-18.

¹⁸ Appendix at 138, 167, 198, 225.

¹⁹ *Ralph*, 182 Wn.2d at 246; Appendix at 231-35

affirmed the orders dismissing those cases.²⁰ On review, this Court held that RCW 4.12.010 pertains to venue, not subject matter jurisdiction; reversed the Court of Appeals; and remanded for further proceedings.²¹

On April 2, 2015, this Court issued its mandate in the *Ralph* and *Forth* cases.²² On remand, Respondents moved in each of these four cases to transfer venue to the Lewis County Superior Court.²³ Respondents generally argued that a transfer of venue to Lewis County was appropriate under RCW 4.12.030(1) because (1) under RCW 4.12.010 and this Court's characterization of that statute in *Ralph* as a "mandatory venue" statute, Lewis County was the mandatory venue for the cases and (2) a transfer of venue to Lewis County was also appropriate under RCW 4.12.030 for the convenience of the witnesses in the case.²⁴ Conditioned on the trial courts transferring venue under RCW 4.12.030(1), Respondents also requested the trial courts order Petitioners to pay the costs of changing venue and announced their intention to move for an award of attorney fees as well.²⁵

Petitioners opposed each motion on the exact same grounds: (1) Respondents waived the affirmative defense of improper venue under CR 12(h) by failing to plead it in their answers or join that defense in their motion to dismiss; (2) venue was proper in King County under RCW

²⁰ *Ralph*, 182 Wn.2d at 247.

²¹ *Ralph*, 182 Wn.2d at 259.

²² Appendix at 237-38.

²³ Appendix at 239-259.

²⁴ *See, e.g.*, Appendix at 241-42.

²⁵ Appendix at 242.

4.12.020, RCW 4.12.025, and RCW 4.92.010; (3) witness convenience did not warrant transferring venue to Lewis County under RCW 4.12.030(3); and (4) Respondents should not be awarded their associated costs if venue was transferred to Lewis County.²⁶

The respective trial courts entered orders in each case transferring venue to Lewis County.²⁷ The *Carey* trial court was the only one to provide an explanation in its order for transferring venue to Lewis County, reasoning that (1) Respondents' pre-*Ralph* motion to dismiss had asserted that the action was "brought in the [in]correct county," but merely sought the wrong remedy, thus preserving their objection to venue; and (2) venue was appropriate in Lewis County, citing RCW 4.12.010(1) and this Court's decision in *Ralph*.²⁸ In each case, Petitioners timely filed notices of discretionary review directed to this Court.²⁹

V. ARGUMENT

A. As A Matter of Precedent, Accepting Discretionary Review of the Respective Trial Court's Venue Decisions is Appropriate

As this Court held decades ago, if a plaintiff objects to a venue decision,

[the plaintiff's] proper remedy [is] to seek [discretionary review] and not to wait until the trial [is] concluded and then ask an appellate court to set aside an unfavorable

²⁶ Appendix at 260-297.

²⁷ Appendix at 304-07, 313-14, 320-21, 326-27.

²⁸ Appendix at 305-06.

²⁹ Appendix at 299-328.

judgment on the basis that the venue was laid in the wrong county.

Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978) (footnote omitted). Accordingly, “this court has consistently taken cognizance of [motions for discretionary review of] orders pertaining to venue.” *Lincoln*, 89 Wn.2d at 578.

In the decades since *Lincoln*, Washington appellate courts have adhered to the general rule announced in *Lincoln*, routinely granting discretionary review of trial court orders granting or denying a change of venue, often without reference to a particular provision of RAP 2.3(b). See, e.g., *Old Nat. Bank of Wash. v. Rainier Bancorporation*, 18 Wn. App. 353, 354-55, 567 P.2d 695 (1977); *Kahelamat v. Yakima County*, 31 Wn. App. 464, 465, 643 P.2d 453 (1982); *Roy v. City of Everett*, 48 Wn. App. 369, 370, 738 P.2d 1090 (1987); *Bechtel Civil and Minerals, Inc. v. South Columbia Basin Irr. Dist.*, 51 Wn. App. 143, 752 P.2d 395 (1988); *Hickey v. City of Bellingham*, 90 Wn. App. 711, 713, 953 P.2d 822 (1998); *Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485, 488, 76 P.3d 255 (2003); *Moore v. Flateau*, 154 Wn. App. 210, 212, 225 P.3d 361 (2010); see also *In re Marriage of Hennemann*, 69 Wn. App. 345, 348, n.3, 848 P.2d 760 (1993) (noting that this Court “has encouraged discretionary review of interlocutory review of venue decisions,” citing *Lincoln*, because doing so avoids the problems of “a second trial and the attendant expense and waste of judicial resources.”).

Indeed, in *Kahclamat*, the Court of Appeals granted discretionary review of a trial court's order granting a motion to change venue involving an issue materially identical to the primary issue presented by this case: whether the moving party had waived its right to request a change of venue. 31 Wn. App. at 466. Accordingly, *Lincoln's* general rule and *Kahclamat* compel acceptance of discretionary review of this case.

B. This Court Should Accept Review of the Four Orders Transferring Venue Because the Respective Trial Courts Have Committed Obvious Error Rendering Further Proceedings Useless

Furthermore, under RAP 2.3(b)(1), this Court may accept discretionary review when “[t]he superior court has committed an obvious error which would render further proceedings useless.” Because (1) the respective trial courts committed obvious error in granting Respondents’ motions to change venue and (2) that error would result in four useless trials, discretionary review is appropriate.

1. The Trial Courts Committed Obvious Error By Transferring Venue Because Respondents Waived Their Objections to Improper Venue

First, this Court reviews *de novo* whether a defendant waived an affirmative defense such as improper venue. *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 858, 313 P.3d 431 (2013). “The initial choice of venue belongs to the plaintiff.” *Eubanks v. Brown*, 180 Wn.2d 590, 595, 327 P.3d 635 (2014). “If initial venue is not proper as to the defendant, the defendant may either waive their objection

to the erroneous venue by failing to object or move to transfer the case to where venue is proper.” *Id.*

However, improper venue is an affirmative defense and, thus, Washington’s civil rules impose specific requirements for the timing of and manner in which the defendant “objects.” Specifically, an affirmative defense of improper venue is waived if not made by motion under CR 12(b) or asserted in a responsive pleading. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008) (citing CR 12(h)(1)³⁰; *Andrews v. Cusin*, 65 Wn.2d 205, 396 P.2d 155 (1964) (“An affirmative defense of improper venue is waived if not made by motion under the rule or included in a responsive pleading.”); *Kahclamat*, 31 Wn. App. at 466 (“When . . . a rule 12(b) defense or objection is raised by motion prior to pleading or in conjunction with the responsive pleading . . . a failure to join all other 12(b) defenses or objections which were then

³⁰ CR 12(h)(1) provides:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

CR 12(g) provides:

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

available to the defendant results in a waiver of the omitted defenses or objections.”).

Here, Respondents failed to assert the affirmative defense of improper venue in its answer and failed to join the defense in its CR 12(b) motion to dismiss. Furthermore, in their motions to dismiss, Respondents expressly refuted that transfer of venue was even an option. In their motions, Respondents stated,

Plaintiffs may argue that the Court may cure this jurisdictional defect by transferring venue to Lewis County. This argument lacks merit.³¹

³¹ Petitioners anticipate that Respondents may argue that it would be inequitable to hold that they waived their objection to venue by failing to move in the alternative for a transfer of venue because they were entitled to rely on Washington precedent existing before this Court’s holding in *Ralph*, 182 Wn.2d at 258, that RCW 4.12.010 relates to venue, not jurisdiction and, thus, the only remedy they could seek was dismissal of the action.

Such an argument, however, misstates Washington law prior to *Ralph*. As this Court observed in *Ralph*, although prior precedent had characterized RCW 4.12.020 as jurisdictional, in practice the statute had repeatedly been applied to allow trial courts to “confer” their “jurisdiction” over an action to another court and transfer the case to that latter court. *Ralph*, 182 Wn.2d at 255 (citing *Snyder v. Ingram*, 48 Wn.2d 637, 639, 296 P.2d 305 (1956); *Cugini v. Apex Mercury Mining Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946); *N. Bend Lumber Co. v. City of Seattle*, 147 Wash. 330, 336, 266 P. 156 (1928)).

Accordingly, Washington law—even prior to *Ralph*—provided sufficient notice to Respondents that transfer of these cases to Lewis County was a viable alternative. And, indeed, Respondents would have suffered no prejudice had they attempted to “cover their bases” by arguing in their motions to dismiss that, in the event the trial disagreed that dismissal on jurisdictional grounds was appropriate, Lewis County was the proper forum for these actions.

Instead, Respondents strategically engaged in a zero sum game of seeking an exclusive remedy of dismissal because Respondents could have been at risk of being barred by the statute of limitations if they were forced to refile. Respondents were entitled to their litigation tactics, but this tactics now have a manifest and certain consequence, which is that Respondents have waived the defense of improper venue. *Kahclamat*, 31 Wn. App. at 466; CR 12(g); CR 12(h)(1).

Petitioners also anticipate that Respondents will argue their general denials of venue in their various answers, either unexplained or “for lack of information” were sufficient to preserve their subsequent objections to venue. However, CR 8(c) provides that parties “shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.” Thus, “Any matter that does not tend to controvert the opposing party’s prima facie case as determined by applicable substantive law should be pleaded,

Kachlamat is on all fours. There, the issue was whether “the defendant waive[d] its right to request a change of venue by not asserting its objections to venue in a motion prior to pleading or in its answer, and in waiting a year to make its request.” Division One answered affirmatively. “A rule 12(b) defense or objection *must* be asserted by a defendant either by motion prior to pleading or else in its responsive pleading if no rule 12(b) motions were made by the defendant before so pleading.” *Id.* (Emphasis added); *see also Raymond*, 24 Wn. App. at 114-115. The *Kachlamat* Court held that the defendant waived his challenge to venue because he did not move to change venue “until many months after its answer and motion to dismiss were filed.” *Id.*

Like in *Kachlamat*, Respondents failed to raise improper venue as an affirmative defense and failed to join the defense in its CR 12(b)

and is not put at issue by a general denial.” Shinn Irr. Equipment, Inc. v. Marchand, 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969) (emphasis added); *see also Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (stating the same).

Here, Respondents only made general denials regarding Petitioners’ venue allegations, as opposed to properly pleading improper venue as an affirmative defense. Both CR 8(c) and *Shinn* make clear that such general denials are insufficient to preserve an affirmative defense such as improper venue. Accordingly, Respondents waived their objections to venue.

Finally, Petitioners anticipate that the Department will argue that its purported “reserve[ations]” in *Forth* and *Carey* of “the right to move for a change of venue as permitted by court rule and statute” were sufficient to preserve its objections to venue in those cases. However, court rules permit such a motion only when improper venue is properly pleaded as an affirmative defense or asserted as part of a CR 12 motion filed in the case. CR 8(c); CR 12(h)(1); CR 12(g). Here, the Department did neither. Holding that the Department’s equivocation regarding venue was sufficient to preserve its action would contravene the plain language and clear purpose of the Civil Rules by allowing it a second bite at an issue it tactically chose to waive in hopes of strengthening its arguments for outright dismissal of those cases.

motion. After a lengthy appeal process, Respondents now argue, for the first time, that venue is improper. But Washington law is clear: A defendant waives the right to assert improper venue if it (1) fails to affirmatively plead the defense in a responsive pleading and (2) fails to join the defense in a CR 12(b) motion. Respondents waived their improper venue objections, and the trial court committed obvious error in granting their motions to transfer venue.

2. The Trial Courts Committed Obvious Error By Transferring Venue Because Venue Was Proper In King County

Even if Respondents did not waive their objections to improper venue, the trial court still committed obvious error in concluding venue was proper in Lewis County under RCW 4.12.010(1) and transferring venue because venue was proper in King County under RCW 4.12.020, RCW 4.12.025(3), and RCW 4.92.010. This issue presents the issue of determining the applicability of competing venue statutes, an issue of statutory interpretation reviewed *de novo*. *Eubanks v. Brown*, 180 Wn.2d 590, 596-97, 327 P.3d 635 (2014); *see also Moore v. Flateau*, 154 Wn. App. 210, 214, 255 P.3d 361 (2010) (transfers of venue under RCW 4.12.030(1) because case is filed in improper county reviewed *de novo*).

Respondents and, apparently, the trial courts relied on this Court's observation in *Ralph* that RCW 4.12.010 "applies to tort actions seeking monetary relief for damages to real property and relates to venue" and its characterization of that statute as relating to "mandatory venue." 182 Wn.2d at 257, 259. However, this Court's decision in *Ralph* did not

purport to address and, indeed, could not have addressed an issue not before it: the interaction between RCW 4.12.010(1) and other applicable venue statutes. Accordingly, the trial courts committed obvious error by extending *Ralph*'s holding beyond the confines of its particular facts and issues to conclude that RCW 4.12.010(1) operates to the exclusion of all other applicable venue statutes.

Now, however, that issue is squarely before the Court. The flooding at issue caused a great deal of damage to Petitioners; part of this will be damage to their real property in Lewis County, but another portion of the damages analysis will entail damage to their personal property as well as emotional distress in seeing his property destroyed. In this vein, RCW 4.12.020 applies, which mandates that actions for the recovery of damages for injuries to the person or for injury to personal property *shall* be tried either in the county where the cause arose or in the county in which one of the defendants resides.³² *See also* RCW 4.92.010(4) (venue for actions against the State “shall be . . . [t]he county where the action may be properly commenced by reason of the joinder of an additional

³² RCW 4.12.020 states in relevant part:

Actions for the following causes *shall be tried* in the county where the cause, or some part thereof, arose:

* * *

(3) For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff shall have the option of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

defendant); RCW 4.12.025(3) (“The venue of any action brought against a corporation, at the option of the plaintiff, shall be: (a) In the county where the tort was committed; . . . or (d) in the county where the corporation has its residence”). In the present case, the tort was committed and the cause of action arose at Weyerhaeuser’s headquarters in King County, where the policies and procedures causing the negligent timber practices were born, cultivated, and ordered. And, at the very least, Weyerhaeuser resides in King County by virtue of being headquartered there. Thus, venue in each case was proper in King County under RCW 4.12.020, RCW 4.12.025(3), and RCW 4.92.010.

Furthermore, all three of those venue statutes utilize the same mandatory term “shall” as RCW 4.12.010 and, thus, may all be fairly characterized as “mandatory venue” statutes. “When two statutes apparently conflict, the rules of statutory construction direct the court to, if possible, reconcile them so as to give effect to each provision.” *Anderson v. Dep’t of Corrections*, 159 Wn.2d 849, 861, 154 P.3d 220 (2007) (quoting *State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992)). Thus, in order to give effect to the mandatory “shall” in each statute, the Court should interpret them as permitting plaintiffs a choice of venues in which to file their lawsuits, so long as the chosen venue is one of the venues permitted by the multiple, applicable statutes mandating venue or giving mandatory effect to plaintiffs’ choice. See *Johanson v. City of Centralia*, 60 Wn. App. 748, 750-51, 907 P.2d 376 (1991) (giving competing venue statutes a “complementary” interpretation of permitting

plaintiff to choose between each to give each statute effect). Accordingly, the trial courts' conclusion that RCW 4.12.010 operates as a "mandatory" venue statute to the exclusion of all others invalidated the other applicable venue statutes and further constituted obvious error.

Moreover, although none of the trial courts' written order purported to rely on RCW 4.12.030(3), no tenable or reasonable ground exist for transferring venue to Lewis County to serve "the convenience of witnesses." This Court reviews a decision to transfer venue under RCW 4.12.030(3) for abuse of discretion. *Moore v. Flateau*, 154 Wn. App. 210, 214, 255 P.3d 361 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *McCoy v. Kent Nursery*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011) (internal quotation marks omitted) (quoting *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)).

Here, on a balance, there cannot be a reasonable debate that most of the central witnesses to this lawsuit will be in King County. The underlying forest practices and policies that caused damages to Petitioners' property occurred at the Weyerhaeuser headquarters. All of the necessary documents will be coming from the Weyerhaeuser headquarters, and in fact, before this case was dismissed, the undersigned

were planning to visit Weyerhaeuser headquarters to review the boxes of responsive discovery documents. The experts as well will also likely be from King County or immediately surrounding counties. The only witnesses who will be in Lewis County are Petitioners and some eyewitnesses. Taken together, witness convenience does not weigh in favor of transferring venue. Accordingly, the respective trial courts abused their discretion in transferring the cases to Lewis County by exercising that discretion based on unreasonable and untenable grounds.

3. The Trial Courts Committed Obvious Error in Ordering Petitioners to Pay the Costs of Transferring Venue When the Cases Were Properly Filed in King County

Furthermore, even if this Court were to hold that Respondents did not waive their objections to venue and that the trial courts did not err in transferring the cases to Lewis County for witness convenience, the trial courts committed obvious error in ordering Petitioners to pay the costs of transferring venue. RCW 4.12.090³³ requires the party successfully moving for a venue change to pay the associated costs unless the venue

³³ RCW 4.12.090(1) provides:

When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the court to which it is transferred and charge a fee as provided in RCW 36.18.016. The costs and fees thereof and of filing the papers anew must be paid by the party at whose instance the order was made, except in the cases mentioned in RCW 4.12.030(1), in which case the plaintiff shall pay costs of transfer and, in addition thereto, if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence, it shall order the plaintiff to pay the reasonable attorney's fee of the defendant for the changing of venue to the proper county. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

change is ordered under 4.12.030(1), i.e., “the county designated in the complaint is not the proper county.” For the reasons stated above, venue for these cases was also proper in King County under RCW 4.12.020, RCW 4.12.025(3), and RCW 4.92.010. Accordingly, the trial court committed obvious error by ordering Petitioners, not Respondents, to bear the cost of transfer.

4. The Trial Courts’ Obvious Error Rendered Further Proceedings Useless

Finally, the respective trial courts’ obvious error in transferring venue from King County to Lewis County rendered further proceedings useless. Normally, interlocutory review of trial court orders is disfavored because it lends itself too piecemeal, multiple appeals. *Right-Price Recreation LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). This general rule is rooted in the sound principle that most interlocutory orders involve matters such as discovery, evidentiary rulings, or denials of summary judgment motions, as the ultimate propriety and effect of such rulings may vary from case to case and requires the full trial context to evaluate. *See Minehart v. v. Morning Star Boys Ranch*, 156 Wn. App. 457, 467-68, 232 P.3d 591 (2010).

As discussed above, however, Washington appellate courts treat trial court decisions regarding venue differently, applying a general rule of accepting discretionary review of such decisions despite their interlocutory nature. Such a rule is rooted in a sound principle as well: unlike error in other types of interlocutory rulings and orders, any decision regarding

venue is either erroneous or proper at the outset, independent of what might transpire during the remainder of the proceedings. Moreover, a venue decision fundamentally alters the course of the proceedings as a whole; any alleged error regarding such a decision presents an issue of whether the case can “go forward” in the present venue, *Hickey*, 90 Wn. App. at 712; and an appellate court’s determination of error would require remand for a new trial after appellate review. *See, e.g., Kahclamat*, 31 Wn. App. 464, 465, 643 P.2d 453 (1982); *Roy v. City of Everett*, 48 Wn. App. 369, 370, 738 P.2d 1090 (1987). Thus, venue decisions “render[s] further proceedings useless,” and discretionary review of such decisions avoids the problems of “a second trial and the attendant expense and waste of judicial resources.” *In re Marriage of Hennemann*, 69 Wn. App. at 348 n.3.

Here, the respective trial courts entered orders transferring venue from King County to Lewis County. Petitioners maintain that the respective trial court committed obvious error in doing so; regardless, considerations of both trial and appellate court judicial economy make imperative immediate appellate review of those orders to avoid a potentially useless trial. Accordingly, this Court should accept review under RAP 2.3(b)(1).

C. This Court Should Accept Review of the Four Orders Transferring Venue Because the Respective Trial Courts Have Committed Probable Error Substantially Altering the Status Quo

Even if this Court determines that review is not warranted under RAP 2.3(b)(1), RAP 2.3(b)(2) provides for discretionary review when when “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” Here, the respective trial courts’ decision to transfer venue to Lewis County (1) constitute probable error and (2) substantially altered the status quo, thus warranting discretionary review.

First, even if this Court concludes that Petitioners do not demonstrate the venue decisions constituted “obvious” error, they at least meet the lesser standard of “probable” error for all the reasons discussed above. The *Kahclamat* court held that defendants had waived their objections to venue in circumstances highly analogous to those in this case. Furthermore, even if Respondents did not waive their objections to venue, multiple other venue statutes provided for proper venue in King County, and no tenable reason existed for transferring venue to Lewis County.

Second, and also for the reasons already discussed above, the trial courts’ probable error substantially altered the status quo. Simply put, with the trial courts’ transfers of venue, the *entirety* of the local forum characteristics for this litigation—be they the potential judges; the shared

community values and perspectives from which a jury pool may be drawn; and even the attendant financial costs and expenditure of resources in litigating in Lewis County, as opposed to King County—have changed. Viewed through such a lens, it is unsurprising that Washington appellate courts have previously held that venue change decisions met RAP 2.3(b)(2)'s requirements for discretionary review. *See, e.g., Old Nat'l Bank of Wash.*, 18 Wn. App. at 355. Likewise, because this case presents those very circumstances, it meets the “status quo” prong of RAP 2.3(b)(2). Accordingly, this Court should grant Petitioners’ motion for discretionary review.

VI. CONCLUSION

For all these reasons, Petitioners respectfully request this Court to accept discretionary review of the respective trial courts’ April 16 and April 21, 2015 orders transferring venue from King County to Lewis County.

RESPECTFULLY SUBMITTED this 1st day of July, 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By:  _____

Darrell L. Cochran, WSBA No. 22851
Loren A. Cochran, WSBA No. 32773
Kevin M. Hastings, WSBA No. 42316
Christopher E. Love, WSBA No. 42832

STATE OF WASHINGTON)
)ss
COUNTY OF KING)

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

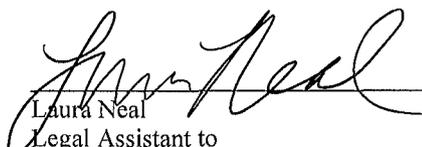
That on July 1, 2015, I placed for delivery with Legal Messengers, Inc., a true and correct copy of the above, directed to:

Mark Jobson
Attorney General of Washington
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
Attorney for: State of Washington Dept. of Natural Resources

Kelly P. Corr
Seann C. Colgan
Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Attorneys for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

DATED this 1st day of July, 2015.



Laura Neal
Legal Assistant to
Darrell L. Cochran

OFFICE RECEPTIONIST, CLERK

To: Chris Love
Subject: RE: Case # 91711-6 - William Ralph v. Weyerhaeuser Company, et al.

Received 7/1/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Chris Love [mailto:chris@pcvalaw.com]
Sent: Wednesday, July 01, 2015 4:48 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Case # 91711-6 - William Ralph v. Weyerhaeuser Company, et al.

Per the Clerk's letter dated July 1, 2015, please find attached a copy of Petitioners' Motion for Discretionary Review including the page numbers that were inadvertently omitted from the copy originally received and filed by the Court on June 30, 2015. Please let us know if we can be of further assistance.

Christopher Love
Associate Attorney
Pfaue Cochran Vertetis Amala PLLC
911 Pacific Avenue, Suite 200
Tacoma, WA 98402
253-348-2199 – direct
253-777-0799 – office
253-627-0654 – fax
chris@pcvalaw.com



This message and the documents attached to it, if any, contains confidential information from PFAU COCHRAN VERTETIS AMALA PLLC, is intended only for the use of the addressee and may contain information that is PRIVILEGED and CONFIDENTIAL under applicable law, and/or may contain ATTORNEY WORK PRODUCT. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please delete all electronic copies of this message and its attachments, destroy any hard copies you may have created and notify me immediately at (253) 617-1828.

APPENDIX

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KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 10-2-42012-6 KNT

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**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

William Ralph, individually,

Plaintiff,

vs.

WEYERHAEUSER COMPANY, a
Washington Corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington Corporation,

Defendants.

NO.

COMPLAINT

[JURY DEMANDED]

[CLERK'S ACTION
REQUESTED]

COMES NOW Plaintiff, by and through their attorneys, Darrell L. Cochran and Pfau,
Cochran, Vertetis, Kosnoff, PLLC, and bring this action against the Defendants named herein.

Plaintiff alleges the following on information and belief:

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I. INTRODUCTION

While some in government and the timber industry have referred to the record floods as an “act of God,” clearly there was a human hand involved that made a bad situation worse.

Current Washington State Commissioner of Public Lands, Peter J. Goldmark, *The Seattle Times*, January 30, 2008 (attached).

1.1 This case arises from unreasonably dangerous and unlawful forest practices by the Defendants on steep and unstable slopes throughout the Chehalis River basin in western Lewis County, Washington. These practices caused hundreds of landslides in the Chehalis River basin on or about December 3, 2007, displacing the waters of the Chehalis River and flooding commercial property of the Plaintiff.

1.2 Defendants Weyerhaeuser Company and Green Diamond Resource Company, owners of much of the land drained by the Chehalis River, owed a duty to exercise reasonable care in the use of and logging activities on their property to avoid harming neighboring landowners. Defendants knew or should have known that their logging activities in and around the Chehalis River basin created an unreasonable danger for their neighbors’ property. Defendants knew or should have known that the steep slopes on their collective properties were unstable because they had a thin mantle of permeable soil over impermeable bedrock. Defendants knew or should have known the climate on these slopes included recurrent, periodic heavy rainfall, including predictably warm rain on accumulated snow. Further, Defendants knew or should have known that extensive clear-cutting, logging and road building would disturb the slopes and create a great danger of debris flows throughout the basin that would flow into the Chehalis River and displace its water. Defendants knew or should have known from the extensive literature on landslide and debris flows, much of it

1 commissioned by and/or created for Defendants, that its activities created an unreasonable
2 danger.

3
4 1.3 Defendants have in the past claimed and it is anticipated will again claim that
5 these landslides and the resultant debris flow and floods occurred as a result of an unfortunate
6 "Act of God," a product of unpredictable, torrential rains. However, Defendants use this
7 same excuse regularly when they are called to accept responsibility for forest practices that
8 result in destructive landslides and devastating floods. Washington State Commissioner of
9 Public Lands, Peter J. Goldmark, aptly illustrated the problem in a January 30, 2008 column
10 written in the wake of the December 2007 floods for *The Seattle Times*:

11 In this case, the buck stops at the Department of Natural
12 Resources, tasked with permitting timber sales — even on
13 private land, in this case Weyerhaeuser — on slide-prone, steep
14 slopes.

15 As stark photos of the clear-cut hillside illustrate, the agency
16 permitted a clear-cut on a slope that should never have been
17 logged in this manner, if at all. Led by Public Lands
18 Commissioner Doug Sutherland, agency personnel acted against
19 state rules designed to balance harvest goals with protecting
20 property, public safety and the environment.

21 In short, they failed to exercise appropriate professional
22 distance between a public agency with a broad public mission
23 and the industry they are tasked to oversee.

24 Unfortunately, this is not an isolated case of lax oversight and
25 too-cozy relationships with industry, whether timber or large
26 developers. From land swaps that result in forests lost to strip
malls and vacation homes to similar land-damaging clearcuts,
the department and its leadership are failing to protect both
public health and the long-term value of our public land."

Id.

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II. PARTIES

2.1 Plaintiff Bill Ralph is a resident of Lewis County, Washington. Several of his commercial properties flooded in the December 2007 floods of the Chehalis River and Salzer Creek.

2.2 Defendant Weyerhaeuser Company (hereinafter "Weyerhaeuser") owns or manages 22 million acres of global timberland with offices or operations in 10 countries. Weyerhaeuser owns or manages nearly 1.1 million acres of timberland in Washington State including a significant portion in and around the Chehalis River basin.

2.3 Defendant Green Diamond Resource Company (hereinafter "Green Diamond") is a logging company that engages in the ownership and operation of timberlands and the manufacture of lumber. It has operations in California, Oregon, and Washington. Green Diamond Resource Company was founded as Simpson Resource Company and changed its name to Green Diamond Resource Company in 2004. Green Diamond is believed to own and or manage a significant portion of timberland in and around the Chehalis River basin.

III. JURISDICTION AND VENUE

3.1 Plaintiff re-alleges and incorporates herein the preceding paragraphs of the Complaint as though set forth in full.

3.2 Defendant Weyerhaeuser's principal place of business is at its International Headquarters located within King County, in Federal Way, Washington.

3.3 Defendant Green Diamond Resource Company has its principal place of business located within King County, in Seattle, Washington.

IV. FACTS

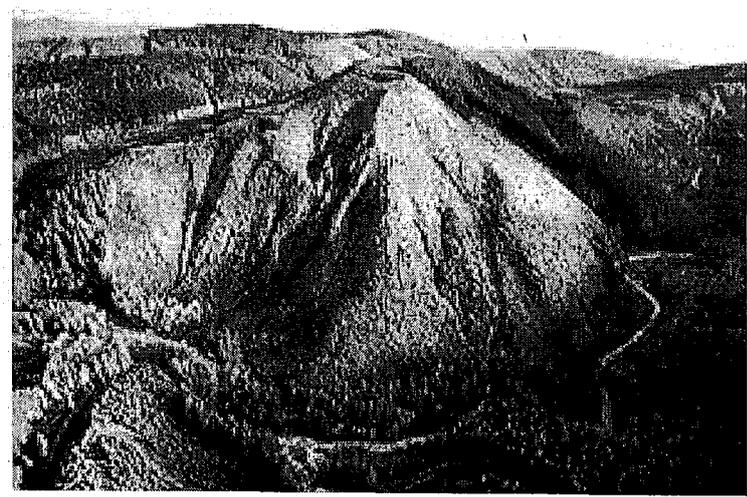
4.1 Plaintiff re-alleges and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

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4.2 On or about December 3, 2007, Plaintiff's commercial properties were flooded by water originating from the Chehalis River and Salzer Creek.

4.3 The Chehalis River basin contains shorelines of the state as defined in the Shoreline Management Act of 1971 (SMA), 90.58 RCW.

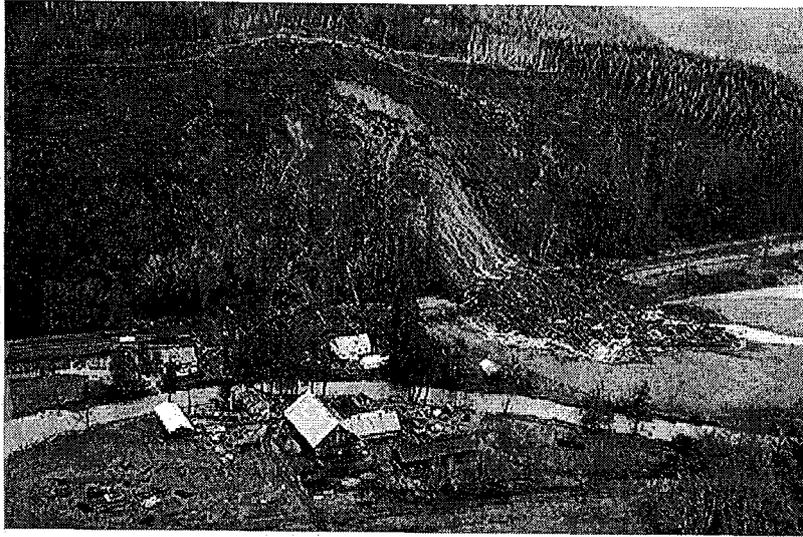
4.4 In the years preceding December 3, 2007, Defendants' unreasonable forest practices, including timber harvesting, extraction, and road building on hazardous steep slopes in the upper Chehalis River basin created a dangerous condition on their lands.



4.5 Previous landslides in these areas demonstrated a substantial likelihood of soil erosion, sediment delivery to public resources, mass wasting, and a probable significant adverse impact to the environment and public safety.

4.6 When heavy rain fell on or about December 3, 2007, steep slopes stripped of trees could not absorb the excess water and quickly eroded.

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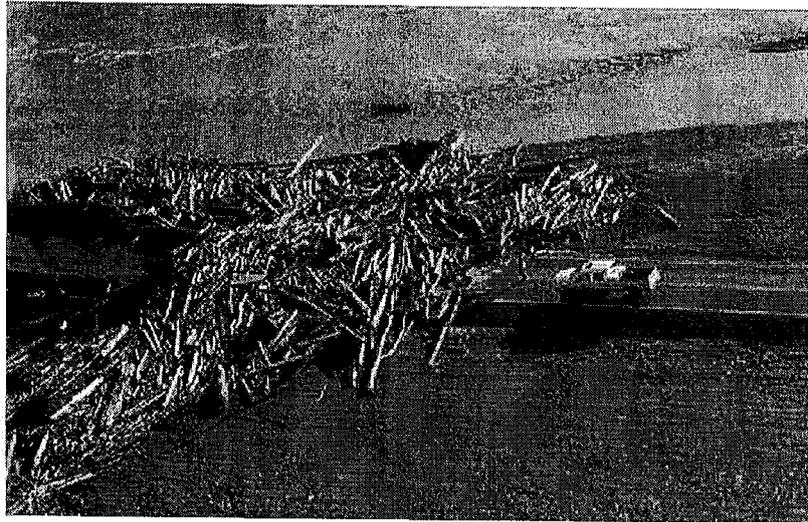


10 4.7 Landslides in the clear cut areas dumped millions of tons of mud, rocks, and
11 logging debris into the Chehalis River, dramatically rose the water level in the river and
12 formed debris dams that blocked the river's channel.



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23 4.8 Several of these unstable earthen dams disintegrated under the immense
24 backpressure building in the river. When the backwater burst through, all the mud and debris
25 rushed downstream and backed up behind bridges along the Chehalis River. Twenty-seven
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1 bridges on the river failed under the deluge, broke apart, and released all the water and debris
2 behind them.
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13 4.9 In addition to flooding lands drained by the Chehalis River, the floodwaters
14 reversed the flow of Salzer Creek, where a dike wall broke and allowed additional flooding
15 into southern Centralia, including Plaintiff's commercial and real property.
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V. CAUSES OF ACTION

A. Negligence

5.1 Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as though set forth in full.

5.2 By their actions, Defendants Weyerhaeuser and Green Diamond breached their duties owed to Plaintiff, including duties as landowners to adjacent landowners; and their responsibilities to execute reasonable care to prevent their logging activities from causing harm to foreseeable endangered persons and property.

5.3 By their actions, Defendants have breached duties owed to Plaintiff.

5.4 By these actions, Defendants are liable to Plaintiff for general and special damages incurred as a result of their negligence and failure to comply with the applicable regulations in accordance with the laws of the State of Washington.

B. Trespass

5.5 Plaintiff re-alleges and incorporates herein the preceding paragraphs of the Complaint as though set forth in full.

5.6 Activities on property of Weyerhaeuser and Green Diamond caused injury to Plaintiff's property. This constitutes a trespass upon property.

C. Tortious Interference with Contractual Relations and Business Expectancy

5.7 Plaintiff re-alleges and incorporates herein the preceding paragraphs of the Complaint as though set forth in full.

5.8 By their actions, Weyerhaeuser and Green Diamond improperly interfered with the contractual relationships and business expectancies Plaintiff had with his customers and vendors, and has caused a disruption of said relationships.

1 **D. Conversion**

2 5.10 Plaintiff re-alleges and incorporates herein the preceding paragraphs of this
3 Complaint as though set forth in full.

4 5.11 Weyerhaeuser and Green Diamond unlawfully converted Plaintiff's property.

5 **E. Shoreline Management Act of 1971**

6 5.12 Plaintiff re-alleges and incorporates herein the preceding paragraphs of this
7 Complaint as though set forth in full.

8 5.13 Defendants failed to obtain a shoreline substantial development permit for
9 forest practices that would likely cause substantial impact to a shoreline of the state.

10 **VI. JURY DEMAND**

11 6.1 Pursuant to the Rules of Civil Procedure, Plaintiff demands that this action be
12 tried before a jury.

13 **VII. RESERVATION OF RIGHTS**

14 7.1 Plaintiff reserves the right to assert additional claims as may be appropriate
15 following further investigation and discovery.

16 **VIII. DAMAGES**

17 8.1 As a direct and proximate result of Defendant Weyerhaeuser's and Green
18 Diamond's negligent and unlawful conduct, Plaintiff has sustained special and general
19 damages.

20 **IX. PRAYER FOR RELIEF**

21 WHEREFORE Plaintiff, having asserted claims for relief, now prays for judgment
22 against Defendants as follows:
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1. For judgment against Defendants Weyerhaeuser and Green Diamond for negligence, trespass, tortious interference with contractual relations and business expectancy and conversion in an amount to be proven at trial.

2. For entry of an order permanently enjoining Defendants from committing similar unlawful acts in the future.

5. For attorney's fees and costs against all Defendants consistent with the purpose of the SMA, RCW 90.58.230.

6. For such other relief that the Court deems just and proper.

Dated this 2nd day of December, 2010.

PFAU COCHRAN VERTETIS KOSNOFF, PLLC

By 

Darrell L. Cochran, WSBA No. 22851
darrell@pcvklaw.com
Attorneys for Plaintiff

4832-1109-4280, v. 1

The Seattle Times

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Risky timber practices worsened December flooding

By Peter J. Goldmark
Special to The Times

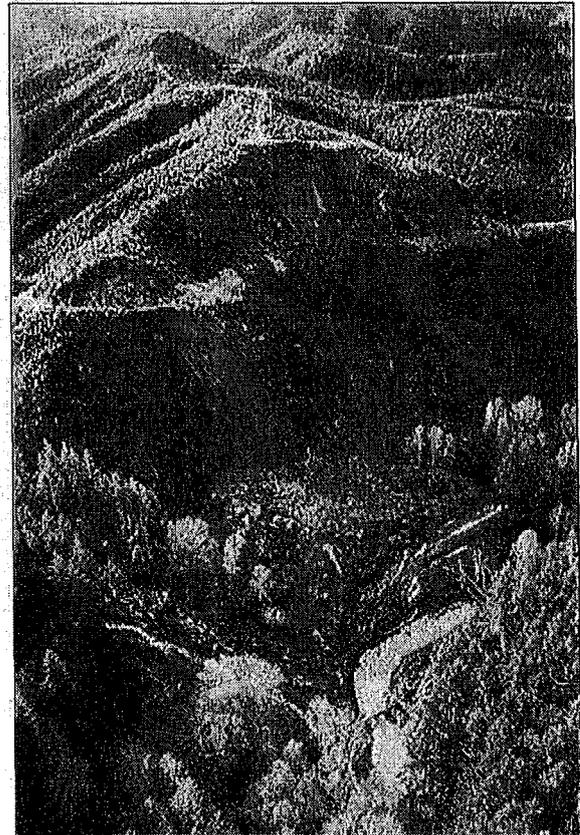
While images of December's Lewis County floods recede like the waters of the Chehalis River, the impacts of the devastation to local families, Washington state taxpayers helping rebuild a community, and the blow to our economy, continue.

Homes are damaged or destroyed. Many farms and businesses are threatened or lost. Cleanup will continue for months. Economic recovery for many will take years.

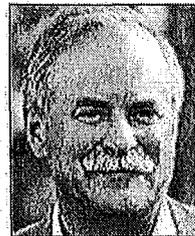
While some in government and the timber industry have referred to the record floods as an "act of God," clearly there was a human hand involved that made a bad situation worse. In this case, the buck stops at the Department of Natural Resources, tasked with permitting timber sales — even on private land, in this case Weyerhaeuser — on slide-prone, steep slopes.

As stark photos of the clear-cut hillside illustrate, the agency permitted a clear-cut on a slope that should never have been logged in this manner, if at all. Led by Public Lands Commissioner Doug Sutherland, agency personnel acted against state rules designed to balance harvest goals with protecting property, public safety and the environment. In short, they failed to exercise appropriate professional distance between a public agency with a broad public mission and the industry they are tasked to oversee.

Unfortunately, this is not an isolated case of lax oversight and too-cozy relationships with industry, whether timber or large developers. From land swaps that result in forests lost to strip malls and vacation homes to similar land-damaging clear-cuts, the department and its leadership are failing to protect both public health and the long-term value of our public land.



STEVE RINGMAN / THE SEATTLE TIMES
Mud and debris slide down a recently replanted clear-cut area into Stillman Creek in Lewis County. The heavily logged Stillman Creek drainage was the scene of many such slides during December's heavy rains.



Peter Goldmark

At a state Senate hearing on the floods held on Jan. 10, agency personnel defended their actions, and predictably placed responsibility on the severe weather. Yet, independent scientists confirmed that while the rain was abnormally intense, the flooding itself was indeed made catastrophic as a result of human action, in this case logging the slopes and development on the floodplain.

It's time to move forward with two initial steps that can help restore balance and accountability.

First, an independent audit of how logging permits are prioritized and approved is critical to helping too-often-overworked land managers, biologists and other on-the-ground workers better assess the impacts of risky timber harvests. Part of this is also to determine where the agency needs to provide a more critical review of permits, and better reflect the goals of promoting local economic growth, maintenance of rural school trusts, and safeguarding environmental and community values.

The Legislature passed in 2006 " and voters reaffirmed that same year " performance audits for state agencies. This is a perfect opportunity for the state auditor or Forest Practices Board to initiate such an overview of DNR performance.

Second, the state Forest Practices Board should, at its February meeting, take action to review and strengthen steep-slope logging regulations. The damage to Lewis County clearly was made worse by mudslides from the clear-cuts, building up at the base of the hills, bursting from pressure, and sending torrents of dirt, trees and water across a floodplain already stressed from years of development and pavement.

There are lessons to be learned from every tragedy which, if we do not heed, we risk seeing over and over again. In this case, it may only be a matter of time before another flood, initiated by another ill-advised clear-cut.

But, with proper oversight and accountability, we can prevent any new clear-cuts on steep terrain that only damage our communities, our environment and our economy.

Peter J. Goldmark is an Okanogan rancher and candidate for Washington commissioner of public lands.
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**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

WILLIAM RALPH, individually,

Plaintiff,

vs.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

NO.

COMPLAINT AND PETITION
FOR JUDICIAL REVIEW

[JURY DEMANDED]

[CLERK'S ACTION
REQUESTED]

COMES NOW the Plaintiff, by and through his attorneys, Darrell L. Cochran and Pfau, Cochran, Vertetis, Kosnoff, PLLC, and bring this action against the Defendant named herein. Plaintiff alleges the following on information and belief:

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I. INTRODUCTION

While some in government and the timber industry have referred to the record floods as an “act of God,” clearly there was a human hand involved that made a bad situation worse.

Current Washington State Commissioner of Public Lands, Peter J. Goldmark, *The Seattle Times*, January 30, 2008 (attached).

1.1 This case arises from unreasonably dangerous and unlawful forest practices by the Defendant on steep and unstable slopes throughout the Chehalis River basin in western Lewis County, Washington. These practices caused hundreds of landslides in the Chehalis River basin on or about December 3, 2007, displacing the waters of the Chehalis River and flooding commercial property of the Plaintiff.

1.2 Defendant Washington State Department of Natural Resources (DNR), owner of land drained by the Chehalis River, owed a duty to exercise reasonable care in the use of and logging activities on their property to avoid harming neighboring landowners. Defendant knew or should have known that their logging activities in and around the Chehalis River basin created an unreasonable danger for their neighbors’ property. Defendant knew or should have known that the steep slopes on their collective properties were unstable because they had a thin mantle of permeable soil over impermeable bedrock. Defendant knew or should have known the climate on these slopes included recurrent, periodic heavy rainfall, including predictably warm rain on accumulated snow. Further, Defendant knew or should have known that extensive clear-cutting, logging and road building would disturb the slopes and create a great danger of debris flows throughout the basin that would flow into the Chehalis River and displace its water. Defendant knew or should have known from the extensive literature on landslide and debris flows, much of it commissioned by and/or created for Defendant, that its activities created an unreasonable danger.

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1.3 Defendant has in the past claimed and it is anticipated will again claim that these landslides and the resultant debris flow and floods occurred as a result of an unfortunate “Act of God,” a product of unpredictable, torrential rains. However, Defendant uses this same excuse regularly when they are called to accept responsibility for forest practices that result in destructive landslides and devastating floods. Washington State Commissioner of Public Lands, Peter J. Goldmark, aptly illustrated the problem in a January 30, 2008 column written in the wake of the December 2007 floods for *The Seattle Times*:

In this case, the buck stops at the Department of Natural Resources, tasked with permitting timber sales — even on private land, in this case Weyerhaeuser — on slide-prone, steep slopes.

As stark photos of the clear-cut hillside illustrate, the agency permitted a clear-cut on a slope that should never have been logged in this manner, if at all. Led by Public Lands Commissioner Doug Sutherland, agency personnel acted against state rules designed to balance harvest goals with protecting property, public safety and the environment.

In short, they failed to exercise appropriate professional distance between a public agency with a broad public mission and the industry they are tasked to oversee.

Unfortunately, this is not an isolated case of lax oversight and too-cozy relationships with industry, whether timber or large developers. From land swaps that result in forests lost to strip malls and vacation homes to similar land-damaging clearcuts, the department and its leadership are failing to protect both public health and the long-term value of our public land.”

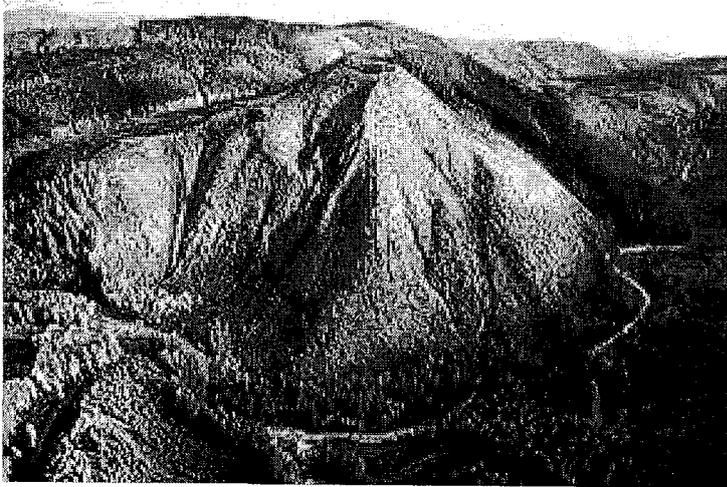
Id.

II. PARTIES

2.1. Plaintiff Bill Ralph is a resident of Lewis County, Washington. Several of his commercial properties flooded in the December 2007 floods of the Chehalis River and Salzer Creek.

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4.5. In the years preceding December 3, 2007, Defendant's unreasonable permitting of unreasonable forest practices, including timber harvesting, extraction, and road building on hazardous steep slopes in the upper Chehalis River basin by other property owners created a dangerous condition on their lands.



4.6. Previous landslides in these areas demonstrated a substantial likelihood of soil erosion, sediment delivery to public resources, mass wasting, and a probable significant adverse impact to the environment and public safety.

4.7. When heavy rain fell on or about December 3, 2007, steep slopes stripped of trees could not absorb the excess water and quickly eroded.

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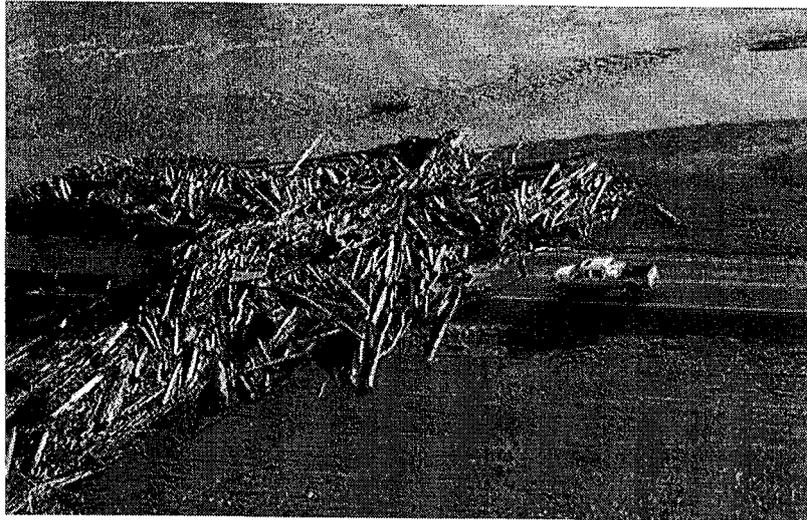
4.8. Landslides in the clear cut areas dumped millions of tons of mud, rocks, and logging debris into the Chehalis River, dramatically rose the water level in the river and formed debris dams that blocked the river's channel.



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4.9. Several of these unstable earthen dams disintegrated under the immense backpressure building in the river. When the backwater burst through, all the mud and debris rushed downstream and backed up behind bridges along the Chehalis River. Twenty-seven

1 bridges on the river failed under the deluge, broke apart, and released all the water and debris
2 behind them.
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13 4.10. In addition to flooding lands drained by the Chehalis River, the floodwaters
14 reversed the flow of Salzer Creek, where a dike wall broke and allowed additional flooding
15 into southern Centralia, including Plaintiff's commercial and real property.
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V. CAUSES OF ACTION

A. Negligence

5.1. Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as though set forth in full.

5.2. By its actions, Defendant breached its duties owed to Plaintiff, including duties as a landowner to adjacent landowners; and its responsibilities to execute reasonable care to prevent their logging activities from causing harm to foreseeable endangered persons and property.

5.3. By its actions, Defendant has breached duties owed to Plaintiff.

5.4. By these actions, Defendant is liable to Plaintiff for general and special damages incurred as a result of its negligence and failure to comply with the applicable regulations in accordance with the laws of the State of Washington.

B. Trespass

5.5. Plaintiff re-alleges and incorporates herein the preceding paragraphs of the Complaint as though set forth in full.

5.6. Activities on Defendant's property of caused injury to Plaintiff's property. This constitutes a trespass upon property.

C. Tortious Interference with Contractual Relations and Business Expectancy

5.7. Plaintiff re-alleges and incorporates herein the preceding paragraphs of the Complaint as though set forth in full.

5.8. By its actions, Defendant improperly interfered with the contractual relationships and business expectancies Plaintiff had with his customers and vendors, and has caused a disruption of said relationships.

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D. Conversion

5.9. Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as though set forth in full.

5.10. Defendant unlawfully converted Plaintiff's property.

E. Inverse Condemnation

5.11. Plaintiffs re-allege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

5.12. The activities of Defendant impacted Plaintiffs' property in such a way as to effect an inverse condemnation of the property.

F. Unlawful Agency Action

5.13. Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as though set forth in full.

5.14. Defendant unlawfully permitted continued forest practices on steep and unstable slopes on lands logged by timber companies such as Weyerhaeuser and Green Diamond Resources, among others by relying on outdated scientific information contained within supporting documents to DNR approved forest practices applications.

5.15. Defendant unreasonably and unlawfully relied on outdated scientific information to continue its own forest practices.

G. Shoreline Management Act of 1971

5.16. Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as though set forth in full.

5.17. Defendant failed to obtain a shoreline substantial development permit for forest practices that would likely cause substantial impact to a shoreline of the state.

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H. Negligent permitting, investigation, enforcement, and inspection under the State Environmental Policy Act (SEPA)

5.18. Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as though set forth in full.

5.19. Defendant failed to follow SEPA's mandate requiring watershed assessments in at least two of the watershed administration units (WAU) where significant landslides and mass wasting occurred.

VI. JURY DEMAND

6.1. Pursuant to the Rules of Civil Procedure, Plaintiff demands that this action be tried before a jury.

VII. RESERVATION OF RIGHTS

7.1. Plaintiff reserves the right to assert additional claims as may be appropriate following further investigation and discovery.

VIII. DAMAGES

8.1. As a direct and proximate result of Defendant's negligent and unlawful conduct, Plaintiff has sustained special and general damages.

IX. PRAYER FOR RELIEF

WHEREFORE Plaintiff, having asserted claims for relief, now prays for judgment against Defendants as follows:

1. For judgment against Defendant for negligence, trespass, tortious interference with contractual relations and business expectancy and conversion in an amount to be proven at trial.

2. For judgment against Defendant for inverse condemnation in an amount to be proven at trial.

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**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

WILLIAM FORTH, individually; GUY
BAUMAN, individually; EILEEN
BAUMAN, individually; LINDA
STANLEY, individually and as personal
representative IN RE THE ESTATE OF
CORAL COTTEN; ROCHELLE
STANLEY as personal representative IN
RE THE ESTATE OF CORAL COTTEN;
DONALD LEMASTER, individually; and
DAVID GIVENS, individually,

Plaintiffs,

vs.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES, a Washington State Public
Agency; WEYERHAEUSER COMPANY,
a Washington Corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington Corporation,

Defendants.

NO.

COMPLAINT AND PETITION
FOR REVIEW OF AGENCY
ACTION

[JURY DEMAND]

[CLERK'S ACTION
REQUESTED]

COMES NOW Plaintiffs, by and through their attorneys, Darrell L. Cochran and Pfau,
Cochran, Vertetis, Kosnoff, PLLC, and bring this action against the Defendants named herein.
Plaintiffs allege the following on information and belief:

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I. INTRODUCTION

While some in government and the timber industry have referred to the record floods as an “act of God,” clearly there was a human hand involved that made a bad situation worse.

Current Washington State Commissioner of Public Lands, Peter J. Goldmark, *The Seattle Times*, January 30, 2008 (attached).

1.1 This case arises from unreasonably dangerous and unlawful forest practices by the Defendants on steep and unstable slopes throughout the Chehalis River basin in western Lewis County, Washington. These practices caused hundreds of landslides in the Chehalis River basin on or about December 3, 2007, displacing the waters of the Chehalis River and flooding the real, personal and commercial property of the Plaintiffs.

1.2 Defendants Washington State Department of Natural Resources (DNR), the Weyerhaeuser Company and Green Diamond Resource Company, owners of much of the land drained by the Chehalis River and nearby Plaintiffs’ property, owed a duty to exercise reasonable care in the use of and logging activities on their property to avoid harming neighboring landowners. Defendants knew or should have known that their logging activities in and around the Chehalis River basin created an unreasonable danger for their neighbors’ property. Defendants knew or should have known that the steep slopes on their collective properties were unstable because they had a thin mantle of permeable soil over impermeable bedrock. Defendants knew or should have known the climate on these slopes included recurrent, periodic heavy rainfall, including predictably warm rain on accumulated snow. Further, Defendants knew or should have known that extensive clear-cutting, logging and road building would disturb the slopes and create a great danger of debris flows throughout the basin that would flow into the Chehalis River and displace its water. Defendants knew or should have known from the extensive literature on landslide and debris flows, much of it

1 commissioned by and/or created for Defendants, that its activities created an unreasonable
2 danger.

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4 1.3 Defendants have in the past claimed and it is anticipated will again claim that
5 these landslides and the resultant debris flow and floods occurred as a result of an unfortunate
6 “Act of God,” a product of unpredictable, torrential rains. However, Defendants use this
7 same excuse regularly when they are called to accept responsibility for forest practices that
8 result in destructive landslides and devastating floods. Washington State Commissioner of
9 Public Lands, Peter J. Goldmark, aptly illustrated the problem in a January 30, 2008 column
10 written in the wake of the December 2007 floods for *The Seattle Times*:

11 In this case, the buck stops at the Department of Natural
12 Resources, tasked with permitting timber sales — even on
13 private land, in this case Weyerhaeuser — on slide-prone, steep
14 slopes.

15 As stark photos of the clear-cut hillside illustrate, the agency
16 permitted a clear-cut on a slope that should never have been
17 logged in this manner, if at all. Led by Public Lands
18 Commissioner Doug Sutherland, agency personnel acted against
19 state rules designed to balance harvest goals with protecting
20 property, public safety and the environment.

21 In short, they failed to exercise appropriate professional
22 distance between a public agency with a broad public mission
23 and the industry they are tasked to oversee.

24 Unfortunately, this is not an isolated case of lax oversight and
25 too-cozy relationships with industry, whether timber or large
26 developers. From land swaps that result in forests lost to strip
malls and vacation homes to similar land-damaging clearcuts,
the department and its leadership are failing to protect both
public health and the long-term value of our public land.”

Id.

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II. PARTIES

2.1. Plaintiff William Forth is a resident of Lewis County, Washington. He was present and witnessed the December 2007 flooding of the Chehalis River and the resultant flood damage to his personal and real property.

2.2 Plaintiff Guy Bauman is a resident of Lewis County, Washington. He was present and witnessed the December 2007 flooding of the Chehalis River and the resultant damage to his personal and real property.

2.3 Plaintiff Eileen Bauman is a resident of Lewis County, Washington. She was present and witnessed the December 2007 flooding of the Chehalis River and the resultant damage to her personal and real property.

2.4 Plaintiff Linda Stanley is a resident of Lewis County, Washington. She was present and witnessed the December 2007 flooding of the Chehalis River and the resultant damage to her personal and real property.

2.5 Plaintiff Linda Stanley is also the personal representative, along with Plaintiff Rochelle Stanley, In Re the Estate of Coral Cotten. Coral Cotten was a resident of Lewis County, Washington, and was present and witnessed the December 2007 flooding of the Chehalis River and the resultant damage to her personal and real property.

2.6 Plaintiff Donald LeMaster is currently a resident of Anne Arundel County, Maryland. He formerly lived in Lewis County, Washington.

2.7 Plaintiff David Givens is a resident of Lewis County, Washington. He was present and witnessed the December 2007 flooding of the Chehalis River and the resultant damage to his personal and real property.

2.8 Defendant State of Washington, Department of Natural Resources (hereinafter "DNR") oversees and monitors the management of state-owned lands and the timber

1 operations on those lands, including those at issue in this suit. DNR must comply with
2 federal, State and local laws and regulations concerning timber practices, including the
3 Washington State Forest Practices Act, RCW 76.09.010. *et seq.* which govern the general
4 management of forest practice on State lands. DNR's forest practices must also comply with
5 a number of other regulatory policies and practices, as well as basic common sense.
6

7 2.9 Defendant Weyerhaeuser Company (hereinafter "Weyerhaeuser") owns or
8 manages 22 million acres of global timberland with offices or operations in 10 countries.
9 Weyerhaeuser owns or manages nearly 1.1 million acres of timberland in Washington State
10 including a significant portion in and around the Chehalis River basin.

11 2.10 Defendant Green Diamond Resource Company (hereinafter "Green Diamond")
12 is a logging company that engages in the ownership and operation of timberlands and the
13 manufacture of lumber. It has operations in California, Oregon, and Washington. Green
14 Diamond Resource Company was founded as Simpson Resource Company and changed its
15 name to Green Diamond Resource Company in 2004. Green Diamond is believed to own and
16 or manage a significant portion of timberland in and around the headwaters of the Chehalis
17 River.
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19 III. JURISDICTION AND VENUE

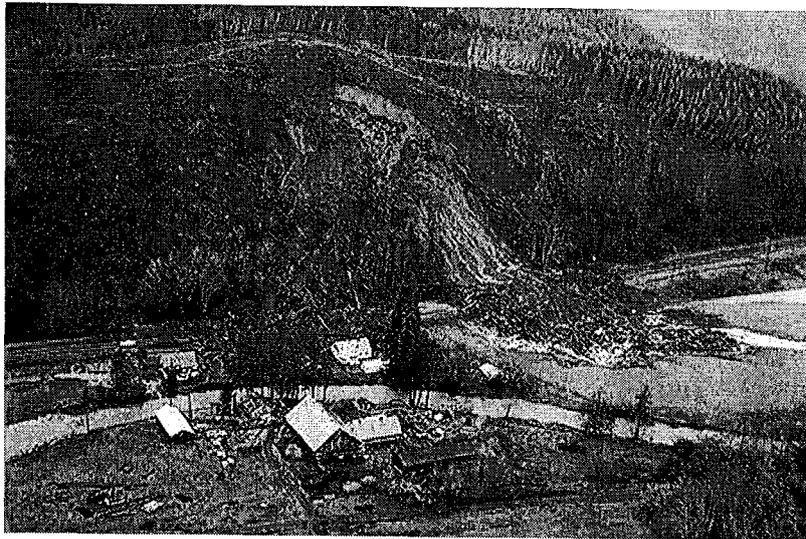
20 3.1 Plaintiffs re-allege and incorporate herein the preceding paragraphs of the
21 Complaint as though set forth in full.

22 3.2 Defendant Weyerhaeuser's principal place of business is at its International
23 Headquarters located within King County, in Federal Way, Washington.

24 3.3 Defendant Green Diamond Resource Company has its principal place of
25 business located within King County, in Seattle, Washington.
26

1 4.5 Previous landslides in these areas demonstrated a substantial likelihood of soil
2 erosion, sediment delivery to public resources, mass wasting, and a probable significant
3 adverse impact to the environment and public safety.
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5 4.6 When heavy rain fell on or about December 3, 2007, steep slopes stripped of
6 trees could not absorb the excess water and quickly eroded.
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17 4.7 Landslides in the clear cut areas dumped millions of tons of mud, rocks, and
18 logging debris into the Chehalis River, dramatically rose the water level in the river and
19 formed debris dams that blocked the river's channel.
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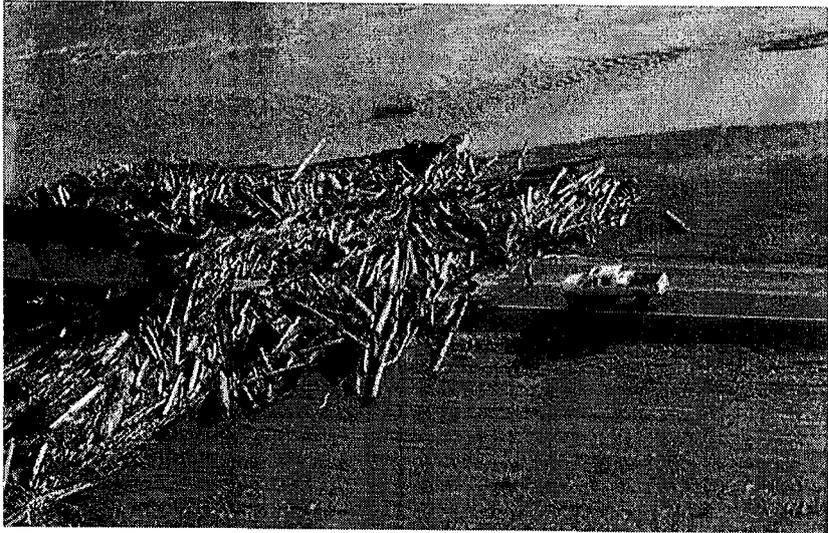
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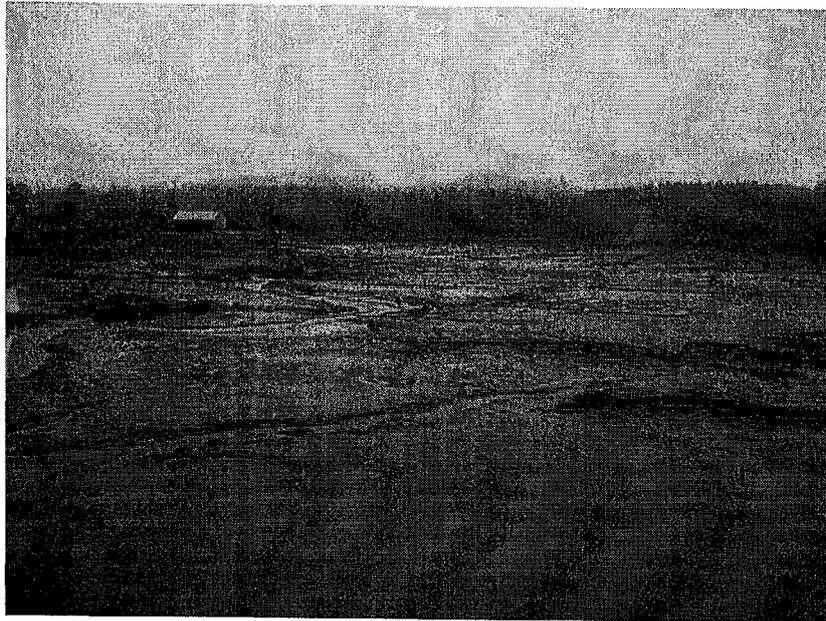


4.8 Several of these unstable earthen dams disintegrated under the immense backpressure building in the river. When the backwater burst through, all the mud and debris rushed downstream and backed up behind bridges along the Chehalis River. Twenty-seven bridges on the river failed under the deluge, broke apart, and released all the water and debris behind them.



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4.8 Water then came over the bank of the Chehalis River, flooded the Plaintiffs' property, and deposited mud and other debris onto their property. Plaintiff Forth, whose family had lived on his property for over 100 years, had never heard of or seen a flood on his property, nor the properties of Plaintiff Stanley or her mother, the late Coral Cotten.



V. CAUSES OF ACTION

A. Negligence

5.1 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

5.2 By their actions, Defendants DNR, Weyerhaeuser and Green Diamond breached their duties owed to Plaintiffs, including duties as landowners to adjacent landowners; and their responsibilities to execute reasonable care to prevent their logging activities from causing harm to foreseeable endangered persons and property.

5.3 By their actions, Defendants have breached duties owed to Plaintiffs.

1 5.4 By these actions, Defendants are liable to Plaintiffs for general and special
2 damages incurred as a result of their negligence and failure to comply with the applicable
3 regulations in accordance with the laws of the State of Washington.

4
5 **B. Trespass**

6 5.5 Plaintiffs re-allege and incorporate herein the preceding paragraphs of the
7 Complaint as though set forth in full.

8 5.6 Activities and property of Defendants DNR, Weyerhaeuser and Green
9 Diamond caused injury to Plaintiffs' property. This constitutes a trespass upon property.

10 **C. Tortious Interference with Contractual Relations and Business Expectancy**

11 5.7 Plaintiffs re-allege and incorporate herein the preceding paragraphs of the
12 Complaint as though set forth in full.

13 5.8 By their actions, Defendants DNR, Weyerhaeuser and Green Diamond
14 improperly interfered with the contractual relationships and business expectancies Plaintiffs
15 had with their customers and vendors, and has caused a disruption of said relationships.

16 **D. Conversion**

17 5.10 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
18 Complaint as though set forth in full.

19 5.11 Defendants DNR, Weyerhaeuser and Green Diamond unlawfully converted
20 Plaintiffs' property.

21 **E. Inverse Condemnation—Defendant DNR**

22 5.12 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
23 Complaint as though set forth in full.

24 5.13 The activities of Defendants DNR impacted Plaintiffs' property in such a way
25 as to effect an inverse condemnation of the property.
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F. Unlawful Agency Action

5.14 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

5.15 Defendant DNR unlawfully permitted continued forest practices on steep and unstable slopes on lands logged by Defendants Weyerhaeuser and Green Diamond Resources by relying on outdated scientific information contained within supporting documents to DNR approved forest practices applications.

5.16 Defendant DNR unreasonably and unlawfully relied on outdated scientific information to continue its own forest practices.

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G. Shoreline Management Act of 1971

5.17 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

5.18 Defendants failed to obtain a shoreline substantial development permit for forest practices that would likely cause substantial impact to a shoreline of the state.

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H. Negligent permitting, investigation, enforcement, and inspection under the State Environmental Policy Act (SEPA)—Defendant DNR

5.19 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

5.20 Defendant DNR failed to follow SEPA's mandate requiring watershed assessments in at least two of the watershed administration units (WAU) where significant landslides and mass wasting occurred.

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VI. JURY DEMAND

6.1 Pursuant to the Rules of Civil Procedure, Plaintiffs demand that this action be tried before a jury.

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VII. RESERVATION OF RIGHTS

7.1 Plaintiffs reserve the right to assert additional claims as may be appropriate following further investigation and discovery.

VIII. DAMAGES

8.1 As a direct and proximate result of Defendant DNR's, Weyerhaeuser's and Green Diamond's negligent and unlawful conduct, Plaintiffs have sustained special and general damages.

IX. PRAYER FOR RELIEF

WHEREFORE Plaintiffs, having asserted claims for relief, now pray for judgment against Defendants as follows:

1. For judgment against Defendants DNR, Weyerhaeuser and Green Diamond for negligence, trespass, tortious interference with contractual relations and business expectancy and conversion in an amount to be proven at trial.

2. For judgment against Defendant DNR for inverse condemnation in an amount to be proven at trial.

3. For entry of an order permanently enjoining Defendants from committing similar unlawful acts in the future.

4. For an entry of a declaratory judgment against Defendant DNR for its violations of SEPA and the Forest Practices Act, RCW 76.09 et seq.

4. For attorney's fees against Defendant DNR consistent with purpose of Washington State's Equal Access to Justice Act (EAJA), RCW 4.84.340, .350, and .360. For attorney's fees and costs against all Defendants consistent with the purpose of the SMA, RCW 90.58.230.

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5. For such other relief that the Court deems just and proper.

Dated this 2ND day of December, 2010.

PFAU COCHRAN VERTETIS KOSNOFF, PLLC

By 
Darrell L. Cochran, WSBA No. 22851
darrell@pcvklaw.com
Attorneys for Plaintiffs

4824-6811-2648, v. 1

The Seattle Times

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Risky timber practices worsened December flooding

By Peter J. Goldmark
Special to The Times

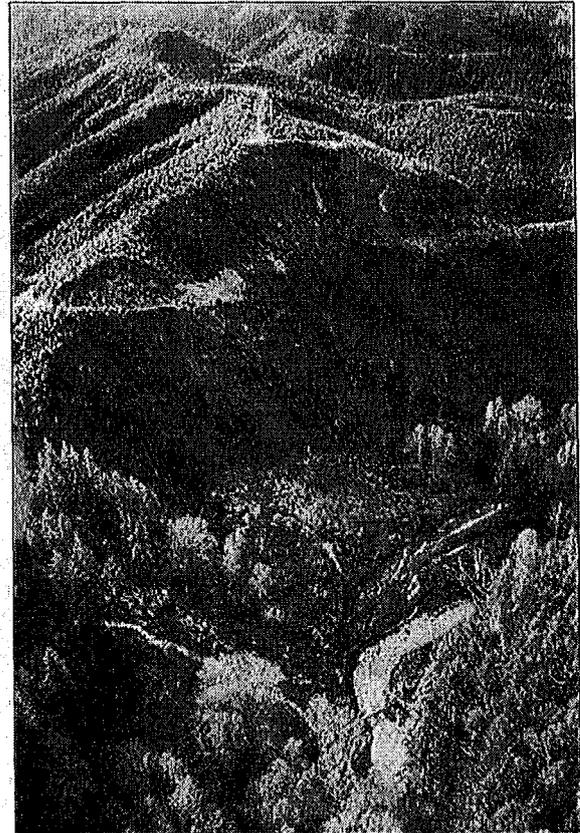
While images of December's Lewis County floods recede like the waters of the Chehalis River, the impacts of the devastation to local families, Washington state taxpayers helping rebuild a community, and the blow to our economy, continue.

Homes are damaged or destroyed. Many farms and businesses are threatened or lost. Cleanup will continue for months. Economic recovery for many will take years.

While some in government and the timber industry have referred to the record floods as an "act of God," clearly there was a human hand involved that made a bad situation worse. In this case, the buck stops at the Department of Natural Resources, tasked with permitting timber sales "even on private land, in this case Weyerhaeuser" on slide-prone, steep slopes.

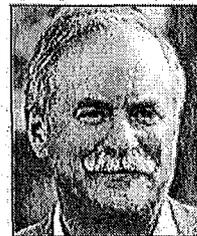
As stark photos of the clear-cut hillside illustrate, the agency permitted a clear-cut on a slope that should never have been logged in this manner, if at all. Led by Public Lands Commissioner Doug Sutherland, agency personnel acted against state rules designed to balance harvest goals with protecting property, public safety and the environment. In short, they failed to exercise appropriate professional distance between a public agency with a broad public mission and the industry they are tasked to oversee.

Unfortunately, this is not an isolated case of lax oversight and too-cozy relationships with industry, whether timber or large developers. From land swaps that result in forests lost to strip malls and vacation homes to similar land-damaging clear-cuts, the department and its leadership are failing to protect both public health and the long-term value of our public land.



STEVE RINGMAN / THE SEATTLE TIMES

Mud and debris slide down a recently replanted clear-cut area into Stillman Creek in Lewis County. The heavily logged Stillman Creek drainage was the scene of many such slides during December's heavy rains.



Peter Goldmark

At a state Senate hearing on the floods held on Jan. 10, agency personnel defended their actions, and predictably placed responsibility on the severe weather. Yet, independent scientists confirmed that while the rain was abnormally intense, the flooding itself was indeed made catastrophic as a result of human action, in this case logging the slopes and development on the floodplain.

It's time to move forward with two initial steps that can help restore balance and accountability.

First, an independent audit of how logging permits are prioritized and approved is critical to helping too-often-overworked land managers, biologists and other on-the-ground workers better assess the impacts of risky timber harvests. Part of this is also to determine where the agency needs to provide a more critical review of permits, and better reflect the goals of promoting local economic growth, maintenance of rural school trusts, and safeguarding environmental and community values.

The Legislature passed in 2006 " and voters reaffirmed that same year " performance audits for state agencies. This is a perfect opportunity for the state auditor or Forest Practices Board to initiate such an overview of DNR performance.

Second, the state Forest Practices Board should, at its February meeting, take action to review and strengthen steep-slope logging regulations. The damage to Lewis County clearly was made worse by mudslides from the clear-cuts, building up at the base of the hills, bursting from pressure, and sending torrents of dirt, trees and water across a floodplain already stressed from years of development and pavement.

There are lessons to be learned from every tragedy which, if we do not heed, we risk seeing over and over again. In this case, it may only be a matter of time before another flood, initiated by another ill-advised clear-cut.

But, with proper oversight and accountability, we can prevent any new clear-cuts on steep terrain that only damage our communities, our environment and our economy.

Peter J. Goldmark is an Okanogan rancher and candidate for Washington commissioner of public lands.
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**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

VIRGINIA CAREY, individually; JAMIE CAREY, individually; PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington Corporation,

Plaintiffs,

vs.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES; WEYERHAEUSER
COMPANY, a Washington Corporation;
and GREEN DIAMOND RESOURCE
COMPANY, a Washington Corporation,

Defendants.

NO.

COMPLAINT AND PETITION
FOR JUDICIAL REVIEW

[JURY DEMANDED]

[CLERK'S ACTION
REQUESTED]

COMES NOW Plaintiffs, by and through their attorneys, Darrell L. Cochran and Pfau, Cochran, Vertetis, Kosnoff, PLLC, and bring this action against the Defendants named herein. Plaintiffs allege the following on information and belief:

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I. INTRODUCTION

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Current Washington State Commissioner of Public Lands, Peter J. Goldmark, *The Seattle Times*, January 30, 2008 (attached).

1.1 This case arises from unreasonably dangerous and unlawful forest practices by the Defendants on steep and unstable slopes throughout the Chehalis River basin in western Lewis County, Washington. These practices caused hundreds of landslides in the Chehalis River basin on or about December 3, 2007, displacing the waters of the Chehalis River and flooding the real, personal and commercial property of the Plaintiffs.

1.2 Defendants Washington State Department of Natural Resources (DNR), the Weyerhaeuser Company and Green Diamond Resource Company, owners of much of the land drained by the Chehalis River and nearby Plaintiffs’ property, owed a duty to exercise reasonable care in the use of and logging activities on their property to avoid harming neighboring landowners. Defendants knew or should have known that their logging activities in and around the Chehalis River basin created an unreasonable danger for their neighbors’ property. Defendants knew or should have known that the steep slopes on their collective properties were unstable because they had a thin mantle of permeable soil over impermeable bedrock. Defendants knew or should have known the climate on these slopes included recurrent, periodic heavy rainfall, including predictably warm rain on accumulated snow. Further, Defendants knew or should have known that extensive clear-cutting, logging and road building would disturb the slopes and create a great danger of debris flows throughout the basin that would flow into the Chehalis River and displace its water. Defendants knew or should have known from the extensive literature on landslide and debris flows, much of it

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18 Commissioner Doug Sutherland, agency personnel acted against
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21 In short, they failed to exercise appropriate professional
22 distance between a public agency with a broad public mission
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24 Unfortunately, this is not an isolated case of lax oversight and
25 too-cozy relationships with industry, whether timber or large
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malls and vacation homes to similar land-damaging clearcuts,
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Id.

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II. PARTIES

2.1 Plaintiff Virginia Carey is a resident of Lewis County, Washington and an owner of Paradyce Industries, Inc., d/b/a The Print Shop. She was present and witnessed the flooding of the Chehalis River and Salzer Creek and the resultant damage to her personal and business interests.

2.2 Plaintiff Jamie Carey is also a resident of Lewis County, Washington and an owner of Paradyce Industries, Inc., d/b/a The Print Shop. He was also present and witnessed the December 2007 flooding of the Chehalis River and Salzer Creek and the resultant damage to his personal and business interests.

2.3 Plaintiff Paradyce Industries, Inc., is a Washington Corporation located in Lewis County, Washington doing business as The Print Shop. The real property housing The Print Shop suffered massive losses of equipment, supplies, documents and subsequent business opportunity from the flooding of the Chehalis River and Salzer Creek.

2.4 Defendant State of Washington, Department of Natural Resources (hereinafter "DNR") oversees and monitors the management of state-owned lands and the timber operations on those lands, including those at issue in this suit. DNR must comply with federal, State and local laws and regulations concerning timber practices, including the Washington State Forest Practices Act, RCW 76.09.010. *et seq.* which govern the general management of forest practice on State lands. DNR's forest practices must also comply with a number of other regulatory policies and practices, as well as basic common sense.

2.5 Defendant Weyerhaeuser Company (hereinafter "Weyerhaeuser") owns or manages 22 million acres of global timberland with offices or operations in 10 countries. Weyerhaeuser owns or manages nearly 1.1 million acres of timberland in Washington State including a significant portion in and around the Chehalis River basin.

1 4.2 On or about December 3, 2007, Plaintiffs printing business and personal and
2 real property was flooded by water originating from the Chehalis River and Salzer Creek.
3

4 4.3 The Chehalis River basin contains shorelines of the state as defined in the
5 Shoreline Management Act of 1971 (SMA), 90.58 RCW.

6 4.4 In the years preceding December 3, 2007, Defendants' unreasonable forest
7 practices, including timber harvesting, extraction, and road building on hazardous steep slopes
8 in the upper Chehalis River basin created a dangerous condition on their lands.
9

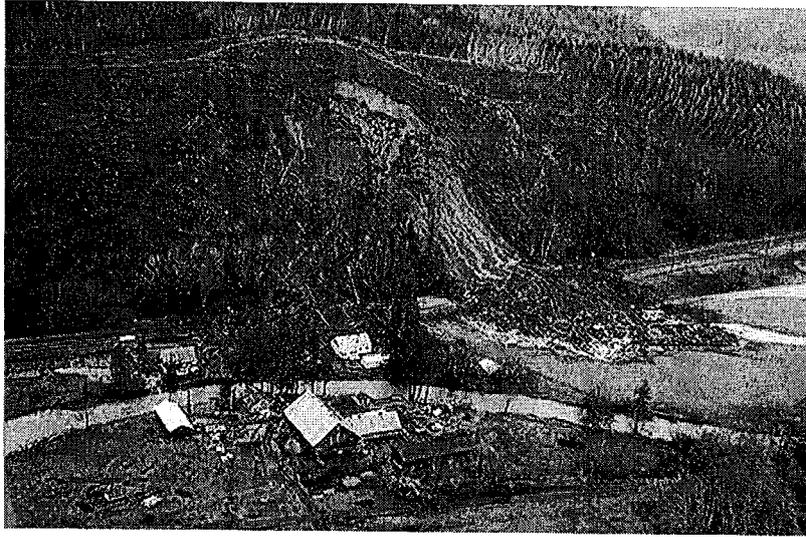


18 4.5 Previous landslides in these areas demonstrated a substantial likelihood of soil
19 erosion, sediment delivery to public resources, mass wasting, and a probable significant
20 adverse impact to the environment and public safety.

21 4.6 When heavy rain fell on or about December 3, 2007, steep slopes stripped of
22 trees could not absorb the excess water and quickly eroded.
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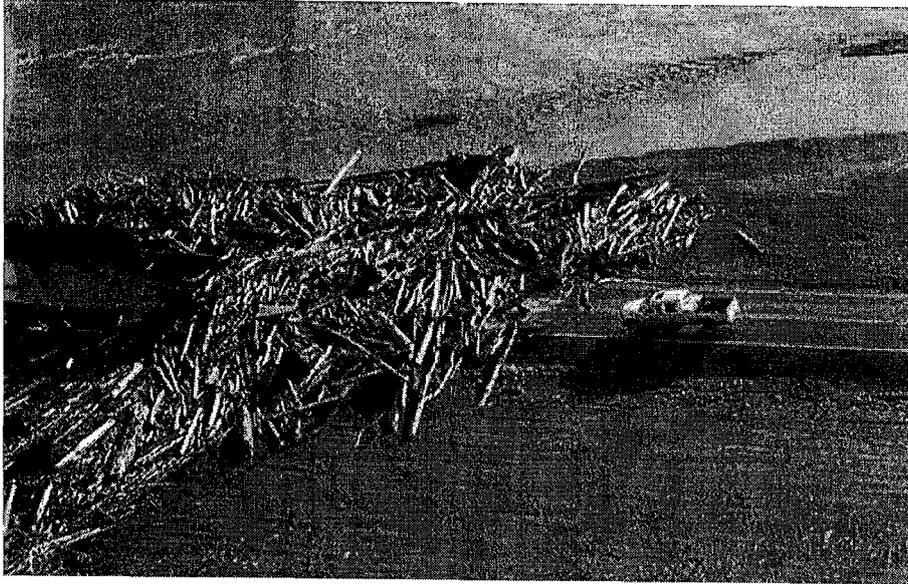


10 4.7 Landslides in the clear cut areas dumped millions of tons of mud, rocks, and
11 logging debris into the Chehalis River, dramatically rose the water level in the river and
12 formed debris dams that blocked the river's channel.



22
23 4.8 Several of these unstable earthen dams disintegrated under the immense
24 backpressure building in the river. When the backwater burst through, all the mud and debris
25 rushed downstream and backed up behind bridges along the Chehalis River. Twenty-seven
26

1 bridges on the river failed under the deluge, broke apart, and released all the water and debris
2 behind them.



13
14 4.8 Water then came over the bank of the Chehalis River, flooded the Plaintiffs'
15 property, and deposited mud and other debris onto their property.

16 4.9 In addition to flooding lands drained by the Chehalis River, the floodwaters
17 reversed the flow of Salzer Creek, where a dike wall broke and allowed additional flooding
18 into southern Centralia, including Plaintiffs' business location and damaged Plaintiffs'
19 commercial and real property, business equipment, and business inventory.
20

21 **V. CAUSES OF ACTION**

22 **A. Negligence**

23 5.1 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
24 Complaint as though set forth in full.

25 5.2 By their actions, Defendants DNR, Weyerhaeuser and Green Diamond
26 breached their duties owed to Plaintiffs, including duties as landowners to adjacent

1 landowners; and their responsibilities to execute reasonable care to prevent their logging
2 activities from causing harm to foreseeable endangered persons and property.

3 5.3 By their actions, Defendants have breached duties owed to Plaintiffs.

4 5.4 By these actions, Defendants are liable to Plaintiffs for general and special
5 damages incurred as a result of their negligence and failure to comply with the applicable
6 regulations in accordance with the laws of the State of Washington.

7
8 **B. Trespass**

9 5.5 Plaintiffs re-allege and incorporate herein the preceding paragraphs of the
10 Complaint as though set forth in full.

11 5.6 Activities and property of Defendants DNR, Weyerhaeuser and Green
12 Diamond caused injury to Plaintiffs' property. This constitutes a trespass upon property.

13 **C. Tortious Interference with Contractual Relations and Business Expectancy**

14 5.7 Plaintiffs re-allege and incorporate herein the preceding paragraphs of the
15 Complaint as though set forth in full.

16 5.8 By their actions, Defendants DNR, Weyerhaeuser and Green Diamond
17 improperly interfered with the contractual relationships and business expectancies Plaintiffs
18 had with their customers and vendors, and has caused a disruption of said relationships.

19 **D. Conversion**

20 5.10 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
21 Complaint as though set forth in full.

22 5.11 Defendants DNR, Weyerhaeuser and Green Diamond unlawfully converted
23 Plaintiffs' property.
24
25
26

1 **E. Inverse Condemnation—Defendant DNR**

2 5.12 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
3 Complaint as though set forth in full.

4 5.13 The activities of Defendants DNR impacted Plaintiffs' property in such a way
5 as to effect an inverse condemnation of the property.
6

7 **F. Unlawful Agency Action**

8 5.14 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
9 Complaint as though set forth in full.

10 5.15 Defendant DNR unlawfully permitted continued forest practices on steep and
11 unstable slopes on lands logged by Defendants Weyerhaeuser and Green Diamond Resources
12 by relying on outdated scientific information contained within supporting documents to DNR
13 approved forest practices applications.

14 5.16 Defendant DNR unreasonably and unlawfully relied on outdated scientific
15 information to continue its own forest practices.
16

17 **G. Shoreline Management Act of 1971**

18 5.17 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
19 Complaint as though set forth in full.

20 5.18 Defendants failed to obtain a shoreline substantial development permit for
21 forest practices that would likely cause substantial impact to a shoreline of the state.

22 **H. Negligent permitting, investigation, enforcement, and inspection under the State**
23 **Environmental Policy Act (SEPA)—Defendant DNR**

24 5.19 Plaintiffs re-allege and incorporate herein the preceding paragraphs of this
25 Complaint as though set forth in full.
26

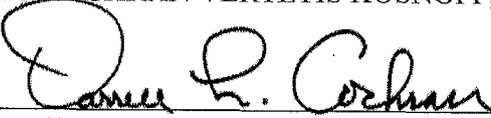
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2 4. For an entry of a declaratory judgment against Defendant DNR for its
3 violations of SEPA and the Forest Practices Act, RCW 76.09 et seq.

4 5. For attorney's fees against Defendant DNR consistent with purpose of
5 Washington State's Equal Access to Justice Act (EAJA), RCW 4.84.340, .350, and .360. For
6 attorney's fees and costs against all Defendants consistent with the purpose of the SMA,
7 RCW 90.58.230.

8 6. For such other relief that the Court deems just and proper.

9
10 Dated this 2nd day of December, 2010.

11 PFAU COCHRAN VERTETIS KOSNOFF, PLLC

12
13 By 
14 Darrell L. Cochran, WSBA No. 22851
15 darrell@pcvklaw.com
16 Attorneys for Plaintiffs

17
18 4824-3803-1624, v. 1
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The Seattle Times

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Risky timber practices worsened December flooding

By Peter J. Goldmark
Special to The Times

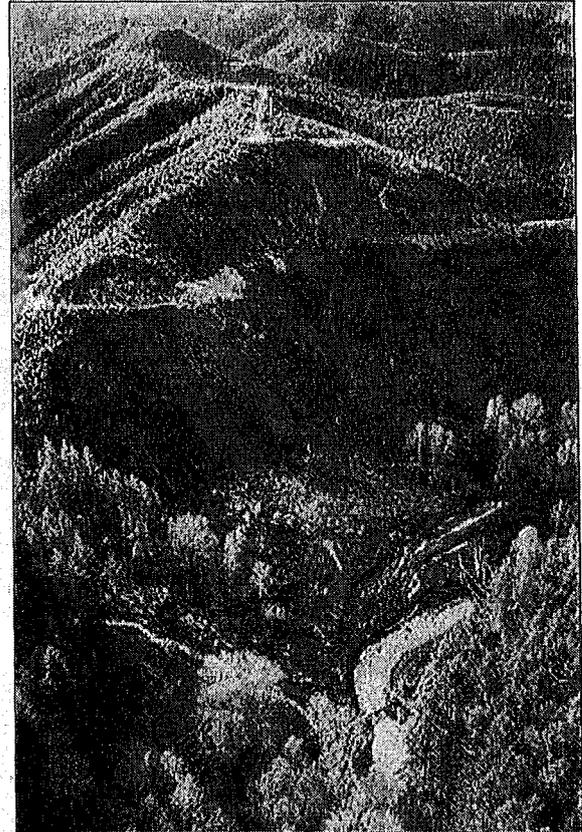
While images of December's Lewis County floods recede like the waters of the Chehalis River, the impacts of the devastation to local families, Washington state taxpayers helping rebuild a community, and the blow to our economy, continue.

Homes are damaged or destroyed. Many farms and businesses are threatened or lost. Cleanup will continue for months. Economic recovery for many will take years.

While some in government and the timber industry have referred to the record floods as an "act of God," clearly there was a human hand involved that made a bad situation worse. In this case, the buck stops at the Department of Natural Resources, tasked with permitting timber sales "even on private land, in this case Weyerhaeuser" on slide-prone, steep slopes.

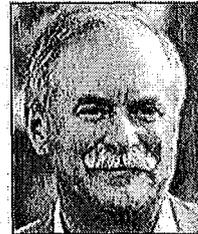
As stark photos of the clear-cut hillside illustrate, the agency permitted a clear-cut on a slope that should never have been logged in this manner, if at all. Led by Public Lands Commissioner Doug Sutherland, agency personnel acted against state rules designed to balance harvest goals with protecting property, public safety and the environment. In short, they failed to exercise appropriate professional distance between a public agency with a broad public mission and the industry they are tasked to oversee.

Unfortunately, this is not an isolated case of lax oversight and too-cozy relationships with industry, whether timber or large developers. From land-swaps that result in forests lost to strip malls and vacation homes to similar land-damaging clear-cuts, the department and its leadership are failing to protect both public health and the long-term value of our public land.



STEVE RINGMAN / THE SEATTLE TIMES

Mud and debris slide down a recently replanted clear-cut area into Stillman Creek in Lewis County. The heavily logged Stillman Creek drainage was the scene of many such slides during December's heavy rains.



Peter Goldmark

At a state Senate hearing on the floods held on Jan. 10, agency personnel defended their actions, and predictably placed responsibility on the severe weather. Yet, independent scientists confirmed that while the rain was abnormally intense, the flooding itself was indeed made catastrophic as a result of human action, in this case logging the slopes and development on the floodplain.

It's time to move forward with two initial steps that can help restore balance and accountability.

First, an independent audit of how logging permits are prioritized and approved is critical to helping too-often-overworked land managers, biologists and other on-the-ground workers better assess the impacts of risky timber harvests. Part of this is also to determine where the agency needs to provide a more critical review of permits, and better reflect the goals of promoting local economic growth, maintenance of rural school trusts, and safeguarding environmental and community values.

The Legislature passed in 2006 " and voters reaffirmed that same year " performance audits for state agencies. This is a perfect opportunity for the state auditor or Forest Practices Board to initiate such an overview of DNR performance.

Second, the state Forest Practices Board should, at its February meeting, take action to review and strengthen steep-slope logging regulations. The damage to Lewis County clearly was made worse by mudslides from the clear-cuts, building up at the base of the hills, bursting from pressure; and sending torrents of dirt, trees and water across a floodplain already stressed from years of development and pavement.

There are lessons to be learned from every tragedy which, if we do not heed, we risk seeing over and over again. In this case, it may only be a matter of time before another flood, initiated by another ill-advised clear-cut.

But, with proper oversight and accountability, we can prevent any new clear-cuts on steep terrain that only damage our communities, our environment and our economy.

Peter J. Goldmark is an Okanogan rancher and candidate for Washington commissioner of public lands.
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THE HONORABLE BARBARA A. MACK

11-02-25 A10:49 IN

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; and PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

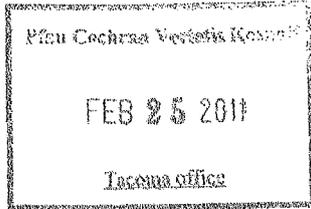
No. 10-2-42011-8 KNT

ANSWER OF DEFENDANT WEYERHAEUSER COMPANY TO PLAINTIFFS' COMPLAINT AND PETITION FOR JUDICIAL REVIEW

Defendant, Weyerhaeuser Company, for its answer to Plaintiffs' Complaint and Petition for Judicial Review, admits, denies, and alleges as follows:

I. INTRODUCTION

- 1.1 Deny.
- 1.2 Deny.
- 1.3 Deny.



Answer of Defendant Weyerhaeuser Company to Plaintiffs' Complaint and Petition for Judicial Review - 1

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1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Appendix 053
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II. PARTIES

2.1 Deny for lack of information.

2.2 Deny for lack of information.

2.3 Deny for lack of information.

2.4 Weyerhaeuser admits that the Washington State Department of Natural Resources ("DNR") manages state owned lands. Weyerhaeuser admits that DNR must comply with certain laws and regulations, including the Washington State Forest Practices Act. Weyerhaeuser denies the remaining allegations in paragraph 2.8 of the Complaint for lack of information.

2.5 Admit.

2.6 Deny for lack of information.

III. JURISDICTION AND VENUE

3.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

3.2 Admit.

3.3 Deny for lack of information.

3.4 Admit.

3.5 Deny for lack of information.

IV. FACTS

4.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

4.2 Deny for lack of information.

4.3 Admit.

4.4 Deny.

4.5 Deny.

- 1 4.6 Deny.
- 2 4.7 Deny.
- 3 4.8 Deny.
- 4 4.8(sic) Deny for lack of information.
- 5 4.9 Deny for lack of information.

V. CAUSES OF ACTION

A. Negligence

- 9 5.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
- 10 the preceding paragraphs.
- 11 5.2 Deny.
- 12 5.3 Deny.
- 13 5.4 Deny.

B. Trespass

- 15 5.5 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
- 16 the preceding paragraphs.
- 17 5.6 Deny.

C. Tortious Interference with Contractual Relations and Business Expectancy

- 19 5.7 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
- 20 the preceding paragraphs.
- 21 5.8 Deny.

D. Conversion

- 23 5.10 (sic) Weyerhaeuser re-alleges and incorporates herein by reference its
- 24 answers to the preceding paragraphs.
- 25 5.11 Deny.

E. Inverse Condemnation-Defendant DNR

- 27 5.12 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
- 28 the preceding paragraphs.

1 5.13 Deny for lack of information.

2 **F. Unlawful Agency Action**

3 5.14 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
4 the preceding paragraphs.

5 5.15 Deny.

6 5.16 Deny.

7 **G. Shoreline Management Act of 1971**

8 5.17 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
9 the preceding paragraphs.

10 5.18 Deny.

11 **H. Negligent permitting, investigation, enforcement, and inspection under the State**
12 **Environmental Policy Act (SEPA)-Defendant DNR**

13 5.19 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
14 the preceding paragraphs.

15 5.20 Deny.

16 **VI. JURY DEMAND**

17 6.1 No response to paragraph 6.1 of the Complaint is required.

18 **VII. RESERVATION OF RIGHTS**

19 7.1 No response to paragraph 7.1 of the Complaint is required.

20 **VIII. DAMAGES**

21 8.1 Deny.

22 **AFFIRMATIVE DEFENSES**

23 Weyerhaeuser asserts the following affirmative defenses:

- 24
- 25 1. Failure to state a claim upon which relief can be granted;
 - 26 2. Plaintiff's claims are barred by RCW 76.09.330;
 - 27 3. Statutory and regulatory compliance;
- 28

- 1 4. Statute of limitations;
2 5. Assumption of risk;
3 6. Comparative negligence;
4 7. Act of God;
5 8. Intervening or superseding cause; and
6 9. Laches.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant Weyerhaeuser
9 prays that the Court dismiss Plaintiffs' Complaint with prejudice and award defendants their
10 costs and disbursements.

11 DATED this 24th day of February, 2011.

12 HILLIS CLARK MARTIN & PETERSON P.S.

13 By s/ Louis D. Peterson

14 Louis D. Peterson, WSBA #5776
15 Michael R. Scott, WSBA #12822
16 Alexander M. Wu, WSBA #40649
17 Hillis Clark Martin & Peterson P.S.
18 1221 Second Avenue, Suite 500
19 Seattle WA 98101-2925
20 Telephone: (206) 623-1745
21 Facsimile: (206) 623-7789
22 Email: ldp@hcmp.com; mrs@hcmp.com;
23 amw@hcmp.com

24 Attorneys for Defendant
25 Weyerhaeuser Company

26 **CERTIFICATE OF SERVICE**

27 The undersigned certifies that on this day she caused a copy of this
28 document to be delivered via messenger and U.S. Mail to the last known
address of all counsel of record.

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

DATED this 24th day of February, 2011, at Seattle, Washington.

s/ Suzanne Powers
Suzanne Powers

ND: 11100.182 4812-4921-3704v2

*Answer of Defendant Weyerhaeuser Company to
Plaintiffs' Complaint and Petition for
Judicial Review - 5*

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Tacoma Office

THE HONORABLE BARBARA A. MACK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAIME CAREY, individually; PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42011-8 KNT

DEFENDANT GREEN DIAMOND RESOURCE COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT AND PETITION FOR JUDICIAL REVIEW

Defendant Green Diamond Resource Company ("Green Diamond"), in answer to Plaintiffs' Complaint and Petition for Review of Agency Action (the "Complaint"), states as follows:

I. INTRODUCTION

- 1.1 Green Diamond denies paragraph 1.1 and the preamble to paragraph 1.1.
- 1.2 Green Diamond denies paragraph 1.2.
- 1.3 Green Diamond denies paragraph 1.3.

DEFENDANT GREEN DIAMOND RESOURCE COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT AND PETITION FOR JUDICIAL REVIEW - 1

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II. PARTIES

2.1 Green Diamond denies paragraph 2.1 for lack of information.

2.2 Green Diamond denies paragraph 2.2 for lack of information.

2.3 Green Diamond denies paragraph 2.3 for lack of information.

2.4 In answer to paragraph 2.4, Green Diamond admits that the Washington State Department of Natural Resources (“DNR”) maintains regulatory authority regarding state-owned lands and that DNR is required to comply with certain laws and regulations, which includes the Washington State Forest Practices Act. Green Diamond denies the remaining allegations in paragraph 2.4 for lack of information.

2.5 In answer to paragraph 2.5, Green Diamond admits that defendant Weyerhaeuser Company (“Weyerhaeuser”) owns and/or manages a significant amount of timberland, including timberland located in Washington state and including timberland located in Lewis County, Washington. Green Diamond denies the remaining allegations in paragraph 2.5 for lack of information.

2.6 In answer to paragraph 2.6, Green Diamond admits that it is a forest products company that owns and manages forests in California, Oregon and Washington, including forests in Lewis County, Washington. Green Diamond admits that it was incorporated in 2001 as Simpson Resource Company, it first owned real property in Lewis County, Washington in 2002, and its name was changed to Green Diamond Resource Company in 2004. Green Diamond denies the remaining allegations in paragraph 2.6.

III. JURISDICTION AND VENUE

22 3.1 Green Diamond realleges and incorporates herein by reference its answers to the
23 preceding paragraphs.

24 3.2 Green Diamond denies paragraph 3.2 for lack of information.
25

1 **B. Trespass**

2 5.5 Green Diamond realleges and incorporates herein by reference its answers to the
3 preceding paragraphs.

4 5.6 Green Diamond denies paragraph 5.6.

5 **C. Tortious Interference with Contractual Relations and Business Expectancy**

6 5.7 Green Diamond realleges and incorporates herein by reference its answers to the
7 preceding paragraphs.

8 5.8 Green Diamond denies paragraph 5.8.

9 **D. Conversion**

10 5.10 Green Diamond realleges and incorporates herein by reference its answers to the
11 preceding paragraphs.

12 5.11 Green Diamond denies paragraph 5.11.

13 **E. Inverse Condemnation -- Defendant DNR**

14 5.12 Green Diamond realleges and incorporates herein by reference its answers to the
15 preceding paragraphs.

16 5.13 Green Diamond denies paragraph 5.13.

17 **F. Unlawful Agency Action**

18 5.14 Green Diamond realleges and incorporates herein by reference its answers to the
19 preceding paragraphs.

20 5.15 Green Diamond denies paragraph 5.15.

21 5.16 Green Diamond denies paragraph 5.16.

22 **G. Shoreline Management Act of 1971**

23 5.17 Green Diamond realleges and incorporates herein by reference its answers to the
24 preceding paragraphs.

25

1 5.18 Green Diamond denies paragraph 5.18.

2 **H. Negligent permitting, investigation, enforcement, and inspection under the State**
3 **Environmental Policy Act (SEPA) -- Defendant DNR**

4 5.19 Green Diamond realleges and incorporates herein by reference its answers to the
5 preceding paragraphs.

6 5.20 Green Diamond denies paragraph 5.20.

7 **VI. JURY DEMAND**

8 6.1 Paragraph 6.1 does not require a response.

9 **VII. RESERVATION OF RIGHTS**

10 7.1 Paragraph 7.1 does not require a response.

11 **VIII. DAMAGES**

12 8.1 Green Diamond denies paragraph 8.1.

13 **IX. AFFIRMATIVE DEFENSES**

14 Green Diamond sets forth the following affirmative defenses to the Complaint:

- 15 1. **Failure to State a Claim.** The Complaint fails to state a claim upon which
16 relief can be granted.
- 17 2. **RCW 76.09.330.** Plaintiffs' claims are barred by the statutory requirements of
18 RCW 76.09.330.
- 19 3. **Proximate Cause.** Plaintiffs' claims are barred by the doctrine of proximate
20 cause.
- 21 4. **Substantial Factor.** Plaintiffs' claims are barred by the doctrine of "substantial
22 factor."
- 23 5. **Intervening and/or Superseding Causes.** Plaintiffs' claims are barred by the
24 doctrines of intervening and/or superseding causes.
- 25 6. **Act of God.** Plaintiffs' claims are barred by the doctrine of "Act of God."

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendant Green Diamond Resource Company.

2. I hereby certify that on March 17th, 2011, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

Darrell L. Cochran
Pfau Cochran Vertetis Kosnoff PLLC
911 Pacific Avenue, Suite 200
Tacoma, WA 98401
Email: darrell@pcvkllaw.com

Attorneys for Plaintiffs
Via Hand Delivery

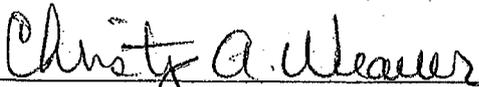
Louis D. Peterson
Hillis, Clark, Martin & Peterson
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Attorneys for Defendant Weyerhaeuser
Via Email and U.S. Mail

Mark C. Jobson
Office of The Attorney General
Torts Division
P.O. Box 40126
Olympia, WA 98504-0126
Email: Markj@ATG.WA.Gov
**Attorneys for Defendant State of
Washington Department of
Natural Resources**
Via Email and U.S. Mail

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

DATED this 17th day of March, 2011 at Seattle, Washington.


Christy A. Weaver

**DEFENDANT GREEN DIAMOND RESOURCE
COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT
AND PETITION FOR JUDICIAL REVIEW - 7**

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

VIRGINIA CAREY, individually;
JAMIE CAREY, individually;
PARADYCE INDUSTRIES, INC.,
d/b/a/ THE PRINT SHOP, a
Washington Corporation,

Plaintiffs.
v.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES; WEYERHAEUSER
COMPANY, a Washington
Corporation; and GREEN DIAMOND
RESOURCE COMPANY, a
Washington Corporation,

Defendants.

NO. 10-2-42011-8KNT
DEFENDANT DEPARTMENT OF
NATURAL RESOURCES'
AMENDED ANSWER TO
PLAINTIFFS' COMPLAINT AND
PETITION FOR JUDICIAL REVIEW
AND COUNTERCLAIM

Under the APA, there is no requirement to file an answer in response to such petitions.
See RCW 34.05.570 (requiring an answer only to a petition for review of an agency's failure to
perform a duty under RCW 34.05.570(4)(b)). Accordingly, DNR provides no answer specific
to the Caption.

1 Defendant, State of Washington Department of Natural Resources (DNR), in answer to
2 plaintiffs' complaint, admits, denies and alleges as follows:
3

4 **I. INTRODUCTION**

5 1.1 Defendant denies the allegations contained in paragraph number 1.1.

6 1.2 Defendant denies the allegations contained in paragraph number 1.2.

7 1.3 Defendant denies the allegations contained in paragraph number 1.3. Defendant
8 objects to the plaintiff's use of hearsay statements and opinions of citizen Peter Goldmark
9 made before he took office as the Commissioner of Public Lands. These statements are not
10 made by a party or agent for a party and their use is inadmissible and improper.
11

12 **II. PARTIES**

13 2.1 Defendant is without knowledge or information sufficient to form a belief as to the truth of
14 the allegations contained in paragraph 2.1 and therefore denies the same.

15 2.2 Defendant is without knowledge or information sufficient to form a belief as to the truth of
16 the allegations contained in paragraph 2.2 and therefore denies the same.

17 2.3 Defendant is without knowledge or information sufficient to form a belief as to the truth of
18 the allegations contained in paragraph 2.3 and therefore denies the same.

19 2.4 States legal conclusions and requires no answer.

20 2.5 Defendant is without knowledge or information sufficient to form a belief as to the truth of
21 the allegations contained in paragraph 2.5 and therefore denies the same.

22 2.6 Defendant is without knowledge or information sufficient to form a belief as to the truth of
23 the allegations contained in paragraph 2.6 and therefore denies the same.
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III. JURISDICTION AND VENUE

3.1 Defendant re-alleges and incorporates its previous answers.

3.2 The allegations in paragraph 3.2 appear to be directed to or about other defendants and this defendant either cannot answer for lack of knowledge or information or is not required to answer.

3.3 The allegations in paragraph 3.3 appear to be directed to or about other defendants and this defendant either cannot answer for lack of knowledge or information or is not required to answer.

3.4 Defendant admits that plaintiff may file an action against the state in King County where joinder of an additional defendant resident there permits. Defendant reserves the right to move for a change of venue as permitted by court rule and statute.

3.5 Defendant admits that plaintiff filed a tort claim against DNR. Defendant denies the second sentence asserting that the court has jurisdiction or that venue is "appropriate."

IV. FACTS

4.1 Defendant re-alleges and incorporates its previous answers.

4.2 Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Par. 4.2 and therefore denies the same.

4.3 Defendant admits the allegations contained in paragraph number 4.3.

4.4 Defendant denies the allegations contained in paragraph number 4.4.

4.5 Defendant denies the allegations contained in paragraph number 4.5.

4.6 Defendant admits that 'heavy rain fell on or about December 3, 2007.' Defendant denies remainder.

1 4.7 Defendant admits that landslides dumped tons of debris in the Chehalis River forming
2 debris dams that blocked the channel. Defendant denies the remainder.

3 4.8 Defendant admits that debris dams broke releasing debris downstream and destroying
4 bridges. Defendant denies the remainder.

5 4.8 (*Second)¹ Defendant admits that the Chehalis River flooded over its banks. Defendant is
6 without knowledge or information sufficient to form a belief as to the truth of the other allegations
7 contained in paragraph 4.8 (second) and therefore denies the same.

8 4.9 Defendant is without knowledge or information sufficient to form a belief as to the truth of
9 the allegations contained in Par. 4.9 and therefore denies the same.
10

11 V. CAUSES OF ACTION

12 A. Negligence

13 5.1 Defendant re-alleges and incorporates its previous answers.

14 5.2 Defendant denies the allegations contained in paragraph number 5.2.

15 5.3 Defendant denies the allegations contained in paragraph number 5.3.

16 5.4 Defendant denies the allegations contained in paragraph number 5.4.

17 B. Trespass

18 5.5 Defendant re-alleges and incorporates its previous answers.

19 5.6 Defendant denies the allegations contained in paragraph number 5.6.

20 C. Tortious Interference With Contractual Relations and Business Expectancy

21 5.7 Defendant re-alleges and incorporates its previous answers.
22
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26 ¹The complaint includes two paragraphs numbered "4.8."

- 1 5.8 Defendant denies the allegations contained in paragraph number 5.8.
- 2
- 3 **D. Conversion**
- 4 5.10 Defendant re-alleges and incorporates its previous answers.
- 5 5.11 Defendant denies the allegations contained in paragraph number 5.11.
- 6
- 7 **E. Inverse Condemnation – Defendant DNR**
- 8 5.12 Defendant re-alleges and incorporates its previous answers.
- 9 5.13 Defendant denies the allegations contained in paragraph number 5.13.
- 10
- 11 **F. Unlawful Agency Action**
- 12 5.14 Defendant re-alleges and incorporates its previous answers.
- 13 5.15 Defendant denies the allegations contained in paragraph number 5.15.
- 14 5.16 Defendant denies the allegations contained in paragraph number 5.16.
- 15
- 16 **G. Shoreline Management Act of 1971**
- 17 5.17 Defendant re-alleges and incorporates its previous answers.
- 18 5.18 Defendant denies the allegations contained in paragraph number 5.18.
- 19
- 20 **H. Negligent Permitting, Investigation, Enforcement, and Inspection Under The State**
- 21 **Environmental Policy Act (SEPA)—Defendant DNR**
- 22 5.19 Defendant re-alleges and incorporates its previous answers.
- 23 5.20 Paragraph 5.20 states legal conclusions and requires no answer.
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VI. JURY DEMAND

6.1 Requires no answer.

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VII. (PLAINTIFFS') RESERVATION OF RIGHTS

7.1 Requires no answer.

VIII. DAMAGES

8.1 Defendant denies the allegations contained in paragraph number 8.1.

IX. PRAYER FOR RELIEF

Defendant denies that it is liable to the plaintiff for any relief sought in this action.

By Way of FURTHER ANSWER and AFFIRMATIVE DEFENSES, defendant alleges:

- 1. That the injuries and damages, if any, claimed by the plaintiffs were proximately caused or contributed to by the fault of the plaintiffs as defined by RCW 4.22.015.
- 2. That all actions of the defendant, Department of Natural Resources, herein alleged as negligence, manifest a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of governmental authority entrusted to them by law and are neither tortious nor actionable.
- 3. That if the plaintiffs suffered damages, recovery therefore is limited by plaintiffs' failure to mitigate said damages.
- 4. That defendant is entitled to an offset from any award to plaintiffs herein and/or recovery of back monies paid to plaintiffs.
- 5. That the plaintiffs have failed to state a claim upon which relief may be granted.
- 6. Nonparty at fault. Plaintiffs' injuries and damages, if any, were caused by the fault of a non-party for purposes of RCW 4.22.070(1). The identity of one non-party at fault is Lewis

1 County, with respect to whom DNR has no legal liability. The identities of additional non-
2 parties who may be at fault are not presently known.

3 7. That the injuries or damages claimed were proximately caused by the fault of a party
4 for whom this defendant is not liable.

5 8. That the court lacks jurisdiction over the subject matter or over the defendant DNR.

6 9. That the plaintiff's claims are barred by the statute of limitations.

7
8 **X. COUNTERCLAIM**

9 1. DNR realleges its answers to the complaint and reincorporates them here.

10 2. Although DNR denies any unconstitutional taking using and/or damaging of Plaintiffs'
11 property, if DNR should be found liable for the payment of damages and/or just compensation
12 for taking, using and/or damaging Plaintiff's property and/or property rights, DNR is entitled to
13 fee simple title to or perpetual easement to overflow, flood, and submerge such property and/or
14 property rights.

15
16 **RESERVATION OF RIGHTS**

17 Defendant DNR reserves the right to amend this answer, including the addition of
18 affirmative defenses warranted by investigation and discovery, and to make such amendments
19 either before or during trial, including asserting other defense theories or conforming the
20 pleadings to the proof offered at the time of trial.

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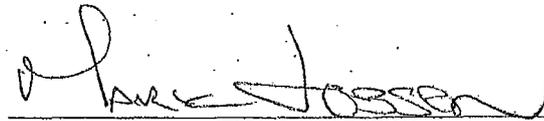
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26

1 WHEREFORE, defendant prays that plaintiffs' complaint be dismissed with prejudice as
2 to Department of Natural Resources and that plaintiffs take nothing by their complaint and that
3 defendant be allowed its costs and reasonable attorneys' fees herein.
4

5 DATED this 26 day of September, 2011.

6 ROBERT M. MCKENNA
7 Attorney General

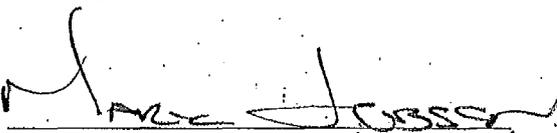
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10 MARK JOBSON, WSBA No. 22171
Assistant Attorney General

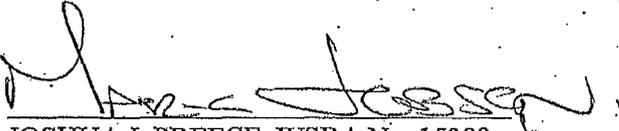
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13 Amendment by consent per CR 15.

14 

15 DARRELL COCHRAN, WSBA No. 22851
16 Pfau Cochran Vertetis Kosnoff PLLC
Attorney for Plaintiffs

17
18 

19 LOUIS D. PETERSON, WSBA No. 7556
20 Hillis Clark Martin & Peterson PS
Attorney for Co-Defendant Weyerhaeuser

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23 JOSHUA J. PREECE, WSBA No. 15380
24 Corr Cronin Michelson Baumgardner & Preece LLP
Attorney for Co-Defendant Green Diamond

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Tacoma office

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WILLIAM FORTH, individually; GUY
BAUMAN, individually; EILEEN
BAUMAN, individually; LINDA
STANLEY, individually and as
personal representative IN RE THE
ESTATE OF CORAL COTTEN;
ROCHELLE STANLEY, as personal
representative of IN RE THE ESTATE
OF CORAL COTTEN; DONALD
LEMASTER, individually; and DAVID
GIVENS, individually,

Plaintiffs,

v.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES, a Washington State
Public Agency; WEYERHAEUSER
COMPANY, a Washington
Corporation; and GREEN DIAMOND
RESOURCE COMPANY, a
Washington Corporation,

Defendants.

NO. 10-2-42009-6KNT

DEFENDANT DEPARTMENT OF
NATURAL RESOURCES' ANSWER
TO PLAINTIFFS' COMPLAINT AND
PETITION FOR JUDICIAL REVIEW

Under the APA, there is no requirement to file an answer in response to such petitions.
See RCW 34.05.570 (requiring an answer only to a petition for review of an agency's failure to
perform a duty under RCW 34.05.570(4)(b)). Accordingly, DNR provides no answer specific
to the Caption.

1 Defendant, State of Washington Department of Natural Resources (DNR), in answer to
2 plaintiffs' complaint, admits, denies and alleges as follows:

3
4 **I. INTRODUCTION**

5 1.1 Defendant denies the allegations contained in paragraph number 1.1.

6 1.2 Defendant denies the allegations contained in paragraph number 1.2.

7 1.3 Defendant denies the allegations contained in paragraph number 1.3. Defendant
8 objects to the plaintiff's use of hearsay statements and opinions of citizen Peter Goldmark
9 made before he took office as the Commissioner of Public Lands. These statements are not
10 made by a party or agent for a party and their use is inadmissible and improper.
11

12 **II. PARTIES**

13 2.1 Defendant is without knowledge or information sufficient to form a belief as to the truth of
14 the allegations contained in paragraph 2.1 and therefore denies the same.

15 2.2 Defendant is without knowledge or information sufficient to form a belief as to the truth of
16 the allegations contained in paragraph 2.2 and therefore denies the same.
17

18 2.3 Defendant is without knowledge or information sufficient to form a belief as to the truth of
19 the allegations contained in paragraph 2.3 and therefore denies the same.

20 2.4 Defendant is without knowledge or information sufficient to form a belief as to the truth of
21 the allegations contained in Par. 2.4 and therefore denies the same.

22 2.5 Defendant is without knowledge or information sufficient to form a belief as to the truth of
23 the allegations contained in paragraph 2.5 and therefore denies the same.
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1 2.6 Defendant is without knowledge or information sufficient to form a belief as to the truth of
2 the allegations contained in paragraph 2.6 and therefore denies the same.

3 2.7 Defendant is without knowledge or information sufficient to form a belief as to the truth of
4 the allegations contained in Par. 2.7 and therefore denies the same.

5 2.8 States legal conclusions and no answer is required.

6 2.9 Defendant is without knowledge or information sufficient to form a belief as to the truth of
7 the allegations contained in Par. 2.9 and therefore denies the same.

8 2.10 Defendant is without knowledge or information sufficient to form a belief as to the truth of
9 the allegations contained in Par. 2.10 and therefore denies the same.
10

11
12 **III. JURISDICTION AND VENUE**

13 3.1 Defendant re-alleges and incorporates its previous answers.

14 3.2 The allegations in paragraph 3.2 appear to be directed to or about other defendants and
15 this defendant either cannot answer for lack of knowledge or information or is not required to
16 answer.

17 3.3 The allegations in paragraph 3.3 appear to be directed to or about other defendants and
18 this defendant either cannot answer for lack of knowledge or information or is not required to
19 answer.

20 3.4 Defendant admits that plaintiff may file an action against the state in King County
21 where joinder of an additional defendant resident there permits. Defendant reserves the right
22 to move for a change of venue as permitted by court rule and statute.
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1 3.5 Defendant admits that plaintiff filed a tort claim against DNR. Defendant denies the
2 second sentence asserting that the court has jurisdiction or that venue is "appropriate."
3

4 **IV. FACTS**

5 4.1 Defendant re-alleges and incorporates its previous answers.

6 4.2 Defendant is without knowledge or information sufficient to form a belief as to the truth of
7 the allegations contained in Par. 4.2 and therefore denies the same.

8 4.3 Defendant admits the allegations contained in paragraph number 4.3.

9 4.4 Defendant denies the allegations contained in paragraph number 4.4.

10 4.5 Defendant denies the allegations contained in paragraph number 4.5.

11 4.6 Defendant admits that 'heavy rain fell on or about December 3, 2007. Defendant
12 denies remainder.

13 4.7 Defendant admits that landslides dumped tons of debris in the Chehalis River forming
14 debris dams that blocked the channel. Defendant denies the remainder.

15 4.8 Defendant admits that debris dams broke releasing debris downstream and destroying
16 bridges. Defendant denies the remainder.

17 4.8 (*Second)¹ Defendant admits that the Chehalis River came over its banks. Defendant is
18 without knowledge or information sufficient to form a belief as to the truth of the other allegations
19 contained in paragraph 4.8 (second) and therefore denies the same.
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26 ¹ The complaint includes two paragraphs numbered "4.8."

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V. CAUSES OF ACTION

A. Negligence

- 5.1 Defendant re-alleges and incorporates its previous answers.
- 5.2 Defendant denies the allegations contained in paragraph number 5.2.
- 5.3 Defendant denies the allegations contained in paragraph number 5.3.
- 5.4 Defendant denies the allegations contained in paragraph number 5.4.

B. Trespass

- 5.5 Defendant re-alleges and incorporates its previous answers.
- 5.6 Defendant denies the allegations contained in paragraph number 5.6.

C. Tortious Interference With Contractual Relations and Business Expectancy

- 5.7 Defendant re-alleges and incorporates its previous answers.
- 5.8 Defendant denies the allegations contained in paragraph number 5.8.

D. Conversion

- 5.10 Defendant re-alleges and incorporates its previous answers.
- 5.11 Defendant denies the allegations contained in paragraph number 5.11.

E. Inverse Condemnation – Defendant DNR

- 5.12 Defendant re-alleges and incorporates its previous answers.
- 5.13 Defendant denies the allegations contained in paragraph number 5.13.

F. Unlawful Agency Action

- 5.14 Defendant re-alleges and incorporates its previous answers.

1 5.15 Defendant denies the allegations contained in paragraph number 5.15.

2 5.16 Defendant denies the allegations contained in paragraph number 5.16.

3

4 **G. Shoreline Management Act of 1971**

5 5.17 Defendant re-alleges and incorporates its previous answers.

6 5.18 Defendant denies the allegations contained in paragraph number 5.18.

7

8 **H. Negligent Permitting, Investigation, Enforcement, and Inspection Under The State Environmental Policy Act (SEPA)—Defendant DNR**

9 5.19 Defendant re-alleges and incorporates its previous answers.

10 5.20 Paragraph 5.20 states legal conclusions and requires no answer.

11

12 **VI. JURY DEMAND**

13 6.1 Requires no answer.

14

15 **VII. (PLAINTIFFS') RESERVATION OF RIGHTS**

16 7.1 Requires no answer.

17

18 **VIII. DAMAGES**

19 8.1 Defendant denies the allegations contained in paragraph number 8.1.

20

21 **IX. PRAYER FOR RELIEF**

22 Defendant denies that it is liable to the plaintiff for any relief sought in this action.

23 By Way of FURTHER ANSWER and AFFIRMATIVE DEFENSES, defendant alleges:

- 24 1. That the injuries and damages, if any, claimed by the plaintiffs were proximately caused
25 or contributed to by the fault of the plaintiffs as defined by RCW 4.22.015.
26

1 2. That all actions of the defendant, Department of Natural Resources, herein alleged as
2 negligence, manifest a reasonable exercise of judgment and discretion by authorized public
3 officials made in the exercise of governmental authority entrusted to them by law and are neither
4 tortious nor actionable.

5
6 3. That if the plaintiffs suffered damages, recovery therefore is limited by plaintiffs' failure
7 to mitigate said damages.

8 4. That defendant is entitled to an offset from any award to plaintiffs herein and/or recovery
9 of back monies paid to plaintiffs.

10 5. That the plaintiffs have failed to state a claim upon which relief may be granted.

11 6. Nonparty at fault. Plaintiffs' injuries and damages, if any, were caused by the fault of a
12 non-party for purposes of RCW 4.22.070(1). The identity of one non-party at fault is Lewis
13 County, with respect to whom DNR has no legal liability. The identities of additional non-
14 parties who may be at fault are not presently known.

15
16 7. That the injuries or damages claimed were proximately caused by the fault of a party
17 for whom this defendant is not liable.

18 8. That the court lacks jurisdiction over the subject matter or over the defendant DNR.

19 9. That the plaintiff's claims are barred by the statute of limitations.

20
21 **RESERVATION OF RIGHTS**

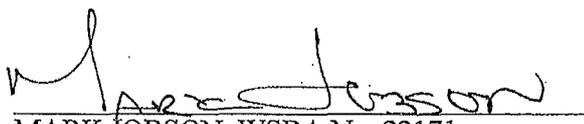
22 Defendant DNR reserves the right to amend this answer, including the addition of
23 affirmative defenses warranted by investigation and discovery, and to make such amendments
24 either before or during trial, including asserting other defense theories or conforming the
25 pleadings to the proof offered at the time of trial.

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WHEREFORE, defendant prays that plaintiffs' complaint be dismissed with prejudice as to Department of Natural Resources and that plaintiffs take nothing by their complaint and that defendant be allowed its costs and reasonable attorneys' fees herein.

DATED this 24 day of January, 2011.

ROBERT M. MCKENNA
Attorney General


MARK JOBSON, WSBA No. 22171
Assistant Attorney General

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PROOF OF SERVICE

I certify that I caused a copy of this document to be served on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid via Consolidated Mail Service

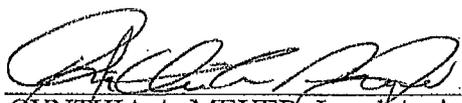
(Counsel for Plaintiffs)
Mr. Darrell L. Cochran
Pfau Cochran Vertetis Kosnoff, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402

(Counsel for Defendant Weyerhaeuser Company)
Mr. Louis D. Peterson
Hillis Clark Martin & Peterson P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925

(Counsel for Defendant Green Diamond Resource Company)
Mr. Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051

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

DATED this 5th day of January, 2011, at Tumwater, Washington.



CYNTHIA A. MEYER, Legal Assistant

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11-02-20 10:50 IN

THE HONORABLE LEROY McCULLOUGH

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM FORTH, individually; GUY BAUMAN, individually; EILEEN BAUMAN, individually; LINDA STANLEY, individually and as personal representative IN RE THE ESTATE OF CORAL COTTON; ROCHELLE STANLEY, as personal representative IN RE THE ESTATE OF CORAL COTTON; DONALD LEMASTER, individually; and DAVID GIVENS, individually;

Plaintiffs,

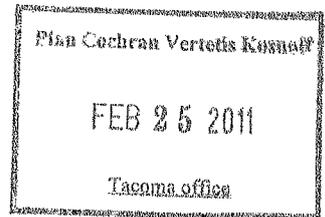
v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES, a Washington State public agency; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

ANSWER OF DEFENDANT WEYERHAEUSER COMPANY TO PLAINTIFFS' COMPLAINT AND PETITION FOR REVIEW OF AGENCY ACTION



Defendant, Weyerhaeuser Company, for its answer to Plaintiffs' Complaint and Petition for Review of Agency Action (the "Complaint"), admits, denies, and alleges as follows:

Answer of Defendant Weyerhaeuser Company to Plaintiffs' Complaint and Petition for Review of Agency Action - 1

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Appendix 082
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I. INTRODUCTION

- 1.1 Deny.
- 1.2 Deny.
- 1.3 Deny.

II. PARTIES

- 2.1 Deny for lack of information.
- 2.2 Deny for lack of information.
- 2.3 Deny for lack of information.
- 2.4 Deny for lack of information.
- 2.5 Deny for lack of information.
- 2.6 Deny for lack of information.
- 2.7 Deny for lack of information.
- 2.8 Weyerhaeuser admits that the Washington State Department of Natural Resources ("DNR") manages state owned lands. Weyerhaeuser admits that DNR must comply with certain laws and regulations, including the Washington State Forest Practices Act. Weyerhaeuser denies the remaining allegations in paragraph 2.8 of the Complaint for lack of information.

- 2.9 Admit.
- 2.10 Deny for lack of information.

III. JURISDICTION AND VENUE

- 3.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.
- 3.2 Admit.
- 3.3 Deny for lack of information.
- 3.4 Admit.
- 3.5 Deny for lack of information.

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IV. FACTS

4.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

4.2 Deny for lack of information.

4.3 Admit.

4.4 Deny.

4.5 Deny.

4.6 Deny.

4.7 Deny.

4.8 Deny.

4.8(sic) Deny for lack of information.

V. CAUSES OF ACTION

A. Negligence

5.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

5.2 Deny.

5.3 Deny.

5.4 Deny.

B. Trespass

5.5 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

5.6 Deny.

C. Tortious Interference with Contractual Relations and Business Expectancy

5.7 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

5.8 Deny.

1 **D. Conversion**

2 5.10 (sic) Weyerhaeuser re-alleges and incorporates herein by reference its
3 answers to the preceding paragraphs.

4 5.11 Deny.

5 **E. Inverse Condemnation-Defendant DNR**

6 5.12 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
7 the preceding paragraphs.

8 5.13 Deny for lack of information.

9 **F. Unlawful Agency Action**

10 5.14 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
11 the preceding paragraphs.

12 5.15 Deny.

13 5.16 Deny.

14 **G. Shoreline Management Act of 1971**

15 5.17 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
16 the preceding paragraphs.

17 5.18 Deny.

18 **H. Negligent permitting, investigation, enforcement, and inspection under the State**
19 **Environmental Policy Act (SEPA)-Defendant DNR**

20 5.19 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
21 the preceding paragraphs.

22 5.20 Deny.

23 **VI. JURY DEMAND**

24 6.1 No response to paragraph 6.1 of the Complaint is required.

25 **VII. RESERVATION OF RIGHTS**

26 7.1 No response to paragraph 7.1 of the Complaint is required.
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VIII. DAMAGES

8.1 Deny.

AFFIRMATIVE DEFENSES

Weyerhaeuser asserts the following affirmative defenses:

1. Failure to state a claim upon which relief can be granted;
2. Plaintiff's claims are barred by RCW 76.09.330;
3. Statutory and regulatory compliance;
4. Statute of limitations;
5. Assumption of risk;
6. Comparative negligence;
7. Act of God;
8. Intervening or superseding cause; and
9. Laches.

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PRAYER FOR RELIEF

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant Weyerhaeuser prays that the Court dismiss Plaintiffs' Complaint with prejudice and award defendants their costs and disbursements.

DATED this 24th day of February, 2011.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Louis D. Peterson

Louis D. Peterson, WSBA #5776
Michael R. Scott, WSBA #12822
Alexander M. Wu, WSBA #40649
Hillis Clark Martin & Peterson P.S.
1221 Second Avenue, Suite 500
Seattle WA 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789
Email: ldp@hcmp.com; mrs@hcmp.com;
amw@hcmp.com

Attorneys for Defendant
Weyerhaeuser Company

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be delivered via messenger and U.S. Mail to the last known address of all counsel of record.

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

DATED this 24th day of February, 2011, at Seattle, Washington.

s/ Suzanne Powers
Suzanne Powers

ND: 11100.180 4825-7441-7160v4

MAR 17 2011

Tacoma Office

THE HONORABLE LEROY MCCULLOUGH

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM FORTH, individually; GUY BAUMAN, individually; EILEEN BAUMAN, individually; LINDA STANLEY, individually and as personal representative IN RE THE ESTATE OF CORAL COTTEN; ROCHELLE STANLEY as personal representative IN RE THE ESTATE OF CORAL COTTEN; DONALD LEMASTER, individually; and DAVID GIVENS, individually,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

DEFENDANT GREEN DIAMOND RESOURCE COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT AND PETITION FOR REVIEW OF AGENCY ACTION.

Defendant Green Diamond Resource Company ("Green Diamond"), in answer to Plaintiffs' Complaint and Petition for Review of Agency Action (the "Complaint"), states as follows:

I. INTRODUCTION

1.1 Green Diamond denies paragraph 1.1 and the preamble to paragraph 1.1.

DEFENDANT GREEN DIAMOND RESOURCE COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT AND PETITION FOR REVIEW OF AGENCY ACTION - 1

CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP 1001 Fourth Avenue, Suite 3900 Seattle, Washington 98154-1051 Tel (206) 625-8600 Fax (206) 625-0900

COPY

1 1.2 Green Diamond denies paragraph 1.2.

2 1.3 Green Diamond denies paragraph 1.3.

3 **II. PARTIES**

4 2.1 Green Diamond denies paragraph 2.1 for lack of information.

5 2.2 Green Diamond denies paragraph 2.2 for lack of information.

6 2.3 Green Diamond denies paragraph 2.3 for lack of information.

7 2.4 Green Diamond denies paragraph 2.4 for lack of information.

8 2.5 Green Diamond denies paragraph 2.5 for lack of information.

9 2.6 Green Diamond denies paragraph 2.6 for lack of information.

10 2.7 Green Diamond denies paragraph 2.7 for lack of information.

11 2.8 In answer to paragraph 2.8, Green Diamond admits that the Washington State
12 Department of Natural Resources ("DNR") maintains regulatory authority regarding state-
13 owned lands and that DNR is required to comply with certain laws and regulations, which
14 includes the Washington State Forest Practices Act. Green Diamond denies the remaining
15 allegations in paragraph 2.8 for lack of information.

16 2.9 In answer to paragraph 2.9, Green Diamond admits that defendant
17 Weyerhaeuser Company ("Weyerhaeuser") owns and/or manages a significant amount of
18 timberland, including timberland located in Washington state and including timberland
19 located in Lewis County, Washington. Green Diamond denies the remaining allegations in
20 paragraph 2.9 for lack of information.

21 2.10 In answer to paragraph 2.10, Green Diamond admits that it is a forest products
22 company that owns and manages forests in California, Oregon and Washington, including
23 forests in Lewis County, Washington. Green Diamond admits that it was incorporated in
24 2001 as Simpson Resource Company, it first owned real property in Lewis County,
25

1 Washington in 2002, and its name was changed to Green Diamond Resource Company in
2 2004. Green Diamond denies the remaining allegations in paragraph 2.10.

3 **III. JURISDICTION AND VENUE**

4 3.1 Green Diamond realleges and incorporates herein by reference its answers to
5 the preceding paragraphs.

6 3.2 Green Diamond denies paragraph 3.2 for lack of information.

7 3.3 Green Diamond admits paragraph 3.3.

8 3.4 Green Diamond admits paragraph 3.4.

9 3.5 Green Diamond denies paragraph 3.5 for lack of information.

10 **IV. FACTS**

11 4.1 Green Diamond realleges and incorporates herein by reference its answers to
12 the preceding paragraphs.

13 4.2 Green Diamond denies paragraph 4.2 for lack of information.

14 4.3 Green Diamond admits paragraph 4.3.

15 4.4 Green Diamond denies paragraph 4.4.

16 4.5 Green Diamond denies paragraph 4.5.

17 4.6 Green Diamond denies paragraph 4.6.

18 4.7 Green Diamond denies paragraph 4.7.

19 4.8 Green Diamond denies paragraph 4.8.

20 4.8[sic] Green Diamond denies the second paragraph 4.8 for lack of information.

21 **V. CAUSES OF ACTION**

22 **A. Negligence**

23 5.1 Green Diamond realleges and incorporates herein by reference its answers to
24 the preceding paragraphs.
25

1 5.2 Green Diamond denies paragraph 5.2.

2 5.3 Green Diamond denies paragraph 5.3.

3 5.4 Green Diamond denies paragraph 5.4.

4 **B. Trespass**

5 5.5 Green Diamond realleges and incorporates herein by reference its answers to
6 the preceding paragraphs.

7 5.6 Green Diamond denies paragraph 5.6.

8 **C. Tortious Interference with Contractual Relations and Business Expectancy**

9 5.7 Green Diamond realleges and incorporates herein by reference its answers to
10 the preceding paragraphs.

11 5.8 Green Diamond denies paragraph 5.8.

12 **D. Conversion**

13 5.10 Green Diamond realleges and incorporates herein by reference its answers to
14 the preceding paragraphs.

15 5.11 Green Diamond denies paragraph 5.11.

16 **E. Inverse Condemnation -- Defendant DNR**

17 5.12 Green Diamond realleges and incorporates herein by reference its answers to
18 the preceding paragraphs.

19 5.13 Green Diamond denies paragraph 5.13.

20 **F. Unlawful Agency Action**

21 5.14 Green Diamond realleges and incorporates herein by reference its answers to
22 the preceding paragraphs.

23 5.15 Green Diamond denies paragraph 5.15.

24 5.16 Green Diamond denies paragraph 5.16.

1 **G. Shoreline Management Act of 1971**

2 5.17 Green Diamond realleges and incorporates herein by reference its answers to
3 the preceding paragraphs.

4 5.18 Green Diamond denies paragraph 5.18.

5 **H. Negligent permitting, investigation, enforcement, and inspection under the State**
6 **Environmental Policy Act (SEPA) -- Defendant DNR**

7 5.19 Green Diamond realleges and incorporates herein by reference its answers to
8 the preceding paragraphs.

9 5.20 Green Diamond denies paragraph 5.20.

10 **VI. JURY DEMAND**

11 6.1 Paragraph 6.1 does not require a response.

12 **VII. RESERVATION OF RIGHTS**

13 7.1 Paragraph 7.1 does not require a response.

14 **VIII. DAMAGES**

15 8.1 Green Diamond denies paragraph 8.1.

16 **IX. AFFIRMATIVE DEFENSES**

17 Green Diamond sets forth the following affirmative defenses to the Complaint:

- 18 1. **Failure to State a Claim.** The Complaint fails to state a claim upon which
19 relief can be granted.
- 20 2. **RCW 76.09.330.** Plaintiffs' claims are barred by the statutory requirements of
21 RCW 76.09.330.
- 22 3. **Proximate Cause.** Plaintiffs' claims are barred by the doctrine of proximate
23 cause.
- 24 4. **Substantial Factor.** Plaintiffs' claims are barred by the doctrine of
25 "substantial factor."

1 5. Intervening and/or Superseding Causes. Plaintiffs' claims are barred by the
2 doctrines of intervening and/or superseding causes.

3 6. Act of God. Plaintiffs' claims are barred by the doctrine of "Act of God."

4 7. Statutory and Regulatory Compliance. Green Diamond has fully complied
5 with all statutory and regulatory requirements.

6 8. Assumption of Risk. Plaintiffs' claims are barred by the doctrine of
7 assumption of risk.

8 9. Statute of Limitations and/or Laches. Plaintiffs' claims are barred by the
9 applicable statute of limitations and/or the doctrine of laches.

10 X. PRAYER FOR RELIEF

11 Green Diamond denies Plaintiffs' Prayer for Relief to the extent a response is
12 required.

13 Green Diamond has fully answered Plaintiffs' Complaint and respectfully requests
14 that this Court dismiss Plaintiffs' Complaint and claims with prejudice and award Green
15 Diamond its costs and reasonable attorneys' fees and such other legal and equitable relief as is
16 deemed just.

17 DATED this 16th day of March, 2011.

18 CORR CRONIN MICHELSON
19 BAUMGARDNER & PREECE LLP

20 /s/ Joshua J. Preece

21 Kelly P. Corr, WSBA No. 00555
22 Joshua J. Preece, WSBA No. 15380
23 Seann C. Colgan, WSBA No. 38769
24 Attorneys for Defendant Green Diamond
25 Resource Company

**DEFENDANT GREEN DIAMOND RESOURCE
COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT
AND PETITION FOR REVIEW OF AGENCY ACTION - 6**

**CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900**

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP,
attorneys of record for Defendant Green Diamond Resource Company.

2. I hereby certify that on March 17, 2011, I caused a true and correct copy of
the foregoing document to be served on the following parties in the manner indicated below:

Darrell L. Cochran
Pfau Cochran Vertetis Kosnoff PLLC
911 Pacific Avenue, Suite 200
Tacoma, WA 98401
Email: darrell@pcvklaw.com

Attorneys for Plaintiffs
Via Hand Delivery

Louis D. Peterson
Hillis, Clark, Martin & Peterson
1221 Second Ave., Suite 500
Seattle, WA 98101-2925
Email: ldp@hcmp.com

Attorneys for Defendant Weyerhaeuser
Via Email and U.S. Mail

Mark C. Jobson
Office of The Attorney General
Torts Division
P.O. Box 40126
Olympia, WA 98504-0126
Email: Markj@ATG.WA.Gov
**Attorneys for Defendant State of
Washington Department of
Natural Resources**
Via Email and U.S. Mail

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

DATED this 17th day of March, 2011 at Seattle, Washington.


Christy A. Weaver

**DEFENDANT GREEN DIAMOND RESOURCE
COMPANY'S ANSWER TO PLAINTIFFS' COMPLAINT
AND PETITION FOR REVIEW OF AGENCY ACTION - 7**

**CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP**
1001 Fourth Avenue, Suite 3900
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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WILLIAM RALPH, individually,

Plaintiff,

v.

NO. 11-2-05769-1KNT

DEFENDANT DEPARTMENT OF
NATURAL RESOURCES' ANSWER
TO PLAINTIFFS' COMPLAINT AND
PETITION FOR JUDICIAL REVIEW

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

Under the APA, there is no requirement to file an answer in response to such petitions. See RCW 34.05.570 (requiring an answer only to a petition for review of an agency's failure to perform a duty under RCW 34.05.570(4)(b)). Accordingly, DNR provides no answer specific to the caption.

Defendant, State of Washington Department of Natural Resources (DNR), in answer to Plaintiff's complaint, admits, denies and alleges as follows:

I. INTRODUCTION

- 1.1 Defendant denies the allegations contained in paragraph 1.1.
- 1.2 Defendant denies the allegations contained in paragraph 1.2.

1 1.3 Defendant denies the allegations contained in paragraph 1.3. Defendant objects to the
2 plaintiff's use of hearsay statements and opinions of citizen Peter Goldmark made before he
3 took office as the Commissioner of Public Lands. These statements are not made by a party or
4 agent for a party and their use is inadmissible and improper.
5

6 II. PARTIES

7 2.1 Defendant is without knowledge or information sufficient to form a belief as to the truth of
8 the allegations contained in paragraph 2.1 and therefore denies the same.

9 2.2 Paragraph 2.2 states legal conclusions and no answer is required.

10 III. JURISDICTION AND VENUE

11 3.1 Defendant re-alleges and incorporates its previous answers.

12 3.2 Defendant denies that venue is proper in King County Superior Court.

13 3.3 Defendant admits that Plaintiff filed a tort claim against DNR. Defendant denies the
14 second sentence asserting that the court has jurisdiction or that venue is "appropriate."
15

16 IV. FACTS

17 4.1 Defendant re-alleges and incorporates its previous answers.

18 4.2 Defendant is without knowledge or information sufficient to form a belief as to the truth of
19 the allegations contained in paragraph 4.2 and therefore denies the same.

20 4.3 Defendant admits the allegations contained in paragraph 4.3.

21 4.4 Defendant denies the allegations contained in paragraph 4.4.

22 4.5 Defendant denies the allegations contained in paragraph 4.5.

23 4.6 Defendant denies the allegations contained in paragraph 4.6.
24
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26

- 1 4.7 Defendant admits that "... heavy rain fell on or about December 3, 2007... ."
2 Defendant denies remainder.
3
4 4.8 Defendant admits that landslides dumped tons of debris in the Chehalis River forming
5 debris dams that blocked the channel. Defendant denies the remainder.
6
7 4.9 Defendant admits that debris dams broke releasing debris downstream and destroying
8 bridges. Defendant denies the remainder.
9
10 4.10 Defendant is without knowledge or information sufficient to form a belief as to the
11 truth of the allegations contained in paragraph 4.10 and therefore denies the same.

10 V. CAUSES OF ACTION

11 A. Negligence

- 12 5.1 Defendant re-alleges and incorporates its previous answers.
13
14 5.2 Defendant denies the allegations contained in paragraph 5.2.
15
16 5.3 Defendant denies the allegations contained in paragraph 5.3.
17
18 5.4 Defendant denies the allegations contained in paragraph 5.4.

17 B. Trespass

- 18 5.5 Defendant re-alleges and incorporates its previous answers.
19
20 5.6 Defendant denies the allegations contained in paragraph 5.6.

21 C. Tortious Interference With Contractual Relations and Business Expectancy

- 22 5.7 Defendant re-alleges and incorporates its previous answers.
23
24 5.8 Defendant denies the allegations contained in paragraph 5.8.
25
26

1 **D. Conversion**

2 5.9 Defendant re-alleges and incorporates its previous answers.

3 5.10 Defendant denies the allegations contained in paragraph 5.10.

4 **E. Inverse Condemnation – Defendant DNR**

5 5.11 Defendant re-alleges and incorporates its previous answers.

6 5.12 Defendant denies the allegations contained in paragraph 5.12.

7 **F. Unlawful Agency Action**

8 5.13 Defendant re-alleges and incorporates its previous answers.

9 5.14 Defendant denies the allegations contained in paragraph 5.14.

10 5.15 Defendant denies the allegations contained in paragraph 5.15.

11 **G. Shoreline Management Act of 1971**

12 5.16 Defendant re-alleges and incorporates its previous answers.

13 5.17 Defendant denies the allegations contained in paragraph 5.17.

14 **H. Negligent Permitting, Investigation, Enforcement, and Inspection Under The State**
15 **Environmental Policy Act (SEPA)—Defendant DNR**

16 5.18 Defendant re-alleges and incorporates its previous answers.

17 5.19 Paragraph 5.19 states legal conclusions and requires no answer. To the extent this
18 paragraph is deemed to contain factual allegations, if at all, they are denied.
19

20 **VI. JURY DEMAND**

21 6.1 Paragraph 6.1 requires no answer.
22

23 **VII. (PLAINTIFFS') RESERVATION OF RIGHTS**

24 7.1 Paragraph 7.1 requires no answer.
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VIII. DAMAGES

8.1 Defendant denies the allegations contained in paragraph 8.1.

IX. PRAYER FOR RELIEF

Defendant denies that it is liable to the plaintiff for any relief sought in this action.

By Way of FURTHER ANSWER and AFFIRMATIVE DEFENSES, defendant alleges:

1. That the injuries and damages, if any, claimed by the plaintiff was proximately caused or contributed to by the fault of the plaintiff as defined by RCW 4.22.015.

2. That all actions of the defendant, Department of Natural Resources, herein alleged as negligence, manifest a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of governmental authority entrusted to them by law and are neither tortious nor actionable.

3. That if the plaintiff suffered damages, recovery therefore is limited by plaintiff's failure to mitigate said damages.

4. That defendant is entitled to an offset from any award to plaintiff herein and/or recovery of back monies paid to plaintiff.

5. That the plaintiff has failed to state a claim upon which relief may be granted.

6. Nonparty at fault. Plaintiff's injuries and damages, if any, were caused by the fault of a non-party for purposes of RCW 4.22.070(1). The identity of one non-party at fault is Lewis County, with respect to whom DNR has no legal liability. The identities of additional non-parties who may be at fault are not presently known.

7. That the injuries or damages claimed were proximately caused by the fault of a party for whom this defendant is not liable.

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- 8. That the court lacks jurisdiction over the subject matter or over the defendant DNR.
- 9. That the plaintiff's claims are barred by the statute of limitations.

RESERVATION OF RIGHTS

Defendant DNR reserves the right to amend this answer, including the addition of affirmative defenses warranted by investigation and discovery, and to make such amendments either before or during trial, including asserting other defense theories or conforming the pleadings to the proof offered at the time of trial.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed with prejudice as to Department of Natural Resources and that plaintiff takes nothing by his complaint and that defendant be allowed its costs and reasonable attorneys' fees herein.

DATED this 25th day of February, 2011.

ROBERT M. MCKENNA
Attorney General



MARK JOBSON, WSBA No. 22171
THOMAS R. KNOLL, WSBA No. 38559
Assistant Attorneys General

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PROOF OF SERVICE

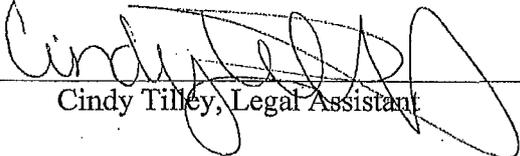
I certify that I caused a copy of this document to be served on all parties or their counsel of record on the date below as follows:

Hand delivered by ABC Legal Messengers Service to:

**Mr. Darrell L. Cochran
Pfau Cochran Vertetis Kosnoff, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402**

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

DATED this 25th day of February, 2011, at Tumwater, Washington.


Cindy Tilley, Legal Assistant

1 THE HONORABLE BRIAN GAIN

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7
8 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

9 WILLIAM RALPH, individually,
10 Plaintiff,

No. 10-2-42012-6 KNT

11 v.

DEFENDANT GREEN DIAMOND
RESOURCE COMPANY'S ANSWER TO
PLAINTIFF'S COMPLAINT

12 WEYERHAEUSER COMPANY, a
13 Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
14 Washington corporation,

15 Defendants.

16 Defendant Green Diamond Resource Company ("Green Diamond"), in answer to
17 Plaintiff's Complaint (the "Complaint"), states as follows:

18 I. INTRODUCTION

- 19 1.1 Green Diamond denies paragraph 1.1 and the preamble to paragraph 1.1.
20 1.2 Green Diamond denies paragraph 1.2.
21 1.3 Green Diamond denies paragraph 1.3.

22 II. PARTIES

- 23 2.1 Green Diamond denies paragraph 2.1 for lack of information.
24
25

DEFENDANT GREEN DIAMOND RESOURCE
COMPANY'S ANSWER TO PLAINTIFF'S COMPLAINT - 1

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

COPY

1 **E. Shoreline Management Act of 1971**

2 5.12 Green Diamond realleges and incorporates herein by reference its answers to
3 the preceding paragraphs.

4 5.13 Green Diamond denies paragraph 5.13.

5 **VI. JURY DEMAND**

6 6.1 Paragraph 6.1 does not require a response.

7 **VII. RESERVATION OF RIGHTS**

8 7.1 Paragraph 7.1 does not require a response.

9 **VIII. DAMAGES**

10 8.1 Green Diamond denies paragraph 8.1.

11 **IX. AFFIRMATIVE DEFENSES**

12 Green Diamond sets forth the following affirmative defenses to the Complaint:

- 13 1. **Failure to State a Claim.** The Complaint fails to state a claim upon which
14 relief can be granted.
- 15 2. **RCW 76.09.330.** Plaintiff's claims are barred by the statutory requirements of
16 RCW 76.09.330.
- 17 3. **Proximate Cause.** Plaintiff's claims are barred by the doctrine of proximate
18 cause.
- 19 4. **Substantial Factor.** Plaintiff's claims are barred by the doctrine of
20 "substantial factor."
- 21 5. **Intervening and/or Superseding Causes.** Plaintiff's claims are barred by the
22 doctrines of intervening and/or superseding causes.
- 23 6. **Act of God.** Plaintiff's claims are barred by the doctrine of "Act of God."
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP,
attorneys of record for Defendant Green Diamond Resource Company.

2. I hereby certify that on March 17, 2011, I caused a true and correct copy of
the foregoing document to be served on the following parties in the manner indicated below:

Darrell L. Cochran
Pfau Cochran Vertétis Kosnoff PLLC
911 Pacific Avenue, Suite 200
Tacoma, WA 98401
Email: darrell@pcvklaw.com

Attorneys for Plaintiffs
Via Hand Delivery

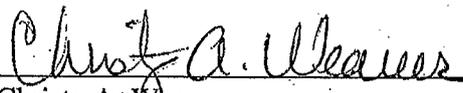
Louis D. Peterson
Hillis, Clark, Martin & Peterson
1221 Second Ave., Suite 500
Seattle, WA 98101-2925
Email: ldp@hcmp.com

Attorneys for Defendant Weyerhaeuser
Via Email and U.S. Mail

Mark C. Jobson
Office of The Attorney General
Torts Division
P.O. Box 40126
Olympia, WA 98504-0126
Email: Markj@ATG.WA.Gov
**Attorneys for Defendant State of
Washington Department of
Natural Resources**
Via Email and U.S. Mail

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

DATED this 17th day of March, 2011 at Seattle, Washington.


Christy A. Weaver

**DEFENDANT GREEN DIAMOND RESOURCE
COMPANY'S ANSWER TO PLAINTIFF'S COMPLAINT - 6**

**CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP**
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
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KING COUNTY
THE HONORABLE SUPERIOR COURT
E-FILED

CASE NUMBER: 10-2-42012-6 KNT

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM RALPH, individually,
Plaintiff,

v.

WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,
Defendants.

No. 10-2-42012-6 KNT

**ANSWER OF DEFENDANT
WEYERHAEUSER COMPANY TO
PLAINTIFFS' COMPLAINT**

Defendant, Weyerhaeuser Company, for its answer to Plaintiffs' Complaint and
Petition for Review of Agency Action (the "Complaint"), admits, denies, and alleges as
follows:

I. INTRODUCTION

- 1.1 Deny.
- 1.2 Deny.
- 1.3 Deny.

II. PARTIES

- 2.1 Deny for lack of information.
- 2.2 Admit.

*Answer of Defendant Weyerhaeuser Company to
Plaintiffs' Complaint - 1*

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

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2.3 Deny for lack of information.

III. JURISDICTION AND VENUE

3.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

3.2 Admit.

3.3 Admit.

IV. FACTS

4.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

4.2 Deny for lack of information.

4.3 Admit.

4.4 Deny.

4.5 Deny.

4.6 Deny.

4.7 Deny.

4.8 Deny.

4.9 Deny for lack of information.

V. CAUSES OF ACTION

A. Negligence

5.1 Weyerhaeuser re-alleges and incorporates herein by reference its answers to the preceding paragraphs.

5.2 Deny.

5.3 Deny.

5.4 Deny.

1 **B. Trespass**

2 5.5 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
3 the preceding paragraphs.

4 5.6 Deny.

5 **C. Tortious Interference with Contractual Relations and Business Expectancy**

6 5.7 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
7 the preceding paragraphs.

8 5.8 Deny.

9 **D. Conversion**

10 5.10 (sic) Weyerhaeuser re-alleges and incorporates herein by reference its
11 answers to the preceding paragraphs.

12 5.11 Deny.

13 **E. Shoreline Management Act of 1971**

14 5.12 Weyerhaeuser re-alleges and incorporates herein by reference its answers to
15 the preceding paragraphs.

16 5.13 Deny.

17 **VI. JURY DEMAND**

18 6.1 No response to paragraph 6.1 of the Complaint is required.
19

20 **VII. RESERVATION OF RIGHTS**

21 7.1 No response to paragraph 7.1 of the Complaint is required.
22

23 **VIII. DAMAGES**

24 8.1 Deny.

25 **AFFIRMATIVE DEFENSES**

26 Weyerhaeuser asserts the following affirmative defenses:

- 27 1. Failure to state a claim upon which relief can be granted;
28 2. Plaintiff's claims are barred by RCW 76.09.330;

Pfau Cochran Vertefis Amala
JUN 13 2011
Tacoma Office

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THE HONORABLE BRIAN D. GAIN

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM RALPH, individually,
Plaintiff,
v.
WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,
Defendants.

No. 10-2-42012-6 KNT

**DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION**

I. RELIEF REQUESTED

Defendants bring this motion, pursuant to Civil Rule 12(h)(3), to dismiss this case because this Court lacks subject matter jurisdiction. Plaintiff commenced this action in King County to recover damages for injury to his property from flooding in Lewis County allegedly caused by defendants' actions. All of plaintiff's injuries arise from this flooding. However, Washington law vests exclusive subject matter jurisdiction over this action in Lewis County Superior Court. Consequently, because this Court lacks subject matter jurisdiction, this lawsuit should be dismissed.

*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 1*

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

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II. STATEMENT OF FACTS

Plaintiff owns real property located in Lewis County, Washington. Complaint ¶ 2.1. Defendants own timberlands property in Lewis County upon which they conduct forest practices (including harvesting trees). Complaint ¶¶ 1.2, 2.2-2.3. Plaintiff alleges that defendants engaged in negligent forest practices that contributed to flooding, causing damage to plaintiff's property. Complaint ¶ 1.2, 5.2.

This case is one of five filed in King County Superior Court arising from the same flood, brought by similarly situated plaintiffs seeking damages for injury to their respective real property. In *Davis et al. v. State of Washington Department of Natural Resources et al.*, King County Superior Court No. 10-2-42010-0 KNT, assigned to Judge James Cayce, defendants moved for dismissal on the same grounds identified in this motion. Judge Cayce granted defendants' motion for dismissal by order dated June 9, 2011. For the Court's convenience, a copy of Judge Cayce's order is attached to this motion as Exhibit A.

III. STATEMENT OF ISSUE

Plaintiff alleges that his real property, located in Lewis County, was damaged by flooding caused by defendants' negligent or otherwise tortious conduct. Plaintiff commenced this action in King County Superior Court to recover his damages. In light of RCW 4.12.010, which requires actions involving injury to real property to be brought in the county where such property is located, should this action be dismissed because this Court lacks subject matter jurisdiction?

1 Puyallup River that flooded the Tacoma Meat Company's real property (located in Pierce
2 County). 104 Wash. at 269. The plaintiff properly commenced the action in Pierce County
3 Superior Court, and defendant King County sought a change of venue, which was denied. *Id.*
4 King County sought a writ of mandamus compelling Pierce County Superior Court to change
5 venue. *Id.* The Supreme Court denied the writ, holding that an action for negligent injury to
6 real property in which the plaintiff seeks money damages is local in nature, and may only be
7 properly commenced in the county in which the property is located. 104 Wash. at 276.
8

9
10 This action arises from the flooding of plaintiff's real property located in Lewis
11 County. Plaintiff seeks damages for injuries to his real property caused by this flooding.
12 Consequently, RCW 4.12.010(1) applies to this case and vests sole jurisdiction over this
13 action in Lewis County Superior Court. This Court should dismiss this action for lack of
14 subject matter jurisdiction.
15

16 **B. THE COURT MAY NOT TRANSFER VENUE TO LEWIS COUNTY.**

17 Plaintiff may argue that the Court may cure this jurisdictional defect by transferring
18 venue to Lewis County. This argument lacks merit. A court lacking subject matter
19 jurisdiction may do nothing but enter an order of dismissal. *Howlett v. Weslo, Inc.*,
20 90 Wn. App. 365, 368, 951 P.2d 831 (1998); *see also Apex Mercury Mining*,
21 24 Wn.2d at 409. A court may transfer venue only after the action has been properly
22 commenced in a court with subject matter jurisdiction over the action:
23

24 Actions instituted in the proper county may be transferred to another county
25 for trial if sufficient cause be shown therefor. When a cause is transferred for
26 trial, the court to which the transfer is made has complete jurisdiction to
27 determine the issues in the case.
28

1 *Apex Mercury Mining*, 24 Wn.2d at 409; see also *State v. Super. Ct. of King County*,
2 82 Wn.2d 356, 360, 144 P. 291 (1914) (transfer of venue from King County to Chelan County
3 did not destroy jurisdiction where the action was properly commenced in King County).
4

5 In this case, plaintiff was required to commence this action in Lewis County Superior
6 Court. However, plaintiff disregarded the jurisdictional requirements of RCW 4.12.010(1),
7 which cannot be cured by a transfer of venue. The only remedy available to this Court is to
8 dismiss this action for lack of subject matter jurisdiction.
9

10 **C. PARTIES MAY NOT WAIVE SUBJECT MATTER JURISDICTION.**

11 Plaintiff may argue that defendants somehow waived their objection to subject matter
12 jurisdiction. However, subject matter jurisdiction may not be waived under any
13 circumstances. *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit County*,
14 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (“While litigants, like the cities involved here, may
15 waive their right to assert a lack of *personal* jurisdiction, litigants may not waive *subject*
16 *matter* jurisdiction.”) (emphasis in original). Consequently, defendants cannot waive their
17 objection to subject matter jurisdiction.
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28 *Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 5*

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VI. CONCLUSION

RCW 4.12.010(1) vests sole subject matter jurisdiction over this action in Lewis County Superior Court because Lewis County is where plaintiff's injured real property is located. Plaintiff disregarded this requirement and commenced this action in King County Superior Court. This Court must dismiss this action for lack of subject matter jurisdiction.

DATED this 13th day of June, 2011.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Louis D. Peterson

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Michael R. Scott, WSBA #12822
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Attorneys for Defendant

Green Diamond Resource Company

ND: 11100.183 4847-1781-5561v1

*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 6*

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THE HONORABLE JAMES CAYCE

FILED
KING COUNTY, WASHINGTON
JUN 09 2011
SUPERIOR COURT CLERK
BY STEPHANIE WALTON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CONNIE DAVIS, personally; SPENCER
DAVIS, personally; and DIRTY THUMB
NURSERY, a Washington State sole
proprietorship,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES;
WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

No. 10-2-42010-0 KNT

^{2 DC}
~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

THIS MATTER came before the Court on Defendants' Motion to Dismiss for Lack of
Subject Matter Jurisdiction ("Motion"). The Court reviewed the Motion, ^{and response} ~~or~~ ^{JDC} ~~JDC~~

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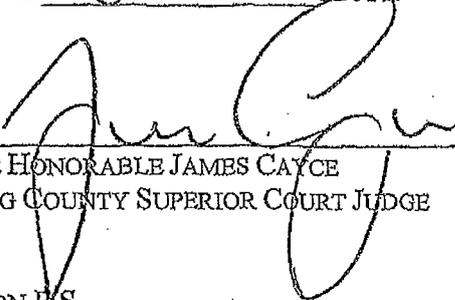
*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 1*

EXHIBIT A

HILLIS CLARK MARTIN & PETERSON P.S.
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1 reply thereto, and the records and files herein. In light of the foregoing, IT IS HEREBY
2 ORDERED that Defendants' Motion is GRANTED.

3
4 DONE THIS 9th day of JUNE, 2011.

5
6
7 
8 THE HONORABLE JAMES CAYCE
9 KING COUNTY SUPERIOR COURT JUDGE

10 Presented by:

11 HILLIS CLARK MARTIN & PETERSON P.S.

12 By s/ Louis D. Peterson

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*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 2*

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Proposed Order Granting Motion to Dismiss - Davis.docx

*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 3*

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THE HONORABLE BRIAN GAIN

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR LEWIS COUNTY

WILLIAM RALPH, individually,

Plaintiffs,

vs.

WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

NO. 10-2-42012-6 KNT

PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION
TO DISMISS FOR LACK OF
SUBJECT MATTER
JURISDICTION

HEARING DATE: June 17, 2011

I. RELIEF REQUESTED

In *Young v. Clark*, 149 Wash.2d 130 (2003), 65 P.3d 1192 (2003) the Washington State Supreme Court, en banc, eliminated earlier confusion about the subject matter jurisdiction of Washington's superior courts. Overruling and reversing previous case law, the Court unanimously struck down a legislatively-created, jurisdiction limiting statute (RCW 4.12.020) as violative of article IV, section 6 of the state constitution. See *Young*, 149 Wash.2d at 133. "The language of the constitution is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts *universal original jurisdiction*." (emphasis added) *Id.* at 134, quoting *Moore v. Perrot*, 2 Wash. 1, 4, 25 P. 906 (1891). The

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION - 1 of 12

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Court went on to strike down jurisdictional limits from a similarly restrictive statute, as well. *Id.* “[T]he filing requirements of RCW 36.01.50 relate only to venue, not to the trial court’s subject matter jurisdiction.” *Id.*, quoting *Shoop v. Kittitas County*, 149 Wash.2d 29, 37, 65 P.3d 1194 (2003).

Defendants’ motion asks this court to similarly violate the state constitution’s article IV, section 6, by unlawfully treating RCW 4.12.010 as a statutorily superseding limit to the superior court’s constitutionally-defined subject matter jurisdiction. Plaintiffs’ assert that this Court must decline Defendants’ invitation and deny the motion to dismiss for lack of subject matter jurisdiction.

Even if this Court was to ignore the clear guidance of *Young v. Clark* regarding the superior court of King County’s subject matter jurisdiction in this case, Plaintiffs further submit that the damages at issue here stem from tortious and illegal conduct including negligence, conversion and trespass, which amount to personal interests and are therefore transitory in nature and not limited to “injuries to real property” as envisioned by RCW 4.12.010.

And finally, if the court were to find elements of Plaintiffs’ claims so unique to the property that a judicial presence within the same county as the property is essential, then the least restrictive and the only constitutional option would be to change venue, rather than improperly entering dismissal for lack of subject matter jurisdiction on all claims.

II. STATEMENT OF FACTS

For the purposes of the underlying motion, the facts contained within the Plaintiffs’ complaint are not in material dispute. The following is a recitation of those averred facts relevant to the instant motion.

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IV. EVIDENCE RELIED UPON

As the underlying facts are not in dispute, Plaintiffs opposition relies on the pleadings already filed with this court, along with the Declaration of Darrell L. Cochran and the exhibit attached to it.

V. AUTHORITY

A. Defendants Motion Must Be Denied Because the State Constitution Controls, Not RCW 4.12.010, Vesting Universal Original Jurisdiction with All State Superior Courts.

“The superior court shall ...have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” WASH. CONST. art. IV. Thus, the state constitution, **not the legislature**, gives the superior courts universal original jurisdiction. *Id.*; *Young v. Clark*, 149 Wash.2d at 133-34. The legislature is empowered only to “carve out” the limited jurisdiction of inferior courts. *Young v. Clark*, 149 Wash.2d at 133-34. Otherwise, the superior court retains original jurisdiction in all cases and over all proceedings. WASH. CONST. art. IV, § 6; *Clark* at 133.

Young v. Clark required the state Supreme Court to analyze the inconsistencies of RCW 4.12.020(3), which provides a motor vehicle accident plaintiff “the option of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action,” with the express grant of universal original jurisdiction to the state’s superior courts accorded in article IV, section 6 of the Washington state constitution. *Id.* at 134. In determining whether the legislature’s authority to limit subject matter jurisdiction as among superior courts violates article IV, section 6 of the state constitution, the Court held, “Our previous interpretation of RCW 4.12.020 construed the statute to limit subject matter jurisdiction as among superior courts.

1 So understood, the statute violates article IV, section 6 of the state constitution.” *Id.*

2 Defendants’ motion would require this court to ignore the same constitutional
3 violation the Supreme Court forbade in *Young v. Clark*, and instead create an impermissible
4 legislatively-created subject matter limitation from RCW 4.12.010. Defendants cite Judge
5 James Cayce’s ruling of June 9 in *Davis v. DNR*, but they do so without mention of a court’s
6 obligation to construe statutes consistently with the constitution. *See id.*, *State v. Clausen*,
7 160 Wash. 618, 632, 295 P. 751 (1931). Plaintiffs urge this Court to follow the plain meaning
8 of the constitution’s clear language on this issue and deny Defendants’ Motion to Dismiss for
9 Lack of Subject Matter Jurisdiction. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108
10 Wash.2d 679, 706, 743 P.2d 793 (1987) (“Where the language of the constitution is clear, the
11 words used therein should be given their plain meaning.”).
12

13
14 **B. Defendant’s Motion Should Also Be Denied Because Plaintiffs’ Action is**
15 **Transitory in Nature as Seeking Primarily Monetary Damages for Personal**
16 **Interests to Both Real and Personal Property.**

17 Washington courts have long recognized the power of a court to determine personal
18 interests in real property located outside the immediate jurisdiction. *See Silver Surprise, Inc.*
19 *v. Sunshine Mining Co.*, 74 Wn.2d 519, 445 P.2d 334 (1968). The courts acknowledge the
20 distinction between jurisdiction to adjudicate title to land and jurisdiction to settle the parties’
21 personal interests in real estate. (“No one would question that an action brought to try the
22 naked question of title to land must be brought in the state where the land is situate. However,
23 where the basis of the action is transitory and one over which the court has jurisdiction, the
24 court may hear and determine the action even though a question of title to foreign land may be
25 involved, and even though the question of title may constitute the essential point on which the
26 case depends.”) *Id.* at 526. For example, while a superior court lacks jurisdiction to directly

1 affect title to real property located in another country, the court does possess jurisdiction to
2 indirectly affect title to such property by apportioning interests among individuals over whom
3 it has personal jurisdiction. *See In Re the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d
4 959 (2008) (determining personal interests in real property located in Poland pursuant to a
5 marriage dissolution).

6
7 Washington's Supreme Court has routinely rejected jurisdictional challenges where
8 personal interests in real property have been at stake. *See id.* (affirming power of
9 Washington court to adjudicate parties' interests in Idaho real estate in a breach of contract
10 claim); *Donaldson*, 40 Wn.2d at 251 (affirming power of Washington court to adjudicate
11 parties' interests in California real estate in a partnership dissolution); *Elsom v. Tefft*, 140
12 Wash. 586, 591, 250 P. 346 (1926) (affirming power of Washington court to adjudicate
13 parties' interests in mining claims located in British Columbia in an action brought to enforce
14 a trust); *Smith v. Fletcher*, 102 Wash. 218, 220, 173 P. 19 (1918) ("It is a universal rule that
15 the courts of one state cannot pass judgment on the title to land in another state. But, where
16 the action is aimed at the personal relations of parties in connection with property beyond the
17 jurisdiction, it is well recognized that courts may afford relief."); *Rosenbaum v. Evans*, 63
18 Wash. 506, 508-09, 115 P. 1054 (1911) ("a suit for the specific performance of a contract to
19 convey real estate is a transitory one . . . [which] affects the parties to the action personally,
20 but does not determine the title") (collecting cases); *Sheppard v. Coeur d'Alene Lumber Co.*,
21 62 Wash. 12, 15, 112 P. 932 (1911) ("[W]hen the title is incidental the court possessing
22 jurisdiction of the contract which is in its nature transitory, may even inquire into the very title
23 let the lands lie where they may." (quoting *Henwood v. Cheeseman*, 3 Serg. & Rawle 500,
24 504 (Pa. 1817))); *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909)

1 (recognizing court's power to establish and enforce a trust in real property located outside
2 state).

3 Here, the trial court's jurisdiction over the parties and this action clearly encompasses
4 the power to adjudicate the parties' personal interests in the real property located in Lewis
5 County. The subject matter of the suit -- negligence, trespass, tortious interference with
6 contractual relations and business expectancy, conversion and inverse condemnation -- is an
7 action in which a court with personal jurisdiction over the defendants, like King County here,
8 also has jurisdiction to determine the parties' relative interests in all property brought to the
9 court's attention. *See Kowalewski*, 163 Wn.2d at 550.

11 In addition, Washington law is clear, actions for monetary damages to real property
12 are transitory in nature and may be brought in the county in which the defendant resides.
13 *Shelton v. Farkas*, 30 Wn. App. 549, 553, 635 P.2d 1109 (1981) ("[t]he term 'transitory
14 action' encompasses those actions which at common law might be tried wherever personal
15 service can be obtained as opposed to in rem proceedings which are local in nature"). Actions
16 described in RCW 4.12.010, which must be brought in the county where the property is
17 located, are "local", while "transitory" actions are those described in RCW 4.12.025, which
18 may be brought where the defendant resides. *See State ex rel. U.S. Trust Co. v. Phillips*, 12
19 Wn.2d 308, 315, 121 P.2d 360 (1942). Actions for monetary recovery are in personam and
20 are transitory in nature. Here, Plaintiffs' action against defendants is solely for monetary
21 damages, is transitory in nature, and may be brought in King County, where the Defendants
22 reside,
23

24 Contrary to Defendants' suggestion, Plaintiffs' claims are transitory in nature. In
25 *Washington State Bank v. Medalia Healthcare L.L.C.*, the Washington Court of Appeals held
26 that an action where the plaintiff seeks exclusively monetary recovery is in personam and

1 transitory in nature and is therefore not subject to the requirement of RCW 4.12.010 that local
2 actions be commenced in the county where the property is located. 96 Wn. App. 547, 558,
3 984 P.2d 1041, 1047 (1999). The Court's holding is consistent with the general trend to limit
4 the applicability of the local action rules. See *Andrews v. Cusin*, 65 Wn.2d 205, 207, 396 P.2d,
5 155 (1964) ("rules or statutes which require that actions for injuries to land be brought at the
6 situs of the land have been severely criticized, as having no sound basis in reason"); *Mueller*
7 *v. Brunn*, 313 N.W.2d 171, 796-97 (Wis. 1982) (stating that "courts wherever possible have
8 consistently construed actions concerning real estate to be transitory rather than local" and
9 that the trend is toward making all money damage actions transitory). Here, Plaintiffs' claims
10 are transitory in nature as they solely seek monetary damages for damages caused by the
11 defendants. Title to or disposition of Plaintiffs' land is not in question or dispute.

12
13 Moreover, as Plaintiffs' claims are transitory in nature, they may be brought where the
14 defendants reside, King County, in accordance with RCW 4.12.025. In *McLeod v. Ellis*, the
15 Washington Supreme Court found that an action for the conversion of timber seeking the
16 value of the trees was transitory and could be brought in a county other than the one in which
17 the land where the trees were harvested was located. 2 Wash. 117, 122, 26 P. 76 (1891)
18 (finding that the complaint sufficiently pleaded a claim for conversion as opposed to a claim
19 for injury to real property). In *McLeod*, the defendant cut down, removed, and disposed of
20 trees located on the plaintiff's property; thus, causing injuries to the real property valued at
21 approximately \$14,000. *Id.* The *McLeod* defendant challenged the court's jurisdiction over
22 the claim as the suit was not filed in the same county in which the property was located. The
23 Washington Supreme Court concluded that the plaintiff's action was one for the value of his
24 trees without any claim for injury to the land. Here, Plaintiffs' have similar claims of damage
25 to real property that does not constitute "injury to the land" as outlined in RCW 4.12.010.
26

1 Plaintiffs' real property damage includes flood damage to their residences, outbuildings, and
2 business property.

3
4 Finally, Washington Courts have not limited this allowance for transitory claims to
5 conversion actions. In *Silver Surprise, Inc. v. Sunshine Mining Co.*, the plaintiff brought a
6 breach of contract claim concerning an exchange of conveyances and mining of property
7 located in Idaho. 74 Wn.2d 519, 520, 445 P.2d 334 (1968). The defendant asserted an
8 affirmative defense of adverse possession. *Id.* at 521. The trial court dismissed for lack of
9 subject matter jurisdiction because it viewed the subject of the action to be the determination
10 of the title to the property in Idaho. *Id.* at 522. The Washington Supreme Court reversed
11 noting that the contract action was transitory and recognizing that "[t]he view is generally
12 maintained that where the relief sought acts upon the party personally and does not require the
13 court to deal directly with 'the real estate itself', the proceeding need not be maintained in the
14 state or county where the property is situate." *Id.* at 525-527. The court held that "where the
15 basis of the action is transitory and one over which the court has jurisdiction, the court may
16 hear and determine the action even though a question of title to foreign land may be involved,
17 and even though the question of title may constitute the essential point on which the case
18 depends." *Id.* at 526. Here, the Plaintiffs' are solely seeking monetary damages. The Court
19 will not have to deal directly with the real property that was damaged as a result of the
20 negligence of the defendants. Moreover, in *Silver Surprise*, the plaintiff's claim indirectly
21 dealt with the determination of the title of real property in Idaho; yet the Washington Supreme
22 Court held the plaintiff's claim was transitory and jurisdiction was proper in Washington.
23 Here, title to the real property is not a question to be decided. Again, Plaintiffs' are primarily
24 seeking monetary damages, and other relief not associated with Plaintiffs' real property.
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Here, Plaintiffs state five causes of action targeted against Defendants in their complaint. Each can be characterized as personal to them, rather than relating exclusively to the property. First, Plaintiffs pleaded Negligence, a transitory action, remedied by general and special damages. Second, the Plaintiffs pleaded Trespass, which may appear as localized, but as the trespass was temporary (ie: the waters and debris receded), the Plaintiffs did not request the normal remedy, ejection. Instead, they seek money damages for the effect of the trespass. Third, the Plaintiffs pleaded conversion, which has been held to constitute a transitory action under RCW 4.12.010. *Wash. State Bank*, 96 Wn. App. at 558. Fourth, the Plaintiffs pleaded tortious interference with business expectancy, which is personal to the Plaintiffs and are remedies solely by monetary damages equal to lost profits. Fifth and finally, Plaintiffs pleaded the Shoreline Management Act of 1971, which relates exclusively to the actions of the defendant on its own property, and does not affect the rights to property contemplated in in rem jurisdiction.

C. The Court Has a Less Restrictive, Constitutional Option to Recognize the "Venue Only" Character of RCW 4.12.010.

If, and only if, the court were to find some elements of Plaintiffs' personal, transitory interests in real property so unique to the property's physical location that resolution of the claims could only be properly adjudicated in the county in which the property exists, then the only constitutionally permissible option would be to change the venue. Plaintiffs submit that venue is proper in King County. However, if the Court believes the property's location is so particular to the claims asserted, then a recognition of the Supreme Court's "venue-only" interpretation of statutory provisions of RCW 4.12.010 prescribed by the *Young v. Clark* opinion would require the denial of Defendants' motion to dismiss for lack of subject matter jurisdiction and instead a separate consideration of the case's most appropriate venue.

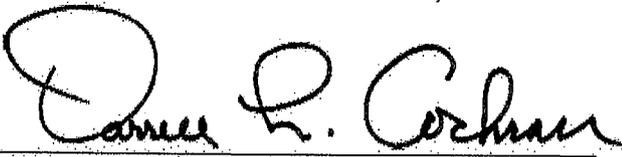
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VI. CONCLUSION

Defendants' motion must be denied because the plain language of the state constitution confers original jurisdiction to the King County Superior Court. A unanimous state Supreme Court has ruled unequivocally that filing requirements, like those statutorily prescribed in RCW 4.12.010, pertain only to venue questions, not to subject matter jurisdiction. In addition, the Plaintiffs' transitory personal interests damaged as a result of Defendants' unlawful and tortious acts are clearly within this court's power despite the physical location of the property in question. In the alternative, if the court finds certain elements of Plaintiffs claims to be local interests, unique to the properties' physical location, then venue change, not dismissal of the action as a whole, is the only appropriate remedial action.

Dated this 17th day of June, 2011.

PFAU COCHRAN VERTETIS AMALA, PLLC

By 

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darrell@pcvalaw.com
Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I, **Ami Erpenbach**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served via E-Service, and by Facsimile to Attorney Mark Jobson, indicated below, by directing delivery to the following individuals:

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DATED this 17th day of June, 2011.

Ami Erpenbach
Legal Assistant to Darrell L. Cochran

4827-6891-0601, v. 1

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THE HONORABLE BRIAN D. GAIN

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM RALPH, individually,

Plaintiff,

v.

WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

No. 10-2-42012-6 KNT

**REPLY IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction*

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1 In his response, plaintiff contends that the legislature's jurisdictional restriction in
2 RCW 4.12.010(1) is unconstitutional, and that all claims for damages are transitory such that
3 the claims may be brought in any county where a defendant resides. In doing so, plaintiff
4 asks this Court to disregard long established controlling precedent and the legislature's
5 unambiguous mandate: actions for injuries to real property "shall be commenced" in the
6 county where the real property is located. RCW 4.12.010(1); *Cugini v. Apex Mercury Mining*
7 *Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946). Plaintiff disregarded this requirement when he
8 commenced this action in King County to recover damages for injury to his real property in
9 Lewis County, and now invites the Court to do the same. The Court should decline plaintiff's
10 invitation and dismiss this action for lack of subject matter jurisdiction.

11 **A. THE JURISDICTIONAL REQUIREMENTS OF RCW 4.12.010(1) ARE**
12 **CONSTITUTIONAL.**

13 Plaintiff relies upon *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003), to attempt
14 to escape from RCW 4.12.010(1)'s jurisdictional requirements. However, *Young* interpreted a
15 different statute, RCW 4.12.020(3), and involved an action to recover damages for personal
16 injury, which are transitory in nature, *Mendoza v. Neudorfer Engineers, Inc.*,
17 145 Wn. App. 146, 156, 185 P.3d 1204 (2008). *Young*, 149 Wn.2d at 132-133. Therefore,
18 *Young* does not address the Supreme Court's holding in *Apex Mercury Mining* regarding
19 RCW 4.12.010(1) and jurisdiction over actions for injuries to real property.

20 Moreover, plaintiff's constitutional argument requires the Court to read article IV
21 section 6 of the state constitution in isolation, ignoring language used in the rest of the
22 constitution. Section 6 vests "the superior court" with original jurisdiction over cases "in
23 which the demand or the value of the property in controversy amounts to three thousand
24 dollars or as otherwise determined by law," and also "in all cases and of all proceedings in
25 which jurisdiction shall not have been by law vested exclusively in some other court."
26 Const. art. IV, § 6. Though this section does vest jurisdiction in *the* superior court, it does not
27 describe *which* superior court. The state constitution uses "the superior court" to refer to the
28 superior court for a particular county. See Const. art. IV, § 5 (election of judges to the

1 superior court for each county). In contrast, the constitution uses “superior courts” when
2 discussing all superior courts. *See* Const. art. IV, § 1 (“The judicial power of the state shall be
3 vested in a supreme court, *superior courts*, justices of the peace, and such inferior courts at
4 the legislature may provide.”), §11 (“The supreme court and *the superior courts* shall be
5 courts of record, and the legislature shall have power to provide that any of the courts of this
6 state, excepting justices of the peace, shall be courts of record.”), § 13 (“The judges of the
7 supreme court and judges of *the superior courts* shall severally at stated times, during the
8 continuance in office, receive for their services the salaries prescribed by law therefor, which
9 shall not be increased after their election, nor during the term for which they shall have been
10 elected.”), § 24 (“The judges of *the superior courts*, shall from time to time, establish uniform
11 rules for the governance of *the superior courts*.”) (emphasis added).

12 According to authority cited by plaintiff, “Where the language of the constitution is
13 clear, the words used therein should be given their plain meaning.” *City of Tacoma v.*
14 *Taxpayers of City of Tacoma*, 108 Wn.2d 679, 706, 743 P.2d 793 (1987). Section 6
15 authorizes the legislature to vest jurisdiction for actions involving injury to real property only
16 in the superior court for the county where the property is located. Consistent with this
17 authority, the Supreme Court has upheld the jurisdictional nature of RCW 4.12.010(1).
18 *Apex Mercury Mining*, 24 Wn.2d at 409.

19 **B. ACTIONS SEEKING DAMAGES FOR INJURY TO REAL PROPERTY ARE LOCAL,
20 NOT TRANSITORY.**

21 Plaintiff’s contention that all actions for damages are transitory ignores controlling
22 precedent. In fact, actions seeking damages for injury to real property are local in nature, and
23 must be brought in the county where the property is located. *State ex rel. King County v.*
24 *Superior Court of Pierce County*, 104 Wash. 268, 276, 176 P. 352 (1918). To determine the
25 nature of an action, the Court should look to the subject matter of the complaint. *Silver*
26 *Surprise, Inc. v. Sunshine Min. Co.*, 74 Wn.2d 519, 522, 445 P.2d 334 (1968) (examining
27 plaintiff’s complaint and determining that it was “patently a contract action”).
28

1 Here, the subject matter of plaintiff's complaint is plainly the injury caused to his real
2 and personal property arising from flooding of his real property. Plaintiff seeks the same
3 relief sought by the plaintiff in *King County* – in this case, damages for injury to real property
4 located in Lewis County. The fact that plaintiff seeks only money damages does not convert
5 this action from local to transitory.

6 **C. PLAINTIFF RELIES UPON INAPPOSITE LEGAL AUTHORITY.**

7 Plaintiff does not dispute that *King County* holds that actions for injury to real
8 property are local, not transitory. Instead, plaintiff cites three categories of cases to support
9 his erroneous contention that all actions for damages are transitory. Cases in the first category
10 hold that actions for breach of contract are transitory. Cases in the second category hold that
11 actions for tortious injury to personal property are transitory. Cases in the third category hold
12 that equitable actions are transitory. None addresses the Court's jurisdictional defect in this
13 case, where plaintiff seeks damages for injury to his real property.

14 **1. Actions for breach of contract are transitory.**

15 Plaintiff cites to *Shelton v. Farkas* in support of the proposition that actions for
16 damages for injury to real property are transitory. Response at 8. However, *Shelton* had
17 nothing to do with real property. In *Shelton*, the plaintiff (residing in King County) brought
18 an action for breach of contract for the sale of a violin in King County Superior Court against
19 a defendant residing in Kittitas County. 30 Wn. App. 549, 550-52, 635 P.2d 1109 (1981).
20 Upon defendant's request, the King County Superior Court transferred venue to Kittitas
21 County. *Id.* at 552. On appeal, the plaintiff argued that the King County Superior Court erred
22 by transferring venue. *Id.* at 553. The Court of Appeals disagreed, holding that an action for
23 breach of contract is transitory and that venue for such an action may lie where one of the
24 defendants resides. *Id.* at 553-54. *Shelton* did not involve a claim for damages from injury to
25 real property, and is inapposite to the issue at hand.

26 Plaintiff's other authority is similarly inapplicable. *State ex rel. U.S. Trust Co. v.*
27 *Phillips* held that an action for breach of contract (in that case, for the sale of timber) is
28 transitory, which may be brought in the county where one of the defendants resides.

1 12 Wn.2d 308, 315, 121 P.2d 360 (1942). *Silver Surprise* held that an action for breach of
2 contract (in that case, for the mining of land in Idaho) is transitory, even where the defendant
3 asserts ownership of real property as a defense. 74 Wn.2d at 522-24. *Andrews v. Cusin* held
4 that an action for breach of contract (in that case, express and implied warranties for potato
5 seedlings) is transitory and may be brought where the defendant resides. 65 Wn.2d 205, 209,
6 396 P.2d 155 (1964). *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Wash. 12, 112 P. 932
7 (1911), was an action for breach of lease to recover unpaid rent. None of these cases address
8 the issue now before the Court: whether this Court has subject matter jurisdiction over an
9 action for damages for injury to real property in Lewis County.

10 **2. Actions for tortious injury to personal property, unrelated to**
11 **injuries to real property, are transitory.**

12 Plaintiff overstates the holding of *Washington State Bank v. Medalia Healthcare,*
13 *L.L.C.* Response at 8. In that case, a lender sued the purchaser of medical equipment
14 (in which the lender had a security interest) for conversion, claiming damages in the amount
15 of the value of the equipment. *Washington State Bank v. Medalia Healthcare L.L.C.*,
16 96 Wn. App. 547, 548, 984 P.2d 1041 (1999). The court stated, “[W]e hold that a conversion
17 action where the plaintiff seeks exclusively monetary recovery is in personam and transitory
18 in nature and is therefore not subject to the requirement of RCW 4.12.010(2) that local actions
19 be commenced in the county where the personal property is located.” *Id.* at 558. *Medalia* is
20 inapposite – it relates only to actions for damages for conversion of personal property and did
21 not relate to real property in any way.

22 *McLeod v. Ellis* does not help plaintiff. In *Apex Mercury Mining*, the Supreme Court
23 described its holding in *McLeod* as follows: “[*McLeod*] held that an action commenced in the
24 county other than that where the property was located would not give the court jurisdiction.”
25 24 Wn.2d at 404. In *McLeod*, the plaintiff’s claim was for conversion of timber, not for injury
26 to real property, and was therefore transitory. 2 Wash. at 122. Likewise, the plaintiff’s action
27 for negligent injury to personal property in *Andrews* was held to be transitory.
28 65 Wn.2d at 209. None of these cases stand for the proposition that this Court may exercise

1 subject matter jurisdiction over an action seeking damages for injury to real property in Lewis
2 County.

3 **3. Equitable relief is transitory.**

4 Plaintiff's remaining authority establishes that actions in equity are transitory. *In re*
5 *the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008) (marriage dissolution);
6 *Donaldson v. Greenwood*, 40 Wn.2d 238, 232 P.2d 1038 (1952) (enforcement of equitable
7 trust); *Elsom v. Tefft*, 140 Wash. 586, 250 P. 346 (1926) (enforcement of trust in equity);
8 *Rosenbaum v. Evans*, 63 Wash. 506, 115 P. 1054 (1911) (equitable decree to reform a deed);
9 *State ex. rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909) (enforcement of
10 equitable trust). These cases are inapposite because plaintiff does not seek equitable relief.

11 **D. LACKING SUBJECT MATTER JURISDICTION, THIS COURT MAY NOT**
12 **TRANSFER VENUE.**

13 Plaintiff does not dispute that if this Court lacks subject matter jurisdiction, it may
14 only enter an order of dismissal. *Young*, 149 Wn.2d at 133 ("When a court lacks subject
15 matter jurisdiction in a case, dismissal is the only permissible action the court may take.").
16 Nonetheless, plaintiff requests a transfer of venue to Lewis County as an alternative form of
17 relief. Response at 11. Absent subject matter jurisdiction, this Court should disregard
18 plaintiff's request for alternative venue, and should dismiss this action.

19 **E. CONCLUSION**

20 This action arises from the same storm, in the same county, involving a similarly
21 situated plaintiff, and asserts the same causes of action as those in *Davis et al. v. Washington*
22 *State Department of Natural Resources et al.*, King County Superior Court No. 10-2-42010-0
23 KNT, assigned to Judge James Cayce. Judge Cayce granted defendants' motion for dismissal
24 on the same grounds.¹ RCW 4.12.010(1) and controlling precedent vests sole jurisdiction
25 over this action in Lewis County Superior Court. This Court should dismiss this action.

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28 ¹ The plaintiffs in *Davis* moved for reconsideration of Judge Cayce's decision on June 17, 2011.

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DATED this 20th day of June, 2011.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Louis D. Peterson

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Green Diamond Resource Company

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be emailed and faxed to the last known address of all counsel of record.

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

DATED this 20th day of June, 2011, at Seattle, Washington.

s/ Suzanne Powers
Suzanne Powers

ND: 11100.183 4841-3565-9529v1

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction - 6*

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THE HONORABLE LEROY MCCULLOUGH

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WILLIAM RALPH, individually,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

NO. 11-2-05769-1KNT

DEFENDANT'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION

I. RELIEF REQUESTED

Defendant State DNR brings this motion, pursuant to Civil Rule 12(h)(3), to dismiss this case because this Court lacks subject matter jurisdiction. Plaintiff commenced this action in King County to recover damages for injury to his property located in Lewis County from flooding allegedly caused by defendant's actions. All of plaintiff's injuries arise from this flooding. However, Washington law vests exclusive subject matter jurisdiction over this action in Lewis County Superior Court. Because this Court lacks subject matter jurisdiction this lawsuit should be dismissed.

DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
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(360) 586-6300

1 II. STATEMENT OF FACTS

2 Plaintiff owns real property located in Lewis County, Washington. Complaint ¶ 2.1.
3 Defendant owns property in Lewis County upon which it conducts forest practices (including
4 harvesting trees) and also regulates forest practices on property owned by other private and
5 public entities. Complaint ¶¶ 1.2, 2.2-2.3. Plaintiff alleges that defendant engaged in negligent
6 forest practices that contributed to flooding, causing damage to plaintiff's property. Complaint
7 ¶ 1.2, 5.2.
8

9 Mr. Ralph filed a separate action based on the same facts naming as defendants
10 Weyerhaeuser Corporation and Green Diamond Corporation. King County Cause No. 10-2-
11 42012-6 KNT.¹
12

13 This case is one of five filed in King County Superior Court arising from the same
14 flood, brought by similarly situated plaintiffs seeking damages for injury to their respective
15 real property all of which is located in Lewis County. In *Davis et al. v. State of Washington*
16 *Department of Natural Resources et al.*, King County Superior Court No. 10-2-42010-0 KNT,
17 assigned to Judge James Cayce, defendants moved for dismissal on the same grounds
18 identified in this motion. Judge Cayce granted defendants' motion for dismissal by order dated
19 June 9, 2011. For the Court's convenience, a copy of Judge Cayce's order is attached to this
20 motion as Exhibit A.
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25 _____
26 ¹ The related action is assigned to the Honorable Brian D. Gain. Defendants in the related action have filed a motion to dismiss based on the same grounds as the present motion.

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III. STATEMENT OF ISSUE

Plaintiff alleges that his real property, located in Lewis County, was damaged by flooding caused by defendants' negligent or otherwise tortious conduct. Plaintiff commenced this action in King County Superior Court to recover his damages. In light of RCW 4.12.010, which requires actions involving injury to real property to be brought in the county where such property is located, should this action be dismissed because this Court lacks subject matter jurisdiction?

IV. EVIDENCE RELIED UPON

This motion is based upon plaintiff's complaint and all other documents on file with the Court in this action.

V. LEGAL AUTHORITY

Defendants seek dismissal of this action pursuant to Civil Rule 12(h)(3), which states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action."

A. The Court Lacks Subject Matter Jurisdiction Over This Action

Where an action involves injury to real property, only the court in the county where the property is located has jurisdiction over the action. RCW 4.12.010(1). The relevant statute (formerly codified at Rem. Rev. Statues § 204) states:

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated: (1)... for any injury to real property.

1 RCW 4.12.010(1). As the Supreme Court held in *Cugini v. Apex Mercury Mining, Co.*,
2 24 Wn.2d 401; 409, 165 P.2d 82 (1946), "The provisions of § 204 are jurisdictional in
3 character. Actions involving title or *injury to real property* may only be commenced in the
4 county in which the real property is situated. Otherwise, the action must be dismissed for want
5 of jurisdiction." (Emphasis added).
6

7 Even an action seeking only money damages for injury to real property, not involving
8 title to or possession of real property, must be brought in the county where the property is
9 located. *State ex rel. King County v. Superior Court of Pierce County*, 104 Wash. 268, 276,
10 176 P. 352 (1918). In that case, the plaintiff receiver of the Tacoma Meat Company sought
11 damages from defendants King County and Pierce County, alleging negligent diversion of the
12 Puyallup River that flooded the Tacoma Meat Company's real property (located in Pierce
13 County). 104 Wash. at 269. The plaintiff properly commenced the action in Pierce County
14 Superior Court, and defendant King County sought a change of venue, which was denied. *Id.*
15 King County sought a writ of mandamus compelling Pierce County Superior Court to change
16 venue. *Id.* The Supreme Court denied the writ, holding that an action for negligent injury to
17 real property in which the plaintiff seeks money damages is local in nature, and may only be
18 properly commenced in the county in which the property is located. 104 Wash. at 276.
19
20

21 This action arises from the flooding of plaintiff's real property located in Lewis
22 County. Plaintiff seeks damages for injuries to his real property caused by this flooding.
23 Consequently, RCW 4.12.010(1) applies to this case and vests sole jurisdiction over this action
24 in Lewis County Superior Court. This Court should dismiss this action for lack of subject
25 matter jurisdiction.
26

DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

4.

ATTORNEY GENERAL OF WASHINGTON
Torts Division
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1 **B. Application of RCW 4.92.010 Does Not Cure the Jurisdictional Defect**

2 Plaintiff may cite RCW 4.92.010 (providing for venue in actions against the State) in
3 response to defendants' motion. However, this statute does not apply to the jurisdictional issue
4 before the Court. First, RCW 4.92.010 relates to venue for actions against the State, not
5 jurisdiction. *Sim v. Wash. State Parks and Rec. Comm'n*, 90 Wn.2d 378, 382, 583 P.2d 1193
6 (1978) ("RCW 4.92.010 is a general venue statute"). Second, the venue requirements of RCW
7 4.92.010 act in harmony with the jurisdictional requirements of RCW 4.12.010(1), as RCW
8 4.92.010(3) authorizes venue in "the county where the real property that is the subject of the
9 action is situated." *See Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993) (statutes
10 must be harmonized where possible). Consequently, RCW 4.92.010 offers plaintiff no relief
11 from defendants' objection to subject matter jurisdiction.
12

13
14 **C. The Court may not Transfer Venue to Lewis County**

15 Plaintiff may argue that the Court may cure this jurisdictional defect by transferring
16 venue to Lewis County. This argument lacks merit. A court lacking subject matter jurisdiction
17 may do nothing but enter an order of dismissal. *Howlett v. Weslo, Inc.*, 90 Wn. App. 365, 368,
18 951 P.2d 831 (1998); *see also Apex Mercury Mining*, 24 Wn.2d at 409. A court may transfer
19 venue only after the action has been properly commenced in a court with subject matter
20 jurisdiction over the action:
21

22 Actions instituted in the proper county may be transferred to another county for
23 trial if sufficient cause be shown therefor. When a cause is transferred for trial,
24 the court to which the transfer is made has complete jurisdiction to determine
25 the issues in the case.
26

1 *Apex Mercury Mining*, 24 Wn.2d at 409; see also *State v. Super. Ct. of King County*, 82 Wn.2d
2 356, 360, 144 P. 291 (1914) (transfer of venue from King County to Chelan County did not
3 destroy jurisdiction where the action was properly commenced in King County).

4
5 In this case, plaintiff was required to commence this action in Lewis County Superior
6 Court. However, plaintiff disregarded the jurisdictional requirements of RCW 4.12.010(1),
7 which cannot be cured by a transfer of venue. The only remedy available to this Court is to
8 dismiss this action for lack of subject matter jurisdiction.

9
10 **D. Parties May Not Waive Subject Matter Jurisdiction**

11 Plaintiff may argue that defendants somehow waived their objection to subject matter
12 jurisdiction. However, subject matter jurisdiction may not be waived under any circumstances.
13 *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d
14 962 (1998) ("While litigants, like the cities involved here, may waive their right to assert a lack
15 of *personal* jurisdiction, litigants may not waive *subject matter* jurisdiction.") (emphasis in
16 original). Consequently, defendants cannot waive their objection to subject matter jurisdiction.
17

18 **VI. CONCLUSION**

19 RCW 4.12.010(1) vests sole subject matter jurisdiction over this action in Lewis
20 County Superior Court because Lewis County is where plaintiff's injured real property is
21 located. Plaintiff disregarded this requirement and commenced this action in King County
22 Superior Court. This Court must dismiss this action for lack of subject matter jurisdiction.
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DATED this 14th day of June, 2011.

ROBERT M. MCKENNA
Attorney General

By s/ Mark Jobson
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Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2011, I caused to be electronically filed the foregoing document with the Clerk of the Court using the King County E-filing system and served on counsel of record:

via ABC Legal Messenger to:

Mr. Darrell L. Cochran
Pfau Cochran Vertetis Kosnoff, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402

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

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/s/ Mark C. Jobson
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THE HONORABLE JAMES CAYCE

FILED
KING COUNTY, WASHINGTON
JUN 09 2011
SUPERIOR COURT CLERK
BY STEPHANIE WALTON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CONNIE DAVIS, personally; SPENCER
DAVIS, personally; and DIRTY THUMB
NURSERY, a Washington State sole
proprietorship,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES;
WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

No. 10-2-42010-0 KNT

JBC

~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

THIS MATTER came before the Court on Defendants' Motion to Dismiss for Lack of
Subject Matter Jurisdiction ("Motion"). The Court reviewed the Motion, ~~any~~ response ~~or~~ *JBC JAC*

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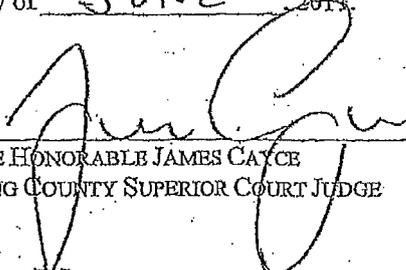
*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 1*

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EXHIBIT A

1 reply thereto, and the records and files herein. In light of the foregoing, IT IS HEREBY
2 ORDERED that Defendants' Motion is GRANTED.

3
4 DONE THIS 9th day of JUNE, 2011.

5
6
7 
8 THE HONORABLE JAMES CAYCE
9 KING COUNTY SUPERIOR COURT JUDGE

10 Presented by:

11 HILLIS CLARK MARTIN & PETERSON P.S.

12 By s/ Louis D. Peterson

13 Louis D. Peterson, WSBA #5776
14 Michael R. Scott, WSBA #12822
15 Alexander M. Wu, WSBA #40649
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*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 2*

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s/ Kelly P. Corr

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Proposed Order Granting Motion to Dismiss - Davis.docx

*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 3*

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1 Court went on to strike down jurisdictional limits from a similarly restrictive statute, as well.
2 *Id.* “[T]he filing requirements of RCW 36.01.50 relate only to venue, not to the trial court’s
3 subject matter jurisdiction.” *Id.*, quoting *Shoop v. Kittitas County*, 149 Wash.2d 29, 37, 65
4 P.3d 1194 (2003).

5
6 Defendants’ motion asks this court to similarly violate the state constitution’s article
7 IV, section 6, by unlawfully treating RCW 4.12.010 as a statutorily superseding limit to the
8 superior court’s constitutionally-defined subject matter jurisdiction. Plaintiffs’ assert that this
9 Court must decline Defendants’ invitation and deny the motion to dismiss for lack of subject
10 matter jurisdiction.

11 Even if this Court was to ignore the clear guidance of *Young v. Clark* regarding the
12 superior court of King County’s subject matter jurisdiction in this case, Plaintiffs further
13 submit that the damages at issue here stem from tortious and illegal conduct including
14 negligence, conversion and trespass, which amount to personal interests and are therefore
15 transitory in nature and not limited to “injuries to real property” as envisioned by RCW
16 4.12.010.

17
18 And finally, if the court were to find elements of Plaintiffs’ claims so unique to the
19 property that a judicial presence within the same county as the property is essential, then the
20 least restrictive and the only constitutional option would be to change venue, rather than
21 improperly entering dismissal for lack of subject matter jurisdiction on all claims.

22 II. STATEMENT OF FACTS

23 For the purposes of the underlying motion, the facts contained within the Plaintiffs
24 complaint are not in material dispute. The following is a recitation of those averred facts
25 relevant to the instant motion.
26

1 On December 3rd and 4th, 2007, rainfall triggered roughly 2,000 landslides on clear
2 cut and otherwise de-stabilized property on lands owned by the defendants. The millions of
3 tons of mud and debris deposited in the Chehalis River system displaced the water, causing
4 flooding of record proportion. Declaration of Darrell L. Cochran ("Cochran Declaration"),
5 Exhibit A. Plaintiffs' homes and property were destroyed by this flooding. Plaintiffs' homes
6 and businesses suffered extensive damage due to the flooding. Cochran Declaration, Exhibit
7 B. Their property was damaged, much of it ruined and some of it entirely washed away.
8 Cochran Declaration, Exhibit A and B.

9
10 Plaintiffs properly and timely brought their complaint in King County against King
11 County business residents, Weyerhaeuser and Green Diamond Resource Company, and joined
12 Defendant DNR in this venue under RCW 4.92.010, as an additional defendant. Cochran
13 Declaration. ¶6. Plaintiffs seek monetary damages for the amount of injury suffered as a
14 result of Defendants' unlawful and tortious conduct.

15 16 III. STATEMENT OF ISSUES

17 A. Whether subject matter jurisdiction for this action is proper in King County Superior
18 Court, in keeping with the unanimous Supreme Court opinion in *Young v. Clark*, 149
19 Wash.2d 130 (2003), 65 P.3d 1192 (2003), which found that only the state constitution can
20 determine original jurisdiction, and that legislatively created statutes, like RCW 4.12.010,
21 relate only to venue, not to the trial court's subject matter jurisdiction.

22
23 B. And in the alternative, whether the King County Superior Court has jurisdiction over
24 the instant action when the Plaintiffs seek a remedy of money damages arising out of injury to
25 real, personal, and business property, or "personal interests," but do not seek relief related to
26 the title or other disposition specific to the real property.

1 IV. EVIDENCE RELIED UPON

2 As the underlying facts are not in dispute, Plaintiffs opposition relies on the pleadings
3 already filed with this court, along with the Declaration of Darrell L. Cochran and the exhibit
4 attached to it.

5 V. AUTHORITY

6 **A. Defendants Motion Must Be Denied Because the State Constitution Controls,**
7 **Not RCW 4.12.010, Vesting Universal Original Jurisdiction with All State**
8 **Superior Courts.**

9 “The superior court shall ...have original jurisdiction in all cases and of all
10 proceedings in which jurisdiction shall not have been by law vested exclusively in some other
11 court.” WASH. CONST. art. IV. Thus, the state constitution, **not the legislature**, gives the
12 superior courts universal original jurisdiction. *Id.*; *Young v. Clark*, 149 Wash.2d at 133-34.
13 The legislature is empowered only to “carve out” the limited jurisdiction of inferior courts.
14 *Young v. Clark*, 149 Wash.2d at 133-34. Otherwise, the superior court retains original
15 jurisdiction in all cases and over all proceedings. WASH. CONST. art. IV, § 6; *Clark* at 133.

16 *Young v. Clark* required the state Supreme Court to analyze the inconsistencies of
17 RCW 4.12.020(3), which provides a motor vehicle accident plaintiff “the option of suing
18 either in the county in which the cause of action or some part thereof arose, or in the county in
19 which the defendant resides, or if there be more than one defendant, where some one of the
20 defendants resides, at the time of the commencement of the action,” with the express grant of
21 universal original jurisdiction to the state’s superior courts accorded in article IV, section 6 of
22 the Washington state constitution. *Id.* at 134. In determining whether the legislature’s
23 authority to limit subject matter jurisdiction as among superior courts violates article IV,
24 section 6 of the state constitution, the Court held, “Our previous interpretation of RCW
25 4.12.020 construed the statute to limit subject matter jurisdiction as among superior courts.
26

1 So understood, the statute violates article IV, section 6 of the state constitution.” *Id.*

2 Defendants’ motion would require this court to ignore the same constitutional
3 violation the Supreme Court forbade in *Young v. Clark*, and instead create an impermissible
4 legislatively-created subject matter limitation from RCW 4.12.010. Defendants cite Judge
5 James Cayce’s ruling of June 9 in *Davis v. DNR*, but they do so without mention of a court’s
6 obligation to construe statutes consistently with the constitution. *See id., State v. Clausen*,
7 160 Wash. 618, 632, 295 P. 751 (1931). Plaintiffs urge this Court to follow the plain meaning
8 of the constitution’s clear language on this issue and deny Defendants’ Motion to Dismiss for
9 Lack of Subject Matter Jurisdiction. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108
10 Wash.2d 679, 706, 743 P.2d 793 (1987) (“Where the language of the constitution is clear, the
11 words used therein should be given their plain meaning.”).

12
13
14 **B. Defendant’s Motion Should Also Be Denied Because Plaintiffs’ Action is**
15 **Transitory in Nature as Seeking Primarily Monetary Damages for Personal**
16 **Interests to Both Real and Personal Property.**

17 Washington courts have long recognized the power of a court to determine personal
18 interests in real property located outside the immediate jurisdiction. *See Silver Surprise, Inc.*
19 *v. Sunshine Mining Co.*, 74 Wn.2d 519, 445 P.2d 334 (1968). The courts acknowledge the
20 distinction between jurisdiction to adjudicate title to land and jurisdiction to settle the parties’
21 personal interests in real estate. (“No one would question that an action brought to try the
22 naked question of title to land must be brought in the state where the land is situate. However,
23 where the basis of the action is transitory and one over which the court has jurisdiction, the
24 court may hear and determine the action even though a question of title to foreign land may be
25 involved, and even though the question of title may constitute the essential point on which the
26 case depends.”) *Id.* at 526. For example, while a superior court lacks jurisdiction to directly

1 affect title to real property located in another country, the court does possess jurisdiction to
2 indirectly affect title to such property by apportioning interests among individuals over whom
3 it has personal jurisdiction. *See In Re the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d
4 959 (2008) (determining personal interests in real property located in Poland pursuant to a
5 marriage dissolution).
6

7 Washington's Supreme Court has routinely rejected jurisdictional challenges where
8 personal interests in real property have been at stake. *See id.* (affirming power of
9 Washington court to adjudicate parties' interests in Idaho real estate in a breach of contract
10 claim); *Donaldson*, 40 Wn.2d at 251 (affirming power of Washington court to adjudicate
11 parties' interests in California real estate in a partnership dissolution); *Elsom v. Tefft*, 140
12 Wash. 586, 591, 250 P. 346 (1926) (affirming power of Washington court to adjudicate
13 parties' interests in mining claims located in British Columbia in an action brought to enforce
14 a trust); *Smith v. Fletcher*, 102 Wash. 218, 220, 173 P. 19 (1918) ("It is a universal rule that
15 the courts of one state cannot pass judgment on the title to land in another state. But, where
16 the action is aimed at the personal relations of parties in connection with property beyond the
17 jurisdiction, it is well recognized that courts may afford relief."); *Rosenbaum v. Evans*, 63
18 Wash. 506, 508-09, 115 P. 1054 (1911) ("a suit for the specific performance of a contract to
19 convey real estate is a transitory one . . . [which] affects the parties to the action personally,
20 but does not determine the title") (collecting cases); *Sheppard v. Coeur d'Alene Lumber Co.*,
21 62 Wash. 12, 15, 112 P. 932 (1911) ("[W]hen the title is incidental the court possessing
22 jurisdiction of the contract which is in its nature transitory, may even inquire into the very title
23 let the lands lie where they may." (quoting *Henwood v. Cheeseman*, 3 Serg. & Rawle 500,
24 504 (Pa. 1817))); *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909)
25
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1 (recognizing court's power to establish and enforce a trust in real property located outside
2 state).

3
4 Here, the trial court's jurisdiction over the parties and this action clearly encompasses
5 the power to adjudicate the parties' personal interests in the real property located in Lewis
6 County. The subject matter of the suit -- negligence, trespass, tortious interference with
7 contractual relations and business expectancy, conversion and inverse condemnation -- is an
8 action in which a court with personal jurisdiction over the defendants, like King County here,
9 also has jurisdiction to determine the parties' relative interests in all property brought to the
10 court's attention. *See Kowalewski*, 163 Wn.2d at 550.

11 In addition, Washington law is clear, actions for monetary damages to real property
12 are transitory in nature and may be brought in the county in which the defendant resides.
13 *Shelton v. Farkas*, 30 Wn. App. 549, 553, 635 P.2d 1109 (1981) ("[t]he term „transitory
14 action“ encompasses those actions which at common law might be tried wherever personal
15 service can be obtained as opposed to in rem proceedings which are local in nature”). Actions
16 described in RCW 4.12.010, which must be brought in the county where the property is
17 located, are “local”, while “transitory” actions are those described in RCW 4.12.025, which
18 may be brought where the defendant resides. *See State ex rel. U.S. Trust Co. v. Phillips*, 12
19 Wn.2d 308, 315, 121 P.2d 360 (1942). Actions for monetary recovery are in personam and
20 are transitory in nature. Here, Plaintiffs' action against defendants is solely for monetary
21 damages, is transitory in nature, and may be brought in King County, where the Defendants
22 reside.
23

24 Contrary to Defendants' suggestion, Plaintiffs' claims are transitory in nature. In
25 *Washington State Bank v. Medalia Healthcare L.L.C.*, the Washington Court of Appeals held
26 that an action where the plaintiff seeks exclusively monetary recovery is in personam and

1 transitory in nature and is therefore not subject to the requirement of RCW 4.12.010 that local
2 actions be commenced in the county where the property is located. 96 Wn. App. 547, 558,
3 984 P.2d 1041, 1047 (1999). The Court's holding is consistent with the general trend to limit
4 the applicability of the local action rules. See *Andrews v. Cusin*, 65 Wn.2d 205, 207, 396 P.2d
5 155 (1964) ("rules or statutes which require that actions for injuries to land be brought at the
6 situs of the land have been severely criticized, as having no sound basis in reason"); *Mueller*
7 *v. Brunn*, 313 N.W.2d 171, 796-97 (Wis. 1982) (stating that "courts wherever possible have
8 consistently construed actions concerning real estate to be transitory rather than local" and
9 that the trend is toward making all money damage actions transitory). Here, Plaintiffs' claims
10 are transitory in nature as they solely seek monetary damages for damages caused by the
11 defendants. Title to or disposition of Plaintiffs' land is not in question or dispute.

13 Moreover, as Plaintiffs' claims are transitory in nature, they may be brought where the
14 defendants reside, King County, in accordance with RCW 4.12.025. In *McLeod v. Ellis*, the
15 Washington Supreme Court found that an action for the conversion of timber seeking the
16 value of the trees was transitory and could be brought in a county other than the one in which
17 the land where the trees were harvested was located. 2 Wash. 117, 122, 26 P. 76 (1891)
18 (finding that the complaint sufficiently pleaded a claim for conversion as opposed to a claim
19 for injury to real property). In *McLeod*, the defendant cut down, removed, and disposed of
20 trees located on the plaintiff's property; thus, causing injuries to the real property valued at
21 approximately \$14,000. *Id.* The *McLeod* defendant challenged the court's jurisdiction over
22 the claim as the suit was not filed in the same county in which the property was located. The
23 Washington Supreme Court concluded that the plaintiff's action was one for the value of his
24 trees without any claim for injury to the land. Here, Plaintiffs' have similar claims of damage
25 to real property that does not constitute "injury to the land" as outlined in RCW 4.12.010.
26

1 Plaintiffs' real property damage includes flood damage to their residences, outbuildings, and
2 business property.

3
4 Finally, Washington Courts have not limited this allowance for transitory claims to
5 conversion actions. In *Silver Surprise, Inc. v. Sunshine Mining Co.*, the plaintiff brought a
6 breach of contract claim concerning an exchange of conveyances and mining of property
7 located in Idaho. 74 Wn.2d 519, 520, 445 P.2d 334 (1968). The defendant asserted an
8 affirmative defense of adverse possession. *Id.* at 521. The trial court dismissed for lack of
9 subject matter jurisdiction because it viewed the subject of the action to be the determination
10 of the title to the property in Idaho. *Id.* at 522. The Washington Supreme Court reversed
11 noting that the contract action was transitory and recognizing that "[t]he view is generally
12 maintained that where the relief sought acts upon the party personally and does not require the
13 court to deal directly with „the real estate itself“, the proceeding need not be maintained in the
14 state or county where the property is situate." *Id.* at 525-527. The court held that "where the
15 basis of the action is transitory and one over which the court has jurisdiction, the court may
16 hear and determine the action even though a question of title to foreign land may be involved,
17 and even though the question of title may constitute the essential point on which the case
18 depends." *Id.* at 526. Here, the Plaintiffs' are solely seeking monetary damages. The Court
19 will not have to deal directly with the real property that was damaged as a result of the
20 negligence of the defendants. Moreover, in *Silver Surprise*, the plaintiff's claim indirectly
21 dealt with the determination of the title of real property in Idaho; yet the Washington Supreme
22 Court held the plaintiff's claim was transitory and jurisdiction was proper in Washington.
23 Here, title to the real property is not a question to be decided. Again, Plaintiffs' are primarily
24 seeking monetary damages, and other relief not associated with Plaintiffs' real property.
25
26

1 Here, Plaintiffs state five causes of action targeted against Defendants in their
2 complaint. Each can be characterized as personal to them, rather than relating exclusively to
3 the property. First, Plaintiffs pleaded Negligence, a transitory action, remedied by general
4 and special damages. Second, the Plaintiffs pleaded Trespass, which may appear as localized,
5 but as the trespass was temporary (ie: the waters and debris receded), the Plaintiffs did not
6 request the normal remedy, ejectment. Instead, they seek money damages for the effect of the
7 trespass. Third, the Plaintiffs pleaded conversion, which has been held to constitute a
8 transitory action under RCW 4.12.010. *Wash. State Bank*, 96 Wn. App. at 558. Fourth, the
9 Plaintiffs pleaded tortious interference with business expectancy, which is personal to the
10 Plaintiffs and are remedies solely by monetary damages equal to lost profits. Fifth and
11 finally, Plaintiffs pleaded the Shoreline Management Act of 1971, which relates exclusively
12 to the actions of the defendant on its own property, and does not affect the rights to property
13 contemplated in in rem jurisdiction.
14

15
16 **C. The Court Has a Less Restrictive, Constitutional Option to Recognize the**
17 **“Venue Only” Character of RCW 4.12.010.**

18 If, and only if, the court were to find some elements of Plaintiffs’ personal, transitory
19 interests in real property so unique to the property’s physical location that resolution of the
20 claims could only be properly adjudicated in the county in which the property exists, then the
21 only constitutionally permissible option would be to change the venue. Plaintiffs submit that
22 venue is proper in King County. However, if the Court believes the property’s location is so
23 particular to the claims asserted, then a recognition of the Supreme Court’s “venue-only”
24 interpretation of statutory provisions of RCW 4.12.010 prescribed by the *Young v. Clark*
25 opinion would require the denial of Defendants’ motion to dismiss for lack of subject matter
26 jurisdiction and instead a separate consideration of the case’s most appropriate venue.

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VI. CONCLUSION

Defendants' motion must be denied because the plain language of the state constitution confers original jurisdiction to the King County Superior Court. A unanimous state Supreme Court has ruled unequivocally that filing requirements, like those statutorily prescribed in RCW 4.12.010, pertain only to venue questions, not to subject matter jurisdiction. In addition, the Plaintiffs' transitory personal interests damaged as a result of Defendants' unlawful and tortious acts are clearly within this court's power despite the physical location of the property in question. In the alternative, if the court finds certain elements of Plaintiffs claims to be local interests, unique to the properties' physical location, then venue change, not dismissal of the action as a whole, is the only appropriate remedial action.

Dated this 17th day of June, 2011.

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By 
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CERTIFICATE OF SERVICE

I, **Ami Erpenbach**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served via E-Service, and by Facsimile to Attorney Mark Jobson, indicated below, by directing delivery to the following individuals:

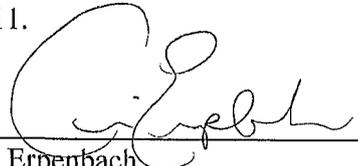
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DATED this 17th day of June, 2011.



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4852-3823-8729, v. 1

Pfan Cochran Vertells Amala
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Tacoma Office

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THE HONORABLE LEROY MCCULLOUGH

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WILLIAM RALPH, individually,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

NO. 11-2-05769-1KNT

REPLY IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION

REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

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1 In his response, plaintiff contends that the legislature's jurisdictional restriction in
2 RCW 4.12.010(1) is unconstitutional, and that all claims for damages are transitory such that
3 the claims may be brought in any county where a defendant resides. In doing so, plaintiff asks
4 this Court to disregard long established controlling precedent and the legislature's
5 unambiguous mandate: actions for injuries to real property "shall be commenced" in the
6 county where the real property is located. RCW 4.12.010(1); *Cugini v. Apex Mercury Mining*
7 *Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946). Plaintiff disregarded this requirement when he
8 commenced this action in King County to recover damages for injury to his real property in
9 Lewis County, and now invites the Court to do the same. The Court should decline plaintiff's
10 invitation and dismiss this action for lack of subject matter jurisdiction.

11 **A. The Jurisdictional Requirements of RCW 4.12.010(1) Are Constitutional.**

12 Plaintiff relies upon *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003), to attempt to
13 escape from RCW 4.12.010(1)'s jurisdictional requirements. However, *Young* interpreted a
14 different statute, RCW 4.12.020(3), and involved an action to recover damages for personal
15 injury, which are transitory in nature, *Mendoza v. Neudorfer Engineers, Inc.*,
16 145 Wn. App. 146, 156, 185 P.3d 1204 (2008). *Young*, 149 Wn.2d at 132-133. Therefore,
17 *Young* does not address the Supreme Court's holding in *Apex Mercury Mining* regarding RCW
18 4.12.010(1) and jurisdiction over actions for injuries to real property.

19 Moreover, plaintiff's constitutional argument requires the Court to read article IV
20 section 6 of the state constitution in isolation, ignoring language used in the rest of the
21 constitution. Section 6 vests "the superior court" with original jurisdiction over cases "in
22 which the demand or the value of the property in controversy amounts to three thousand
23 dollars or as otherwise determined by law," and also "in all cases and of all proceedings in
24 which jurisdiction shall not have been by law vested exclusively in some other court."
25 Const. art. IV, § 6. Though this section does vest jurisdiction in *the* superior court, it does not
26 describe *which* superior court. The state constitution uses "the superior court" to refer to the
superior court for a particular county. *See* Const. art. IV, § 5 (election of judges to the superior

1 court for each county). In contrast, the constitution uses “superior courts” when discussing all
2 superior courts. See Const. art. IV, § 1 (“The judicial power of the state shall be vested in a
3 supreme court, *superior courts*, justices of the peace, and such inferior courts at the legislature
4 may provide.”), § 11 (“The supreme court and *the superior courts* shall be courts of record, and
5 the legislature shall have power to provide that any of the courts of this state, excepting justices
6 of the peace, shall be courts of record.”), § 13 (“The judges of the supreme court and judges of
7 *the superior courts* shall severally at stated times, during the continuance in office, receive for
8 their services the salaries prescribed by law therefore; which shall not be increased after their
9 election, nor during the term for which they shall have been elected.”), § 24 (“The judges of
10 *the superior courts*, shall from time to time, establish uniform rules for the governance of *the*
11 *superior courts.*”) (emphasis added).

12 According to authority cited by plaintiff, “Where the language of the constitution is
13 clear, the words used therein should be given their plain meaning.” *City of Tacoma v.*
14 *Taxpayers of City of Tacoma*, 108 Wn.2d 679, 706, 743 P.2d 793 (1987). Section 6 authorizes
15 the legislature to vest jurisdiction for actions involving injury to real property only in the
16 superior court for the county where the property is located. Consistent with this authority, the
17 Supreme Court has upheld the jurisdictional nature of RCW 4.12.010(1). *Apex Mercury*
18 *Mining*; 24 Wn.2d at 409.

19 **B. Actions Seeking Damages for Injury to Real Property Are Local, Not Transitory**

20 Plaintiff’s contention that all actions for damages are transitory ignores controlling
21 precedent. In fact, actions seeking damages for injury to real property are local in nature, and
22 must be brought in the county where the property is located. *State ex rel. King County v.*
23 *Superior Court of Pierce County*, 104 Wash. 268, 276, 176 P. 352 (1918). To determine the
24 nature of an action, the Court should look to the subject matter of the complaint.
25 *Silver Surprise, Inc. v. Sunshine Min. Co.*, 74 Wn.2d 519, 522, 445 P.2d 334 (1968)
26 (examining plaintiff’s complaint and determining that it was “patently a contract action”).

1 Here, the subject matter of plaintiff's complaint is plainly the injury caused to his real
2 and personal property arising from flooding of his real property. Plaintiff seeks the same relief
3 sought by the plaintiff in *King County* – in this case, damages for injury to real property
4 located in Lewis County. The fact that plaintiff seeks only money damages does not convert
5 this action from local to transitory.

6 **C. Plaintiff Relies Upon Inapposite Legal Authority**

7 Plaintiff does not dispute that *King County* holds that actions for injury to real property
8 are local, not transitory. Instead, plaintiff cites three categories of cases to support his
9 erroneous contention that all actions for damages are transitory. Cases in the first category
10 hold that actions for breach of contract are transitory. Cases in the second category hold that
11 actions for tortious injury to personal property are transitory. Cases in the third category hold
12 that equitable actions are transitory. None addresses the Court's jurisdictional defect in this
13 case, where plaintiff seeks damages for injury to his real property.

14 **1. Actions for breach of contract are transitory.**

15 Plaintiff cites to *Shelton v. Farkas* in support of the proposition that actions for
16 damages for injury to real property are transitory. Response at 8. However, *Shelton* had
17 nothing to do with real property. In *Shelton*, the plaintiff (residing in King County) brought an
18 action for breach of contract for the sale of a violin in King County Superior Court against a
19 defendant residing in Kittitas County. 30 Wn. App. 549, 550-52, 635 P.2d 1109 (1981). Upon
20 defendant's request, the King County Superior Court transferred venue to Kittitas County. *Id.*
21 at 552. On appeal, the plaintiff argued that the King County Superior Court erred by
22 transferring venue. *Id.* at 553. The Court of Appeals disagreed, holding that an action for
23 breach of contract is transitory and that venue for such an action may lie where one of the
24 defendants resides. *Id.* at 553-54. *Shelton* did not involve a claim for damages from injury to
real property, and is inapposite to the issue at hand.

25 Plaintiff's other authority is similarly inapplicable. *State ex rel. U.S. Trust Co. v.*
26 *Phillips* held that an action for breach of contract (in that case, for the sale of timber) is

1 transitory, which may be brought in the county where one of the defendants resides. 12 Wn.2d
2 308, 315, 121 P.2d 360 (1942). *Silver Surprise* held that an action for breach of contract (in
3 that case, for the mining of land in Idaho) is transitory, even where the defendant asserts
4 ownership of real property as a defense. 74 Wn.2d at 522-24. *Andrews v. Cusin* held that an
5 action for breach of contract (in that case, express and implied warranties for potato seedlings)
6 is transitory and may be brought where the defendant resides. 65 Wn.2d 205, 209, 396 P.2d
7 155 (1964). *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Wash. 12, 112 P. 932 (1911), was an
8 action for breach of lease to recover unpaid rent. None of these cases address the issue now
9 before the Court: whether this Court has subject matter jurisdiction over an action for damages
10 for injury to real property in Lewis County.

11 **2. Actions for tortious injury to personal property, unrelated to injuries to**
12 **real property, are transitory.**

13 Plaintiff overstates the holding of *Washington State Bank v. Medalia Healthcare,*
14 *L.L.C.* Response at 8. In that case, a lender sued the purchaser of medical equipment
15 (in which the lender had a security interest) for conversion, claiming damages in the amount of
16 the value of the equipment. *Washington State Bank v. Medalia Healthcare L.L.C.*, 96 Wn.
17 App. 547, 548, 984 P.2d 1041 (1999). The court stated, “[W]e hold that a conversion action
18 where the plaintiff seeks exclusively monetary recovery is in persona and transitory in nature
19 and is therefore not subject to the requirement of RCW 4.12.010(2) that local actions be
20 commenced in the county where the personal property is located.” *Id.* at 558. *Medalia* is
21 inapposite – it relates only to actions for damages for conversion of personal property and did
22 not relate to real property in any way.

23 *McLeod v. Ellis* does not help plaintiff. In *Apex Mercury Mining*, the Supreme Court
24 described its holding in *McLeod* as follows: “[*McLeod*] held that an action commenced in the
25 county other than that where the property was located would not give the court jurisdiction.”
26 24 Wn.2d at 404. In *McLeod*, the plaintiff’s claim was for conversion of timber, not for injury
to real property, and was therefore transitory. 2 Wash. at 122. Likewise, the plaintiff’s action

1 for negligent injury to personal property in *Andrews* was held to be transitory. 65 Wn.2d at
2 209. None of these cases stand for the proposition that this Court may exercise subject matter
3 jurisdiction over an action seeking damages for injury to real property in Lewis County.

4 **3. Equitable relief is transitory.**

5 Plaintiff's remaining authority establishes that actions in equity are transitory. *In re the*
6 *Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008) (marriage dissolution);
7 *Donaldson v. Greenwood*, 40 Wn.2d 238, 232 P.2d 1038 (1952) (enforcement of equitable
8 trust); *Elsom v. Tefft*, 140 Wash. 586, 250 P. 346 (1926) (enforcement of trust in equity);
9 *Rosenbaum v. Evans*, 63 Wash. 506, 115 P. 1054 (1911) (equitable decree to reform a deed);
10 *State ex. rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909) (enforcement of
11 equitable trust). These cases are inapposite because plaintiff does not seek equitable relief.

12 **D. Lacking Subject Matter Jurisdiction, This Court May Not Transfer Venue**

13 Plaintiff does not dispute that if this Court lacks subject matter jurisdiction, it may only
14 enter an order of dismissal. *Young*, 149 Wn.2d at 133 ("When a court lacks subject matter
15 jurisdiction in a case, dismissal is the only permissible action the court may take.").
16 Nonetheless, plaintiff requests a transfer of venue to Lewis County as an alternative form of
17 relief. Response at 11. Absent subject matter jurisdiction, this Court should disregard
18 plaintiff's request for alternative venue, and should dismiss this action.

19 **E. Conclusion**

20 This action arises from the same storm, in the same county, involving a similarly
21 situated plaintiff, and asserts the same causes of action as those in *Davis et al. v. Washington*
22 *State Department of Natural Resources et al.*, King County Superior Court No. 10-2-42010-0
23 KNT, assigned to Judge James Cayce. Judge Cayce granted defendants' motion for dismissal
24 on the same grounds.¹ RCW 4.12.010(1) and controlling precedent vests sole jurisdiction over
25 this action in Lewis County Superior Court. This Court should dismiss this action.

26 ¹ The plaintiffs in *Davis* moved for reconsideration of Judge Cayce's decision on June 17, 2011.

1 DATED this 20th day of June, 2011.

2
3
4 ROBERT M. MCKENNA
Attorney General

5
6 By s/ Mark Jobson
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9
10 Attorneys for Defendant
11 Department of Natural Resources

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on June 14, 2011, I caused to be electronically filed the foregoing
14 document with the Clerk of the Court using the King County E-filing system and served on
counsel of record:

15 Hand Delivered to:

16 **Mr. Darrell L. Cochran**
17 **Pfau Cochran Vertetis Kosnoff, PLLC**
18 **911 Pacific Avenue, Suite 200**
Tacoma, Washington 98402

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

21 ROBERT M. MCKENNA
22 Attorney General

23 /s/ Mark C. Jobson
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Pfau Cochran Vertetis Amala
JUN 13 2011
Tacoma Office

THE HONORABLE LEROY McCULLOUGH

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM FORTH, individually; GUY BAUMAN, individually; EILEEN BAUMAN, individually; LINDA STANLEY, individually and as personal representative IN RE THE ESTATE OF CORAL COTTON; ROCHELLE STANLEY, as personal representative IN RE THE ESTATE OF CORAL COTTON; DONALD LEMASTER, individually; and DAVID GIVENS, individually;

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES, a Washington State public agency; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

I. RELIEF REQUESTED

Defendants bring this motion, pursuant to Civil Rule 12(h)(3), to dismiss this case because this Court lacks subject matter jurisdiction. Plaintiffs commenced this action in King

Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction - 1

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1 County to recover damages for injury to their property from flooding in Lewis County
2 allegedly caused by defendants' actions. All of plaintiffs' injuries arise from this flooding.
3
4 However, Washington law vests exclusive subject matter jurisdiction over this action in Lewis
5 County Superior Court. Consequently, because this Court lacks subject matter jurisdiction,
6 this lawsuit should be dismissed.

7
8 **II. STATEMENT OF FACTS**

9 Plaintiffs own real property located in Lewis County, Washington. Complaint ¶¶ 2.1-
10 2.7. Defendants own timberlands property in Lewis County upon which they conduct forest
11 practices (including harvesting trees). Complaint ¶¶ 1.2, 2.8-2.10. Defendant Washington
12 State Department of Natural Resources also regulates these forest practices.
13
14 Complaint ¶¶ 1.2, 2.8. Plaintiffs allege that defendants engaged in negligent forest practices
15 that contributed to flooding, causing damage to plaintiffs' property. Complaint ¶ 1.2, 5.2.

16 This case is one of five filed in King County Superior Court arising from the same
17 flood, brought by similarly situated plaintiffs seeking damages for injury to their respective
18 real property. In *Davis et al. v. State of Washington Department of Natural Resources et al.*,
19 King County Superior Court No. 10-2-42010-0 KNT, assigned to Judge James Cayce,
20 defendants moved for dismissal on the same grounds identified in this motion. Judge Cayce
21 granted defendants' motion for dismissal by order dated June 9, 2011. For the Court's
22 convenience, a copy of Judge Cayce's order is attached to this motion as Exhibit A.
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III. STATEMENT OF ISSUE

Plaintiffs allege that their real property, located in Lewis County, was damaged by flooding caused by defendants' negligent or otherwise tortious conduct. Plaintiffs commenced this action in King County Superior Court to recover their damages. In light of RCW 4.12.010, which requires actions involving injury to real property to be brought in the county where such property is located, should this action be dismissed because this Court lacks subject matter jurisdiction?

IV. EVIDENCE RELIED UPON

This motion is based upon plaintiffs' complaint and all other documents on file with the Court in this action.

V. LEGAL AUTHORITY

Defendants seek dismissal of this action pursuant to Civil Rule 12(h)(3), which states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action."

A. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

Where an action involves injury to real property, only the court in the county where the property is located has jurisdiction over the action. RCW 4.12.010(1). The relevant statute (formerly codified at Rem. Rev. Statues §204) states:

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated: (1)... for any injury to real property.

RCW 4.12.010(1). As the Supreme Court held in *Cugini v. Apex Mercury Mining, Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946), "The provisions of §204 are jurisdictional in

Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction - 3

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1 character. Actions involving title or *injury to real property* may only be commenced in the
2 county in which the real property is situated. Otherwise, the action must be dismissed for
3 want of jurisdiction.” (Emphasis added).
4

5 Even an action seeking only money damages for injury to real property, not involving
6 title to or possession of real property, must be brought in the county where the property is
7 located. *State ex rel. King County v. Superior Court of Pierce County*, 104 Wash. 268, 276,
8 176 P. 352 (1918). In that case, the plaintiff receiver of the Tacoma Meat Company sought
9 damages from defendants King County and Pierce County, alleging negligent diversion of the
10 Puyallup River that flooded the Tacoma Meat Company’s real property (located in Pierce
11 County). 104 Wash. at 269. The plaintiff properly commenced the action in Pierce County
12 Superior Court, and defendant King County sought a change of venue, which was denied. *Id.*
13 King County sought a writ of mandamus compelling Pierce County Superior Court to change
14 venue. *Id.* The Supreme Court denied the writ, holding that an action for negligent injury to
15 real property in which the plaintiff seeks money damages is local in nature, and may only be
16 properly commenced in the county in which the property is located. 104 Wash. at 276.
17
18

19 This action arises from the flooding of plaintiffs’ real property located in Lewis
20 County. Plaintiffs seek damages for injuries to their real property caused by this flooding.
21 Consequently, RCW 4.12.010(1) applies to this case and vests sole jurisdiction over this
22 action in Lewis County Superior Court. This Court should dismiss this action for lack of
23 subject matter jurisdiction.
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*Defendants’ Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 4*

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1 **B. APPLICATION OF RCW 4.92.010 DOES NOT CURE THE JURISDICTIONAL**
2 **DEFECT.**

3 Plaintiffs may cite RCW 4.92.010 (providing for venue in actions against the State) in
4 response to defendants' motion. However, this statute does not apply to the jurisdictional
5 issue before the Court. First, RCW 4.92.010 relates to venue for actions against the State, not
6 jurisdiction. *Sim v. Wash. State Parks and Rec. Comm'n*, 90 Wn.2d 378, 382, 583 P.2d 1193
7 (1978) ("RCW 4.92.010 is a general venue statute"). Second, the venue requirements of
8 RCW 4.92.010 act in harmony with the jurisdictional requirements of RCW 4.12.010(1), as
9 RCW 4.92.010(3) authorizes venue in "the county where the real property that is the subject
10 of the action is situated." *See Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993)
11 (statutes must be harmonized where possible). Consequently, RCW 4.92.010 offers plaintiffs
12 no relief from defendants' objection to subject matter jurisdiction.
13
14

15 **C. THE COURT MAY NOT TRANSFER VENUE TO LEWIS COUNTY.**

16 Plaintiffs may argue that the Court may cure this jurisdictional defect by transferring
17 venue to Lewis County. This argument lacks merit. A court lacking subject matter
18 jurisdiction may do nothing but enter an order of dismissal. *Howlett v. Weslo, Inc.*,
19 90 Wn. App. 365, 368, 951 P.2d 831 (1998); *see also Apex Mercury Mining*, 24 Wn.2d
20 at 409. A court may transfer venue only after the action has been properly commenced in a
21 court with subject matter jurisdiction over the action:
22
23

24 Actions instituted in the proper county may be transferred to another county
25 for trial if sufficient cause be shown therefor. When a cause is transferred for
26 trial, the court to which the transfer is made has complete jurisdiction to
27 determine the issues in the case.
28

1 *Apex Mercury Mining*, 24 Wn.2d at 409; *see also State v. Super. Ct. of King County*,
2 82 Wn.2d 356, 360, 144 P. 291 (1914) (transfer of venue from King County to Chelan County
3 did not destroy jurisdiction where the action was properly commenced in King County).
4

5 In this case, plaintiffs were required to commence this action in Lewis County
6 Superior Court. However, plaintiffs disregarded the jurisdictional requirements of RCW
7 4.12.010(1), which cannot be cured by a transfer of venue. The only remedy available to this
8 Court is to dismiss this action for lack of subject matter jurisdiction.
9

10 **D. PARTIES MAY NOT WAIVE SUBJECT MATTER JURISDICTION.**

11 Plaintiffs may argue that defendants somehow waived their objection to subject matter
12 jurisdiction. However, subject matter jurisdiction may not be waived under any
13 circumstances. *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d
14 542, 556, 958 P.2d 962 (1998) (“While litigants, like the cities involved here, may waive their
15 right to assert a lack of *personal* jurisdiction, litigants may not waive *subject matter*
16 jurisdiction.”) (emphasis in original). Consequently, defendants cannot waive their objection
17 to subject matter jurisdiction.
18

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*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 6*

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VI. CONCLUSION

RCW 4.12.010(1) vests sole subject matter jurisdiction over this action in Lewis County Superior Court because Lewis County is where plaintiffs' injured real property is located. Plaintiffs disregarded this requirement and commenced this action in King County Superior Court. This Court must dismiss this action for lack of subject matter jurisdiction.

DATED this 13th day of June, 2011.

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By s/ Louis D. Peterson

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Department of Natural Resources

*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 7*

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*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 8*

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FILED
KING COUNTY, WASHINGTON
JUN 09 2011
SUPERIOR COURT CLERK
BY STEPHANIE WALTON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CONNIE DAVIS, personally; SPENCER
DAVIS, personally; and DIRTY THUMB
NURSERY, a Washington State sole
proprietorship,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES;
WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

No. 10-2-42010-0 KNT

^{2DC}
~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

THIS MATTER came before the Court on Defendants' Motion to Dismiss for Lack of
Subject Matter Jurisdiction ("Motion"). The Court reviewed the Motion, ~~any response or~~ ^{or} ~~or~~ ^{or}

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JDC JDC

*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 1*

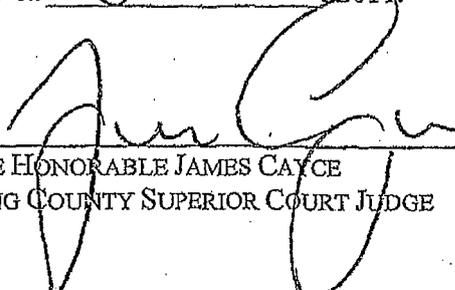
EXHIBIT

A

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1 reply thereto, and the records and files herein. In light of the foregoing, IT IS HEREBY
2 ORDERED that Defendants' Motion is GRANTED.

3
4 DONE THIS 9th day of JUNE, 2011.

5
6
7 
8 THE HONORABLE JAMES CAYCE
9 KING COUNTY SUPERIOR COURT JUDGE

10 Presented by:

11 HILLIS CLARK MARTIN & PETERSON P.S.

12 By s/ Louis D. Peterson

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14 Michael R. Scott, WSBA #12822
15 Alexander M. Wu, WSBA #40649
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Department of Natural Resources

*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 2*

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11 Attorneys for Defendant

12 Green Diamond Resource Company

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14 Proposed Order Granting Motion to Dismiss - Davis.docx

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*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 3*

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THE HONORABLE LEROY MCCULLOUGH

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILLIAM FORTH, individually; GUY
BAUMAN, individually; EILEEN
BAUMAN, individually; LINDA
STANLEY, individually and as personal
representative IN RE THE ESTATE OF
CORAL COTTON; ROCHELLE
STANLEY, as personal representative IN RE
THE ESTATE OF CORAL COTTON;
DONALD LEMASTER, individually; and
DAVID GIVENS, individually;

Plaintiffs,

vs.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES; WEYERHAEUSER
COMPANY, a Washington corporation; and
GREEN DIAMOND RESOURCE
COMPANY, a Washington corporation,

Defendants.

NO. 10-2-42009-6 KNT

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION

HEARING DATE: June 17, 2011

I. RELIEF REQUESTED

In *Young v. Clark*, 149 Wash.2d 130 (2003), 65 P.3d 1192 (2003) the Washington State Supreme Court, en banc, eliminated earlier confusion about the subject matter jurisdiction of Washington's superior courts. Overruling and reversing previous case law, the Court unanimously struck down a legislatively-created, jurisdiction limiting statute (RCW

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION 1 of 13
10-2-42009-6 KNT



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1 4.12.020) as violative of article IV, section 6 of the state constitution. *See Young*, 149
2 Wash.2d at 133. ““The language of the constitution is not that the superior courts shall have
3 exclusive jurisdiction, but it gives to the superior courts *universal original jurisdiction*.”
4 (emphasis added) *Id.* at 134, quoting *Moore v. Perrot*, 2 Wash. 1, 4, 25 P. 906 (1891). The
5 Court went on to strike down jurisdictional limits from a similarly restrictive statute, as well.
6 *Id.* “[T]he filing requirements of RCW 36.01.50 relate only to venue, not to the trial court’s
7 subject matter jurisdiction.” *Id.*, quoting *Shoop v. Kittitas County*, 149 Wash.2d 29, 37, 65
8 P.3d 1194 (2003).

9
10 Defendants’ motion asks this court to similarly violate the state constitution’s article
11 IV, section 6, by unlawfully treating RCW 4.12.010 as a statutorily superseding limit to the
12 superior court’s constitutionally-defined subject matter jurisdiction. Plaintiffs’ assert that this
13 Court must decline Defendants’ invitation and deny the motion to dismiss for lack of subject
14 matter jurisdiction.

15
16 Even if this Court was to ignore the clear guidance of *Young v. Clark* regarding the
17 superior court of King County’s subject matter jurisdiction in this case, Plaintiffs further
18 submit that the damages at issue here stem from tortious and illegal conduct including
19 negligence, conversion and trespass, which amount to personal interests and are therefore
20 transitory in nature and not limited to “injuries to real property” as envisioned by RCW
21 4.12.010.
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1 And finally, if the court were to find elements of Plaintiffs' claims so unique to the
2 property that a judicial presence within the same county as the property is essential, then the
3 least restrictive and the only constitutional option would be to change venue, rather than
4 improperly entering dismissal for lack of subject matter jurisdiction on all claims.
5

6 II. STATEMENT OF FACTS

7 For the purposes of the underlying motion, the facts contained within the Plaintiffs
8 complaint are not in material dispute. The following is a recitation of those averred facts
9 relevant to the instant motion.

10 On December 3rd and 4th, 2007, rainfall triggered roughly 2,000 landslides on clear
11 cut and otherwise de-stabilized property on lands owned by the defendants. The millions of
12 tons of mud and debris deposited in the Chehalis River system displaced the water, causing
13 flooding of record proportion. Declaration of Darrell L. Cochran ("Cochran Declaration"),
14 Exhibit A. Plaintiffs' homes and property were destroyed by this flooding. Plaintiffs' homes
15 and businesses suffered extensive damage due to the flooding. Cochran Declaration, Exhibit
16 B. Their property was damaged, much of it ruined and some of it entirely washed away.
17 Cochran Declaration, Exhibit A and B.
18

19 Plaintiffs properly and timely brought their complaint in King County against King
20 County business residents, Weyerhaeuser and Green Diamond Resource Company, and joined
21 Defendant DNR in this venue under RCW 4.92.010, as an additional defendant. Cochran
22 Declaration. ¶6. Plaintiffs seek monetary damages for the amount of injury suffered as a
23 result of Defendants' unlawful and tortious conduct.
24
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1 III. STATEMENT OF ISSUES

2 A. Whether subject matter jurisdiction for this action is proper in King County Superior
3 Court, in keeping with the unanimous Supreme Court opinion in *Young v. Clark*, 149
4 Wash.2d 130 (2003), 65 P.3d 1192 (2003), which found that only the state constitution can
5 determine original jurisdiction, and that legislatively created statutes, like RCW 4.12.010,
6 relate only to venue, not to the trial court's subject matter jurisdiction.
7

8 B. And in the alternative, whether the King County Superior Court has jurisdiction over
9 the instant action when the Plaintiffs seek a remedy of money damages arising out of injury to
10 real, personal, and business property, or "personal interests," but do not seek relief related to
11 the title or other disposition specific to the real property.
12

13 IV. EVIDENCE RELIED UPON

14 As the underlying facts are not in dispute, Plaintiffs opposition relies on the pleadings
15 already filed with this court, along with the Declaration of Darrell L. Cochran and the exhibit
16 attached to it.
17

18 V. AUTHORITY

19 **A. Defendants Motion Must Be Denied Because the State Constitution Controls,
20 Not RCW 4.12.010, Vesting Universal Original Jurisdiction with All State
21 Superior Courts.**

22 "The superior court shall ...have original jurisdiction in all cases and of all
23 proceedings in which jurisdiction shall not have been by law vested exclusively in some other
24 court." WASH. CONST. art. IV. Thus, the state constitution, **not the legislature**, gives the
25 superior courts universal original jurisdiction. *Id.*; *Young v. Clark*, 149 Wash.2d at 133-34.
26 The legislature is empowered only to "carve out" the limited jurisdiction of inferior courts.

1 *Young v. Clark*, 149 Wash.2d at 133-34. Otherwise, the superior court retains original
2 jurisdiction in all cases and over all proceedings. WASH. CONST. art. IV, § 6; *Clark* at 133.

3
4 *Young v. Clark* required the state Supreme Court to analyze the inconsistencies of
5 RCW 4.12.020(3), which provides a motor vehicle accident plaintiff “the option of suing
6 either in the county in which the cause of action or some part thereof arose, or in the county in
7 which the defendant resides, or if there be more than one defendant, where some one of the
8 defendants resides, at the time of the commencement of the action,” with the express grant of
9 universal original jurisdiction to the state’s superior courts accorded in article IV, section 6 of
10 the Washington state constitution. *Id.* at 134. In determining whether the legislature’s
11 authority to limit subject matter jurisdiction as among superior courts violates article IV,
12 section 6 of the state constitution, the Court held, “Our previous interpretation of RCW
13 4.12.020 construed the statute to limit subject matter jurisdiction as among superior courts.
14 So understood, the statute violates article IV, section 6 of the state constitution.” *Id.*

15
16 Defendants’ motion would require this court to ignore the same constitutional
17 violation the Supreme Court forbade in *Young v. Clark*, and instead create an impermissible
18 legislatively-created subject matter limitation from RCW 4.12.010. Defendants cite Judge
19 James Cayce’s ruling of June 9 in *Davis v. DNR*, but they do so without mention of a court’s
20 obligation to construe statutes consistently with the constitution. *See id.*, *State v. Clausen*,
21 160 Wash. 618, 632, 295 P. 751 (1931). Plaintiffs urge this Court to follow the plain meaning
22 of the constitution’s clear language on this issue and deny Defendants’ Motion to Dismiss for
23 Lack of Subject Matter Jurisdiction. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108
24 Wash.2d 679, 706, 743 P.2d 793 (1987) (“Where the language of the constitution is clear, the
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1 words used therein should be given their plain meaning.”).

2 **B. Defendant’s Motion Should Also Be Denied Because Plaintiffs’ Action is**
3 **Transitory in Nature as Seeking Primarily Monetary Damages for Personal**
4 **Interests to Both Real and Personal Property.**

5 Washington courts have long recognized the power of a court to determine personal
6 interests in real property located outside the immediate jurisdiction. *See Silver Surprise, Inc.*
7 *v. Sunshine Mining Co.*, 74 Wn.2d 519, 445 P.2d 334 (1968). The courts acknowledge the
8 distinction between jurisdiction to adjudicate title to land and jurisdiction to settle the parties’
9 personal interests in real estate. (“No one would question that an action brought to try the
10 naked question of title to land must be brought in the state where the land is situate. However,
11 where the basis of the action is transitory and one over which the court has jurisdiction, the
12 court may hear and determine the action even though a question of title to foreign land may be
13 involved, and even though the question of title may constitute the essential point on which the
14 case depends.”) *Id.* at 526. For example, while a superior court lacks jurisdiction to directly
15 affect title to real property located in another country, the court does possess jurisdiction to
16 indirectly affect title to such property by apportioning interests among individuals over whom
17 it has personal jurisdiction. *See In Re the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d
18 959 (2008) (determining personal interests in real property located in Poland pursuant to a
19 marriage dissolution).

22 Washington’s Supreme Court has routinely rejected jurisdictional challenges where
23 personal interests in real property have been at stake. *See id.* (affirming power of
24 Washington court to adjudicate parties’ interests in Idaho real estate in a breach of contract
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1 claim); *Donaldson*, 40 Wn.2d at 251 (affirming power of Washington court to adjudicate
2 parties' interests in California real estate in a partnership dissolution); *Elsom v. Tefft*, 140
3 Wash. 586, 591, 250 P. 346 (1926) (affirming power of Washington court to adjudicate
4 parties' interests in mining claims located in British Columbia in an action brought to enforce
5 a trust); *Smith v. Fletcher*, 102 Wash. 218, 220, 173 P. 19 (1918) ("It is a universal rule that
6 the courts of one state cannot pass judgment on the title to land in another state. But, where
7 the action is aimed at the personal relations of parties in connection with property beyond the
8 jurisdiction, it is well recognized that courts may afford relief."); *Rosenbaum v. Evans*, 63
9 Wash. 506, 508-09, 115 P. 1054 (1911) ("a suit for the specific performance of a contract to
10 convey real estate is a transitory one . . . [which] affects the parties to the action personally,
11 but does not determine the title") (collecting cases); *Sheppard v. Coeur d'Alene Lumber Co.*,
12 62 Wash. 12, 15, 112 P. 932 (1911) ("[W]hen the title is incidental the court possessing
13 jurisdiction of the contract which is in its nature transitory, may even inquire into the very title
14 let the lands lie where they may." (quoting *Henwood v. Cheeseman*, 3 Serg. & Rawle 500,
15 504 (Pa. 1817))); *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909)
16 (recognizing court's power to establish and enforce a trust in real property located outside
17 state).

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21 Here, the trial court's jurisdiction over the parties and this action clearly encompasses
22 the power to adjudicate the parties' personal interests in the real property located in Lewis
23 County. The subject matter of the suit -- negligence, trespass, tortious interference with
24 contractual relations and business expectancy, conversion and inverse condemnation -- is an
25 action in which a court with personal jurisdiction over the defendants, like King County here,
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1 also has jurisdiction to determine the parties' relative interests in all property brought to the
2 court's attention. *See Kowalewski*, 163 Wn.2d at 550.

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4 In addition, Washington law is clear, actions for monetary damages to real property
5 are transitory in nature and may be brought in the county in which the defendant resides.
6 *Shelton v. Farkas*, 30 Wn. App. 549, 553, 635 P.2d 1109 (1981) (“[t]he term „transitory
7 action“ encompasses those actions which at common law might be tried wherever personal
8 service can be obtained as opposed to in rem proceedings which are local in nature”). Actions
9 described in RCW 4.12.010, which must be brought in the county where the property is
10 located, are “local”, while “transitory” actions are those described in RCW 4.12.025, which
11 may be brought where the defendant resides. *See State ex rel. U.S. Trust Co. v. Phillips*, 12
12 Wn.2d 308, 315, 121 P.2d 360 (1942). Actions for monetary recovery are in personam and
13 are transitory in nature. Here, Plaintiffs' action against defendants is solely for monetary
14 damages, is transitory in nature, and may be brought in King County, where the Defendants
15 reside.

16
17 Contrary to Defendants' suggestion, Plaintiffs' claims are transitory in nature. In
18 *Washington State Bank v. Medalia Healthcare L.L.C.*, the Washington Court of Appeals held
19 that an action where the plaintiff seeks exclusively monetary recovery is in personam and
20 transitory in nature and is therefore not subject to the requirement of RCW 4.12.010 that local
21 actions be commenced in the county where the property is located. 96 Wn. App. 547, 558,
22 984 P.2d 1041, 1047 (1999). The Court's holding is consistent with the general trend to limit
23 the applicability of the local action rules. *See Andrews v. Cusin*, 65 Wn.2d 205, 207, 396 P.2d
24 155 (1964) (“rules or statutes which require that actions for injuries to land be brought at the
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1 situs of the land have been severely criticized, as having no sound basis in reason”); *Mueller*
2 *v. Brunn*, 313 N.W.2d 171, 796-97 (Wis. 1982) (stating that “courts wherever possible have
3 consistently construed actions concerning real estate to be transitory rather than local” and
4 that the trend is toward making all money damage actions transitory). Here, Plaintiffs’ claims
5 are transitory in nature as they solely seek monetary damages for damages caused by the
6 defendants. Title to or disposition of Plaintiffs’ land is not in question or dispute.

8 Moreover, as Plaintiffs’ claims are transitory in nature, they may be brought where the
9 defendants reside, King County, in accordance with RCW 4.12.025. In *McLeod v. Ellis*, the
10 Washington Supreme Court found that an action for the conversion of timber seeking the
11 value of the trees was transitory and could be brought in a county other than the one in which
12 the land where the trees were harvested was located. 2 Wash. 117, 122, 26 P. 76 (1891)
13 (finding that the complaint sufficiently pleaded a claim for conversion as opposed to a claim
14 for injury to real property). In *McLeod*, the defendant cut down, removed, and disposed of
15 trees located on the plaintiff’s property; thus, causing injuries to the real property valued at
16 approximately \$14,000. *Id.* The *McLeod* defendant challenged the court’s jurisdiction over
17 the claim as the suit was not filed in the same county in which the property was located. The
18 Washington Supreme Court concluded that the plaintiff’s action was one for the value of his
19 trees without any claim for injury to the land. Here, Plaintiffs’ have similar claims of damage
20 to real property that does not constitute “injury to the land” as outlined in RCW 4.12.010.
21 Plaintiffs’ real property damage includes flood damage to their residences, outbuildings, and
22 business property.
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1 Finally, Washington Courts have not limited this allowance for transitory claims to
2 conversion actions. In *Silver Surprise, Inc. v. Sunshine Mining Co.*, the plaintiff brought a
3 breach of contract claim concerning an exchange of conveyances and mining of property
4 located in Idaho. 74 Wn.2d 519, 520, 445 P.2d 334 (1968). The defendant asserted an
5 affirmative defense of adverse possession. *Id.* at 521. The trial court dismissed for lack of
6 subject matter jurisdiction because it viewed the subject of the action to be the determination
7 of the title to the property in Idaho. *Id.* at 522. The Washington Supreme Court reversed
8 noting that the contract action was transitory and recognizing that “[t]he view is generally
9 maintained that where the relief sought acts upon the party personally and does not require the
10 court to deal directly with „the real estate itself“, the proceeding need not be maintained in the
11 state or county where the property is situate.” *Id.* at 525-527. The court held that “where the
12 basis of the action is transitory and one over which the court has jurisdiction, the court may
13 hear and determine the action even though a question of title to foreign land may be involved,
14 and even though the question of title may constitute the essential point on which the case
15 depends.” *Id.* at 526. Here, the Plaintiffs“ are solely seeking monetary damages. The Court
16 will not have to deal directly with the real property that was damaged as a result of the
17 negligence of the defendants. Moreover, in *Silver Surprise*, the plaintiff’s claim indirectly
18 dealt with the determination of the title of real property in Idaho; yet the Washington Supreme
19 Court held the plaintiff’s claim was transitory and jurisdiction was proper in Washington.
20 Here, title to the real property is not a question to be decided. Again, Plaintiffs“ are primarily
21 seeking monetary damages, and other relief not associated with Plaintiffs“ real property.
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1 Here, Plaintiffs state five causes of action targeted against Defendants in their
2 complaint. Each can be characterized as personal to them, rather than relating exclusively to
3 the property. First, Plaintiffs pleaded Negligence, a transitory action, remedied by general
4 and special damages. Second, the Plaintiffs pleaded Trespass, which may appear as localized,
5 but as the trespass was temporary (ie: the waters and debris receded), the Plaintiffs did not
6 request the normal remedy, ejectment. Instead, they seek money damages for the effect of the
7 trespass. Third, the Plaintiffs pleaded conversion, which has been held to constitute a
8 transitory action under RCW 4.12.010. *Wash. State Bank*, 96 Wn. App. at 558. Fourth, the
9 Plaintiffs pleaded tortious interference with business expectancy, which is personal to the
10 Plaintiffs and are remedies solely by monetary damages equal to lost profits. Fifth and
11 finally, Plaintiffs pleaded the Shoreline Management Act of 1971, which relates exclusively
12 to the actions of the defendant on its own property, and does not affect the rights to property
13 contemplated in in rem jurisdiction.

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16 **C. The Court Has a Less Restrictive, Constitutional Option to Recognize the**
17 **“Venue Only” Character of RCW 4.12.010.**

18 If, and only if, the court were to find some elements of Plaintiffs’ personal, transitory
19 interests in real property so unique to the property’s physical location that resolution of the
20 claims could only be properly adjudicated in the county in which the property exists, then the
21 only constitutionally permissible option would be to change the venue. Plaintiffs submit that
22 venue is proper in King County. However, if the Court believes the property’s location is so
23 particular to the claims asserted, then a recognition of the Supreme Court’s “venue-only”
24 interpretation of statutory provisions of RCW 4.12.010 prescribed by the *Young v. Clark*
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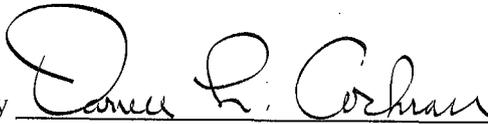
1 opinion would require the denial of Defendants' motion to dismiss for lack of subject matter
2 jurisdiction and instead a separate consideration of the case's most appropriate venue.

3
4 VI. CONCLUSION

5 Defendants' motion must be denied because the plain language of the state
6 constitution confers original jurisdiction to the King County Superior Court. A unanimous
7 state Supreme Court has ruled unequivocally that filing requirements, like those statutorily
8 prescribed in RCW 4.12.010, pertain only to venue questions, not to subject matter
9 jurisdiction. In addition, the Plaintiffs' transitory personal interests damaged as a result of
10 Defendants' unlawful and tortious acts are clearly within this court's power despite the
11 physical location of the property in question. In the alternative, if the court finds certain
12 elements of Plaintiffs' claims to be local interests, unique to the properties' physical location,
13 then venue change, not dismissal of the action as a whole, is the only appropriate remedial
14 action.

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16 Dated this 17th day of June, 2011.

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18 PFAU COCHRAN VERTETIS AMALA, PLLC

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21 By 

22 Darrell L. Cochran, WSBA No. 22851
23 darrell@pcvalaw.com
24 Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I, **Ami Erpenbach**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served via E-Service, and by Facsimile to Attorney Mark Jobson, indicated below, by directing delivery to the following individuals:

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DATED this 17th day of June, 2011.



Ami Erpenbach
Legal Assistant to Darrell L. Cochran

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THE HONORABLE LEROY McCULLOUGH

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM FORTH, individually; GUY BAUMAN, individually; EILEEN BAUMAN, individually; LINDA STANLEY, individually and as personal representative IN RE THE ESTATE OF CORAL COTTON; ROCHELLE STANLEY, as personal representative IN RE THE ESTATE OF CORAL COTTON; DONALD LEMASTER, individually; and DAVID GIVENS, individually;

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES, a Washington State public agency; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Reply in Support of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction

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1 In their response, plaintiffs contend that the legislature's jurisdictional restriction in
2 RCW 4.12.010(1) is unconstitutional, and that all claims for damages are transitory such that
3 the claims may be brought in any county where a defendant resides. In doing so, plaintiffs
4 ask this Court to disregard long established controlling precedent and the legislature's
5 unambiguous mandate: actions for injuries to real property "shall be commenced" in the
6 county where the real property is located. RCW 4.12.010(1); *Cugini v. Apex Mercury Mining*
7 *Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946). Plaintiffs disregarded this requirement when
8 they commenced this action in King County to recover damages for injury to their real
9 property in Lewis County, and now invite the Court to do the same. The Court should decline
10 plaintiffs' invitation and dismiss this action for lack of subject matter jurisdiction.

11 **A. THE JURISDICTIONAL REQUIREMENTS OF RCW 4.12.010(1) ARE**
12 **CONSTITUTIONAL.**

13 Plaintiffs rely upon *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003), to attempt
14 to escape from RCW 4.12.010(1)'s jurisdictional requirements. However, *Young* interpreted a
15 different statute, RCW 4.12.020(3), and involved an action to recover damages for personal
16 injury, which are transitory in nature, *Mendoza v. Neudorfer Engineers, Inc.*,
17 145 Wn. App. 146, 156, 185 P.3d 1204 (2008). *Young*, 149 Wn.2d at 132-133. Therefore,
18 *Young* does not address the Supreme Court's holding in *Apex Mercury Mining* regarding
19 RCW 4.12.010(1) and jurisdiction over actions for injuries to real property.

20 Moreover, plaintiffs' constitutional argument requires the Court to read article IV
21 section 6 of the state constitution in isolation, ignoring language used in the rest of the
22 constitution. Section 6 vests "the superior court" with original jurisdiction over cases
23 "in which the demand or the value of the property in controversy amounts to three thousand
24 dollars or as otherwise determined by law," and also "in all cases and of all proceedings in
25 which jurisdiction shall not have been by law vested exclusively in some other court."
26 Const. art. IV, § 6. Though this section does vest jurisdiction in *the* superior court, it does not
27 describe *which* superior court. The state constitution uses "the superior court" to refer to the
28 superior court for a particular county. *See* Const. art. IV, § 5 (election of judges to the

1 superior court for each county). In contrast, the constitution uses "superior courts" when
2 discussing all superior courts. *See* Const. art. IV, § 1 ("The judicial power of the state shall be
3 vested in a supreme court, *superior courts*, justices of the peace, and such inferior courts at
4 the legislature may provide."), §11 ("The supreme court and *the superior courts* shall be
5 courts of record, and the legislature shall have power to provide that any of the courts of this
6 state, excepting justices of the peace, shall be courts of record."), § 13 ("The judges of the
7 supreme court and judges of *the superior courts* shall severally at stated times, during the
8 continuance in office, receive for their services the salaries prescribed by law therefor, which
9 shall not be increased after their election, nor during the term for which they shall have been
10 elected."), § 24 ("The judges of *the superior courts*, shall from time to time, establish uniform
11 rules for the governance of *the superior courts*.") (emphasis added).

12 According to authority cited by plaintiffs, "Where the language of the constitution is
13 clear, the words used therein should be given their plain meaning." *City of Tacoma v.*
14 *Taxpayers of City of Tacoma*, 108 Wn.2d 679, 706, 743 P.2d 793 (1987). Section 6
15 authorizes the legislature to vest jurisdiction for actions involving injury to real property only
16 in the superior court for the county where the property is located. Consistent with this
17 authority, the Supreme Court has upheld the jurisdictional nature of RCW 4.12.010(1).
18 *Apex Mercury Mining*, 24 Wn.2d at 409.

19 **B. ACTIONS SEEKING DAMAGES FOR INJURY TO REAL PROPERTY ARE LOCAL,**
20 **NOT TRANSITORY.**

21 Plaintiffs' contention that all actions for damages are transitory ignores controlling
22 precedent. In fact, actions seeking damages for injury to real property are local in nature, and
23 must be brought in the county where the property is located. *State ex rel. King County v.*
24 *Superior Court of Pierce County*, 104 Wash. 268, 276, 176 P. 352 (1918). To determine the
25 nature of an action, the Court should look to the subject matter of the complaint. *Silver*
26 *Surprize, Inc. v. Sunshine Min. Co.*, 74 Wn.2d 519, 522, 445 P.2d 334 (1968) (examining
27 plaintiff's complaint and determining that it was "patently a contract action").
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1 Here, the subject matter of plaintiffs' complaint is plainly the injury caused to
2 plaintiffs' real and personal property arising from flooding of their real property. Plaintiffs
3 seek the same relief sought by the plaintiff in *King County* – in this case, damages for injury
4 to real property located in Lewis County. The fact that plaintiffs seek only money damages
5 does not convert this action from local to transitory.

6 **C. PLAINTIFFS RELY UPON INAPPOSITE LEGAL AUTHORITY.**

7 Plaintiffs do not dispute that *King County* holds that actions for injury to real property
8 are local, not transitory. Instead, plaintiffs cite three categories of cases to support of their
9 erroneous contention that all actions for damages are transitory. Cases in the first category
10 hold that actions for breach of contract are transitory. Cases in the second category hold that
11 actions for tortious injury to personal property are transitory. Cases in the third category hold
12 that equitable actions are transitory. None addresses the Court's jurisdictional defect in this
13 case, where plaintiffs seek damages for injury to their real property.

14 **1. Actions for breach of contract are transitory.**

15 Plaintiffs cite to *Shelton v. Farkas* in support of the proposition that actions for
16 damages for injury to real property are transitory. Response at 8. However, *Shelton* had
17 nothing to do with real property. In *Shelton*, the plaintiff (residing in King County) brought
18 an action for breach of contract for the sale of a violin in King County Superior Court against
19 a defendant residing in Kittitas County. 30 Wn. App. 549, 550-52, 635 P.2d 1109 (1981).
20 Upon defendant's request, the King County Superior Court transferred venue to Kittitas
21 County. *Id.* at 552. On appeal, the plaintiff argued that the King County Superior Court erred
22 by transferring venue. *Id.* at 553. The Court of Appeals disagreed, holding that an action for
23 breach of contract is transitory and that venue for such an action may lie where one of the
24 defendants resides. *Id.* at 553-54. *Shelton* did not involve a claim for damages from injury to
25 real property, and is inapposite to the issue at hand.

26 Plaintiffs' other authority is similarly inapplicable. *State ex rel. U.S. Trust Co. v.*
27 *Phillips* held that an action for breach of contract (in that case, for the sale of timber) is
28 transitory, which may be brought in the county where one of the defendants resides.

1 12 Wn.2d 308, 315, 121 P.2d 360 (1942). *Silver Surprise* held that an action for breach of
2 contract (in that case, for the mining of land in Idaho) is transitory, even where the defendant
3 asserts ownership of real property as a defense. 74 Wn.2d at 522-24. *Andrews v. Cusin* held
4 that an action for breach of contract (in that case, express and implied warranties for potato
5 seedlings) is transitory and may be brought where the defendant resides. 65 Wn.2d 205, 209,
6 396 P.2d 155 (1964). *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Wash. 12, 112 P. 932
7 (1911), was an action for breach of lease to recover unpaid rent. None of these cases address
8 the issue now before the Court: whether this Court has subject matter jurisdiction over an
9 action for damages for injury to real property in Lewis County.

10 **2. Actions for tortious injury to personal property, unrelated to**
11 **injuries to real property, are transitory.**

12 Plaintiffs overstate the holding of *Washington State Bank v. Medalia Healthcare,*
13 *L.L.C.* Response at 8. In that case, a lender sued the purchaser of medical equipment
14 (in which the lender had a security interest) for conversion, claiming damages in the amount
15 of the value of the equipment. *Washington State Bank v. Medalia Healthcare L.L.C.*,
16 96 Wn. App. 547, 548, 984 P.2d 1041 (1999). The court stated, “[W]e hold that a conversion
17 action where the plaintiff seeks exclusively monetary recovery is in personam and transitory
18 in nature and is therefore not subject to the requirement of RCW 4.12.010(2) that local actions
19 be commenced in the county where the personal property is located.” *Id.* at 558. *Medalia* is
20 inapposite – it relates only to actions for damages for conversion of personal property and did
21 not relate to real property in any way.

22 *McLeod v. Ellis* does not help plaintiffs. In *Apex Mercury Mining*, the Supreme Court
23 described its holding in *McLeod* as follows: “[*McLeod*] held that an action commenced in the
24 county other than that where the property was located would not give the court jurisdiction.”
25 24 Wn.2d at 404. In *McLeod*, the plaintiff’s claim was for conversion of timber, not for injury
26 to real property, and was therefore transitory. 2 Wash. at 122. Likewise, the plaintiff’s action
27 for negligent injury to personal property in *Andrews* was held to be transitory.
28 65 Wn.2d at 209. None of these cases stand for the proposition that this Court may exercise

1 subject matter jurisdiction over an action seeking damages for injury to real property in Lewis
2 County.

3 **3. Equitable relief is transitory.**

4 Plaintiffs' remaining authority establishes that actions in equity are transitory. *In re*
5 *the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008) (marriage dissolution);
6 *Donaldson v. Greenwood*, 40 Wn.2d 238, 232 P.2d 1038 (1952) (enforcement of equitable
7 trust); *Elsom v. Tefft*, 140 Wash. 586, 250 P. 346 (1926) (enforcement of trust in equity);
8 *Rosenbaum v. Evans*, 63 Wash. 506, 115 P. 1054 (1911) (equitable decree to reform a deed);
9 *State ex. rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909) (enforcement of
10 equitable trust). These cases are inapposite because plaintiffs do not seek equitable relief.

11 **D. LACKING SUBJECT MATTER JURISDICTION, THIS COURT MAY NOT**
12 **TRANSFER VENUE.**

13 Plaintiffs do not dispute that if this Court lacks subject matter jurisdiction, it may only
14 enter an order of dismissal. *Young*, 149 Wn.2d at 133 ("When a court lacks subject matter
15 jurisdiction in a case, dismissal is the only permissible action the court may take.").
16 Nonetheless, plaintiffs request a transfer of venue to Lewis County as an alternative form of
17 relief. Response at 11. Absent subject matter jurisdiction, this Court should disregard
18 plaintiffs' request for alternative venue, and should dismiss this action.

19 **E. CONCLUSION**

20 This action arises from the same storm, in the same county, involving similarly
21 situated plaintiffs, and asserts the same causes of action as those in *Davis et al. v. Washington*
22 *State Department of Natural Resources et al.*, King County Superior Court No. 10-2-42010-0
23 KNT, assigned to Judge James Cayce. Judge Cayce granted defendants' motion for dismissal
24 on the same grounds.¹ RCW 4.12.010(1) and controlling precedent vests sole jurisdiction
25 over this action in Lewis County Superior Court. This Court should dismiss this action.

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28 ¹ The plaintiffs in *Davis* moved for reconsideration of Judge Cayce's decision on June 17, 2011.

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DATED this 20th day of June, 2011.

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Green Diamond Resource Company

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be emailed and faxed to the last known address of all counsel of record.

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

DATED this 20th day of June, 2011, at Seattle, Washington.

s/ Suzanne Powers
Suzanne Powers

ND: 11100.180 4838-5044-6857v2

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction - 7*

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JUN 13 2011

Tacoma Office

THE HONORABLE BARBARA A. MACK

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; and PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42011-8 KNT

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

I. RELIEF REQUESTED

Defendants bring this motion, pursuant to Civil Rule 12(h)(3), to dismiss this case because this Court lacks subject matter jurisdiction. Plaintiffs commenced this action in King County to recover damages for injury to their property from flooding in Lewis County allegedly caused by defendants' actions. All of plaintiffs' injuries arise from this flooding. However, Washington law vests exclusive subject matter jurisdiction over this action in Lewis

Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction - 1

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COPY

1 County Superior Court. Consequently, because this Court lacks subject matter jurisdiction,
2 this lawsuit should be dismissed.

3
4 **II. STATEMENT OF FACTS**

5 Plaintiffs own real property located in Lewis County, Washington. Complaint ¶¶ 2.1-
6 2.3. Defendants own timberlands property in Lewis County upon which they conduct forest
7 practices (including harvesting trees). Complaint ¶¶ 1.2, 2.4-2.6. Defendant Washington
8 State Department of Natural Resources also regulates these forest practices.
9
10 Complaint ¶¶ 1.2, 2.4. Plaintiffs allege that defendants engaged in negligent forest practices
11 that contributed to flooding, causing damage to plaintiffs' property. Complaint ¶ 1.2, 5.2.

12
13 This case is one of five filed in King County Superior Court arising from the same
14 flood, brought by similarly situated plaintiffs seeking damages for injury to their respective
15 real property. In *Davis et al. v. State of Washington Department of Natural Resources et al.*,
16 King County Superior Court No. 10-2-42010-0 KNT, assigned to Judge James Cayce,
17 defendants moved for dismissal on the same grounds identified in this motion. Judge Cayce
18 granted defendants' motion for dismissal by order dated June 9, 2011. For the Court's
19 convenience, a copy of Judge Cayce's order is attached to this motion as Exhibit A.
20

21
22 **III. STATEMENT OF ISSUE**

23 Plaintiffs allege that their real property, located in Lewis County, was damaged by
24 flooding caused by defendants' negligent or otherwise tortious conduct. Plaintiffs
25 commenced this action in King County Superior Court to recover their damages. In light of
26 RCW 4.12.010, which requires actions involving injury to real property to be brought in the
27
28

1 county where such property is located, should this action be dismissed because this Court
2 lacks subject matter jurisdiction?
3

4 IV. EVIDENCE RELIED UPON

5 This motion is based upon plaintiffs' complaint and all other documents on file with
6 the Court in this action.
7

8 V. LEGAL AUTHORITY

9 Defendants seek dismissal of this action pursuant to Civil Rule 12(h)(3), which states,
10 "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction
11 over the subject matter, the court shall dismiss the action."
12

13 A. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

14 Where an action involves injury to real property, only the court in the county where
15 the property is located has jurisdiction over the action. RCW 4.12.010(1). The relevant
16 statute (formerly codified at Rem. Rev. Statues §204) states:
17

18 Actions for the following causes shall be commenced in the county in which
19 the subject of the action, or some part thereof, is situated: (1)... for any injury
to real property.

20 RCW 4.12.010(1). As the Supreme Court held in *Cugini v. Apex Mercury Mining, Co.*,
21 24 Wn.2d 401, 409, 165 P.2d 82 (1946), "The provisions of §204 are jurisdictional in
22 character. Actions involving title or *injury to real property* may only be commenced in the
23 county in which the real property is situated. Otherwise, the action must be dismissed for
24 want of jurisdiction." (Emphasis added).
25

26 Even an action seeking only money damages for injury to real property, not involving
27 title to or possession of real property, must be brought in the county where the property is
28

1 located. *State ex rel. King County v. Superior Court of Pierce County*, 104 Wash. 268, 276,
2 176 P. 352 (1918). In that case, the plaintiff receiver of the Tacoma Meat Company sought
3 damages from defendants King County and Pierce County, alleging negligent diversion of the
4 Puyallup River that flooded the Tacoma Meat Company's real property (located in Pierce
5 County). 104 Wash. at 269. The plaintiff properly commenced the action in Pierce County
6 Superior Court, and defendant King County sought a change of venue, which was denied. *Id.*
7 King County sought a writ of mandamus compelling Pierce County Superior Court to change
8 venue. *Id.* The Supreme Court denied the writ, holding that an action for negligent injury to
9 real property in which the plaintiff seeks money damages is local in nature, and may only be
10 properly commenced in the county in which the property is located. 104 Wash. at 276.

11 This action arises from the flooding of plaintiffs' real property located in Lewis
12 County. Plaintiffs seek damages for injuries to their real property caused by this flooding.
13 Consequently, RCW 4.12.010(1) applies to this case and vests sole jurisdiction over this
14 action in Lewis County Superior Court. This Court should dismiss this action for lack of
15 subject matter jurisdiction.

16 **B. APPLICATION OF RCW 4.92.010 DOES NOT CURE THE JURISDICTIONAL**
17 **DEFECT.**

18 Plaintiffs may cite RCW 4.92.010 (providing for venue in actions against the State) in
19 response to defendants' motion. However, this statute does not apply to the jurisdictional
20 issue before the Court. First, RCW 4.92.010 relates to venue for actions against the State, not
21 jurisdiction. *Sim v. Wash. State Parks and Rec. Comm'n*, 90 Wn.2d 378, 382, 583 P.2d 1193
22 (1978) ("RCW 4.92.010 is a general venue statute"). Second, the venue requirements of
23 RCW 4.92.010 act in harmony with the jurisdictional requirements of RCW 4.12.010(1), as
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*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 4*

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1 RCW 4.92.010(3) authorizes venue in "the county where the real property that is the subject
2 of the action is situated." *See Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993)
3 (statutes must be harmonized where possible). Consequently, RCW 4.92.010 offers plaintiffs
4 no relief from defendants' objection to subject matter jurisdiction.
5

6 **C. THE COURT MAY NOT TRANSFER VENUE TO LEWIS COUNTY.**

7 Plaintiffs may argue that the Court may cure this jurisdictional defect by transferring
8 venue to Lewis County. This argument lacks merit. A court lacking subject matter
9 jurisdiction may do nothing but enter an order of dismissal. *Howlett v. Weslo, Inc.*,
10 90 Wn. App. 365, 368, 951 P.2d 831 (1998); *see also Apex Mercury Mining*,
11 24 Wn.2d at 409. A court may transfer venue only after the action has been properly
12 commenced in a court with subject matter jurisdiction over the action:
13

14
15 Actions instituted in the proper county may be transferred to another county
16 for trial if sufficient cause be shown therefor. When a cause is transferred for
17 trial, the court to which the transfer is made has complete jurisdiction to
18 determine the issues in the case.

19 *Apex Mercury Mining*, 24 Wn.2d at 409; *see also State v. Super. Ct. of King County*,
20 82 Wn.2d 356, 360, 144 P. 291 (1914) (transfer of venue from King County to Chelan County
21 did not destroy jurisdiction where the action was properly commenced in King County).

22 In this case, plaintiffs were required to commence this action in Lewis County
23 Superior Court. However, plaintiffs disregarded the jurisdictional requirements of
24 RCW 4.12.010(1), which cannot be cured by a transfer of venue. The only remedy available
25 to this Court is to dismiss this action for lack of subject matter jurisdiction.
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*Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 7*

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**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

VIRGINIA CAREY, individually; JAMIE CAREY, individually; PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington Corporation,

Plaintiffs,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington Corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington Corporation,

Defendants.

NO. 10-2-42011-8KNT

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

HEARING DATE: June 17, 2011

I. RELIEF REQUESTED

In *Young v. Clark*, 149 Wash.2d 130 (2003), 65 P.3d 1192 (2003) the Washington State Supreme Court, en banc, eliminated earlier confusion about the subject matter jurisdiction of Washington's superior courts. Overruling and reversing previous case law, the Court unanimously struck down a legislatively-created, jurisdiction limiting statute (RCW 4.12.020) as violative of article IV, section 6 of the state constitution. See *Young*, 149 Wash.2d at 133. "The language of the constitution is not that the superior courts shall have

1 exclusive jurisdiction, but it gives to the superior courts *universal original jurisdiction*.¹⁰
2 (emphasis added) *Id.* at 134, quoting *Moore v. Perrot*, 2 Wash. 1, 4, 25 P. 906 (1891). The
3 Court went on to strike down jurisdictional limits from a similarly restrictive statute, as well.
4 *Id.* “[T]he filing requirements of RCW 36.01.50 relate only to venue, not to the trial court’s
5 subject matter jurisdiction.” *Id.*, quoting *Shoop v. Kittitas County*, 149 Wash.2d 29, 37, 65
6 P.3d 1194 (2003).
7

8 Defendants’ motion asks this court to similarly violate the state constitution’s article
9 IV, section 6, by unlawfully treating RCW 4.12.010 as a statutorily superseding limit to the
10 superior court’s constitutionally-defined subject matter jurisdiction. Plaintiffs’ assert that this
11 Court must decline Defendants’ invitation and deny the motion to dismiss for lack of subject
12 matter jurisdiction.

13 Even if this Court was to ignore the clear guidance of *Young v. Clark* regarding the
14 superior court of King County’s subject matter jurisdiction in this case, Plaintiffs further
15 submit that the damages at issue here stem from tortious and illegal conduct including
16 negligence, conversion and trespass, which amount to personal interests and are therefore
17 transitory in nature and not limited to “injuries to real property” as envisioned by RCW
18 4.12.010.
19

20 And finally, if the court were to find elements of Plaintiffs’ claims so unique to the
21 property that a judicial presence within the same county as the property is essential, then the
22 least restrictive and the only constitutional option would be to change venue, rather than
23 improperly entering dismissal for lack of subject matter jurisdiction on all claims.
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II. STATEMENT OF FACTS

For the purposes of the underlying motion, the facts contained within the Plaintiffs complaint are not in material dispute. The following is a recitation of those averred facts relevant to the instant motion.

On December 3rd and 4th, 2007, rainfall triggered roughly 2,000 landslides on clear cut and otherwise de-stabilized property on lands owned by the defendants. The millions of tons of mud and debris deposited in the Chehalis River system displaced the water, causing flooding of record proportion. Declaration of Darrell L. Cochran ("Cochran Declaration"), Exhibit A. Plaintiffs' homes and property were destroyed by this flooding. Plaintiffs' homes and businesses suffered extensive damage due to the flooding. Cochran Declaration, Exhibit B. Their property was damaged, much of it ruined and some of it entirely washed away. Cochran Declaration, Exhibit A and B.

Plaintiffs properly and timely brought their complaint in King County against King County business residents, Weyerhaeuser and Green Diamond Resource Company, and joined Defendant DNR in this venue under RCW 4.92.010, as an additional defendant. Cochran Declaration, ¶6. Plaintiffs seek monetary damages for the amount of injury suffered as a result of Defendants' unlawful and tortious conduct.

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III. STATEMENT OF ISSUES

A. Whether subject matter jurisdiction for this action is proper in King County Superior Court, in keeping with the unanimous Supreme Court opinion in *Young v. Clark*, 149 Wash.2d 130 (2003), 65 P.3d 1192 (2003), which found that only the state constitution can

1 determine original jurisdiction, and that legislatively created statutes, like RCW 4.12.010,
2 relate only to venue, not to the trial court's subject matter jurisdiction.

3 **B.** And in the alternative, whether the King County Superior Court has jurisdiction over
4 the instant action when the Plaintiffs seek a remedy of money damages arising out of injury to
5 real, personal, and business property, or "personal interests," but do not seek relief related to
6 the title or other disposition specific to the real property.

8 IV. EVIDENCE RELIED UPON

9 As the underlying facts are not in dispute, Plaintiffs opposition relies on the pleadings
10 already filed with this court, along with the Declaration of Darrell L. Cochran and the exhibit
11 attached to it.

12 V. AUTHORITY

13 **A. Defendants Motion Must Be Denied Because the State Constitution Controls,** 14 **Not RCW 4.12.010, Vesting Universal Original Jurisdiction with All State** 15 **Superior Courts.**

16 "The superior court shall ...have original jurisdiction in all cases and of all
17 proceedings in which jurisdiction shall not have been by law vested exclusively in some other
18 court." WASH. CONST. art. IV. Thus, the state constitution, **not the legislature**, gives the
19 superior courts universal original jurisdiction. *Id.*; *Young v. Clark*, 149 Wash.2d at 133-34.
20 The legislature is empowered only to "carve out" the limited jurisdiction of inferior courts.
21 *Young v. Clark*, 149 Wash.2d at 133-34. Otherwise, the superior court retains original
22 jurisdiction in all cases and over all proceedings. WASH. CONST. art. IV, § 6; *Clark* at 133.

23 *Young v. Clark* required the state Supreme Court to analyze the inconsistencies of
24 RCW 4.12.020(3), which provides a motor vehicle accident plaintiff "the option of suing
25 either in the county in which the cause of action or some part thereof arose, or in the county in
26 which the defendant resides, or if there be more than one defendant, where some one of the

1 defendants resides, at the time of the commencement of the action,” with the express grant of
2 universal original jurisdiction to the state’s superior courts accorded in article IV, section 6 of
3 the Washington state constitution. *Id.* at 134. In determining whether the legislature’s
4 authority to limit subject matter jurisdiction as among superior courts violates article IV,
5 section 6 of the state constitution, the Court held, “Our previous interpretation of RCW
6 4.12.020 construed the statute to limit subject matter jurisdiction as among superior courts.
7 So understood, the statute violates article IV, section 6 of the state constitution.” *Id.*

8
9 Defendants’ motion would require this court to ignore the same constitutional
10 violation the Supreme Court forbade in *Young v. Clark*, and instead create an impermissible
11 legislatively-created subject matter limitation from RCW 4.12.010. Defendants cite Judge
12 James Cayce’s ruling of June 9 in *Davis v. DNR*, but they do so without mention of a court’s
13 obligation to construe statutes consistently with the constitution. *See id., State v. Clausen*,
14 160 Wash. 618, 632, 295 P. 751 (1931). Plaintiffs urge this Court to follow the plain meaning
15 of the constitution’s clear language on this issue and deny Defendants’ Motion to Dismiss for
16 Lack of Subject Matter Jurisdiction. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108
17 Wash.2d 679, 706, 743 P.2d 793 (1987) (“Where the language of the constitution is clear, the
18 words used therein should be given their plain meaning.”).

19
20 **B. Defendant’s Motion Should Also Be Denied Because Plaintiffs’ Action is**
21 **Transitory in Nature as Seeking Primarily Monetary Damages for Personal**
22 **Interests to Both Real and Personal Property.**

23 Washington courts have long recognized the power of a court to determine personal
24 interests in real property located outside the immediate jurisdiction. *See Silver Surprise, Inc.*
25 *v. Sunshine Mining Co.*, 74 Wn.2d 519, 445 P.2d 334 (1968). The courts acknowledge the
26 distinction between jurisdiction to adjudicate title to land and jurisdiction to settle the parties’

1 personal interests in real estate. (“No one would question that an action brought to try the
2 naked question of title to land must be brought in the state where the land is situate. However,
3 where the basis of the action is transitory and one over which the court has jurisdiction, the
4 court may hear and determine the action even though a question of title to foreign land may be
5 involved, and even though the question of title may constitute the essential point on which the
6 case depends.”) *Id.* at 526. For example, while a superior court lacks jurisdiction to directly
7 affect title to real property located in another country, the court does possess jurisdiction to
8 indirectly affect title to such property by apportioning interests among individuals over whom
9 it has personal jurisdiction. *See In Re the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d
10 959 (2008) (determining personal interests in real property located in Poland pursuant to a
11 marriage dissolution).

12
13 Washington’s Supreme Court has routinely rejected jurisdictional challenges where
14 personal interests in real property have been at stake. *See id.* (affirming power of
15 Washington court to adjudicate parties’ interests in Idaho real estate in a breach of contract
16 claim); *Donaldson*, 40 Wn.2d at 251 (affirming power of Washington court to adjudicate
17 parties’ interests in California real estate in a partnership dissolution); *Elsom v. Tefft*, 140
18 Wash. 586, 591, 250 P. 346 (1926) (affirming power of Washington court to adjudicate
19 parties’ interests in mining claims located in British Columbia in an action brought to enforce
20 a trust); *Smith v. Fletcher*, 102 Wash. 218, 220, 173 P. 19 (1918) (“It is a universal rule that
21 the courts of one state cannot pass judgment on the title to land in another state. But, where
22 the action is aimed at the personal relations of parties in connection with property beyond the
23 jurisdiction, it is well recognized that courts may afford relief.”); *Rosenbaum v. Evans*, 63
24 Wash. 506, 508-09, 115 P. 1054 (1911) (“a suit for the specific performance of a contract to
25 convey real estate is a transitory one . . . [which] affects the parties to the action personally,
26

1 but does not determine the title”) (collecting cases); *Sheppard v. Coeur d’Alene Lumber Co.*,
2 62 Wash. 12, 15, 112 P. 932 (1911) (“„[W]hen the title is incidental the court possessing
3 jurisdiction of the contract which is in its nature transitory, may even inquire into the very title
4 let the lands lie where they may.”” (quoting *Henwood v. Cheeseman*, 3 Serg. & Rawle 500,
5 504 (Pa. 1817))); *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909)
6 (recognizing court’s power to establish and enforce a trust in real property located outside
7 state).
8

9 Here, the trial court’s jurisdiction over the parties and this action clearly encompasses
10 the power to adjudicate the parties’ personal interests in the real property located in Lewis
11 County. The subject matter of the suit -- negligence, trespass, tortious interference with
12 contractual relations and business expectancy, conversion and inverse condemnation -- is an
13 action in which a court with personal jurisdiction over the defendants, like King County here,
14 also has jurisdiction to determine the parties’ relative interests in all property brought to the
15 court’s attention. *See Kowalewski*, 163 Wn.2d at 550.
16

17 In addition, Washington law is clear, actions for monetary damages to real property
18 are transitory in nature and may be brought in the county in which the defendant resides.
19 *Shelton v. Farkas*, 30 Wn. App. 549, 553, 635 P.2d 1109 (1981) (“[t]he term „transitory
20 action” encompasses those actions which at common law might be tried wherever personal
21 service can be obtained as opposed to in rem proceedings which are local in nature”). Actions
22 described in RCW 4.12.010, which must be brought in the county where the property is
23 located, are “local”, while “transitory” actions are those described in RCW 4.12.025, which
24 may be brought where the defendant resides. *See State ex rel. U.S. Trust Co. v. Phillips*, 12
25 Wn.2d 308, 315, 121 P.2d 360 (1942). Actions for monetary recovery are in personam and
26 are transitory in nature. Here, Plaintiffs’ action against defendants is solely for monetary

1 damages, is transitory in nature, and may be brought in King County, where the Defendants
2 reside.

3
4 Contrary to Defendants' suggestion, Plaintiffs' claims are transitory in nature. In
5 *Washington State Bank v. Medalia Healthcare L.L.C.*, the Washington Court of Appeals held
6 that an action where the plaintiff seeks exclusively monetary recovery is in personam and
7 transitory in nature and is therefore not subject to the requirement of RCW 4.12.010 that local
8 actions be commenced in the county where the property is located. 96 Wn. App. 547, 558,
9 984 P.2d 1041, 1047 (1999). The Court's holding is consistent with the general trend to limit
10 the applicability of the local action rules. See *Andrews v. Cusin*, 65 Wn.2d 205, 207, 396 P.2d
11 155 (1964) ("rules or statutes which require that actions for injuries to land be brought at the
12 situs of the land have been severely criticized, as having no sound basis in reason"); *Mueller*
13 *v. Brunn*, 313 N.W.2d 171, 796-97 (Wis. 1982) (stating that "courts wherever possible have
14 consistently construed actions concerning real estate to be transitory rather than local" and
15 that the trend is toward making all money damage actions transitory). Here, Plaintiffs' claims
16 are transitory in nature as they solely seek monetary damages for damages caused by the
17 defendants. Title to or disposition of Plaintiffs' land is not in question or dispute.

18
19 Moreover, as Plaintiffs' claims are transitory in nature, they may be brought where the
20 defendants reside, King County, in accordance with RCW 4.12.025. In *McLeod v. Ellis*, the
21 Washington Supreme Court found that an action for the conversion of timber seeking the
22 value of the trees was transitory and could be brought in a county other than the one in which
23 the land where the trees were harvested was located. 2 Wash. 117, 122, 26 P. 76 (1891)
24 (finding that the complaint sufficiently pleaded a claim for conversion as opposed to a claim
25 for injury to real property). In *McLeod*, the defendant cut down, removed, and disposed of
26 trees located on the plaintiff's property; thus, causing injuries to the real property valued at

1 approximately \$14,000. *Id.* The *McLeod* defendant challenged the court's jurisdiction over
2 the claim as the suit was not filed in the same county in which the property was located. The
3 Washington Supreme Court concluded that the plaintiff's action was one for the value of his
4 trees without any claim for injury to the land. Here, Plaintiffs' have similar claims of damage
5 to real property that does not constitute "injury to the land" as outlined in RCW 4.12.010.
6 Plaintiffs' real property damage includes flood damage to their residences, outbuildings, and
7 business property.
8

9 Finally, Washington Courts have not limited this allowance for transitory claims to
10 conversion actions. In *Silver Surprise, Inc. v. Sunshine Mining Co.*, the plaintiff brought a
11 breach of contract claim concerning an exchange of conveyances and mining of property
12 located in Idaho. 74 Wn.2d 519, 520, 445 P.2d 334 (1968). The defendant asserted an
13 affirmative defense of adverse possession. *Id.* at 521. The trial court dismissed for lack of
14 subject matter jurisdiction because it viewed the subject of the action to be the determination
15 of the title to the property in Idaho. *Id.* at 522. The Washington Supreme Court reversed
16 noting that the contract action was transitory and recognizing that "[t]he view is generally
17 maintained that where the relief sought acts upon the party personally and does not require the
18 court to deal directly with „the real estate itself“, the proceeding need not be maintained in the
19 state or county where the property is situate." *Id.* at 525-527. The court held that "where the
20 basis of the action is transitory and one over which the court has jurisdiction, the court may
21 hear and determine the action even though a question of title to foreign land may be involved,
22 and even though the question of title may constitute the essential point on which the case
23 depends." *Id.* at 526. Here, the Plaintiffs' are solely seeking monetary damages. The Court
24 will not have to deal directly with the real property that was damaged as a result of the
25 negligence of the defendants. Moreover, in *Silver Surprise*, the plaintiff's claim indirectly
26

1 dealt with the determination of the title of real property in Idaho; yet the Washington Supreme
2 Court held the plaintiff's claim was transitory and jurisdiction was proper in Washington.
3 Here, title to the real property is not a question to be decided. Again, Plaintiffs' are primarily
4 seeking monetary damages, and other relief not associated with Plaintiffs' real property.
5

6 Here, Plaintiffs state five causes of action targeted against Defendants in their
7 complaint. Each can be characterized as personal to them, rather than relating exclusively to
8 the property. First, Plaintiffs pleaded Negligence, a transitory action, remedied by general
9 and special damages. Second, the Plaintiffs pleaded Trespass, which may appear as localized,
10 but as the trespass was temporary (ie: the waters and debris receded), the Plaintiffs did not
11 request the normal remedy, ejection. Instead, they seek money damages for the effect of the
12 trespass. Third, the Plaintiffs pleaded conversion, which has been held to constitute a
13 transitory action under RCW 4.12.010. *Wash. State Bank*, 96 Wn. App. at 558. Fourth, the
14 Plaintiffs pleaded tortious interference with business expectancy, which is personal to the
15 Plaintiffs and are remedies solely by monetary damages equal to lost profits. Fifth and
16 finally, Plaintiffs pleaded the Shoreline Management Act of 1971, which relates exclusively
17 to the actions of the defendant on its own property, and does not affect the rights to property
18 contemplated in in rem jurisdiction.
19

20 **C. The Court Has a Less Restrictive, Constitutional Option to Recognize the**
21 **"Venue Only" Character of RCW 4.12.010.**

22
23 If, and only if, the court were to find some elements of Plaintiffs' personal, transitory
24 interests in real property so unique to the property's physical location that resolution of the
25 claims could only be properly adjudicated in the county in which the property exists, then the
26 only constitutionally permissible option would be to change the venue. Plaintiffs submit that
venue is proper in King County. However, if the Court believes the property's location is so

1 particular to the claims asserted, then a recognition of the Supreme Court's "venue-only"
2 interpretation of statutory provisions of RCW 4.12.010 prescribed by the *Young v. Clark*
3 opinion would require the denial of Defendants' motion to dismiss for lack of subject matter
4 jurisdiction and instead a separate consideration of the case's most appropriate venue.
5

6 VI. CONCLUSION

7 Defendants' motion must be denied because the plain language of the state
8 constitution confers original jurisdiction to the King County Superior Court. A unanimous
9 state Supreme Court has ruled unequivocally that filing requirements, like those statutorily
10 prescribed in RCW 4.12.010, pertain only to venue questions, not to subject matter
11 jurisdiction. In addition, the Plaintiffs' transitory personal interests damaged as a result of
12 Defendants' unlawful and tortious acts are clearly within this court's power despite the
13 physical location of the property in question. In the alternative, if the court finds certain
14 elements of Plaintiffs claims to be local interests, unique to the properties' physical location,
15 then venue change, not dismissal of the action as a whole, is the only appropriate remedial
16 action.
17

18 Dated this 17th day of June, 2011.

19 PFAU COCHRAN VERTETIS AMALA, PLLC

20
21 By 
22 Darrell L. Cochran, WSBA No. 22851
23 darrell@pcvalaw.com
24 Attorneys for Plaintiffs
25
26

CERTIFICATE OF SERVICE

I, Ami Erpenbach, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served via E-Service, and by Facsimile to Attorney Mark Jobson, indicated below, by directing delivery to the following individuals:

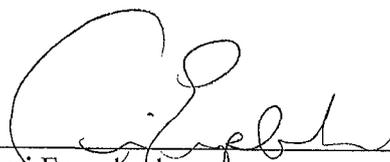
Mark Jobson
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Olympia, WA 98504-0126
Attorney for: State of Washington Dept. of Natural Resources

Kelly P. Corr
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Attorney for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

DATED this 17th day of June, 2011.


Ami Erpenbach
Legal Assistant to Darrell L. Cochran

4824-2123-9305, v. 1

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THE HONORABLE BARBARA A. MACK

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; and PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42011-8 KNT

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Reply in Support of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction

HILLIS CLARK MARTIN & PETERSON P.S.
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1 In their response, plaintiffs contend that the legislature's jurisdictional restriction in
2 RCW 4.12.010(1) is unconstitutional, and that all claims for damages are transitory such that
3 the claims may be brought in any county where a defendant resides. In doing so, plaintiffs
4 ask this Court to disregard long established controlling precedent and the legislature's
5 unambiguous mandate: actions for injuries to real property "shall be commenced" in the
6 county where the real property is located. RCW 4.12.010(1); *Cugini v. Apex Mercury Mining*
7 *Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946). Plaintiffs disregarded this requirement when
8 they commenced this action in King County to recover damages for injury to their real
9 property in Lewis County, and now invite the Court to do the same. The Court should decline
10 plaintiffs' invitation and dismiss this action for lack of subject matter jurisdiction.

11 **A. THE JURISDICTIONAL REQUIREMENTS OF RCW 4.12.010(1) ARE**
12 **CONSTITUTIONAL.**

13 Plaintiffs rely upon *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003), to attempt
14 to escape from RCW 4.12.010(1)'s jurisdictional requirements. However, *Young* interpreted a
15 different statute, RCW 4.12.020(3), and involved an action to recover damages for personal
16 injury, which are transitory in nature, *Mendoza v. Neudorfer Engineers, Inc.*,
17 145 Wn. App. 146, 156, 185 P.3d 1204 (2008). *Young*, 149 Wn.2d at 132-133. Therefore,
18 *Young* does not address the Supreme Court's holding in *Apex Mercury Mining* regarding
19 RCW 4.12.010(1) and jurisdiction over actions for injuries to real property.

20 Moreover, plaintiffs' constitutional argument requires the Court to read article IV
21 section 6 of the state constitution in isolation, ignoring language used in the rest of the
22 constitution. Section 6 vests "the superior court" with original jurisdiction over cases
23 "in which the demand or the value of the property in controversy amounts to three thousand
24 dollars or as otherwise determined by law," and also "in all cases and of all proceedings in
25 which jurisdiction shall not have been by law vested exclusively in some other court."
26 Const. art. IV, § 6. Though this section does vest jurisdiction in *the* superior court, it does not
27 describe *which* superior court. The state constitution uses "the superior court" to refer to the
28 superior court for a particular county. *See* Const. art. IV, § 5 (election of judges to the

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction - 1*

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1 superior court for each county). In contrast, the constitution uses "superior courts" when
2 discussing all superior courts. *See* Const. art. IV, § 1 ("The judicial power of the state shall be
3 vested in a supreme court, *superior courts*, justices of the peace, and such inferior courts at
4 the legislature may provide."), §11 ("The supreme court and *the superior courts* shall be
5 courts of record, and the legislature shall have power to provide that any of the courts of this
6 state, excepting justices of the peace, shall be courts of record."), § 13 ("The judges of the
7 supreme court and judges of *the superior courts* shall severally at stated times, during the
8 continuance in office, receive for their services the salaries prescribed by law therefor, which
9 shall not be increased after their election, nor during the term for which they shall have been
10 elected."), § 24 ("The judges of *the superior courts*, shall from time to time, establish uniform
11 rules for the governance of *the superior courts*." (emphasis added)).

12 According to authority cited by plaintiffs, "Where the language of the constitution is
13 clear, the words used therein should be given their plain meaning." *City of Tacoma v.*
14 *Taxpayers of City of Tacoma*, 108 Wn.2d 679, 706, 743 P.2d 793 (1987). Section 6
15 authorizes the legislature to vest jurisdiction for actions involving injury to real property only
16 in the superior court for the county where the property is located. Consistent with this
17 authority, the Supreme Court has upheld the jurisdictional nature of RCW 4.12.010(1).
18 *Apex Mercury Mining*, 24 Wn.2d at 409.

19 **B. ACTIONS SEEKING DAMAGES FOR INJURY TO REAL PROPERTY ARE LOCAL,
20 NOT TRANSITORY.**

21 Plaintiffs' contention that all actions for damages are transitory ignores controlling
22 precedent. In fact, actions seeking damages for injury to real property are local in nature, and
23 must be brought in the county where the property is located. *State ex rel. King County v.*
24 *Superior Court of Pierce County*, 104 Wash. 268, 276, 176 P. 352 (1918). To determine the
25 nature of an action, the Court should look to the subject matter of the complaint. *Silver*
26 *Surprise, Inc. v. Sunshine Min. Co.*, 74 Wn.2d 519, 522, 445 P.2d 334 (1968) (examining
27 plaintiff's complaint and determining that it was "patently a contract action").
28

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction - 2*

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1 Here, the subject matter of plaintiffs' complaint is plainly the injury caused to
2 plaintiffs' real and personal property arising from flooding of their real property. Plaintiffs
3 seek the same relief sought by the plaintiff in *King County* – in this case, damages for injury
4 to real property located in Lewis County. The fact that plaintiffs seek only money damages
5 does not convert this action from local to transitory.

6 **C. PLAINTIFFS RELY UPON INAPPOSITE LEGAL AUTHORITY.**

7 Plaintiffs do not dispute that *King County* holds that actions for injury to real property
8 are local, not transitory. Instead, plaintiffs cite three categories of cases to support of their
9 erroneous contention that all actions for damages are transitory. Cases in the first category
10 hold that actions for breach of contract are transitory. Cases in the second category hold that
11 actions for tortious injury to personal property are transitory. Cases in the third category hold
12 that equitable actions are transitory. None addresses the Court's jurisdictional defect in this
13 case, where plaintiffs seek damages for injury to their real property.

14 **1. Actions for breach of contract are transitory.**

15 Plaintiffs cite to *Shelton v. Farkas* in support of the proposition that actions for
16 damages for injury to real property are transitory. Response at 8. However, *Shelton* had
17 nothing to do with real property. In *Shelton*, the plaintiff (residing in King County) brought
18 an action for breach of contract for the sale of a violin in King County Superior Court against
19 a defendant residing in Kittitas County. 30 Wn. App. 549, 550-52, 635 P.2d 1109 (1981).
20 Upon defendant's request, the King County Superior Court transferred venue to Kittitas
21 County. *Id.* at 552. On appeal, the plaintiff argued that the King County Superior Court erred
22 by transferring venue. *Id.* at 553. The Court of Appeals disagreed, holding that an action for
23 breach of contract is transitory and that venue for such an action may lie where one of the
24 defendants resides. *Id.* at 553-54. *Shelton* did not involve a claim for damages from injury to
25 real property, and is inapposite to the issue at hand.

26 Plaintiffs' other authority is similarly inapplicable. *State ex rel. U.S. Trust Co. v.*
27 *Phillips* held that an action for breach of contract (in that case, for the sale of timber) is
28 transitory, which may be brought in the county where one of the defendants resides.

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction - 3*

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1 12 Wn.2d 308, 315, 121 P.2d 360 (1942). *Silver Surprise* held that an action for breach of
2 contract (in that case, for the mining of land in Idaho) is transitory, even where the defendant
3 asserts ownership of real property as a defense. 74 Wn.2d at 522-24. *Andrews v. Cusin* held
4 that an action for breach of contract (in that case, express and implied warranties for potato
5 seedlings) is transitory and may be brought where the defendant resides. 65 Wn.2d 205, 209,
6 396 P.2d 155 (1964). *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Wash. 12, 112 P. 932
7 (1911), was an action for breach of lease to recover unpaid rent. None of these cases address
8 the issue now before the Court: whether this Court has subject matter jurisdiction over an
9 action for damages for injury to real property in Lewis County.

10 **2. Actions for tortious injury to personal property, unrelated to**
11 **injuries to real property, are transitory.**

12 Plaintiffs overstate the holding of *Washington State Bank v. Medalia Healthcare,*
13 *L.L.C.* Response at 8. In that case, a lender sued the purchaser of medical equipment (in
14 which the lender had a security interest) for conversion, claiming damages in the amount of
15 the value of the equipment. *Washington State Bank v. Medalia Healthcare L.L.C.*,
16 96 Wn. App. 547, 548, 984 P.2d 1041 (1999). The court stated, "[W]e hold that a conversion
17 action where the plaintiff seeks exclusively monetary recovery is in personam and transitory
18 in nature and is therefore not subject to the requirement of RCW 4.12.010(2) that local actions
19 be commenced in the county where the personal property is located." *Id.* at 558. *Medalia* is
20 inapposite – it relates only to actions for damages for conversion of personal property and did
21 not relate to real property in any way.

22 *McLeod v. Ellis* does not help plaintiffs. In *Apex Mercury Mining*, the Supreme Court
23 described its holding in *McLeod* as follows: "[*McLeod*] held that an action commenced in the
24 county other than that where the property was located would not give the court jurisdiction."
25 24 Wn.2d at 404. In *McLeod*, the plaintiff's claim was for conversion of timber, not for injury
26 to real property, and was therefore transitory. 2 Wash. at 122. Likewise, the plaintiff's action
27 for negligent injury to personal property in *Andrews* was held to be transitory.
28 65 Wn.2d at 209. None of these cases stand for the proposition that this Court may exercise

1 subject matter jurisdiction over an action seeking damages for injury to real property in Lewis
2 County.

3 **3. Equitable relief is transitory.**

4 Plaintiffs' remaining authority establishes that actions in equity are transitory. *In re*
5 *the Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008) (marriage dissolution);
6 *Donaldson v. Greenwood*, 40 Wn.2d 238, 232 P.2d 1038 (1952) (enforcement of equitable
7 trust); *Elsom v. Tefft*, 140 Wash. 586, 250 P. 346 (1926) (enforcement of trust in equity);
8 *Rosenbaum v. Evans*, 63 Wash. 506, 115 P. 1054 (1911) (equitable decree to reform a deed);
9 *State ex. rel. Scougale v. Superior Court*, 55 Wash. 328, 104 P. 607 (1909) (enforcement of
10 equitable trust). These cases are inapposite because plaintiffs do not seek equitable relief.

11 **D. LACKING SUBJECT MATTER JURISDICTION, THIS COURT MAY NOT**
12 **TRANSFER VENUE.**

13 Plaintiffs do not dispute that if this Court lacks subject matter jurisdiction, it may only
14 enter an order of dismissal. *Young*, 149 Wn.2d at 133 ("When a court lacks subject matter
15 jurisdiction in a case, dismissal is the only permissible action the court may take.").
16 Nonetheless, plaintiffs request a transfer of venue to Lewis County as an alternative form of
17 relief. Response at 11. Absent subject matter jurisdiction, this Court should disregard
18 plaintiffs' request for alternative venue, and should dismiss this action.

19 **E. CONCLUSION**

20 This action arises from the same storm, in the same county, involving similarly
21 situated plaintiffs, and asserts the same causes of action as those in *Davis et al. v. Washington*
22 *State Department of Natural Resources et al.*, King County Superior Court No. 10-2-42010-0
23 KNT, assigned to Judge James Cayce. Judge Cayce granted defendants' motion for dismissal
24 on the same grounds.¹ RCW 4.12.010(1) and controlling precedent vests sole jurisdiction
25 over this action in Lewis County Superior Court. This Court should dismiss this action.

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28 ¹ The plaintiffs in *Davis* moved for reconsideration of Judge Cayce's decision on June 17, 2011.

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DATED this 20th day of June, 2011.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Louis D. Peterson
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CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP

By s/ Kelly P. Corr

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Attorneys for Defendant
Green Diamond Resource Company

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be emailed and faxed to the last known address of all counsel of record.

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

DATED this 20th day of June, 2011, at Seattle, Washington.

s/ Suzanne Powers
Suzanne Powers

ND: 11100.182 4831-7935-8217v1

*Reply in Support of Defendants' Motion to Dismiss
for Lack of Subject Matter Jurisdiction - 7*

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THE HONORABLE JAMES CAYCE

FILED
KING COUNTY, WASHINGTON
JUN 09 2011
SUPERIOR COURT CLERK
BY STEPHANIE WALTON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CONNIE DAVIS, personally; SPENCER
DAVIS, personally; and DIRTY THUMB
NURSERY, a Washington State sole
proprietorship,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES;
WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

No. 10-2-42010-0 KNT

^{2 DC}
~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

THIS MATTER came before the Court on Defendants' Motion to Dismiss for Lack of
Subject Matter Jurisdiction ("Motion"). The Court reviewed the Motion, ~~any response or~~ ^{or} ~~the~~ ^{the}

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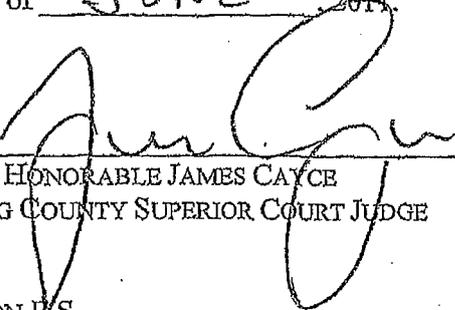
*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 1*

EXHIBIT A

HILLIS CLARK MARTIN & PETERSON P.S.
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Facsimile: (206) 623-7789

1 reply thereto, and the records and files herein. In light of the foregoing, IT IS HEREBY
2 ORDERED that Defendants' Motion is GRANTED.

3
4 DONE THIS 9th day of JUNE, 2011.

5
6
7 
8 THE HONORABLE JAMES CAYCE
9 KING COUNTY SUPERIOR COURT JUDGE

10 Presented by:

11 HILLIS CLARK MARTIN & PETERSON P.S.

12 By s/ Louis D. Peterson

13 Louis D. Peterson, WSBA #5776
14 Michael R. Scott, WSBA #12822
15 Alexander M. Wu, WSBA #40649
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23 Attorneys for Defendant
24 Weyerhaeuser Company

25 ROBERT M. MCKENNA
26 ATTORNEY GENERAL

27 s/ Mark Jobson

28 Mark Jobson, WSBA No. 22171
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Attorneys for Defendant
Department of Natural Resources

*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 2*

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1 CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP

2
3 s/ Kelly P. Corr

4 Kelly P. Corr, WSBA # 555

5 Corr Cronin Michelson Baumgardner & Preece LLP

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10 Email: kcorr@corrchronin.com

11 Attorneys for Defendant

12 Green Diamond Resource Company

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Proposed Order Granting Motion to Dismiss - Davis.docx

*Order Granting Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction - 3*

HILLIS CLARK MARTIN & PETERSON P.S.
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FILED
11 JUL 12 PM 1:21
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

THE HONORABLE BARBARA A. MACK

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; and PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42011-8 KNT

~~PROPOSED~~ ORDER ^{Denying} GRANTING ^{BTM} DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

[Clerk's Action Required]

ORIGINAL

THIS MATTER came before the Court on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion"). The Court reviewed the Motion, the response and ^{plaintiff's & defendant's supplemental authorities,} reply thereto, and the records and files herein. In light of the foregoing, IT IS HEREBY

ORDERED that Defendants' Motion is ~~GRANTED~~ ^{denied}.

//
//
//

~~Proposed~~ Order Granting Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction - 1

HILLIS CLARK MARTIN & PETERSON P.S.
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Seattle, Washington 98101-2925
Telephone: (206) 623-1745
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1 ~~IT IS HEREBY FURTHER ORDERED that this case is DISMISSED without~~
2 ~~prejudice.~~

3 DONE THIS 11 day of July, 2011.

4
5
6 
7 THE HONORABLE ~~BERNARD McCULLOUGH~~
8 KING COUNTY SUPERIOR COURT JUDGE

9 Presented by:

10 HILLIS CLARK MARTIN & PETERSON P.S.

11 By s/ Louis D. Peterson
12 Louis D. Peterson, WSBA #5776
13 Michael R. Scott, WSBA #12822
14 Alexander M. Wu, WSBA #40649
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24 ROBERT M. MCKENNA
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27 Mark Jobson, WSBA No. 22171
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Attorneys for Defendant
Department of Natural Resources

~~Proposed~~ Order Granting Defendants' Motion to
Dismiss for Lack of Subject Matter Jurisdiction - 2

HILLIS CLARK MARTIN & PETERSON P.S.
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2 CORR CRONIN MICHELSON BAUMGARDNER &
3 PREECE LLP

4 By s/ Kelly P. Corr

5 Kelly P. Corr, WSBA # 555

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14 Green Diamond Resource Company

15 ND: 11100.182 4813-4743-0153v1

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~~Proposed~~ Order Granting Defendants' Motion to
Dismiss for Lack of Subject Matter Jurisdiction - 3

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Pfau Cochran Vertetis Amala
OCT 05 2011
Tacoma Office

THE HONORABLE BARBARA A. MACK

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; and PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42011-8 KNT

~~PROPOSED~~ ORDER STAYING PROCEEDINGS

[Clerk's Action Required]

THIS MATTER came before the Court on Defendants' Motion to Stay Proceedings ("Motion"). The Court reviewed the Motion, the response and reply thereto, the documents filed in support thereof, the documents referenced therein, and the records and files herein. In light of the foregoing, IT IS HEREBY ORDERED that the Motion is GRANTED.

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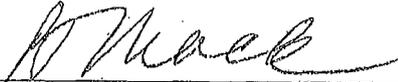
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Order Staying Proceedings - 1

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
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1 IT IS HEREBY FURTHER ORDERED that these proceedings are stayed until further
2 notice, and that defendants' counsel shall immediately notify the Court of the outcome of the
3 appeals of the related cases identified in the Motion.

4 DONE THIS 30 day of Sept, 2011.

5
6 
7 THE HONORABLE BARBARA A. MACK
8 KING COUNTY SUPERIOR COURT JUDGE

9 Presented by:

10 HILLIS CLARK MARTIN & PETERSON P.S.

11 By s/ Louis D. Peterson

12 Louis D. Peterson, WSBA #5776
13 Michael R. Scott, WSBA #12822
14 Alexander M. Wu, WSBA #40649
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22 Attorneys for Defendant
23 Weyerhaeuser Company

24 ROBERT M. MCKENNA
25 ATTORNEY GENERAL

26 By s/ Mark Jobson

27 Mark Jobson, WSBA No. 22171
28 Assistant Attorney General
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Olympia, WA 98504-0126
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Attorneys for Defendant
Department of Natural Resources

Order Staying Proceedings - 2

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2 CORR CRONIN MICHELSON BAUMGARDNER &
3 PREECE LLP

4 By s/ Kelly P. Corr

5 Kelly P. Corr, WSBA # 555

6 Corr Cronin Michelson Baumgardner &
7 Preece LLP

8 1001 Fourth Ave., Suite 3900

9 Seattle, WA 98154

10 Telephone: (206) 625-8600

11 Facsimile: (206) 625-0900

12 Email: kcorr@correronin.com

13 Attorneys for Defendant

14 Green Diamond Resource Company

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ND: 11100.182 4819-7334-9898v1

Order Staying Proceedings - 3

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The opinion of the Supreme Court of the State of Washington was filed on December 31, 2014. The opinion became final on April 1, 2015, upon entry of the Order Denying Motion for Reconsideration. This case is mandated to the superior court for further proceedings in accordance with the attached true copy of the opinion and the order denying motion for reconsideration.

Pursuant to Rule of Appellate Procedure 14.6(c), costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 2nd day of April, 2015.

A handwritten signature in black ink, appearing to read "Ronald R. Carpenter", is written over a horizontal line.

Ronald R. Carpenter
Clerk of the Supreme Court
State of Washington

cc: Clerk, King County Superior Court
Darrell L. Cochran
Loren A. Cochran
Kevin Michael Hastings
Kelly Patrick Corr
Joshua J. Preece
Seann C. Colgan
Mark Conlin Jobson
Louis David Peterson
Michael Ramsey Scott
Alexander Martin Wu
Reporter of Decisions

Pfau Cochran Vertelis Atanala

APR 08 2015

Tacoma Office

THE HONORABLE ROGER ROGOFF
APRIL 16, 2015
WITHOUT ORAL ARGUMENT

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; and PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington corporation,

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42011-8 KNT

**DEFENDANTS' MOTION
TO CHANGE VENUE**

Defendants' Motion to Change Venue

HILLIS CLARK MARTIN & PETERSON P.S.
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Seattle, Washington 98101-2925
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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs commenced this action in King County to recover damages for injury to their properties in Lewis County from flooding allegedly caused by defendants' actions. However, the Washington Supreme Court has determined that, under RCW 4.12.010(1), mandatory venue for this action lies in Lewis County. The Court should therefore change venue to Lewis County.

II. STATEMENT OF FACTS

Plaintiffs own real properties located in Lewis County, Washington. Complaint ¶¶ 2.1-2.3. Defendants own timberlands in Lewis County upon which they conduct forest practices. Complaint ¶¶ 1.2, 2.4-2.6. Defendant Washington State Department of Natural Resources also regulates these forest practices. Complaint ¶¶ 1.2, 2.4. Plaintiffs allege that defendants engaged in negligent forest practices that contributed to flooding, causing damage to plaintiffs' properties. Complaint ¶¶ 1.2, 5.2.

This case is one of four commenced in King County by separate groups of plaintiffs represented by the same counsel. These cases are as follows (together, the "*Flood Cases*"):

- *Forth et al. v. State Dept. of Natural Res. et al.*, King County No. 10-2-42009-6 KNT
- *Carey et al. v. State Dept. of Natural Res. et al.*, King County No 10-2-42011-8 KNT
- *Ralph v. Weyerhaeuser Co. et al.*, King County No. 10-2-42012-6 KNT
- *Ralph v. State Dept. of Natural Res.*, King County No. 11-2-05769-1 KNT

Defendants moved to dismiss the Flood Cases for lack of jurisdiction. The Court dismissed some of the Flood Cases, but declined to dismiss the others. Plaintiffs appealed the dismissals. The Court stayed the actions not dismissed pending the outcome of the appeals.

The Court of Appeals, Division I, consolidated the appeals, and affirmed. *Ralph v. State Dept. of Natural Res.*, 171 Wn. App. 262, 286 P.3d 992 (2012). Plaintiffs petitioned the Supreme Court for review, which was granted. *Ralph v. State Dept. of Natural Res.*, 176 Wn.2d 1024, 301 P.3d 1047 (2013).

Defendants' Motion to Change Venue - 1

HILLIS CLARK MARTIN & PETERSON P.S.
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1 The Supreme Court reversed, holding that RCW 4.12.010(1) identified the mandatory
2 venue for all actions involving injury to real property, including the Flood Cases. *Ralph v.*
3 *State Dept. of Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014).

4 **III. STATEMENT OF ISSUE**

5 Should venue for this action be changed to Lewis County?

6 **IV. EVIDENCE RELIED UPON**

7 This motion is based upon the plaintiffs' complaint and all other documents on file
8 with the Court in this action.

9 **V. AUTHORITY**

10 **A. LEWIS COUNTY IS THE PROPER VENUE FOR THIS ACTION.**

11 In *Ralph v. State Dept. of Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014), the
12 Supreme Court held that RCW 4.12.010(1) applied to this action and determines the
13 mandatory venue for this action. The statute provides that "actions 'for any injuries to real
14 property' 'shall be commenced' in the county in which the property is located," and thus the
15 county of the property is the "mandatory venue." *Id.* The change of venue is authorized by
16 RCW 4.12.060, which requires a change of venue to the county where the action ought to
17 have been commenced if "the county designated in the complaint is not the proper county."
18 RCW 4.12.060 and .030(1). Therefore, venue must be changed to Lewis County.

19 **B. VENUE SHOULD ALSO BE CHANGED TO LEWIS COUNTY FOR THE**
20 **CONVENIENCE OF THE WITNESSES.**

21 In addition to the reason set forth above, the Court should also change venue for the
22 convenience of the witnesses. RCW 4.12.030(3). All of the plaintiffs are located in Lewis
23 County, as are their properties. The storm and flooding occurred in Lewis County. In addition,
24 the defendants' employees who witnessed the storm and flooding are also located in Lewis
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ROBERT W. FERGUSON
ATTORNEY GENERAL

By s/ Mark Jobson
Mark Jobson, WSBA No. 22171
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Attorneys for Defendant
Green Diamond Resource Company

ND: 11100.182 4844-7639-0691v1

04-03-15 15:47 RCVD

Pfau Cochran Vertelle Amala

APR 08 2015

Tacoma Office

CHIEF MRJC JUDGE PATRICK OISHI
APRIL 16, 2015
WITHOUT ORAL ARGUMENT

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM FORTH, individually; GUY BAUMAN, individually; EILEEN BAUMAN, individually; LINDA STANLEY, individually and as personal representative IN RE THE ESTATE OF CORAL COTTON; ROCHELLE STANLEY, as personal representative IN RE THE ESTATE OF CORAL COTTON; DONALD LEMASTER, individually; and DAVID GIVENS, individually;

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES, a Washington State public agency; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

**DEFENDANTS' MOTION
TO CHANGE VENUE**

Defendants' Motion to Change Venue

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs commenced this action in King County to recover damages for injury to their properties in Lewis County from flooding allegedly caused by defendants' actions. However, the Washington Supreme Court has determined that, under RCW 4.12.010(1), mandatory venue for this action lies in Lewis County. The Court should therefore change venue to Lewis County.

II. STATEMENT OF FACTS

Plaintiffs own real properties located in Lewis County, Washington. Complaint ¶¶ 2.1-2.7. Defendants own timberlands in Lewis County upon which they conduct forest practices. Complaint ¶¶ 1.2, 2.8-2.10. Defendant Washington State Department of Natural Resources also regulates these forest practices. Complaint ¶¶ 1.2, 2.8. Plaintiffs allege that defendants engaged in negligent forest practices that contributed to flooding, causing damage to plaintiffs' properties. Complaint ¶¶ 1.2, 5.2.

This case is one of four commenced in King County by separate groups of plaintiffs represented by the same counsel. These cases are as follows (together, the "*Flood Cases*"):

- *Forth et al. v. State Dept. of Natural Res. et al.*, King County No. 10-2-42009-6 KNT
- *Carey et al. v. State Dept. of Natural Res. et al.*, King County No 10-2-42011-8 KNT
- *Ralph v. Weyerhaeuser Co. et al.*, King County No. 10-2-42012-6 KNT
- *Ralph v. State Dept. of Natural Res.*, King County No. 11-2-05769-1 KNT

Defendants moved to dismiss the Flood Cases for lack of jurisdiction. The Court dismissed some of the Flood Cases, but declined to dismiss the others. Plaintiffs appealed the dismissals. The Court stayed the actions not dismissed pending the outcome of the appeals.

The Court of Appeals, Division I, consolidated the appeals, and affirmed. *Ralph v. State Dept. of Natural Res.*, 171 Wn. App. 262, 286 P.3d 992 (2012). Plaintiffs petitioned the Supreme Court for review, which was granted. *Ralph v. State Dept. of Natural Res.*, 176 Wn.2d 1024, 301 P.3d 1047 (2013).

1 The Supreme Court reversed, holding that RCW 4.12.010(1) identified the mandatory
2 venue for all actions involving injury to real property, including the Flood Cases. *Ralph v.*
3 *State Dept. of Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014).

4 **III. STATEMENT OF ISSUE**

5 Should venue for this action be changed to Lewis County?

6 **IV. EVIDENCE RELIED UPON**

7 This motion is based upon the plaintiffs' complaint and all other documents on file
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10 **A. LEWIS COUNTY IS THE PROPER VENUE FOR THIS ACTION.**

11 In *Ralph v. State Dept. of Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014), the
12 Supreme Court held that RCW 4.12.010(1) applied to this action and determines the
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15 county of the property is the "mandatory venue." *Id.* The change of venue is authorized by
16 RCW 4.12.060, which requires a change of venue to the county where the action ought to
17 have been commenced if "the county designated in the complaint is not the proper county."
18 RCW 4.12.060 and .030(1). Therefore, venue must be changed to Lewis County.

19 **B. VENUE SHOULD ALSO BE CHANGED TO LEWIS COUNTY FOR THE**
20 **CONVENIENCE OF THE WITNESSES.**

21 In addition to the reason set forth above, the Court should also change venue for the
22 convenience of the witnesses. RCW 4.12.030(3). All of the plaintiffs are located in Lewis
23 County, as are their properties. The storm and flooding occurred in Lewis County. In addition,
24 the defendants' employees who witnessed the storm and flooding are also located in Lewis
25 County. The same will be true for any third party witnesses. If this case proceeds to trial,
26 defendants will ask that the jury be permitted to view the plaintiffs' properties. Therefore,
27 even if venue were not required to be changed to Lewis County (and it is), the Court should
28 also change venue for the convenience of the witnesses.

Defendants' Motion to Change Venue - 2

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ROBERT W. FERGUSON
ATTORNEY GENERAL

By s/ Mark Jobson
Mark Jobson, WSBA No. 22171
Assistant Attorney General
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Attorneys for Defendant
Department of Natural Resources

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By s/ Kelly P. Corr
Kelly P. Corr, WSBA # 555
Corr Cronin Michelson Baumgardner & Preece LLP
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Email: kcorr@corrchronin.com
Attorneys for Defendant
Green Diamond Resource Company

ND: 11100.180 4840-3569-7697v4

Defendants' Motion to Change Venue - 4

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Chief Judge Patrick Oishi
April 22, 2015
Without Oral Argument

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

WILLIAM RALPH, individually,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

NO. 11-2-05769-1KNT

DNR'S MOTION TO CHANGE
VENUE

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff commenced this action in King County to recover damages for injury to his property in Lewis County from flooding allegedly caused by defendants' actions. However, the Washington Supreme Court has determined that, under RCW 4.12.010(1), mandatory venue for this action lies in Lewis County. The Court should therefore change venue to Lewis County.

II. STATEMENT OF FACTS

Plaintiff owns real property located in Lewis County, Washington. Complaint ¶ 2.1. Defendants own timberlands in Lewis County upon which they conduct forest practices. Complaint ¶¶ 1.2, 2.2-2.3. Plaintiff alleges that defendants engaged in negligent forest

1 practices that contributed to flooding, causing damage to plaintiff's property. Complaint ¶¶
2 1.2, 5.2.

3 This case is one of four commenced in King County by separate groups of plaintiffs
4 represented by the same counsel. These cases are as follows (together, the "*Flood Cases*");

- 5 • *Forth et al. v. State Dept. of Natural Res. et al.*, King County No. 10-2-42009-6 KNT
- 6 • *Carey et al. v. State Dept. of Natural Res. et al.*, King County No 10-2-42011-8 KNT
- 7 • *Ralph v. Weyerhaeuser Co. et al.*, King County No. 10-2-42012-6 KNT
- 8 • *Ralph v. State Dept. of Natural Res.*, King County No. 11-2-05769-1 KNT

9 Defendants moved to dismiss the Flood Cases for lack of jurisdiction. The Court
10 dismissed some of the Flood Cases, but declined to dismiss the others. Plaintiffs appealed the
11 dismissals. The Court stayed the actions not dismissed pending the outcome of the appeals.
12

13
14 The Court of Appeals, Division I, consolidated the appeals, and affirmed. *Ralph v.*
15 *State Dept. of Natural Res.*, 171 Wn. App. 262, 286 P.3d 992 (2012). Plaintiffs petitioned the
16 Supreme Court for review, which was granted. *Ralph v. State Dept. of Natural Res.*, 176
17 Wn.2d 1024, 301 P.3d 1047 (2013).

18 The Supreme Court reversed, holding that RCW 4.12.010(1) identified the "mandatory
19 venue" for all actions involving injury to real property, including the Flood Cases. "We hold
20 that RCW 4.12.010 applies to tort actions seeking monetary relief for damages to real property
21 and relates to venue, not jurisdiction. If an action for injuries to real property is commenced in
22 an improper county, the result is not dismissal but rather a change of venue to the county in
23 which the real property is located. We therefore reverse the Court of Appeals and remand to
24 the trial court for further proceedings consistent with this opinion." *Ralph v. State Dept. of*
25
26

1 *Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014), *slip op. at p. 18 (copy attached)*.
2 Consistent with the Supreme Court's decision this case should be transferred to the county in
3 which the real property is located.

4 **III. STATEMENT OF ISSUE**

5 Should venue for this action be changed to Lewis County?
6

7 **IV. EVIDENCE RELIED UPON**

8 This motion is based upon the plaintiff's complaint and all other documents on file with
9 the Court in this action.

10 **V. AUTHORITY**

11 **A. Lewis County Is the Proper Venue for This Action**

12 In *Ralph v. State Dept. of Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014), the
13 Supreme Court held that RCW 4.12.010(1) applied to this action and determines the mandatory
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15 'shall be commenced' in the county in which the property is located," and thus the county of
16 the property is the "mandatory venue." *Id.* The change of venue is authorized by RCW
17 4.12.060, which requires a change of venue to the county where the action ought to have been
18 commenced if "the county designated in the complaint is not the proper county." RCW
19 4.12.060 and .030(1). Therefore, venue must be changed to Lewis County.
20
21

22 **B. Venue Should Also Be Changed to Lewis County for the Convenience of
23 the Witnesses**

24 In addition to the reason set forth above, the Court should also change venue for the
25 convenience of the witnesses. RCW 4.12.030(3). The plaintiff is located in Lewis County, as
26 is his property. The storm and flooding occurred in Lewis County. In addition, the

1 defendants' employees who witnessed the storm and flooding are also located in Lewis
2 County. The same will be true for any third party witnesses. If this case proceeds to trial,
3 defendants will ask that the jury be permitted to view the plaintiff's property. Therefore, even
4 if venue were not required to be changed to Lewis County (and it is), the Court should also
5 change venue for the convenience of the witnesses.
6

7 **C. Plaintiff Should Pay the Costs of Changing Venue**

8 If a change of venue is ordered under RCW 4.12.030(1) because the plaintiff
9 commenced the action in the wrong county, the plaintiff must pay the costs of changing venue.
10 RCW 4.12.090(1). Here, plaintiff commenced this action in King County despite more than a
11 century of precedent requiring that the action be commenced in Lewis County. *See, e.g., State*
12 *ex rel. King County v. Superior Court of Pierce County*, 104 Wash. 268, 176 P. 352 (1918).
13 Plaintiff knew that the damaged property was located in Lewis County, so plaintiff could have
14 determined the proper venue with reasonable diligence. Because plaintiff commenced this
15 action in King County instead of Lewis County, the Court should order plaintiff to pay the
16 costs of changing venue.¹
17

18 **VI. CONCLUSION**

19 The Court should change venue to Lewis County because RCW 4.12.010(1) and *Ralph*
20 *v. DNR* mandate the transfer. Even if it were not mandatory, changing venue is appropriate for
21 the convenience of the witnesses. The Court should order plaintiff to pay the costs of changing
22 venue.
23
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25 _____
26 ¹ RCW 4.12.090(1) also requires courts to award defendants their attorneys' fees for changing venue to the proper county. If the Court grants this motion, defendants will request an award of fees by separate motion.

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DATED this 13th day of April, 2015.

ROBERT W. FERGUSON
Attorney General



MARK C. JOBSON, WSBA No. 22171
Assistant Attorney General
Attorney for DNR.

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PROOF OF SERVICE

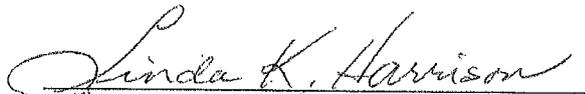
I certify that I caused service of a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid via Consolidated Mail Service

PFAU COCHRAN VERTETIS AMALA, PLLC
Darrell L. Cochran
Kevin M. Hastings
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402

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

DATED this 13th day of April, 2015, at Tumwater, Washington.


LINDA K. HARRISON

04-03-15 15:48 RCVD

Pfau Cochran Vertells Amala

APR 08 2015

Tacoma Office

THE HONORABLE BRIAN D. GAIN
APRIL 16, 2015
WITHOUT ORAL ARGUMENT

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM RALPH, individually,

Plaintiff,

v.

WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
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Washington corporation,

Defendants.

No. 10-2-42012-6 KNT

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TO CHANGE VENUE**

Defendants' Motion to Change Venue

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
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1 The Supreme Court reversed, holding that RCW 4.12.010(1) identified the mandatory
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10 **V. AUTHORITY**

11 **A. LEWIS COUNTY IS THE PROPER VENUE FOR THIS ACTION.**

12 In *Ralph v. State Dept. of Natural Res.*, 182 Wn.2d 242, 343 P.3d 342 (2014), the
13 Supreme Court held that RCW 4.12.010(1) applied to this action and determines the
14 mandatory venue for this action. The statute provides that "actions 'for any injuries to real
15 property' 'shall be commenced' in the county in which the property is located," and thus the
16 county of the property is the "mandatory venue." *Id.* The change of venue is authorized by
17 RCW 4.12.060, which requires a change of venue to the county where the action ought to
18 have been commenced if "the county designated in the complaint is not the proper county."
19 RCW 4.12.060 and .030(1). Therefore, venue must be changed to Lewis County.

20 **B. VENUE SHOULD ALSO BE CHANGED TO LEWIS COUNTY FOR THE
21 CONVENIENCE OF THE WITNESSES.**

22 In addition to the reason set forth above, the Court should also change venue for the
23 convenience of the witnesses. RCW 4.12.030(3). The plaintiff is located in Lewis County, as
24 is his property. The storm and flooding occurred in Lewis County. In addition, the defendants'
25 employees who witnessed the storm and flooding are also located in Lewis County. The same
26 will be true for any third party witnesses. If this case proceeds to trial, defendants will ask that
27 the jury be permitted to view the plaintiff's property. Therefore, even if venue were not
28 required to be changed to Lewis County (and it is), the Court should also change venue for the
convenience of the witnesses.

Defendants' Motion to Change Venue - 2

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1221 Second Avenue, Suite 500
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Telephone: (206) 623-1745
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CORR CRONIN MICHELSON BAUMGARDNER
FOGG & MOORE LLP

By s/ Kelly P. Corr
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Defendants' Motion to Change Venue - 4

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THE HONORABLE ROGER ROGOFF

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

VIRGINIA CAREY, individually; JAMIE CAREY, individually; PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a Washington Corporation,

Plaintiffs,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington Corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington Corporation,

Defendants.

No. 10-2-42011-8 KNT

PLAINTIFFS' OPPOSITION TO DEFENDANT WEYERHAEUSER'S MOTION TO CHANGE VENUE

I. INTRODUCTION

Defendant Weyerhaeuser's motion does not present a difficult question because, due to its own failures, Weyerhaeuser has waived the affirmative defense of improper venue. The Washington Civil Rules and supporting case law are clear that a defendant waives an objection to improper venue where, like Weyerhaeuser, the defendant (1) failed to plead the affirmative defense of improper venue, and (2) failed to join improper venue in a CR 12(b) motion to dismiss.

PLAINTIFFS' OPPOSITION TO DEFENDANT WEYERHAEUSER'S MOTION TO CHANGE VENUE



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1 of the defendants' unreasonable forest practices, including timber harvesting, extraction, and
2 road building on hazardous steep slopes in the upper Chehalis River basin.³

3 Nearly three months later, Defendant Weyerhaeuser finally answered the complaint,
4 presumably right after drafting its CR 12(b) motion to dismiss.⁴ Weyerhaeuser admitted that
5 venue was King County under RCW 4.92.010 "by reason of the joinder of an additional
6 defendant, in this case Defendants Weyerhaeuser Company and Green Diamond Resource
7 Company."⁵

8 On June 13, 2011, Defendant Weyerhaeuser moved to dismiss for lack of subject
9 matter jurisdiction under CR 12(b)(1), contending that the case was improperly filed in King
10 County Superior Court.⁶ Notably, Weyerhaeuser did not join an improper venue objection;
11 instead, it took the position that "the Court may not transfer venue to Lewis County."⁷

12 Weyerhaeuser's motion to dismiss was denied.⁸ Appeal was taken in related cases,
13 and this matter was stayed pending the final outcome of the appeal.⁹

14 On December 31, 2014, the Washington State Supreme Court reversed the summary
15 dismissal the related cases, holding that King County Superior Court has jurisdiction even
16 though the case involved real property located in a different county.¹⁰ The Supreme Court's
17 opinion mandated on April 2, 2015.¹¹

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³ *Id.*

22 ⁴ *Id.* at Ex. B.

23 ⁵ *Id.* at Ex. A.

24 ⁶ *Id.* at Ex. C.

25 ⁷ *Id.* at Ex. B.

26 ⁸ *Id.* at Ex. F.

⁹ *Id.*

¹⁰ *Id.* at Ex. G.

¹¹ *Id.* at Ex. H.

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III. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Darrell L. Cochran In Support of Plaintiffs' Opposition to Defendant Weyerhaeuser's Motion to Change Venue, as well as the existing record on file.

IV. LEGAL ARGUMENT

"The initial choice of venue belongs to the plaintiff." *Eubanks v. Brown*, 180 Wn.2d 590, 595, 327 P.3d 635 (2014). "If initial venue is not proper as to the defendant, the defendant may either waive their objection to the erroneous venue by failing to object or move to transfer the case to where venue is proper." *Id*; see also *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008) (citing CR 12(h)(1)) (An affirmative defense of improper venue is waived if not made by motion under the rule or included in a responsive pleading."); *Andrews v. Cusin*, 65 Wn.2d 205, 396 P.2d 155 (1964) ("An affirmative defense of improper venue is waived if not made by motion under the rule or included in a responsive pleading."); *Kahclamat v. Yakima County*, 31 Wn. App. 464, 466, 643 P.2d 453 (1982) ("When . . . a rule 12(b) defense or objection is raised by motion prior to pleading or in conjunction with the responsive pleading . . . a failure to join all other 12(b) defenses or objections which were then available to the defendant results in a waiver of the omitted defenses or objections.").

A. Defendant Weyerhaeuser Waived Its Objection To Venue By Failing To Affirmatively Plead Improper Venue Or Join All Defenses In Its CR 12(b) Motion.

The defense of improper venue must be pleaded affirmatively in an answer under CR 8 or made by motion under CR 12(b)(3). *Raymond v. Fleming*, 24 Wn. App. 112, 114-115, 600 P.2d 614 (1979) (applying this rule to the CR 12(b)(5) defense of insufficient service of process); *Kahclamat*, 31 Wn. App. at 467 (applying *Raymond* to hold that a defendant waived the affirmative defense of improper venue). "Affirmative defenses 'shall be asserted in the responsive pleading,' or, alternatively, a defendant may assert lack of subject matter or

1 personal jurisdiction, improper venue, insufficient process, insufficient service, failure to state
2 a claim, or failure to join a party in a motion filed under CR 12(b).” *Oltman v. Holland*
3 *America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008).

4 Here, Weyerhaeuser failed to assert the affirmative defense of improper venue in its
5 answer and failed to join the defense in its CR 12(b) motion to dismiss. In fact, Weyerhaeuser
6 not only waited three months to even file an answer—long after the 20 days given under the
7 civil rules¹²—but also Weyerhaeuser expressly refuted that transfer of venue was even an
8 option. In its motion, Weyerhaeuser stated,

9 Plaintiffs may argue that the Court may cure this jurisdictional defect by
10 transferring venue to Lewis County. This argument lacks merit.

11 Weyerhaeuser strategically engaged in this zero sum game because Plaintiffs could have been
12 at risk of being barred by the statute of limitations if they were forced to refile. But this tactic
13 now has a manifest and certain outcome, which is that Weyerhaeuser has waived the defense
14 of improper venue. *Kachlamat*, 31 Wn. App. at 466; CR 12(g)¹³; CR 12(h)(1)¹⁴.

15 *Kachlamat* is on all fours. There, the issue was whether “the defendant waive[d] its
16 right to request a change of venue by not asserting its objections to venue in a motion prior to
17 pleading or in its answer, and in waiting a year to make its request.” Division One answered
18 affirmatively. “A rule 12(b) defense or objection *must* be asserted by a defendant either by
19 motion prior to pleading or else in its responsive pleading if no rule 12(b) motions were made
20 by the defendant before so pleading.” *Id* (Emphasis added); *see also Raymond*, 24 Wn. App.

21 ¹² Even if Weyerhaeuser had pleaded improper venue as an affirmative defense, this dilatory conduct alone
22 would constitute a waiver under Washington law. *Romjue v. Fairchild*, 60 Wn. App. 278, 803 P.2d 57 (1991);
Raymond, 24 Wn. App. 112.

23 ¹³ CR 12(g) states: “A party who makes a motion under this rule may join with it any other motions herein
24 provided for and then available to him. *If a party makes a motion under this rule but omits therefrom any*
defense or objection then available to him which this rule permits to be raised by motion, he shall not
thereafter make a motion based on the defense or objection so omitted, except a motion as provided in
subsection (h)(2) hereof on any of the grounds there stated.” (Emphasis added).

25 ¹⁴ CR 12(h)(1) states: “A defense of lack of jurisdiction over the person, improper venue, insufficiency of
26 process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances
described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive
pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.”

1 at 114-115. The *Kachlamat* Court held that the defendant waived his challenge to venue
2 because he did not move to change venue “until many months after its answer and motion to
3 dismiss were filed.” *Id.*

4 Like in *Kachlamat*, Weyerhaeuser failed to raise improper venue as an affirmative
5 defense and failed to join the defense in its CR 12(b) motion. After a lengthy appeal process,
6 Weyerhaeuser now argues, for the first time, that venue is improper. But Washington law is
7 clear: A defendant waives the right to assert improper venue if it (1) fails to affirmatively
8 plead the defense in a responsive pleading and (2) fails to join the defense in a CR 12(b)
9 motion. Weyerhaeuser has waived the relief it now requests, and its motion should be denied
10 on this ground alone.

11 **B. Even If Weyerhaeuser Did Not Waive The Affirmative Defense of Improper**
12 **Venue, Its Motion Should Be Denied For Other Reasons.**

13 1. Weyerhaeuser Is Equitably Estopped From Asserting Improper Venue.

14 Weyerhaeuser is equitably estopped from asserting improper venue because its answer
15 admits that venue is proper under RCW 4.92.010(4) by virtue of its joinder. Equitable
16 estoppel

17 requires an admission, statement, or act, inconsistent with the claim
18 afterwards asserted; action by the party on the faith of such admission,
19 statement, or act; and injury to such other party arising from permitting the
20 first party to contradict or repudiate such admission, statement, or act.

21 *Raymond*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979).

22 Here, Weyerhaeuser admitted to proper venue in King County by virtue of its joinder
23 to an action where the State was a party. The only motion it brought was to challenge subject
24 matter jurisdiction, never attempting to challenge venue. It cannot now take the completely
25 inconsistent position after years of litigation and losing on appeal. *See, E.g., Raymond*, 24
26 Wn. App. at 115. Plaintiffs acted on this apparent concession by avoiding negotiations with
Weyerhaeuser about agreeing to change venue. The injury here would be manifest now

1 because Plaintiffs may have to wait several more years to resolve another issue on appeal that
2 Weyerhaeuser failed to raise before.

3 2. Venue Is Proper In King County.

4 This case also presents the situation where two or more venue statutes apply. Where
5 there are competing venue statutes, determining the proper venue rests in the sound discretion
6 of the trial court. *Dill v. Public Utility Dist. No. 2 of Grant County*, 3 Wn. App. 360, 366, 475
7 P.2d 309 (1970). Here, the flooding damage at issue caused a great deal of damage to
8 Plaintiffs; part of this will be damage to their real property, but another portion of the damage
9 analysis will entail damage to their personal property as well as emotional distress in seeing
10 their property destroyed. In this vein, RCW 4.12.020 applies, which mandates that actions for
11 the recovery of damages for injuries to the person or for injury to personal property *shall* be
12 tried in the county where the cause arose.¹⁵ See also RCW 4.92.010 (venue is proper by
13 reason of joinder of an additional defendant); RCW 4.12.025(3) (“The venue of any action
14 brought against a corporation, at the option of the plaintiff, shall be: (a) In the county where
15 the tort was committed; . . . or (d) in the county where the corporation has its residence”). In
16 the present case, the tort was committed and the cause of action arose at Weyerhaeuser’s
17 headquarters in King County, where the policies and procedures causing the negligent timber
18 practices were born, cultivated, and ordered.

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23 ¹⁵ RCW 4.12.020 states in relevant part:

24 Actions for the following causes *shall be tried* in the county where the cause, or some part thereof,
arose:

25 * * *

26 (3) For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff shall
have the option of suing either in the county in which the cause of action or some part thereof arose, or in the
county in which the defendant resides, or if there be more than one defendant, where some one of the defendants
resides, at the time of the commencement of the action.

PLAINTIFFS’ OPPOSITION TO DEFENDANT
WEYERHAEUSER’S MOTION TO CHANGE VENUE



1 3. Witness Convenience Does Not Warrant Transferring Venue.

2 A court may transfer venue to serve “the convenience of witnesses.”¹⁶ RCW
3 4.12.030(3). Here, on a balance, there cannot be a reasonable debate that most of the central
4 witnesses to this lawsuit will be in King County. The underlying forest practices and policies
5 that caused damages to Plaintiffs’ property occurred at the Weyerhaeuser headquarters. All of
6 the necessary documents will be coming from the Weyerhaeuser headquarters, and in fact,
7 before this case was dismissed, the undersigned was planning to visit Weyerhaeuser
8 headquarters to review the boxes of responsive discovery documents. The experts as well will
9 also likely be from King County or immediately surrounding counties. The only witnesses
10 who will be in Lewis County are the Plaintiffs and some eyewitnesses. Taken together,
11 witness convenience does not weigh in favor of transferring venue.

12 **C. If Weyerhaeuser’s Motion Is Granted, Plaintiffs Should Not Be Ordered To Pay
13 the Costs of Transferring Venue.**

14 Weyerhaeuser requests that the Court order that Plaintiffs pay the costs of changing
15 venue, and if granted, it plans to move the Court for an award of attorney fees as well.
16 Certainly this is a bold request in light of its clear waiver of improper venue and decision to
17 take an extreme position that forced years of litigation. Under law, though, the party who
18 obtains the change must pay the cost of transfer where, like here, the case was filed in the
19 correct county. RCW 4.12.090; 4.92.010; RCW 4.12.025(3). If the Court disagrees,
20 Plaintiffs would ask that the Court preemptively deny Weyerhaeuser’s future request to move
21 the Court for fees and costs.

22 **V. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully ask the Court deny Defendant
24 Weyerhaeuser’s motion to change venue.

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¹⁶ Weyerhaeuser does not argue that justice cannot be obtained in King County.

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RESPECTFULLY SUBMITTED this 14th day of April, 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala PLLC.

I served the foregoing document via Email / Legal Mesesnger by directing delivery to the following individuals:

Mark Jobson
Attorney General of Washington
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
Attorney for: State of Washington Dept. of Natural Resources

Kelly P. Corr
Seann C. Colgan
Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
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Attorneys for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
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Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

DATED this 14th day of April, 2015.


Laura Neal
Legal Assistant to Darrell L. Cochran

4852-7548-1891, v. 2

THE HONORABLE PATRICK OISHI

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILLIAM FORTH, individually; GUY
BAUMAN, individually; EILEEN BAUMAN,
individually; LINDA STANLEY, individually
and as personal representative IN RE THE
ESTATE OF CORAL COTTEN; ROCHELLE
STANLEY as personal representative IN RE
THE ESTATE OF CORAL COTTEN;
DONALD LEMASTER, individually; and
DAVID GIVENS, individually,

Plaintiffs,

vs.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES;
WEYERHAEUSER COMPANY, a Washington
corporation; and GREEN DIAMOND
RESOURCE COMPANY, a Washington
corporation,

Defendants.

No. 10-2-42009-6 KNT

PLAINTIFFS' OPPOSITION TO
DEFENDANT WEYERHAEUSER'S
MOTION TO CHANGE VENUE

I. INTRODUCTION

Defendant Weyerhaeuser's motion does not present a difficult question because, due to its own failures, Weyerhaeuser has waived the affirmative defense of improper venue. The Washington Civil Rules and supporting case law are clear that a defendant waives an

PLAINTIFFS' OPPOSITION TO DEFENDANT
WEYERHAEUSER'S MOTION TO CHANGE VENUE

 **PEAU COCHRAN
VERTETIS AMALA**
A Professional Limited Liability Company

1 objection to improper venue where, like Weyerhaeuser, the defendant (1) failed to plead the
2 affirmative defense of improper venue, and (2) failed to join improper venue in a CR 12(b)
3 motion to dismiss.

4 “[T]he doctrine of waiver is sensible and consistent with the policy and spirit behind
5 our modern day procedural rules, which exist to foster and promote ‘the just, speedy, and
6 inexpensive determination of every action.’” *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1
7 P.3d 1124 (2000) (quoting CR 1(1)). “If litigants are at liberty to act in an inconsistent
8 fashion or employ delaying tactics, the purpose behind the procedural rules may be
9 compromised.” *Id.* Here, Defendant Weyerhaeuser made the entirely tactical decision to
10 ignore the venue issue in favor of moving for outright dismissal. The reason is clear:
11 Plaintiffs may have been barred from refiling due statute of limitations issues. In taking this
12 extreme and aggressive posture, Weyerhaeuser declined to raise improper venue as an
13 affirmative defense¹, and would not even acknowledge (let alone request) in its CR 12(b)
14 motion to dismiss that an alternative remedy was to transfer venue. In fact, Weyerhaeuser
15 refuted that transfer of venue was a remedy at all.

16 Weyerhaeuser’s zero sum game took the Plaintiffs on a long and expensive trip to the
17 Supreme Court, where Plaintiffs won at Weyerhaeuser’s own bully tactics. After years of
18 litigation, the consequences for Weyerhaeuser are now manifest and significant: It is barred
19 from asserting improper venue, and the Court should handedly deny Weyerhaeuser’s present
20 motion on this ground alone. Even if the Court disagrees, Weyerhaeuser’s motion should be
21 denied on several other grounds that are detailed below.

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25 ¹ None of the other defendants raised the affirmative defense of improper venue, either. Defendant DNR’s
26 answer purports to “reserve[] the right to move for a change of venue as permitted by court rule and statute,” but
Defendant DNR failed to adhere to CR 8 and CR 12 by pleading improper venue as an affirmative defense. Exs.
C-D.

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II. RELEVANT FACTS

Plaintiffs own real property in Lewis County that was damaged on or around December 3, 2007, as the result of flood waters from the Chehalis River.² They filed suit on December 2, 2010, alleging that the damage to their real and personal property was the result of the defendants' unreasonable forest practices, including timber harvesting, extraction, and road building on hazardous steep slopes in the upper Chehalis River basin.³

Nearly three months later, Defendant Weyerhaeuser finally answered the complaint.⁴ Weyerhaeuser admitted that venue was King County under RCW 4.92.010 "by reason of the joinder of an additional defendant, in this case Defendants Weyerhaeuser Company and Green Diamond Resource Company."⁵

On June 13, 2011, Defendant Weyerhaeuser moved to dismiss for lack of subject matter jurisdiction under CR 12(b)(1), contending that the case was improperly filed in King County Superior Court.⁶ Notably, Weyerhaeuser did not join an improper venue objection; instead, it took the position that "the Court may not transfer venue to Lewis County."⁷

Weyerhaeuser's motion to dismiss was granted, and Plaintiffs appealed.⁸ On December 31, 2014, the Washington State Supreme Court reversed the summary dismissal, holding that King County Superior Court has jurisdiction even though the case involved real property located in a different county.⁹ The Supreme Court's opinion mandated on April 2, 2015.¹⁰

² Cochran Decl. at Ex. A.

³ *Id.*

⁴ *Id.* at Ex. B.

⁵ *Id.* at Ex. A.

⁶ *Id.* at Ex. E.

⁷ *Id.* at Ex. B.

⁸ *Id.* at Ex. F.

⁹ *Id.* at Ex. G.

¹⁰ *Id.* at Ex. H.

1 **III. EVIDENCE RELIED UPON**

2 This motion relies upon the Declaration of Darrell L. Cochran In Support of Plaintiffs'
3 Opposition to Defendant Weyerhaeuser's Motion to Change Venue, as well as the existing
4 record on file.

5 **IV. LEGAL ARGUMENT**

6 "The initial choice of venue belongs to the plaintiff." *Eubanks v. Brown*, 180 Wn.2d
7 590, 595, 327 P.3d 635 (2014). "If initial venue is not proper as to the defendant, the
8 defendant may either waive their objection to the erroneous venue by failing to object or
9 move to transfer the case to where venue is proper." *Id*; see also *Oltman v. Holland America*
10 *Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008) (citing CR 12(h)(1)) (An
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14 included in a responsive pleading."); *Kahclamat v. Yakima County*, 31 Wn. App. 464, 466,
15 643 P.2d 453 (1982) ("When . . . a rule 12(b) defense or objection is raised by motion prior to
16 pleading or in conjunction with the responsive pleading . . . a failure to join all other 12(b)
17 defenses or objections which were then available to the defendant results in a waiver of the
18 omitted defenses or objections.").

19 **A. Defendant Weyerhaeuser Waived Its Objection To Venue By Failing To**
20 **Affirmatively Plead Improper Venue Or Join All Defenses In Its CR 12(b)**
21 **Motion.**

22 The defense of improper venue must be pleaded affirmatively in an answer under CR
23 8 or made by motion under CR 12(b)(3). *Raymond v. Fleming*, 24 Wn. App. 112, 114-115,
24 600 P.2d 614 (1979) (applying this rule to the CR 12(b)(5) defense of insufficient service of
25 process); *Kahclamat*, 31 Wn. App. at 467 (applying *Raymond* to hold that a defendant waived
26 the affirmative defense of improper venue). "Affirmative defenses 'shall be asserted in the
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2 a claim, or failure to join a party in a motion filed under CR 12(b).” *Oltman v. Holland*
3 *America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008).

4 Here, Weyerhaeuser failed to assert the affirmative defense of improper venue in its
5 answer and failed to join the defense in its CR 12(b) motion to dismiss. In fact, Weyerhaeuser
6 not only waited three months to even file an answer—long after the 20 days given under the
7 civil rules¹¹—but also Weyerhaeuser expressly refuted that transfer of venue was even an
8 option. In its motion, Weyerhaeuser stated,

9 Plaintiffs may argue that the Court may cure this jurisdictional defect by
10 transferring venue to Lewis County. This argument lacks merit.

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12 at risk of being barred by the statute of limitations if they were forced to refile. But this tactic
13 now has a manifest and certain outcome, which is that Weyerhaeuser has waived the defense
14 of improper venue. *Kachlamat*, 31 Wn. App. at 466; CR 12(g)¹²; CR 12(h)(1)¹³.

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25 ¹³ CR 12(h)(1) states: “A defense of lack of jurisdiction over the person, improper venue, insufficiency of
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pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.”

1 at 114-115. The *Kachlamat* Court held that the defendant waived his challenge to venue
2 because he did not move to change venue “until many months after its answer and motion to
3 dismiss were filed.” *Id.*

4 Like in *Kachlamat*, Weyerhaeuser failed to raise improper venue as an affirmative
5 defense and failed to join the defense in its CR 12(b) motion. After a lengthy appeal process,
6 Weyerhaeuser now argues, for the first time, that venue is improper. But Washington law is
7 clear: A defendant waives the right to assert improper venue if it (1) fails to affirmatively
8 plead the defense in a responsive pleading and (2) fails to join the defense in a CR 12(b)
9 motion. Weyerhaeuser has waived the relief it now requests, and its motion should be denied
10 on this ground alone.

11 **B. Even If Weyerhaeuser Did Not Waive The Affirmative Defense of Improper**
12 **Venue, Its Motion Should Be Denied For Other Reasons.**

13 1. Weyerhaeuser Is Equitably Estopped From Asserting Improper Venue.

14 Weyerhaeuser is equitably estopped from asserting improper venue because its answer
15 admits that venue is proper under RCW 4.92.010(4) by virtue of its joinder. Equitable
16 estoppel

17 requires an admission, statement, or act, inconsistent with the claim
18 afterwards asserted; action by the party on the faith of such admission,
19 statement, or act; and injury to such other party arising from permitting the
20 first party to contradict or repudiate such admission, statement, or act.

21 *Raymond*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979).

22 Here, Weyerhaeuser admitted to proper venue in King County by virtue of its joinder
23 to an action where the State was a party. The only motion it brought was to challenge subject
24 matter jurisdiction, never attempting to challenge venue. It cannot now take the completely
25 inconsistent position after years of litigation and losing on appeal. *See, E.g., Raymond*, 24
26 Wn. App. at 115. Plaintiffs acted on this apparent concession by avoiding negotiations with
Weyerhaeuser about agreeing to change venue. The injury here would be manifest now

1 because Plaintiffs may have to wait several more years to resolve another issue on appeal that
2 Weyerhaeuser failed to raise before.

3 2. Venue Is Proper In King County.

4 This case also presents the situation where two or more venue statutes apply. Where
5 there are competing venue statutes, determining the proper venue rests in the sound discretion
6 of the trial court. *Dill v. Public Utility Dist. No. 2 of Grant County*, 3 Wn. App. 360, 366, 475
7 P.2d 309 (1970). Here, the flooding damage at issue caused a great deal of damage to
8 Plaintiffs; part of this will be damage to their real property, but another portion of the damage
9 analysis will entail damage to their personal property as well as emotional distress in seeing
10 their property destroyed. In this vein, RCW 4.12.020 applies, which mandates that actions for
11 the recovery of damages for injuries to the person or for injury to personal property *shall* be
12 tried in the county where the cause arose.¹⁴ See also RCW 4.92.010 (venue is proper by
13 reason of joinder of an additional defendant); RCW 4.12.025(3) (“The venue of any action
14 brought against a corporation, at the option of the plaintiff, shall be: (a) In the county where
15 the tort was committed; . . . or (d) in the county where the corporation has its residence”). In
16 the present case, the tort was committed and the cause of action arose at Weyerhaeuser’s
17 headquarters in King County, where the policies and procedures causing the negligent timber
18 practices were born, cultivated, and ordered.

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22 _____
¹⁴ RCW 4.12.020 states in relevant part:

23 Actions for the following causes *shall be tried* in the county where the cause, or some part thereof,
24 arose:

25 * * *

26 (3) For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff shall have the option of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

PLAINTIFFS’ OPPOSITION TO DEFENDANT
WEYERHAEUSER’S MOTION TO CHANGE VENUE

 PFAU COCHRAN
VERTETIS AMALA
A Professional Limited Liability Company

1 3. Witness Convenience Does Not Warrant Transferring Venue.

2 A court may transfer venue to serve “the convenience of witnesses.”¹⁵ RCW
3 4.12.030(3). Here, on a balance, there cannot be a reasonable debate that most of the central
4 witnesses to this lawsuit will be in King County. The underlying forest practices and policies
5 that caused damages to Plaintiffs’ property occurred at the Weyerhaeuser headquarters. All of
6 the necessary documents will be coming from the Weyerhaeuser headquarters, and in fact,
7 before this case was dismissed, the undersigned was planning to visit Weyerhaeuser
8 headquarters to review the boxes of responsive discovery documents. The experts as well will
9 also likely be from King County or immediately surrounding counties. The only witnesses
10 who will be in Lewis County are the Plaintiffs and some eyewitnesses. Taken together,
11 witness convenience does not weigh in favor of transferring venue.

12 **C. If Weyerhaeuser’s Motion Is Granted, Plaintiffs Should Not Be Ordered To Pay
13 the Costs of Transferring Venue.**

14 Weyerhaeuser requests that the Court order that Plaintiffs pay the costs of changing
15 venue, and if granted, it plans to move the Court for an award of attorney fees as well.
16 Certainly this is a bold request in light of its clear waiver of improper venue and decision to
17 take an extreme position that forced years of litigation. Under law, though, the party who
18 obtains the change must pay the cost of transfer where, like here, the case was filed in the
19 correct county. RCW 4.12.090; 4.92.010; RCW 4.12.025(3). If the Court disagrees,
20 Plaintiffs would ask that the Court preemptively deny Weyerhaeuser’s future request to move
21 the Court for fees and costs.

22 **V. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully ask the Court deny Defendant
24 Weyerhaeuser’s motion to change venue.

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¹⁵ Weyerhaeuser does not argue that justice cannot be obtained in King County.

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RESPECTFULLY SUBMITTED this 14th day of April, 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala PLLC.

I served the foregoing document via Email / Legal Messenger, by directing delivery to the following individuals:

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Attorney for: Weyerhaeuser Company

DATED this 14th day of April, 2015.



Laura Neal
Legal Assistant to Darrell L. Cochran

4836-5110-6851, v. 1

MOTION TO CONSOLIDATE FOR PRETRIAL
PURPOSES

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Appendix 279

 **PFU COCHRAN
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THE HONORABLE PATRICK OISHI

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILLIAM RALPH, individually,
Plaintiff,

vs.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES,
Defendant.

No. 11-2-05769-1 KNT

PLAINTIFF'S OPPOSITION TO
DEFENDANT DNR'S MOTION TO
CHANGE VENUE

I. INTRODUCTION

Defendant DNR's motion does not present a difficult question because, due to its own failures, DNR has waived the affirmative defense of improper venue. The Washington Civil Rules and supporting case law are clear that a defendant waives an objection to improper venue where, like DNR, the defendant (1) failed to plead the affirmative defense of improper venue, and (2) failed to join improper venue in a CR 12(b) motion to dismiss.

"[T]he doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000) (quoting CR 1(1)). "If litigants are at liberty to act in an inconsistent

PLAINTIFF'S OPPOSITION TO DEFENDANT DNR'S
MOTION TO CHANGE VENUE

1 of 6

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1 fashion or employ delaying tactics, the purpose behind the procedural rules may be
2 compromised.” *Id.* Here, Defendant DNR made the entirely tactical decision to ignore the
3 venue issue in favor of moving for outright dismissal. The reason is clear: Plaintiff might
4 have been barred from refileing due statute of limitations issues. In taking this extreme and
5 aggressive posture, DNR declined to raise improper venue as an affirmative defense, and
6 would not even acknowledge (let alone request) in its CR 12(b) motion to dismiss that an
7 alternative remedy was to transfer venue. In fact, DNR refuted that transfer of venue was a
8 remedy at all.

9 DNR’s zero sum game took the Plaintiff on a long and expensive trip to the Supreme
10 Court, where Plaintiff won at DNR’s own bully tactics. After years of litigation, the
11 consequences for DNR are now manifest and significant: It is barred from asserting improper
12 venue, and the Court should handily deny DNR’s present motion on this ground alone. Even
13 if the Court disagrees, DNR’s motion should be denied on several other grounds that are
14 detailed below.

15 II. RELEVANT FACTS

16 Plaintiff owns real property in Lewis County that was damaged on or around
17 December 3, 2007, as the result of flood waters from the Chehalis River.¹ He filed suit on
18 December 2, 2010, alleging that the damage to his real and personal property was the result of
19 the defendants’ unreasonable forest practices, including timber harvesting, extraction, and
20 road building on hazardous steep slopes in the upper Chehalis River basin.² Defendant
21 DNR’s answer to the complaint did not in any way attempt to plead improper venue as an
22 affirmative defense.³

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25 ¹ Cochran Decl. at Ex. A.

26 ² *Id.*

³ *Id.* at Ex. B.

1 On June 13, 2011, Defendant DNR moved to dismiss for lack of subject matter
2 jurisdiction under CR 12(h)(3), contending that the case was improperly filed in King County
3 Superior Court.⁴ Notably, DNR did not join an improper venue objection; instead, it took the
4 position that “[t]he only remedy available to this Court is to dismiss this action for lack of
5 subject matter jurisdiction.”⁵ DNR’s motion to dismiss granted, and appeal was taken⁶

6 On December 31, 2014, the Washington State Supreme Court reversed the summary
7 dismissal, holding that King County Superior Court has jurisdiction even though the case
8 involved real property located in a different county.⁷ The Supreme Court’s mandate issued on
9 April 2, 2015.⁸

10 III. EVIDENCE RELIED UPON

11 This motion relies upon the Declaration of Darrell L. Cochran In Support of Plaintiff’s
12 Opposition to Defendant DNR’s Motion to Change Venue, as well as the existing record on
13 file.

14 IV. LEGAL ARGUMENT

15 “The initial choice of venue belongs to the plaintiff.” *Eubanks v. Brown*, 180 Wn.2d
16 590, 595, 327 P.3d 635 (2014). “If initial venue is not proper as to the defendant, the
17 defendant may either waive their objection to the erroneous venue by failing to object or
18 move to transfer the case to where venue is proper.” *Id*; see also *Oltman v. Holland America*
19 *Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008) (citing CR 12(h)(1)) (An
20 affirmative defense of improper venue is waived if not made by motion under the rule or
21 included in a responsive pleading.”); *Andrews v. Cusin*, 65 Wn.2d 205, 396 P.2d 155 (1964)
22 (“An affirmative defense of improper venue is waived if not made by motion under the rule or

23
24 ⁴ *Id.* at Ex. C.

25 ⁵ *Id.*

26 ⁶ *Id.* at Ex. D.

⁷ *Id.* at Ex. E.

⁸ *Id.* at Ex. F.

1 included in a responsive pleading.”); *Kahclamat v. Yakima County*, 31 Wn. App. 464, 466,
2 643 P.2d 453 (1982) (“When . . . a rule 12(b) defense or objection is raised by motion prior to
3 pleading or in conjunction with the responsive pleading . . . a failure to join all other 12(b)
4 defenses or objections which were then available to the defendant results in a waiver of the
5 omitted defenses or objections.”).

6 **A. Defendant Weyerhaeuser Waived Its Objection To Venue By Failing To**
7 **Affirmatively Plead Improper Venue Or Join All Defenses In Its CR 12(b)**
8 **Motion.**

9 The defense of improper venue must be pleaded affirmatively in an answer under CR
10 8 or made by motion under CR 12(b)(3). *Raymond v. Fleming*, 24 Wn. App. 112, 114-115,
11 600 P.2d 614 (1979) (applying this rule to the CR 12(b)(5) defense of insufficient service of
12 process); *Kahclamat*, 31 Wn. App. at 467 (applying *Raymond* to hold that a defendant waived
13 the affirmative defense of improper venue). “Affirmative defenses ‘shall be asserted in the
14 responsive pleading,’ or, alternatively, a defendant may assert lack of subject matter or
15 personal jurisdiction, improper venue, insufficient process, insufficient service, failure to state
16 a claim, or failure to join a party in a motion filed under CR 12(b).” *Oltman v. Holland*
17 *America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008).

18 Here, DNR failed to assert the affirmative defense of improper venue in its answer and
19 failed to join the defense in its CR 12(b) motion to dismiss. In fact, DNR not only failed to
20 plead improper venue as an affirmative defense, but also DNR expressly refuted that transfer
21 of venue was even an option. In its motion, DNR stated,

22 Plaintiffs may argue that the Court may cure this jurisdictional defect by
23 transferring venue to Lewis County. This argument lacks merit.

24 DNR strategically engaged in this zero sum game because Plaintiff could have been at risk of
25 being barred by the statute of limitations if they were forced to refile. But this tactic now has
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1 a manifest and certain outcome, which is that DNR has waived the defense of improper
2 venue. *Kachlamat*, 31 Wn. App. at 466; CR 12(g)⁹; CR 12(h)(1)¹⁰.

3 *Kachlamat* is on all fours. There, the issue was whether “the defendant waive[d] its
4 right to request a change of venue by not asserting its objections to venue in a motion prior to
5 pleading or in its answer, and in waiting a year to make its request.” Division One answered
6 affirmatively. “A rule 12(b) defense or objection *must* be asserted by a defendant either by
7 motion prior to pleading or else in its responsive pleading if no rule 12(b) motions were made
8 by the defendant before so pleading.” *Id.* (Emphasis added); *see also Raymond*, 24 Wn. App.
9 at 114-115. The *Kachlamat* Court held that the defendant waived his challenge to venue
10 because he did not move to change venue “until many months after its answer and motion to
11 dismiss were filed.” *Id.*

12 Like in *Kachlamat*, DNR failed to raise improper venue as an affirmative defense and
13 failed to join the defense in its CR 12(h)(3) motion. After a lengthy appeal process, DNR
14 now argues, for the first time, that venue is improper. But Washington law is clear: A
15 defendant waives the right to assert improper venue if it (1) fails to affirmatively plead the
16 defense in a responsive pleading and (2) fails to join the defense in a motion to dismiss. DNR
17 has waived the relief it now requests, and its motion should be denied on this ground alone.

18 **B. The Waiver Was A Voluntary Relinquishment of A Known Right.**

19 Plaintiff anticipates that DNR will argue that it could not possibly have waived its
20 right to assert improper venue as an affirmative defense because, prior to our Supreme Court’s
21 decision in this case, DNR could not have known that asserting improper venue (as opposed
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23 ⁹ CR 12(g) states: “A party who makes a motion under this rule may join with it any other motions herein
24 provided for and then available to him. *If a party makes a motion under this rule but omits therefrom any
25 defense or objection then available to him which this rule permits to be raised by motion, he shall not
26 thereafter make a motion based on the defense or objection so omitted, except a motion as provided in
subsection (h)(2) hereof on any of the grounds there stated.*” (Emphasis added).

¹⁰ CR 12(h)(1) states: “A defense of lack of jurisdiction over the person, improper venue, insufficiency of
process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances
described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive
pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.”

1 to lack of jurisdiction) was an option and, thus, the waiver was not an intentional and
2 voluntary relinquishment of a known right. This argument, however, does not change the
3 original waiver analysis presented.

4 A waiver is “a voluntary act which implies a choice, by the party, to dispense with
5 something of value or to forego some advantage. The right, advantage, or benefit must exist
6 at the time of the alleged waiver. The one against whom waiver is claimed must have actual
7 or constructive knowledge of the existence of the right.” *Henry v. Russell*, 19 Wn. App. 409,
8 576 P.2d 908 (1978) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960, 961
9 (1954)). Here, DNR dispensed with a challenge to venue to bolster its own interpretation that
10 the issue presented was jurisdictional. The notion that it had no idea that the statute could
11 possibly relate to venue is an untruth, particularly because Plaintiff repeatedly told them so
12 and because the statute at issue was located in a chapter entitled “Venue – Jurisdiction.”
13 Chapter 4.12 RCW.

14 But this argument is a red herring anyway because *the affirmative defense of*
15 *improper venue unquestionably existed at the time they filed an answer.* And our Supreme
16 Court’s decision in this case did nothing to alter the preexisting pleading requirements for
17 affirmative defenses. These sophisticated defendants absolutely knew that failing to plead an
18 affirmative defense and then moving to dismiss under CR 12 would result in a relinquishment
19 of the right to later raise the affirmative defense not pleaded. DNR strategically relinquished
20 this right for the perceived advantage of moving for outright dismissal and avoiding even the
21 mere suggestion that a transfer of venue was possible. Indeed, DNR never even argued
22 change of venue in the alternative because doing so would have possibly meant that they
23 would not have achieved outright dismissal. This was a classic litigation strategy, and it was
24 one that DNR took with the risk of losing its right to challenge venue.
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1 present case, the tort was committed and the cause of action arose at Weyerhaeuser's
2 headquarters in King County, where the policies and procedures causing the negligent timber
3 practices were born, cultivated, and ordered.

4 2. Witness Convenience Does Not Warrant Transferring Venue.

5 A court may transfer venue to serve "the convenience of witnesses."¹² RCW
6 4.12.030(3). Here, on a balance, there cannot be a reasonable debate that most of the central
7 witnesses to this lawsuit will be in King County. The underlying forest practices and policies
8 that caused damages to Plaintiff's property occurred at the Weyerhaeuser headquarters. All of
9 the necessary documents will be coming from the Weyerhaeuser headquarters, and in fact,
10 before this case was dismissed, the undersigned was planning to visit Weyerhaeuser
11 headquarters to review the boxes of responsive discovery documents. The experts as well will
12 also likely be from King County or immediately surrounding counties. The only witnesses
13 who will be in Lewis County are the Plaintiff and some eyewitnesses. Taken together,
14 witness convenience does not weigh in favor of transferring venue.

15 **E. If DNR's Motion Is Granted, Plaintiff Should Not Be Ordered To Pay the Costs**
16 **of Transferring Venue.**

17 DNR requests that the Court order that Plaintiff pay the costs of changing venue, and
18 if granted, it plans to move the Court for an award of attorney fees as well. Certainly this is a
19 bold request in light of its clear waiver of improper venue and decision to take an extreme
20 position that forced years of litigation. Under law, though, the party who obtains the change
21 must pay the cost of transfer where, like here, the case was filed in the correct county. RCW
22 4.12.090; 4.92.010; RCW 4.12.025(3). If the Court disagrees, Plaintiff would ask that the
23 Court preemptively deny DNR's future request to move the Court for fees and costs.

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¹² Weyerhaeuser does not argue that justice cannot be obtained in King County.

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V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully ask the Court deny Defendant DNR's motion to change venue.

RESPECTFULLY SUBMITTED this 20th day of April, 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851

Kevin M. Hastings, WSBA No. 42316

CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala PLLC.

I served the foregoing document via Email / Legal Messenger by directing delivery to the following individuals:

Mark Jobson
Attorney General of Washington
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
Attorney for: State of Washington Dept. of Natural Resources

DATED this 20th day of April, 2015.


Laura Neal
Legal Assistant to Darrell L. Cochran

4826-7790-6211, v. 2

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THE HONORABLE BRIAN D. GAIN

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILLIAM RALPH, individually,

Plaintiff,

vs.

WEYERHAEUSER COMPANY, a Washington
corporation; and GREEN DIAMOND
RESOURCE COMPANY, a Washington
corporation,

Defendants.

No. 10-2-42012-6 KNT

PLAINTIFF'S OPPOSITION TO
DEFENDANT WEYERHAEUSER'S
MOTION TO CHANGE VENUE

I. INTRODUCTION

Defendant Weyerhaeuser's motion does not present a difficult question because, due to its own failures, Weyerhaeuser has waived the affirmative defense of improper venue. The Washington Civil Rules and supporting case law are clear that a defendant waives an objection to improper venue where, like Weyerhaeuser, the defendant (1) failed to plead the affirmative defense of improper venue, and (2) failed to join improper venue in a CR 12(b) motion to dismiss.

"[T]he doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote 'the just, speedy, and

PLAINTIFF'S OPPOSITION TO DEFENDANT
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1 inexpensive determination of every action.” *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1
2 P.3d 1124 (2000) (quoting CR 1(1)). “If litigants are at liberty to act in an inconsistent
3 fashion or employ delaying tactics, the purpose behind the procedural rules may be
4 compromised.” *Id.* Here, Defendant Weyerhaeuser made the entirely tactical decision to
5 ignore the venue issue in favor of moving for outright dismissal. The reason is clear: Plaintiff
6 might have been barred from refiling due statute of limitations issues. In taking this extreme
7 and aggressive posture, Weyerhaeuser declined to raise improper venue as an affirmative
8 defense¹, and would not even acknowledge (let alone request) in its CR 12(b) motion to
9 dismiss that an alternative remedy was to transfer venue. In fact, Weyerhaeuser refuted that
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11 Weyerhaeuser’s zero sum game took the Plaintiff on a long and expensive trip to the
12 Supreme Court, where Plaintiff won at Weyerhaeuser’s own bully tactics. After years of
13 litigation, the consequences for Weyerhaeuser are now manifest and significant: It is barred
14 from asserting improper venue, and the Court should handedly deny Weyerhaeuser’s present
15 motion on this ground alone. Even if the Court disagrees, Weyerhaeuser’s motion should be
16 denied on several other grounds that are detailed below.

17 II. RELEVANT FACTS

18 Plaintiff owns real property in Lewis County that was damaged on or around
19 December 3, 2007, as the result of flood waters from the Chehalis River.² He filed suit on
20 December 2, 2010, alleging that the damage to his real and personal property was the result of
21 the defendants’ unreasonable forest practices, including timber harvesting, extraction, and
22 road building on hazardous steep slopes in the upper Chehalis River basin.³

23 Nearly three months later, Defendant Weyerhaeuser finally answered the complaint.⁴

24 ¹ The other defendant, Green Diamond, also failed to raise the affirmative defense of improper venue. Ex. C.

25 ² Cochran Decl. at Ex. A.

26 ³ *Id.*

⁴ *Id.* at Ex. B.

1 On June 13, 2011, Defendant Weyerhaeuser moved to dismiss for lack of subject
2 matter jurisdiction under CR 12(b)(1), contending that the case was improperly filed in King
3 County Superior Court.⁵ Notably, Weyerhaeuser did not join an improper venue objection;
4 instead, it took the position that “the Court may not transfer venue to Lewis County.”⁶

5 Weyerhaeuser’s motion to dismiss originally granted but then denied on
6 reconsideration.⁷ Appeal was taken in related cases, and this matter was stayed pending the
7 final outcome of the appeal.

8 On December 31, 2014, the Washington State Supreme Court reversed the summary
9 dismissal, holding that King County Superior Court has jurisdiction even though the case
10 involved real property located in a different county.⁸ The Supreme Court’s opinion mandated
11 on April 2, 2015.⁹

12 III. EVIDENCE RELIED UPON

13 This motion relies upon the Declaration of Darrell L. Cochran In Support of Plaintiff’s
14 Opposition to Defendant Weyerhaeuser’s Motion to Change Venue, as well as the existing
15 record on file.

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21 *Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008) (citing CR 12(h)(1)) (An
22 affirmative defense of improper venue is waived if not made by motion under the rule or
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24 ⁵ *Id.* at Ex. D.

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7 omitted defenses or objections.”).

8 **A. Defendant Weyerhaeuser Waived Its Objection To Venue By Failing To**
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17 personal jurisdiction, improper venue, insufficient process, insufficient service, failure to state
18 a claim, or failure to join a party in a motion filed under CR 12(b).” *Oltman v. Holland*
19 *America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008).

20 Here, Weyerhaeuser failed to assert the affirmative defense of improper venue in its
21 answer and failed to join the defense in its CR 12(b) motion to dismiss. In fact, Weyerhaeuser
22 not only waited three months to even file an answer—long after the 20 days given under the
23 civil rules¹⁰—but also Weyerhaeuser expressly refuted that transfer of venue was even an
24 option. In its motion, Weyerhaeuser stated,

25 _____
26 ¹⁰ Even if Weyerhaeuser had pleaded improper venue as an affirmative defense, this dilatory conduct alone
would constitute a waiver under Washington law. *Ronjue v. Fairchild*, 60 Wn. App. 278, 803 P.2d 57 (1991);
Raymond, 24 Wn. App. 112.

1 Plaintiffs may argue that the Court may cure this jurisdictional defect by
2 transferring venue to Lewis County. This argument lacks merit.

3 Weyerhaeuser strategically engaged in this zero sum game because Plaintiff could have been
4 at risk of being barred by the statute of limitations if they were forced to refile. But this tactic
5 now has a manifest and certain outcome, which is that Weyerhaeuser has waived the defense
6 of improper venue. *Kahclamat*, 31 Wn. App. at 466; CR 12(g)¹¹; CR 12(h)(1)¹².

7 *Kachlamat* is on all fours. There, the issue was whether “the defendant waive[d] its
8 right to request a change of venue by not asserting its objections to venue in a motion prior to
9 pleading or in its answer, and in waiting a year to make its request.” Division One answered
10 affirmatively. “A rule 12(b) defense or objection *must* be asserted by a defendant either by
11 motion prior to pleading or else in its responsive pleading if no rule 12(b) motions were made
12 by the defendant before so pleading.” *Id* (Emphasis added); *see also Raymond*, 24 Wn. App.
13 at 114-115. The *Kahclamat* Court held that the defendant waived his challenge to venue
14 because he did not move to change venue “until many months after its answer and motion to
15 dismiss were filed.” *Id*.

16 Like in *Kachlamat*, Weyerhaeuser failed to raise improper venue as an affirmative
17 defense and failed to join the defense in its CR 12(b) motion. After a lengthy appeal process,
18 Weyerhaeuser now argues, for the first time, that venue is improper. But Washington law is
19 clear: A defendant waives the right to assert improper venue if it (1) fails to affirmatively
20 plead the defense in a responsive pleading and (2) fails to join the defense in a CR 12(b)
21 motion. Weyerhaeuser has waived the relief it now requests, and its motion should be denied
22 on this ground alone.

23 ¹¹ CR 12(g) states: “A party who makes a motion under this rule may join with it any other motions herein
24 provided for and then available to him. *If a party makes a motion under this rule but omits therefrom any
25 defense or objection then available to him which this rule permits to be raised by motion, he shall not
26 thereafter make a motion based on the defense or objection so omitted, except a motion as provided in
subsection (h)(2) hereof on any of the grounds there stated.*” (Emphasis added).

¹² CR 12(h)(1) states: “A defense of lack of jurisdiction over the person, improper venue, insufficiency of
process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances
described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive
pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.”

PLAINTIFF'S OPPOSITION TO DEFENDANT
WEYERHAEUSER'S MOTION TO CHANGE VENUE

PFAU COCHRAN
VERTETIS AMALA
A Professional Limited Liability Company

1 **B. Even If Weyerhaeuser Did Not Waive The Affirmative Defense of Improper**
2 **Venue, Its Motion Should Be Denied For Other Reasons.**

3 1. Venue Is Proper In King County.

4 This case presents the situation where two or more venue statutes apply. Where there
5 are competing venue statutes, determining the proper venue rests in the sound discretion of
6 the trial court. *Dill v. Public Utility Dist. No. 2 of Grant County*, 3 Wn. App. 360, 366, 475
7 P.2d 309 (1970). Here, the flooding damage at issue caused a great deal of damage to
8 Plaintiff; part of this will be damage to his real property, but another portion of the damage
9 analysis will entail damage to his personal property as well as emotional distress in seeing his
10 property destroyed. In this vein, RCW 4.12.020 applies, which mandates that actions for the
11 recovery of damages for injuries to the person or for injury to personal property *shall* be tried
12 in the county where the cause arose.¹³ See also RCW 4.92.010 (venue is proper by reason of
13 joinder of an additional defendant); RCW 4.12.025(3) (“The venue of any action brought
14 against a corporation, at the option of the plaintiff, shall be: (a) In the county where the tort
15 was committed; . . . or (d) in the county where the corporation has its residence”). In the
16 present case, the tort was committed and the cause of action arose at Weyerhaeuser’s
17 headquarters in King County, where the policies and procedures causing the negligent timber
18 practices were born, cultivated, and ordered.

19 2. Witness Convenience Does Not Warrant Transferring Venue.

20 A court may transfer venue to serve “the convenience of witnesses.”¹⁴ RCW
21 4.12.030(3). Here, on a balance, there cannot be a reasonable debate that most of the central

22 ¹³ RCW 4.12.020 states in relevant part:

23 Actions for the following causes *shall be tried* in the county where the cause, or some part thereof,
24 arose:

25 * * *

26 (3) For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff shall have the option of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

¹⁴ Weyerhaeuser does not argue that justice cannot be obtained in King County.

1 witnesses to this lawsuit will be in King County. The underlying forest practices and policies
2 that caused damages to Plaintiff's property occurred at the Weyerhaeuser headquarters. All of
3 the necessary documents will be coming from the Weyerhaeuser headquarters, and in fact,
4 before this case was dismissed, the undersigned was planning to visit Weyerhaeuser
5 headquarters to review the boxes of responsive discovery documents. The experts as well will
6 also likely be from King County or immediately surrounding counties. The only witnesses
7 who will be in Lewis County are the Plaintiff and some eyewitnesses. Taken together,
8 witness convenience does not weigh in favor of transferring venue.

9 **C. If Weyerhaeuser's Motion Is Granted, Plaintiff Should Not Be Ordered To Pay**
10 **the Costs of Transferring Venue.**

11 Weyerhaeuser requests that the Court order that Plaintiff pay the costs of changing
12 venue, and if granted, it plans to move the Court for an award of attorney fees as well.
13 Certainly this is a bold request in light of its clear waiver of improper venue and decision to
14 take an extreme position that forced years of litigation. Under law, though, the party who
15 obtains the change must pay the cost of transfer where, like here, the case was filed in the
16 correct county. RCW 4.12.090; 4.92.010; RCW 4.12.025(3). If the Court disagrees, Plaintiff
17 would ask that the Court preemptively deny Weyerhaeuser's future request to move the Court
18 for fees and costs.

19 **V. CONCLUSION**

20 For the foregoing reasons, Plaintiff respectfully ask the Court deny Defendant
21 Weyerhaeuser's motion to change venue.

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RESPECTFULLY SUBMITTED this 14th day of April, 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

PLAINTIFF'S OPPOSITION TO DEFENDANT
WEYERHAEUSER'S MOTION TO CHANGE VENUE

8 of 6

Appendix 297

 PFAU COCHRAN
VERTETIS AMALA
A Professional Limited Liability Company

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Tacoma, WA 98402
Phone: (253) 777-0799 Facsimile: (253) 627-0654
www.pcvlaw.com

CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala PLLC.

I served the foregoing document via Email / Legal Messenger by directing delivery to the following individuals:

Kelly P. Corr
Seann C. Colgan
Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Attorneys for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

DATED this 14th day of April, 2015.


Laura Neal
Legal Assistant to Darrell L. Cochran

4810-5221-1235, v. 1

1
2 THE HONORABLE ROGER ROGOFF
3
4
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6
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8 SUPERIOR COURT OF THE STATE OF WASHINGTON
9 FOR KING COUNTY

10 VIRGINIA CAREY, individually; JAMIE
11 CAREY, individually; PARADYCE
12 INDUSTRIES INC., d/b/a THE PRINT SHOP,
13 a Washington Corporation,

14 Plaintiffs,

15 vs.

16 STATE OF WASHINGTON DEPARTMENT
17 OF NATURAL RESOURCES;
18 WEYERHAEUSER COMPANY, a Washington
19 corporation; and GREEN DIAMOND
20 RESOURCE COMPANY, a Washington
21 corporation,

22 Defendants.

No. 10-2-42011-8 KNT

23 NOTICE OF DISCRETIONARY REVIEW
24 TO THE WASHINGTON STATE
25 SUPREME COURT

26 COMES NOW, Plaintiff, by and through his undersigned counsel, and files this Notice of
Discretionary Review, respectfully seeking discretionary review by the Supreme Court of the
State of Washington of the following decisions of the Superior Court in this case:

- 1. Order ON Defendant Weyerhaeuser's Motion to Transfer For Proper Venue,
appended hereto as **Exhibit A**;

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42011-8 KNT | 1



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The names and addresses of the lawyers representing the Plaintiffs are:

Darrell Cochran
Loren Cochran
Kevin Hastings
Pfaue Cochran Vertetis Amala PLLC
911 Pacific Ave., Suite 200,
Tacoma, WA 98402

The name and address of the lawyer representing Defendant Weyerhaeuser is:

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

The names and address of the lawyers representing Defendant Green Diamond are:

Kelly P. Corr
Kevin Baumgardner
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Attorneys for: Green Diamond Resource Company

The name and address of the lawyer representing Defendant DNR is:

Mark C. Jobson
Assistant Attorney General
State of Washington
PO Box 40126
Olympia, WA 98504-0126
Attorney for: Defendant DNR

///

///

///

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42011-8 KNT | 2



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Dated this 18th day of May, 2015.



Darrell L. Cochran

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42011-8 KNT | 3

 **PEAU COCHRAN
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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing via Email / Legal Messenger by directing delivery to the following individuals:

Kelly P. Corr
Seann C. Colgan
Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
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Attorneys for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

Mark C. Jobson
Assistant Attorney General
State of Washington
PO Box 40126
Olympia, WA 98504-0126
Attorney for: Defendant DNR

DATED this 18th day of May, 2015.



Laura Neal
Legal Assistant to Darrell L. Cochran

4844-4271-1332, v. 1

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42011-8 KNT

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EXHIBIT A

FILED
KING COUNTY, WASHINGTON

APR 21 2015 ✓

SUPERIOR COURT CLERK
BY Kim Dunnett
DEPUTY

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

VIRGINIA CAREY, et. al.,

 Plaintiffs,

 v.

STATE OF WASHINGTON
DEPARTMENT OF RESOURCES, et. al.,

 Defendants.

NO. 10-2-42011-8 KNT

**ORDER ON DEFENDANT
WEYERHAUSER'S MOTION TO
TRANSFER FOR PROPER VENUE**

** Clerks action **

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court on the motion of Defendant Weyerhauser for transfer for improper venue in King County, and the Court having considered the records and files herein, including the following:

1. Defendant Weyerhauser's Motion to Change Venue, and exhibits/declarations;
2. Plaintiff Carey's Response to Motion to Dismiss, and exhibits/declarations;
3. Defendant Green Diamond's Reply in Support of Motion to Change Venue;
4. Defendants Department of Natural Resources and Weyerhauser's Reply to Motion to Change Venue;

ORDER ON MOTION TO
TRANSFER FOR IMPROPER VENUE - 1

JUDGE ROGER ROGOFF
KING COUNTY SUPERIOR COURT, DEPT. 47

ORIGINAL

1 Pursuant to the Supreme Court's ruling, Defendant now seeks transfer of the
2 lawsuit to Lewis County. Plaintiff argues that Defendant waived any venue objection by
3 seeking dismissal of the lawsuit rather than transfer.
4

5
6 **ANALYSIS**
7

8 In its original CR 12(b) Motion to Dismiss, Defendants asked the trial court to
9 find that Plaintiffs had violated RCW 4.12.010(1). Plaintiffs denied violating the statute.
10 Defendants further sought a remedy of dismissal. Plaintiffs argued that, if a violation
11 occurred, transfer was the appropriate remedy.
12

13 No reasonable review of the facts allows for a finding that Defendants waived the
14 argument that this lawsuit was brought in the correct county. According to the Supreme
15 Court, they certainly sought an inappropriate remedy for that violation.
16

17 This Court finds that Defendant's motion to dismiss for violation of the venue
18 statute sufficiently preserved the objection to venue. The request for the remedy of
19 dismissal, rather than transfer, does not defeat the basic principle that Defendants timely
20 objected to venue.
21

22 Venue is appropriate in Lewis County, not King County. RCW 4.12.010(1);
23 *Ralph v. State Department of Natural Resources*, 182 Wn.2d 242 (2014). The remedy
24 for violating the venue statute is transfer to the appropriate county.
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ORDER

IT IS THUS HEREBY ORDERED that Defendant Weyerhauser's Motion to Transfer to Lewis County is GRANTED. The case shall transfer from King County to Lewis County forthwith.

DONE IN OPEN COURT this 17th day of April, 2015.



JUDGE ROGER ROGOFF

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THE HONORABLE PATRICK OISHI

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILLIAM FORTH, individually; GUY BAUMAN, individually; EILEEN BAUMAN, individually; LINDA STANLEY, individually and as personal representative IN RE THE ESTATE OF CORAL COTTEN; ROCHELLE STANLEY as personal representative IN RE THE ESTATE OF CORAL COTTEN; DONALD LEMASTER, individually; and DAVID GIVENS, individually,

Plaintiffs,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

NOTICE OF DISCRETIONARY REVIEW TO THE WASHINGTON STATE SUPREME COURT

COMES NOW, Plaintiff, by and through his undersigned counsel, and files this Notice of Discretionary Review, respectfully seeking discretionary review by the Supreme Court of the State of Washington of the following decisions of the Superior Court in this case:

NOTICE OF DISCRETIONARY REVIEW TO THE WASHINGTON STATE SUPREME COURT

10-2-42009-6 KNT | 1



911 Pacific Avenue, Suite 200
Tacoma, WA 98402
Phone: (253) 777-0799 Facsimile: (253) 627-0654
www.pcalaw.com

1 1. Order Granting Defendants' Motion to Change Venue, appended hereto as

2 **Exhibit A;**

3
4 The names and addresses of the lawyers representing the Plaintiffs are:

5 Darrell Cochran
6 Loren Cochran
7 Kevin Hastings
8 Pfau Cochran Vertetis Amala PLLC
9 911 Pacific Ave., Suite 200,
10 Tacoma, WA 98402

11 The name and address of the lawyer representing Defendant Weyerhaeuser is:

12 Louis D. Peterson
13 Hillis Clark Martin & Peterson, P.S.
14 1221 Second Avenue
15 Suite 500
16 Seattle, WA 98101
17 Attorney for: Weyerhaeuser Company

18 The names and address of the lawyers representing Defendant Green Diamond are:

19 Kelly P. Corr
20 Kevin Baumgardner
21 Corr Cronin Michelson Baumgardner & Preece LLP
22 1001 Fourth Avenue, Suite 3900
23 Seattle, WA 98154
24 Attorneys for: Green Diamond Resource Company

25 The name and address of the lawyer representing Defendant DNR is:

26 Mark C. Jobson
27 Assistant Attorney General
28 State of Washington
29 PO Box 40126
30 Olympia, WA 98504-0126
31 Attorney for: Defendant DNR

32 ///

33 ///

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42009-6 KNT | 2



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Dated this 18th day of May, 2015.



Darrell L. Cochran

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42009-6 KNT | 3

 **PFAU COCHRAN**
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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing via Email / Legal Messenger by directing delivery to the following individuals:

Kelly P. Corr
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Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
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Attorneys for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

Mark C. Jobson
Assistant Attorney General
State of Washington
PO Box 40126
Olympia, WA 98504-0126
Attorney for: Defendant DNR

DATED this 18th day of May, 2015.



Laura Neal
Legal Assistant to Darrell L. Cochran

4836-1964-4452, v. 1

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42009-6 KNT

 **PEAU COCHRAN
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EXHIBIT A

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CHIEF MRJC JUDGE PATRICK OISHI
APRIL 16, 2015
WITHOUT ORAL ARGUMENT

FILED
KING COUNTY, WASHINGTON
APR 21 2015
SUPERIOR COURT CLERK
BY LISA ROQUE DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM FORTH, individually; GUY
BAUMAN, individually; EILEEN BAUMAN,
individually; LINDA STANLEY, individually
and as personal representative IN RE THE
ESTATE OF CORAL COTTON;
ROCHELLE STANLEY, as personal
representative IN RE THE ESTATE OF
CORAL COTTON; DONALD LEMASTER,
individually; and DAVID GIVENS,
individually;

Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES, a Washington
State public agency; WEYERHAEUSER
COMPANY, a Washington corporation; and
GREEN DIAMOND RESOURCE
COMPANY, a Washington corporation,

Defendants.

No. 10-2-42009-6 KNT

~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION TO CHANGE
VENUE

[CLERK'S ACTION REQUIRED]

ORIGINAL

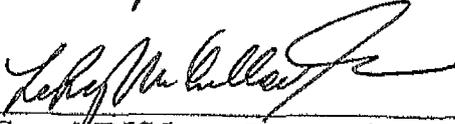
*Order Granting Defendants' Motion to Change
Venue - 1*

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 THIS MATTER came before the Court on Defendants' Motion to Change Venue (the
2 "Motion"). The Court reviewed the Motion, the response and ^{replies *} ~~reply~~ thereto, and the other
3 documents filed with the Court in this matter. In light of the foregoing, the Court hereby
4 GRANTS the Motion. Venue for this action is hereby transferred to Lewis County.

5 IT IS SO ORDERED.

6 DONE THIS 20th day of April, 2015.

7
8 
9 ~~CHIEF JUDGE~~ Patrick Oishi
10 KING COUNTY SUPERIOR COURT JUDGE

11
12 * Defendant Green Diamond Resource submitted a separate
13 Reply from that of Defendant State of Washington
14 Department of Natural Resources. This court reviewed all of
15 the submitted materials, including Plaintiff's designated surrogacy
16 opposing the Motion.

Presented by:

17 HILLIS CLARK MARTIN & PETERSON P.S.

18 By s/ Louis D. Peterson

19 Louis D. Peterson, WSBA #5776
20 Michael R. Scott, WSBA #12822
21 Alexander M. Wu, WSBA #40649
22 Hillis Clark Martin & Peterson P.S.
23 1221 Second Avenue, Suite 500
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26 Facsimile: (206) 623-7789
27 Email: lou.peterson@hcmp.com;
28 michael.scott@hcmp.com;
alex.wu@hcmp.com

Attorneys for Defendant
Weyerhaeuser Company

Order Granting Defendants' Motion to Change
Venue - 2

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1
2 ROBERT W. FERGUSON
3 ATTORNEY GENERAL

4 By s/ Mark Jobson

5 Mark Jobson, WSBA No. 22171
6 Assistant Attorney General
7 State of Washington
8 P.O. Box 40126
9 Olympia, WA 98504-0126
10 Telephone: (360) 586-6300
11 Facsimile: (360) 586-6655
12 Email: markj@atg.wa.gov

13 Attorneys for Defendant
14 Department of Natural Resources

15 CORR CRONIN MICHELSON BAUMGARDNER
16 FOGG & MOORE LLP

17 By s/ Kelly P. Corr

18 Kelly P. Corr, WSBA # 555
19 Corr Cronin Michelson Baumgardner &
20 Preece LLP
21 1001 Fourth Ave., Suite 3900
22 Seattle, WA 98154
23 Telephone: (206) 625-8600
24 Facsimile: (206) 625-0900
25 Email: kcorr@correronin.com

26 Attorneys for Defendant
27 Green Diamond Resource Company
28

Proposed Order re Motion to Change Venue - Forth.docx

*Order Granting Defendants' Motion to Change
Venue - 3*

HILLIS CLARK MARTIN & PETERSON P.S.
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Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1
2 THE HONORABLE LeROY McCULLOUGH
3
4

5
6
7 SUPERIOR COURT OF THE STATE OF WASHINGTON
8 FOR KING COUNTY

9 WILLIAM RALPH, individually,
10 Plaintiff,

No. 11-2-05769-1 KNT

11 vs.

12 STATE OF WASHINGTON DEPARTMENT
13 OF NATURAL RESOURCES,
14 Defendant.

15 NOTICE OF DISCRETIONARY REVIEW
16 TO THE WASHINGTON STATE
17 SUPREME COURT

18 COMES NOW, Plaintiff, by and through his undersigned counsel, and files this Notice of
19 Discretionary Review, respectfully seeking discretionary review by the Supreme Court of the
20 State of Washington of the following decisions of the Superior Court in this case:

- 21 1. Order Granting DNR's Motion to Change Venue, appended hereto as **Exhibit A**;

22 The names and addresses of the lawyers representing the Plaintiffs are:

23 Darrell Cochran
24 Loren Cochran
25 Kevin Hastings
26 Pfau Cochran Vertetis Amala PLLC
911 Pacific Ave., Suite 200,
Tacoma, WA 98402

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

11-2-05769-1 KNT | 1



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The name and address of the lawyers representing Defendant DNR is:

Mark C. Jobson
Assistant Attorney General
State of Washington
PO Box 40126
Olympia, WA 98504-0126
Attorney for: Defendant DNR

Dated this 18th day of May, 2015.



Darrell L. Cochran

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

11-2-05769-1 KNT | 2



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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing via Email / Legal Messenger by directing delivery to the following individuals:

Mark C. Jobson
Assistant Attorney General
State of Washington
PO Box 40126
Olympia, WA 98504-0126
Attorney for: Defendant DNR

DATED this 18th day of May, 2015.



Laura Neal
Legal Assistant to Darrell L. Cochran

4830-6462-0068, v. 1

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

11-2-05769-1 KNT

 **PFAU COCHRAN
VERTETIS AMALA**
A Professional Limited Liability Company

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Phone: (253) 777-0799 Facsimile: (253) 627-0654
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EXHIBIT A

FILED
KING COUNTY, WASHINGTON
APR 21 2015

SUPERIOR COURT CLERK
BY LISA ROQUE DEPUTY

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WILLIAM RALPH, individually,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

NO. 11-2-05769-1KNT

~~PROPOSED~~ ORDER GRANTING
DNR'S MOTION TO CHANGE
VENUE .

THIS MATTER came before the Court on Department of Natural Resources' Motion to Change Venue (the "Motion"). The Court reviewed the Motion, the response, and ^{any} reply thereto, and the other documents filed with the Court in this matter. In light of the foregoing, the Court hereby GRANTS the Motion. Venue for this action is hereby transferred to Lewis County.

IT IS SO ORDERED.

DONE THIS 20th day of April, 2015.



THE HONORABLE *Michelle Hoag, Esq.*
KING COUNTY SUPERIOR COURT JUDGE

ORIGINAL

[PROPOSED] ORDER GRANTING DNR'S
MOTION TO CHANGE VENUE

ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA. 98504-0126
(360) 586-6300

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Presented By:

ROBERT W. FERGUSON
Attorney General

By: /s/ Mark C. Jobson
Mark C. Jobson, WSBA No. 22171
Assistant Attorney General
State of Washington
P.O. Box 40126
Olympia, WA 98504-0126
Telephone: (360) 586-6300
Facsimile: (360) 586-6655
Email: markj@atg.wa.gov

Attorneys for Defendant
Department of Natural Resources

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THE HONORABLE BRIAN D. GAIN

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILLIAM RALPH, individually,

Plaintiff,

vs.

WEYERHAEUSER COMPANY, a Washington
corporation; and GREEN DIAMOND
RESOURCE COMPANY, a Washington
corporation,

Defendants.

No. 10-2-42012-6 KNT

NOTICE OF DISCRETIONARY REVIEW
TO THE WASHINGTON STATE
SUPREME COURT

COMES NOW, Plaintiff, by and through his undersigned counsel, and files this Notice of Discretionary Review, respectfully seeking discretionary review by the Supreme Court of the State of Washington of the following decisions of the Superior Court in this case:

1. Order Granting Defendants' Motion to Change Venue, appended hereto as **Exhibit A;**

The names and addresses of the lawyers representing the Plaintiffs are:

Darrell Cochran
Loren Cochran
Kevin Hastings

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42012-6 KNT | 1



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1 Pfau Cochran Vertetis Amala PLLC
2 911 Pacific Ave., Suite 200,
3 Tacoma, WA 98402

4 The name and address of the lawyer representing Defendant Weyerhaeuser is:

5 Louis D. Peterson
6 Hillis Clark Martin & Peterson, P.S.
7 1221 Second Avenue
8 Suite 500
9 Seattle, WA 98101
10 Attorney for: Weyerhaeuser Company

11 The names and address of the lawyers representing Defendant Green Diamond are:

12 Kelly P. Corr
13 Kevin Baumgardner
14 Corr Cronin Michelson Baumgardner & Preece LLP
15 1001 Fourth Avenue, Suite 3900
16 Seattle, WA 98154
17 Attorneys for: Green Diamond Resource Company

18 Dated this 18th day of May, 2015.

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Darrell L. Cochran

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42012-6 KNT | 2

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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing via US Mail / Email by directing delivery to the following individuals:

Kelly P. Corr
Seann C. Colgan
Joshua J. Preece
Corr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Attorneys for: Green Diamond Resource Company

Louis D. Peterson
Hillis Clark Martin & Peterson, P.S.
1221 Second Avenue
Suite 500
Seattle, WA 98101
Attorney for: Weyerhaeuser Company

DATED this 18th day of May, 2015.



Laura Neal
Legal Assistant to Darrell L. Cochran

4848-9163-2676, v. 1

NOTICE OF DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

10-2-42012-6 KNT



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EXHIBIT A

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FILED
KING COUNTY WASHINGTON
APR 16 2015
ANNIE JOHNSON

THE HONORABLE BRIAN D. GAIN
APRIL 16, 2015
WITHOUT ORAL ARGUMENT

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM RALPH, individually,

Plaintiff,

v.

WEYERHAEUSER COMPANY, a
Washington corporation; and GREEN
DIAMOND RESOURCE COMPANY, a
Washington corporation,

Defendants.

No. 10-2-42012-6 KNT

~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION TO CHANGE
VENUE

[CLERK'S ACTION REQUIRED]

ORIGINAL

1 THIS MATTER came before the Court on Defendants' Motion to Change Venue (the
2 "Motion"). The Court reviewed the Motion, the response and reply thereto, and the other
3 documents filed with the Court in this matter. In light of the foregoing, the Court hereby
4 GRANTS the Motion. Venue for this action is hereby transferred to Lewis County.

5 IT IS SO ORDERED

6 DONE THIS 16th day of April, 2015.

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9
10 THE HONORABLE BRIAN D. GAIN
11 KING COUNTY SUPERIOR COURT JUDGE

BRIAN GAIN

12
13
14
15 Presented by:

16 HILLIS CLARK MARTIN & PETERSON P.S.

17 By s/ Louis D. Peterson

18 Louis D. Peterson, WSBA #5776
19 Michael R. Scott, WSBA #12822
20 Alexander M. Wu, WSBA #40649
21 Hillis Clark Martin & Peterson P.S.
22 1221 Second Avenue, Suite 500
23 Seattle WA 98101-2925
24 Telephone: (206) 623-1745
25 Facsimile: (206) 623-7789
26 Email: lou.peterson@hcmp.com;
27 michael.scott@hcmp.com;
28 alex.wu@hcmp.com

Attorneys for Defendant
Weyerhaeuser Company

1 CORR CRONIN MICHELSON BAUMGARDNER
2 FOGG & MOORE LLP

3 By s/ Kelly P. Corr

4 Kelly P. Corr, WSBA # 555
5 Corr Cronin Michelson Baumgardner &
6 Preece LLP
7 1001 Fourth Ave., Suite 3900
8 Seattle, WA 98154
9 Telephone: (206) 625-8600
10 Facsimile: (206) 625-0900
11 Email: kcorr@corrchronin.com

12 Attorneys for Defendant
13 Green Diamond Resource Company

14 Proposed Order re Motion to Change Venue - Ralph.docx