

NO. 64207-3-I

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

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TOM WESTERGREEN, RICHARD WHITMORE AND NIELSEN  
BROTHERS, INC.,

Appellants,

v.

WHATCOM COUNTY AND WASHINGTON STATE DEPARTMENT  
OF NATURAL RESOURCES,

Respondents.

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**JOINT RESPONSE BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Tom Westergreen, Richard Whitmore, and Nielsen Brothers, Inc. (Westergreen) challenged a Memorandum of Agreement (Agreement) between the Department of Natural Resources (the Department) and Whatcom County, which describes the sequence of steps required for a contemplated reconveyance of state forest land in the Lake Whatcom watershed.

Reconveyances are governed by RCW 79.22.300; thus, the Agreement identifies the process, management issues, and timelines associated with a reconveyance, but makes no commitments. Because the Agreement acts like a descriptive aid, Westergreen's requested remedies, invalidation and recession, would have no practical effect. Whatcom County has not submitted an application for reconveyance under the statute, therefore, the superior court properly determined the case was not ripe and dismissed it without prejudice.

Westergreen's opening brief focuses on justiciability, but does not prove its challenge is ripe for review when the Agreement is a guidance document with no legal or regulatory effect.

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## II. STATEMENT OF FACTS

### A. The Department Manages State Forest Lands in Trust for the County Beneficiaries.

The State of Washington holds state forest lands in trust for the benefit of the county they are located in, and the Department manages the trust lands.<sup>1</sup> See RCW 79.22.040 (creates trust); *Skamania Cy. v. State of Washington*, 102 Wn.2d 127, 133, 685 P.2d 576 (1984). Whatcom County transferred about half of the state forest land in the Lake Whatcom watershed<sup>2</sup> to the State under the law which required counties to deed lands chiefly valuable for timber growing to the State. Laws of 1935, ch. 126, § 1 (codified as RCW 79.22.040). In 1993, the Department completed a land exchange with Trillium Corporation, doubling the state forest land it manages in the watershed. Clerk's Papers (CP) at 33.

### B. Counties May Request Reconveyance of State Forest Lands, but Must Comply With Statutory Requirements.

A county may request reconveyance of its state forest lands for park purposes:

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<sup>1</sup> The State acquired "state forest lands" from counties by statute. RCW 79.02.010(10). In contrast, the federal government deeded "state lands" at statehood. RCW 79.02.010(11). Both types of trust land are intermingled in the watershed. CP at 34.

<sup>2</sup> The Lake Whatcom watershed includes approximately 15,700 acres of trust lands managed by the Department. CP at 33. In addition to the trust lands, the watershed contains urban residential areas and private forest land. *Id.*

Whenever the board of county commissioners of any county shall determine that state forest lands, that were acquired from such county by the state pursuant to RCW 79.22.040 and that are under the administration of the department, are needed by the county for public park use in accordance with the county and the state outdoor recreation plan, the board of county commissioners may file an application with the board<sup>[3]</sup> for the transfer of such state forest lands.

RCW 79.22.300 (emphasis added) (Attachment 2). A county may only modify the trust status of its state forest lands by requesting a reconveyance or through limited situations which are not present in this case. *See* RCW 79.22.060 (condemnation, property disputes). A request for reconveyance in the watershed is limited to all or part of the 8,470 acres of state forest lands. CP at 33; RCW 79.22.300, RCW 79.22.040.

If a board of county commissioners files an application for reconveyance, the Department must provide notice of the impending transfer and determine that the proposed park use is in accordance with the state outdoor recreation plan. RCW 79.22.300; CP at 36–37. The county must develop, maintain, and use the transferred lands for the proposed public park purpose. *Id.* The Board of Natural Resources (Board) may deny the application if the proposed use is not in accord with the state outdoor recreation plan, or if the land is not used for public park purposes.

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<sup>3</sup> The Board of Natural Resources (Board) is a six-member body that makes policy decisions about management of the Department's lands and resources. RCW 43.30.205–.225. The Board is not a party to this litigation. *See* CP at 1–4.

*Id.* Otherwise, if the statutory requirements are met, the Department “shall” reconvey the state forest lands. *Id.*

Critically, no reconveyance can occur unless Whatcom County requests it from the Board, and the Board approves it. RCW 79.22.300. Neither occurred.

**C. The Agreement Describes the Sequence of Future Actions but Does Not Require That Reconveyance Occur.**

In the fall of 2008, the Department and Whatcom County signed a Memorandum of Agreement which described the sequence of steps required to meet the statutory requirements for a request for reconveyance within the watershed. CP at 32–43 (Attachment 1). The Agreement:

specifies the scope, rationale, procedural steps and understandings, subsequent management considerations, and timeline for the proposed transactions.

CP at 33 (“Summary of the Agreement”), 34–37. It also identifies the management issues that will need to be addressed if the land transactions take place, and was intended to “facilitate a well-coordinated and predictable process”. CP at 32, 37–38.

The Agreement does not require any future action by the Department or Whatcom County. *See* CP at 32–43. The Agreement does:

- *propose* (CP at 32, 34, 35, 40, 42, 43);
- *identify* likely results (CP at 34), steps (CP at 35–37), and agreements that will need to be developed (CP at 37–38);

- *guide and govern* (CP at 33);
- *consider* (CP at 34);
- *depict* preliminary ideas only (CP at 34);
- *specify* (CP at 33);
- *envision* (CP at 36); and
- *qualify* (CP at 36, “If re-conveyed ...”).

The future actions that will be required prior to reconveyance are identified in the Agreement: title review, land appraisal, land transaction configuration, formal request, approval, and closing. CP at 40. None of those actions have occurred.

Whatcom County and the Department’s only obligations in the Agreement are to make efforts to make joint public statements and consult if there is a dispute. CP at 38–39.

The Agreement does not have any costs, and it does not mandate any expenditures. *See* CP at 32–43. The Agreement does identify the need for a separate funding agreement in order to meet its projected timeline:

The County and [the Department] will execute an Interagency Agreement under which the County will provide funds to [the Department] to hire a staff person to assist with the transaction, so that the timeline can be met. Without that funding, [the Department] will not be able to meet the proposed timeline.

CP at 39 (emphasis added). That Interagency Agreement was not signed by the Department until December 11, 2009. Therefore, it was not before

the superior court. Westergreen did not identify it as additional evidence in its opening brief.<sup>4</sup> See Rules of Appellate Procedure (RAP) 9.11. The Agreement recognizes there are costs to evaluate and process land transactions, but the Agreement itself has no costs. CP at 40.

If Whatcom County proceeds with a reconveyance request, the Agreement identifies future actions that will need to be taken by Whatcom County, the County Executive and Council, the Board, and the Department, as well as the estimated timelines associated with those actions. CP at 40. The timeline contemplated when the Agreement was signed in 2008 has not been met.

**D. The Superior Court Granted the Joint Motion for Summary Judgment and Dismissed Without Prejudice Because the Case Was Not Ripe for Review.**

The Department and Whatcom County brought a joint motion for summary judgment. CP at 17–28. The superior court granted the motion and dismissed without prejudice, holding the Complaint was not ripe for review. CP at 59. Westergreen filed a motion for reconsideration,

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<sup>4</sup> Westergreen’s designation of clerk’s papers also did not include the supporting documents for its motion for reconsideration. Those included a “Memorandum to the County Executive and Council” and a “Whatcom County Contract Information Sheet”, dated September 2008. CP at 67, 69. Respondents do not designate those documents for the same reason they do not request the Interagency Agreement under RAP 9.11; the documents were not challenged by Westergreen or part of the record before the superior court during summary judgment. *State of Washington v. Madsen*, No. 62143-2-I, 2009 WL 4756143, at \*17 ( Wn. Ct. App. Dec. 14, 2009) (additional evidence is unnecessary and irrelevant where decision is based on existing evidence).

CP at 62–64, which the superior court denied. CP at 72. Westergreen’s appeal followed.

### III. RESTATEMENT OF ISSUE

This case is dispositive on one issue: whether Westergreen’s challenge to an Agreement which describes the requirements to comply with a statutory process but takes no action is ripe for judicial review.

### IV. ARGUMENT

The superior court properly concluded Westergreen’s challenge was not ripe because the Agreement merely describes the sequence of steps if future land transactions are pursued under the reconveyance statute. The Agreement is not a contract and contains no consequences if it were invalidated or Whatcom County or the Department choose not to proceed. This appeal similarly does not identify issues of justiciability or public importance that require appellate review at this premature stage. Although the Agreement identifies actions that may be challenged in the future, a challenge to it remains unripe at the present time.

#### A. **The Standard of Review Is *De Novo* and Summary Judgment Was Appropriate Because Speculation About Future Actions Does Not Create a Factual Dispute.**

“The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.” *Parmelee v. Clarke*, 148 Wn. App. 748, 753, 201 P.3d 1022

(2008). “Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* (citation omitted). Westergreen does not allege there are disputed material facts about the contents of the Agreement, and thus, summary judgment was appropriate.

The court reviews the facts in the light most favorable to Westergreen, as the non-moving party. *Mountain Park Homeowners Ass’n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). However, the court is limited to reviewing the *facts* before it, not speculative assumptions, argumentative assertions, or opinions about what may occur in the future. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1998) (a fact is “what took place, an act, an incident, a reality as distinguished from supposition or opinion”). Further, the non-moving party can not rely on affidavits at face value, but must provide specific facts. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008). The court does not review matters for which the record is inadequate, such as the unchallenged Interagency Agreement signed several months after the summary judgment decision was issued. *See, e.g., Bich v. Gen. Elec. Co.*, 27 Wn. App. 25, 34, 614 P.2d 1323 (1980).

**B. A Memorandum of Agreement That Lacks Promise or Consideration Is Not a Contract.**

The Agreement does not meet the legal elements of a contract:

The essential elements of a contract are (1) the subject matter, (2) the parties, (3) the promise, (4) the terms and conditions, and (5) consideration.

*Trotzer v. Vig*, 149 Wn. App. 594, 605, 203 P.3d 1056 (2009) (citation omitted). The party asserting the existence of a contractual obligation must prove each essential element is present. *Id.* Westergreen did not prove that the Agreement contains the elements of promise or consideration. “Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. In order to constitute consideration, an act or promise must be bargained for and given in exchange for the promise.” *Id.* at 605–06.

Without consideration, the Agreement is not a contract. *Id.* at 606. The Agreement does not contain an act or promise that was bargained for or given in exchange. CP at 32–43. Instead, the Agreement identifies the sequence of steps that will need to be taken if Whatcom County pursues reconveyance. The Agreement does not place any legal obligations for performance on Whatcom County or the Department.

Absent the Agreement, the Department and Whatcom County could proceed with the same actions. The Agreement merely makes the

sequence open, transparent, and predictable to the public, due in part to public interest and the contentious history of land use in the watershed. CP at 33–34.

Although the Agreement does not meet the essential elements of a contract, it is an “agreement to agree”:

[a]n unenforceable agreement that purports to bind two parties to negotiate and enter into a contract ... negotiated with the intent that the final agreement will be embodied in a formal written document and that neither party will be bound until the final agreement is executed.

*Black’s Law Dictionary* 68 (7<sup>th</sup> ed. 1999) (emphasis added). Because reconveyance can not occur without compliance with RCW 79.22.300, the Agreement is limited to identifying the process, management issues, and timelines if there are future land transactions. CP at 32–43. The Agreement’s identification of future steps is not a challengeable contractual obligation.

**C. A Challenge to a Memorandum of Agreement That Does Not Require Any Future Action or Spend Funds Is Not Ripe for Judicial Review.**

**1. A Case Must Present a Ripe Controversy to Avoid an Advisory Judicial Opinion.**

A challenge that is not ripe for judicial review results in a prohibited advisory opinion. *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004). Judicial review of an agency action comes *after*,

not before, the agency has acted. *Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 759, 43 P.3d 471 (2002). An Agreement which has no legal or regulatory effect is not an action ripe for review, and therefore, does not create a justiciable issue. See *Washington Educ. Ass'n v. Pub. Disclosure Comm'n (WEA)*, 150 Wn.2d 612, 614, 80 P.3d 608 (2003).

In *WEA*, the court considered whether an agency's interpretive guidelines created a justiciable controversy under the Administrative Procedure Act. *Id.* The *WEA* court reasoned that the case presented a purely academic or hypothetical question because the guidelines had no legal or regulatory effect. *Id.* at 623. The Agreement before this Court similarly has no legal or regulatory effect. CP at 32–43.

The superior court properly concluded that the Agreement was not ripe for review because it:

merely establishes options and considerations in the event of future action, and any opinion by the Court at this stage would be advisory and based on speculative future actions that may not occur.

CP at 59, ¶ 2 (emphasis added). A judicial opinion on future actions is advisory; therefore, Westergreen's challenge to an action that may or may not occur in the future fails to meet the justiciability criteria for a "final and conclusive" judicial determination. *Coppernoll v. Reed*, 155 Wn.2d 290, 300–01, 119 P.3d 318 (2005) (citation omitted) (when an initiative

may be rejected by voters, or if approved provides no guarantee that a petitioner will suffer any injury, then the challenge is “dormant, hypothetical, [and] speculative” and not permitted).

Further, Westergreen’s allegations of harm do not derive from the Agreement and may never materialize. Before Westergreen can assert harm, a series of decisions must be made by Whatcom County, the Board, and the Department over a two year time period. CP at 40. Nothing prohibits Westergreen from filing a new action challenging future decisions regarding reconveyance. CP at 59 (dismissal was without prejudice).

**2. The Uniform Declaratory Judgments Act Does Not Permit Judicial Review of an Unripe, Local Issue.**

A declaratory judgment action is appropriate only when a justiciable controversy exists (Westergreen’s Issues 1 and 3) or an issue of major public importance is involved (Westergreen’s Issue 2). *Bercier v. Kiga*, 127 Wn. App. 809, 822, 103 P.3d 232 (2004) (citation omitted). The superior court did not address either issue because it dismissed the case on ripeness. CP at 59.

The Uniform Declaratory Judgments Act, RCW 7.24, requires a justiciable controversy before a court has jurisdiction over a claim.<sup>5</sup>

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<sup>5</sup> Westergreen identifies the four elements required for a justiciable controversy in its opening brief at p. 12. *See also* CP at 20.

*Kitsap Cy. v. Smith*, 143 Wn. App. 893, 902–03, 180 P.3d 834 (2008). There is no justiciable controversy when a party is “concerned only with a hypothetical” situation. *Id.*; *DiNino v. State*, 102 Wn.2d 327, 331–32, 684 P.2d 1297 (1984) (a judicial opinion on claims which present a purely hypothetical and speculative controversy would be “nothing more than an advisory opinion”). A claim is premature when there is no action, application, or intent for action. *Lawson v. State*, 107 Wn.2d 444, 460, 730 P.2d 1308 (1986). A claim which does not raise an actual, present and existing dispute, or the mature seeds of one, is not justiciable. *Snohomish Cy. v. Anderson*, 124 Wn.2d 834, 840, 881 P.2d 240 (1994). If the action being challenged has not been implemented, the “claim is a possible, dormant, hypothetical, speculative or moot disagreement, and the trial court did not err by dismissing the claim.” *Id.*

Westergreen’s allegations of harm can only mature if future actions take place.<sup>6</sup> Those actions can take place even if the Agreement itself is invalid, and thus, Westergreen’s requested remedies have no viable effect. CP at 4 (remedy sought is rescission and declaration that

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<sup>6</sup> For example, Westergreen argues that its property value has decreased because of the Agreement. Westergreen’s Brief at 14. Although only supported by a conclusory statement, *see* above Section IV.A. at pp. 7–8, the Agreement takes no action which causes decreased property value. Whether Westergreen will be harmed by a future reconveyance depends on how much of the state forest lands are reconveyed, and whether they are adjacent to Westergreen. *See* CP at 42–43 (maps of proposed transactions).

Agreement invalid). Westergreen's challenge to the Agreement is not justiciable because it will not resolve its concerns.

When there is no justiciable controversy, the Uniform Declaratory Judgments Act only permits judicial review when there is an issue of major public importance:

To determine whether there is an issue of public importance sufficient to overcome the justiciable controversy requirement, courts look to the public interest which is represented by the subject matter of the challenged statute and the extent to which public interest would be enhanced by reviewing the case.

*Kitsap Cy.*, 143 Wn. App. at 902–03, 908 (quotation omitted, emphasis added).

Issues are of major public importance when they relate to interpretation or amendment of a statute<sup>7</sup> or raise statewide concerns.<sup>8</sup>

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<sup>7</sup> *Washington State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 917–18, 949 P.2d 1291 (1997) (“Issues of major public importance have included questions of salary, tenure, and eligibility to stand for office ... and whether a statute increasing the amount of excise tax was constitutional” and DSHS’ interpretation of laws governing homeless children’s foster care placements) (emphasis added); *Kitsap Cy.*, 143 Wn. App. at 908–09 (“the issue of whether conversations with public employees are subject to the Privacy Act and the broader issue of whether certain types of conversations are always considered private conversations for purposes of the Privacy Act are issues of great public importance”) (emphasis added); *Arnold v. Dep't of Ret. Sys.*, 74 Wn. App. 654, 661, 875 P.2d 665 (1994) (challenge to amended definition of “surviving spouse” in RCW 41.26.030(6) for purposes of retirement benefits is an issue of public importance).

<sup>8</sup> *Kightlinger v. Pub. Util. Dist. No. 1*, 119 Wn. App. 501, 505, 81 P.3d 876 (2003) (“PUD’s authority to engage in appliance repair is of widespread public interest ... because of the media coverage in Clark County and because of the possibility that other PUDs statewide may be interested in repairing appliances”) (emphasis added).

Issues are not of major public importance when they are hypothetical,<sup>9</sup> not based on a claim of statutory violation,<sup>10</sup> or when public interest would not be enhanced by reviewing the case.<sup>11</sup>

Westergreen's challenge to the Agreement is not an issue of major public importance. Westergreen has not challenged the application of the reconveyance statute to any particular parcel of trust land. The Agreement does not raise statewide concerns because it is limited to the "unique circumstances present in the watershed". CP at 32. Further, Westergreen's harm depends on actions that may or may not occur, *see* n.6, above, at p. 13, and will not be avoided by its requested remedies, invalidation and rescission of the Agreement. CP at 4. Judicial review of the Agreement will not promote public interest because existing case law addresses the situation in which a challenged action is hypothetical or speculative. Those cases consistently conclude that no issue of major

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<sup>9</sup> *DiNino*, 102 Wn.2d at 332 (a case which presents a hypothetical, speculative controversy on a right to abortion or foregoing medical treatment, even if addressing constitutional rights, does not make an advisory opinion beneficial to the public or other branches of government); *Bercier*, 127 Wn. App. at 822 (the action "does not involve an issue of major public concern" because the challenger did not "explain how a hypothetical compact between the State and the Puyallup Tribe is of major public importance in this context") (emphasis added).

<sup>10</sup> *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 284–85, 4 P.3d 808 (2000) ("we do not find the existence of an issue of major public importance warranting a declaratory judgment" when the disagreement existed only with Commission staff).

<sup>11</sup> *Snohomish Cy.*, 124 Wn.2d at 840–41(challenge to validity of a statute, amendment to the Growth Management Act, and county ordinance, although implicating

public importance exists for speculative situations. *See* nn.9-11, above at pp. 15–16. Westergreen’s challenge is neither justiciable or an issue of major public importance. CP at 59.

**3. Future Actions by the Department and Whatcom County Will Be Governed by the Reconveyance Statute.**

Under the reconveyance statute’s requirements, a reconveyance can only occur after a county submits an application and the Department determines that the proposed use is in accordance with the state outdoor recreation plan. RCW 79.22.300; *see* Section II.B., above at pp. 2–4. The Agreement does not require that any of its identified steps occur, nor does it contain any consequences if either party decides not to continue. Further, Westergreen’s concerns can be addressed in the future if it is harmed by a request for reconveyance. The Court should not interfere with Whatcom County and the Department’s administrative actions describing the steps leading to reconveyance.

The Department, Board, and Whatcom County can not act outside the limits of their authority or fail to comply with procedural statutory requirements. *Pub. Util. Dist. No. 2 of Grant County v. North American Foreign Trade Zone*, 159 Wn.2d 555, 599, 151 P.3d 176 (2007) (quotation citation omitted) (agency must comply with internal procedures

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public interest, were not sufficient to support examination of issue that is not otherwise justiciable because review would not enhance the public interest).

promulgated pursuant to statutory requirement); *Washington Fed'n of State Employees v. State Dep't of Gen. Admin.*, 152 Wn. App. 368, 379, 216 P.3d 1061 (2009) (quotation citation omitted) (agencies may only exercise express or implicit powers).

Courts avoid interference with administrative decisions of agencies when they act within their authority. *State ex rel. Washington Fed'n of State Employees, AFL-CIO v. Bd. of Trs. of Central Washington Univ.*, 93 Wn.2d 60, 73, 605 P.2d 1252 (1980); *Washington State Attorney General's Office v. Washington Utils. and Transp. Comm'n*, 128 Wn. App. 818, 825, 116 P.3d 1064 (2005) (courts do not set aside a discretionary agency decision absent a clear showing of abuse). Transparently describing the administrative steps associated with a land transaction process in an Agreement is within the authority of prudent decision-makers.

A reconveyance can occur only if Whatcom County files an application which the Board approves. RCW 79.22.300. Which parcels will be included are speculative at the present time. Accordingly, the superior court correctly concluded that judicial review should not occur until there is a ripe action.

**D. Westergreen’s Arguments That Were Not Addressed Below Can Not Be Raised for the First Time on Appeal, and Are Also Not Ripe for Judicial Review.**

In its opening brief, Westergreen restates three grounds from its complaint but does not assign error or identify issues related to them. Westergreen’s Brief at 2, 6–7. Under RAP 2.5(a), as a general rule, an issue may not be raised for the first time on appeal. *State v. Collins*, 152 Wn. App. 429, 434, 216 P.3d 463 (2009). This Court does not need to consider these arguments because they were not argued in the summary judgment briefing. *See* CP at 44–51 and 57–64. Further, “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 556, 166 P.3d 813 (2007) (quotation citation omitted). Notwithstanding Westergreen’s failure to properly present these issues for appellate review, the Department and Whatcom County briefly address why each argument is without merit.

Westergreen argues that because some of the state forest land in the watershed was transferred from Trillium Corporation to the State, it is not subject to the reconveyance statute. Westergreen’s Brief at 6–7. Westergreen has not challenged the constitutionality of the statute, and its effort at an as-applied challenge is not ripe for judicial review. The specific parcels which will be requested for reconveyance have not been

identified. *See* CP at 35 (title and property reviews are step 2) and 40 (parcel/title review anticipated to take six months after project staff hired). If Westergreen is harmed by a reconveyance including parcels transferred from a third party to the State, then it may file a new action at that time.

Westergreen argues that the Agreement was executed without any SEPA review. RCW 43.21C; Westergreen's Brief at 7. SEPA rules contain categorical exemptions for procedural actions and the "transfer or exchange of any publicly owned real property". WAC 197-11-800(5), WAC 197-11-800(19). The land transactions identified in the Agreement, and the Agreement itself, are exempt from SEPA.

Westergreen argues that a park will be inconsistent with the Whatcom County Comprehensive Plan "commercial forestry" zoning. Westergreen's Brief at 7; CP at 3 (trust land zoning designation is "for the most part" commercial forestry). Westergreen presents no argument why commercial forestry and a park are mutually exclusive. *See* above, p. 18 (passing treatment insufficient). This issue is also not ripe for review because specific parcels have not been identified that conflict and could not be remedied by an amendment to the zoning classification.

## V. CONCLUSION

Westergreen's challenge to an Agreement which describes the sequence of steps for future land transactions is premature. The relief

Westergreen actually seeks is political, demonstrated by the fact that the requested relief, invalidation of the Agreement, will have no effect on future land transactions. When a party's position is based on policy grounds, argument should be directed to its legislative body. *See King Cy. v. King Cy. Hearing Exam'r*, 135 Wn. App. 312, 324, 144 P.3d 345 (2006) (in context of SEPA challenge). The superior court properly dismissed this case without prejudice because it is not ripe, and the Department and Whatcom County respectfully request this Court do the same.

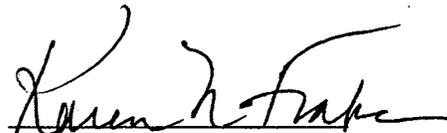
RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of January, 2010.

ROBERT M. MCKENNA  
*Attorney General*



MARTHA F. WHLING,  
WSBA No. 36295  
*Assistant Attorney General*  
*Attorneys for Department of Natural Resources*

WHATCOM COUNTY DEPUTY  
PROSECUTING ATTORNEY



KAREN N. FRAKES,  
WSBA No. 13600  
*Attorney for Whatcom County*

# **Attachment 1**

COUNTY ORIGINAL

2008-14B

Lake Whatcom Watershed Land Transactions  
Memorandum of Agreement  
between  
Whatcom County  
and

WHATCOM COUNTY  
CONTRACT NO.  
200809021

Washington State Department of Natural Resources  
September 23, 2008

**Purpose of the Proposed Transaction**

Whatcom County (County) and the Washington State Department of Natural Resources (DNR) propose to prepare a re-conveyance to the County of certain State Forest lands within the Lake Whatcom watershed for park purposes, pursuant to RCW 79.22.300, following a re-arrangement of trust designations of state-owned trust land in the watershed (inter-grant exchange) which will consolidate some or all State Forest lands and federally-granted State Trust lands.

This Memorandum of Agreement will guide and govern all actions by the County and DNR necessary to prepare the inter-grant exchange and the subsequent re-conveyance, for approval by the Whatcom County Council and the Board of Natural Resources.

The County and DNR seek by this proposed transaction to resolve long-standing questions regarding the management of state trust lands in the watershed in a manner that serves the best interests of both local and state residents, including the beneficiaries of state trust lands. This objective builds upon unique circumstances present in the watershed, in which a large block of state-owned trust forest land is situated very near a major metropolitan area. The County and DNR intend to use this MOA to facilitate a well-coordinated and predictable process to accomplish this stated objective.

The County seeks to accommodate future park needs of County residents by securing and managing for park purposes major tracts of relatively undeveloped forest land within minutes of a major population center. The County intends to manage the re-conveyed lands primarily for passive park and recreational experiences in a relatively wild and natural setting, within walking or biking distance for many urban residents. The proposed future park lands will also provide wildlife habitat and a minimally disturbed portion of the lake's watershed. This proposal helps ensure that these opportunities are available for future generations to enjoy, and maintains a high quality of life for County residents.

DNR will recognize and act on the County's request for re-conveyance, while fulfilling its legal obligation to the beneficiaries of the state-owned trust lands which will remain in State ownership and DNR management in the watershed. DNR acknowledges the topographic diversity in the watershed and the resulting diversity of management settings for trust forest land management. DNR seeks to create an ownership pattern in the watershed which facilitates sustainable management of trust forest lands for trust purposes and for associated ecological and public benefits including clean water, timber, public revenue, wildlife habitat, and recreation.

EXHIBIT

tabbles

## **Summary of the Agreement**

This Memorandum of Agreement specifies the scope, rationale, procedural steps and understandings, subsequent management considerations, and timeline for the proposed transaction.

## **Background and Context**

State trust lands in the Lake Whatcom Landscape Planning Area comprise approximately 15,700 acres, including small adjoining portions of contiguous parcels, and a block of lands west of Cain Road and Reed Lakes. As a whole the watershed is composed of 31 percent urban residential, 46 percent state trust forest land, and 23 percent private forest land. Of the state trust forest land, about 9,350 acres are State Forest lands managed to benefit Whatcom County and its junior taxing districts (8,470 acres of State Forest "transfer," and 880 acres of State Forest "purchased"), and about 5,660 acres are federally-granted trust lands managed to benefit various trust beneficiaries, primarily K-12 common schools statewide. In addition, 690 acres are State Forest lands located in and managed to benefit Skagit County. The watershed provides drinking water to a majority of the residents of Whatcom County.

In 1993, at the request of Whatcom County, DNR doubled its acreage of state-owned trust forest land within the watershed through a land exchange with Trillium Corporation. The watershed has a long history of damaging storm-induced landslides from its steep forested slopes. In 1999, and again in 2000, County residents urged the state legislature to pass legislation relating to DNR's planning and trust land management in the watershed, and addressing local residents' concerns over drinking water quality and public safety in relation to landslides. The 2000 legislation created a local Inter-jurisdictional Committee (IJC), which DNR worked with until 2004 to create a Lake Whatcom Landscape Plan and accompanying Environmental Impact Statement. The plan represented DNR-IJC consensus on most management issues, including streamside and unstable slope protection that goes beyond current state forestry regulations.

The Board of Natural Resources adopted the Lake Whatcom Landscape Plan in November, 2004, while expressing concern over the balance of costs and benefits of implementing the plan, in relation to the State's fiduciary responsibilities to trust beneficiaries.

As called for in the landscape plan, DNR established a new Inter-jurisdictional Committee, which had its first meeting in February, 2005. The committee conducts a site-specific review of proposed DNR activities in the watershed and makes recommendations. The IJC has met numerous times, conducted many field tours, and provided written recommendations on many planned DNR management activities including proposed timber sales, road construction, maintenance and abandonment plans, and silvicultural projects.

Also in February, 2005, Skagit County and junior taxing districts in Skagit and Whatcom Counties filed a lawsuit against the State challenging the validity of the landscape plan,

alleging that it violated the State's trust obligations to the County and taxing districts. That lawsuit is ongoing.

In the spring of 2007, representatives of Whatcom County approached DNR to introduce a County proposal regarding re-conveyance of State Forest lands in the watershed for park purposes under RCW 79.22.300. After several meetings over the course of the spring and summer of 2007, Whatcom County Executive Pete Kremen and Commissioner of Public Lands Doug Sutherland agreed on September 21, 2007 to develop and sign a Memorandum of Agreement to accomplish a re-conveyance.

### **Scope of the Land Transactions**

The proposed inter-grant exchange and re-conveyance is most likely to result in two ownership blocks that will be transferred to Whatcom County for public park use and three ownership blocks that will remain in trust ownership and be managed by DNR as working forests. The attached map, labeled "Proposed Inter-grant Exchange and Re-conveyance," shows the location of the trust land parcels in the Lake Whatcom Landscape Planning Area that are being considered for exchange and re-conveyance, as well as an outline of the Whatcom County and DNR management blocks that would result from this proposal. The map depicts preliminary ideas only, and both size and precise boundaries for the final re-conveyance should not be inferred. DNR and the County understand that specific parcels will be brought up for discussion in the process of finalizing the inter-grant exchange and developing a final re-conveyance package.

### **Rationale for the Inter-grant Exchange**

In the current configuration of trust land designations in the watershed, various designations are intermingled in a complex way, including State Forest lands and federally-granted State Trust lands. Therefore, re-conveying the State Forest lands to the County in their current configuration would result in a complex intermingling of future County park and future State Trust land ownership. This intermingling would greatly complicate the ongoing management of both the park and the trust lands. In addition, the intermingled character of the land designations greatly increases the costs of preparing for and carrying out the re-conveyance. Finally, in many cases the lands most appropriate for ongoing park purposes and for ongoing working forest management as trust lands don't currently reflect State Forest and other State Trust ownership, respectively.

An opportunity exists to rearrange the State Forest lands and other State Trust lands into more contiguous blocks prior to re-conveyance, to provide more manageable areas for each, to increase compatibility of future management of the respective ownerships, to reduce transaction costs, and to position the future park lands and working forests on the most appropriate landscape features. In general, future County park lands would be located on both sides of the central portion of the watershed, often on relatively more environmentally sensitive lands, while state trust lands would be located to the northeast and southeast areas of the watershed, often on less steep and more stable lands.

## **Inter-grant Exchange Process**

Washington's Department of Natural Resources, as trust land manager, occasionally facilitates an exchange between trusts under RCW 79.22.300.

Inter-grant exchanges are subject to all the requirements for land exchanges described in Chapter 79.17 RCW. Inter-grant exchanges must also comply with the common law duties of trust management, which is to say that one trust can't benefit at the cost of another trust and that the current generation cannot benefit at the cost of future generations, or vice versa.

## **Inter-grant Exchange Steps**

1. Identify State Forest Land and exchange parcels that have similar attributes (site class, current use, appreciation potential).
2. Conduct title and property reviews in order to identify any issues or attributes that may affect value.
3. Select contract timber cruiser, timber appraiser, land appraiser, review appraiser as needed. All properties in the exchange must be appraised by a qualified appraiser, and the appraisal must meet all applicable department and industry standards.
4. Advertise and conduct at least one public hearing, jointly with the County.
5. Balance values in the exchange once cruise and appraisal are completed. The final balance should result in either benefit for both trusts, or provide a benefit to one trust without harming the value of another.
6. Prepare documents and presentation for Board of Natural Resources approval.
7. Close transaction by updating title documents and other internal records.

## **Rationale for the Re-conveyance**

With rapid growth and development occurring throughout Whatcom County, Lake Whatcom and its relatively undeveloped watershed currently provides a rare and unique opportunity to accommodate the park and recreational needs of County residents. Within minutes of the major population center are large tracts of wild lands comprised of parks, working forests and other lands. While invaluable for wildlife habitat and lake protection, this area can also provide a passive recreational experience seldom found in close proximity to the urban environment. The value of these lands for recreational purposes was first identified in County planning efforts in the early 1970s when the area was designated as a recreational resource management area.

The continued increase in population and proximity to the City of Bellingham and Sudden Valley Urban Growth area places increased demand upon these lands for public parks and recreation. The location of these lands within the Lake Whatcom Watershed requires additional management efforts and strategies to minimize impacts to the watershed and properly accommodate use.

Whatcom County is proposing to take a major leadership role by requesting from the DNR that two areas in the Lake Whatcom watershed be set aside through re-conveyance

as regional parks serving a multitude of park and recreational purposes and providing a wild and natural experience within walking and biking distance for many residents. These regional parks will connect with neighborhoods, communities and other area attractions and will be similar in scope and nature to the highly successful Chuckanut Mountain Recreation Area. Activities will be determined through a planning process and may provide a variety of passive recreational activities such as camping, hiking, fishing, picnicking and bicycling. Development and management will need to be sensitive to the watershed and utilize low impact design practices.

***Lookout Mountain Regional Park:***

If re-conveyed, Lookout Mountain Regional Park will be located on the western side of Lake Whatcom and encompass the eastern slope of Lookout Mountain. This parkway will provide a buffer between the Bellingham Urban Growth Area and Lake Whatcom. Public access will be provided to trails, day use areas and destination points within the Park. A trail system will be developed to lead visitors to spectacular views of Bellingham Bay and Lake Whatcom and will interconnect to City and County parklands and private trails to the north and west.

***Lake Whatcom Regional Park:***

Located on the eastern shore of Lake Whatcom, Lake Whatcom Regional Park, if re-conveyed, is envisioned to encompass portions of the Smith Creek Watershed and over three miles of lake shoreline. Active recreation and parking will be accommodated within the existing Lake Whatcom County Park with access provided to a system of trails leading to other park areas, overlooks, and connecting trails. The re-conveyance will include the southern mile of the Hertz multi-use trail, waterfalls, rock climbing areas, fishing accesses and scenic overlooks of Lake Whatcom. Also envisioned are rustic back country campsites and hiking trails linking the Y-Road trailhead, Sunnyside Landing, South Lake Whatcom and the community of Acme.

**Re-conveyance Process**

RCW 79.22.300 allows a county to request the transfer of certain State Forest lands back to the county for public park use when in accordance with the county and the state comprehensive outdoor recreation plans. The statute requires the Board of County Commissioners to file an application for re-conveyance with the Board of Natural Resources, and specifies that DNR is to determine whether the request is consistent with the state comprehensive outdoor recreation plan. DNR may place conditions on the re-conveyance regarding management of adjacent public lands for maximizing multiple use and reserving of necessary rights of way, and may only deny a request if the department finds that the proposed use is not in accord with the state comprehensive outdoor recreation plan.

**Re-conveyance Steps**

- 1) A request for re-conveyance is initiated by the County submitting a letter requesting re-conveyance to DNR's region manager.
- 2) The region reviews the County's letter to determine:
  - a. Documented need for the subject land as public park land,

- b. Consistency with an approved county recreation plan, and
  - c. Consistency with the state comprehensive outdoor recreational plan, including consultation with other entities if applicable.
- 3) DNR will give public notice of a public meeting per RCW 42.30.060 to seek public comment, jointly with the County, on the need for the subject land as public park land, and consistency with the applicable recreation plans.
  - 4) The region will use public input, internal review, and consultation with other agencies and tribes, to identify any necessary conditions for continued management of adjacent trust lands, including:
    - a. Conditions that maximize multiple use, and
    - b. Reservation of rights-of-way to manage other public lands in the area.
  - 5) The region will prepare for the Board of Natural Resources a summary of public comments and a recommendation regarding acceptability with applicable recreation plans, including necessary conditions.
  - 6) The County will present the request for re-conveyance to the Board of Natural Resources as an agenda item at a scheduled meeting.
  - 7) The Board of Natural Resources may:
    - a. Approve the request,
    - b. Approve with conditions, or
    - c. Deny the request if found to be inconsistent with the state outdoor recreation plan.
  - 8) If approved, DNR will prepare the necessary transfer paperwork to complete the re-conveyance.

**Management Issues to be Addressed by County and DNR**

***Roads & Easements:***

Agreements will need to be developed for:

1. The maintenance and repair of roads shared by both the County and DNR – including the status of current road system at time of transfer. (Note: DNR will complete road maintenance and abandonment work meeting State Forest Practices standards by November, 2008.)
2. Access needs across both ownerships (roads and trails)
  - a. Administrative
  - b. Public
3. Easement documentation

***Forestry/Resource Management:***

Agreements will need to be developed to address:

1. How forest practices within the potentially re-conveyed areas will be handled by DNR during the negotiation period. For example, timber sales not already prepared and approved will be located to avoid areas being considered for re-conveyance, other than as necessary for salvage.

2. Any roles, responsibilities or obligations DNR would retain on lands re-conveyed to the County, and conversely the roles, responsibilities and obligations the County assumes, including:
  - a. Any potential management of timber on the re-conveyed lands;
  - b. Habitat Conservation Plan obligations;
  - c. Fire control responsibilities;
  - d. Other legal rights, obligations, or liabilities.

### **Management Issues for Retained Trust Lands**

This proposal would result in three blocks of trust ownership that will continue to be managed by DNR for trust beneficiaries. These are the Olson Creek block in the northeast part of the planning area, and the Park Road and Anderson Mountain blocks in the southeast part of the planning area. In addition, DNR will retain approximately five acres at the Lookout Mountain Communication Site and two acres at the South Lookout Mountain Communication Site, which are within the Whatcom County Lookout/Cain management block, for ongoing trust management of these sites. See the "Proposed Inter-grant Exchange and Re-conveyance Map" for locations of these blocks.

#### ***Access:***

As part of this transaction DNR will need to:

- Reserve an easement for the existing LM-1000 and LM-2000 Roads, on property re-conveyed to Whatcom County. This will be necessary for management access to the Lookout Mountain and South Lookout Mountain communication sites.
- Be granted an easement for the existing Lookout Mountain Road (LM-2000), from the Lake Louise Road to existing State Forest lands, from Whatcom County. This will be necessary for management access to the South Lookout Mountain communication site.
- Reserve an easement for access and future construction of up to 0.6 miles of road on property re-conveyed to Whatcom County. This will be necessary for access to a portion of the Olson Creek block and to the existing communication site on Galbraith Mountain.

#### ***Public Use:***

There is existing recreational use of all three management blocks. Hikers and horseback riders regularly use the roads and user built trails in the Olson Creek block. There is less use of the Park Road and Anderson Mountain blocks due to their steeper topography. These uses are currently compatible with resource management activities but conflicts could develop in the future if the frequency of use grows. Potential public concern about resource management in the Lake Whatcom watershed or adjacent to newly created park land would need to be addressed collaboratively by DNR and Whatcom County.

### **Communication and Dispute Resolution**

The County and DNR will at all times attempt to develop and adhere to joint public statements about the re-conveyance and related actions, progress in completing the work

outlined by this MOA, and any issues that arise pertaining to this work. This will include periodic joint statements of progress, as well as a mutual commitment to make public statements regarding the matters related to implementing this MOA only after notifying the other party and attempting to develop a joint statement.

If a dispute or potential dispute arises regarding activities relating to implementing this MOA, the parties agree to attempt to promptly resolve such dispute by consulting together first at the organizational level at which the dispute or potential dispute arises. If resolution is not reached, the dispute will be elevated to the named principal contacts for the MOA, and then, if needed, to the signatories to the MOA or their successors.

### **Staffing**

The County and DNR commit to providing the necessary staff effort to accomplish the transaction described in this MOA approximately according to the timeline presented below. The County and DNR will execute an Interagency Agreement under which the County will provide funds to DNR to hire a staff person to assist with the transaction, so that the timeline can be met. Without that funding, DNR will not be able to meet the proposed timeline.



Principle Contacts for this Memorandum of Agreement

Accepted For Whatcom County:

Approved as to form:

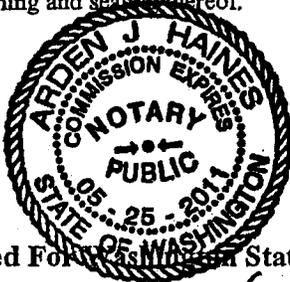
Randy Wells 5/1/08  
Prosecuting Attorney Date

By: Pete Kremen  
Pete Kremen,  
Whatcom County Executive

Dated: 10-23-08

STATE OF WASHINGTON )  
 )ss  
COUNTY OF WHATCOM )

On this 23<sup>rd</sup> day of Oct, 2008, before me personally appeared Pete Kremen, to me known to be the Executive of Whatcom County, who executed the above instrument and who acknowledged to me the act of signing and sealing thereof.



Arden J. Haines  
NOTARY PUBLIC in and for the State of Washington,  
residing at Bellingham My commission expires 05-25-2011

Accepted For Washington State Department of Natural Resources:

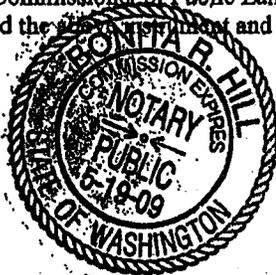
Doug Sutherland  
Doug Sutherland,  
Commissioner of Public Lands  
Washington State Department of Natural Resources



11/3/08

STATE OF WASHINGTON )  
 )ss  
COUNTY OF WHATCOM )

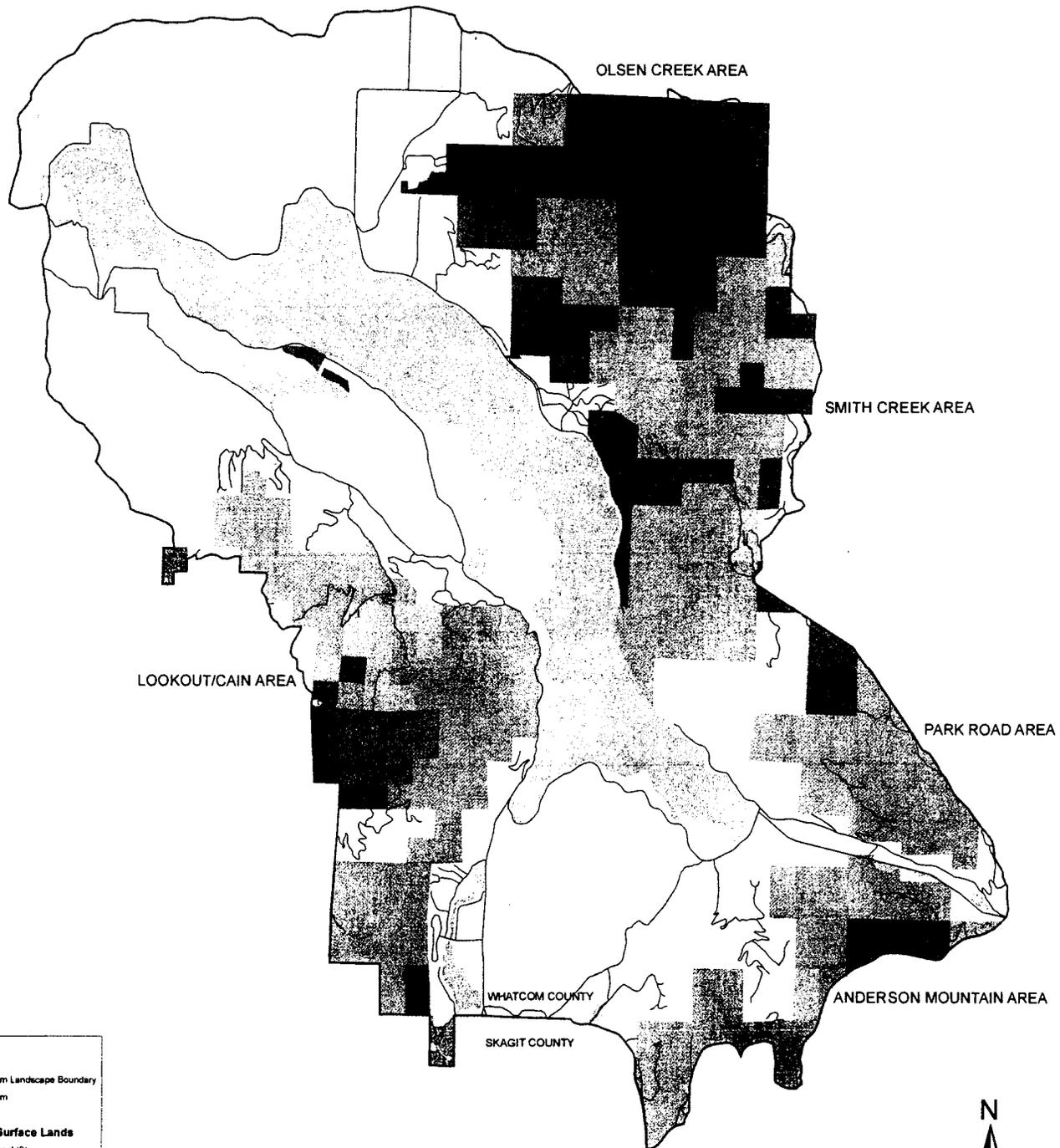
On this 3 day of November 2008, before me personally appeared Doug Sutherland, to me known to be the Commissioner of Public Lands for the Washington State Department of Natural Resources, who executed the above instrument and who acknowledged to me the act of signing and sealing thereof.



Bonita R. Hill  
NOTARY PUBLIC in and for the State of Washington,  
residing at Olympia My commission expires 5-19-09

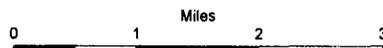
# PROPOSED INTERGRANT EXCHANGE - BEFORE

## State Trust Ownerships in Lake Whatcom Landscape



**LEGEND**

- Lake Whatcom Landscape Boundary
- Lake Whatcom
- Roads
- DNR Managed Surface Lands**
- Common School (3)
- Agricultural School (4)
- Scientific School (10)
- Normal School (8)
- University - Transferred (5)
- University - Original (11)
- CEP and RI (6)
- Capitol Grant (7)
- State Forest Board Transfer (1)
- State Forest Board Purchase (2)
- NAP / NRCA (74 / 75)
- Other DNR-Managed Lands



CP 42



Disclaimer: Extreme care was used during the compilation of this map to ensure accuracy. However, due to changes in ownership and the need to rely on outside sources of information, there are no warranties which accompany this material.

file saved at: snart/am/northwest/users/daca490/Intergrant/Proposed Intergrant Exchange Before.mxd

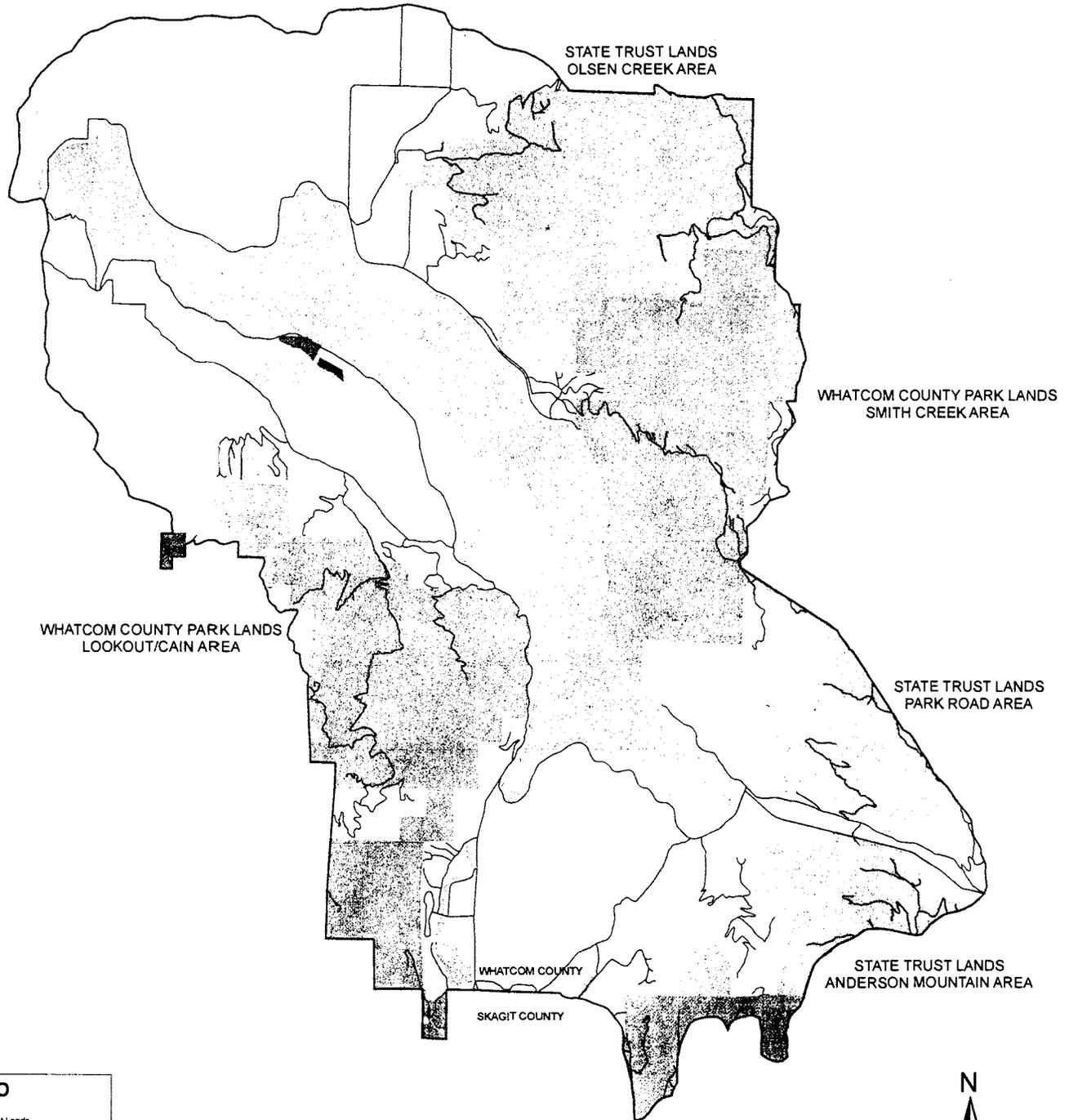
Map created: 2/25/2008



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
 Doug Sutherland - Commissioner of Public Lands

# PROPOSED RECONVEYANCE - AFTER INTERGRANT EXCHANGE

State Trust and Whatcom County Ownerships  
in Lake Whatcom Landscape



**LEGEND**

- State Trust Lands
- Whatcom Park Lands
- Lake Whatcom Landscape Boundary
- Lake Whatcom
- Roads
- DNR Managed Surface Lands**
  - Common School (3)
  - State Forest Board Transfer (1)
  - State Forest Board Purchase (2)
  - NAP / NRCA (74 / 75)
  - Other DNR-Managed Lands



Disclaimer: Extreme care was used during the compilation of this map to ensure accuracy. However, due to changes in ownership and the need to rely on outside sources of information, there are no warranties which accompany this material.

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Map created: 2/25/2008

CP 43



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
Doug Sutherland - Commissioner of Public Lands

## **Attachment 2**

RCW 79.22.300

Procedure — Reconveyance back when use ceases.

Whenever the board of county commissioners of any county shall determine that state forest lands, that were acquired from such county by the state pursuant to RCW 79.22.040 and that are under the administration of the department, are needed by the county for public park use in accordance with the county and the state outdoor recreation plans, the board of county commissioners may file an application with the board for the transfer of such state forest lands.

Upon the filing of an application by the board of county commissioners, the department shall cause notice of the impending transfer to be given in the manner provided by RCW 42.30.060. If the department determines that the proposed use is in accordance with the state outdoor recreation plan, it shall reconvey said state forest lands to the requesting county to have and to hold for so long as the state forest lands are developed, maintained, and used for the proposed public park purpose. This reconveyance may contain conditions to allow the department to coordinate the management of any adjacent public lands with the proposed park activity to encourage maximum multiple use management and may reserve rights-of-way needed to manage other public lands in the area. The application shall be denied if the department finds that the proposed use is not in accord with the state outdoor recreation plan. If the land is not, or ceases to be, used for public park purposes the land shall be conveyed back to the department upon request of the department.

[2004 c 199 § 216; 2003 c 334 § 213; 1983 c 3 § 195; 1969 ex.s. c 47 § 1. Formerly RCW 76.12.072.]

Notes:

**Part headings not law -- 2004 c 199:** See note following RCW 79.02.010.

**Intent -- 2003 c 334:** See note following RCW 79.02.010.

NO. 64207-3-I

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

TOM WESTERGREEN, RICHARD  
WHITMORE, AND NIELSEN  
BROTHERS, INC.,

Appellants,

v.

WHATCOM COUNTY AND  
WASHINGTON STATE  
DEPARTMENT OF NATURAL  
RESOURCES,

Respondents.

CERTIFICATE OF  
SERVICE

**FILED**  
**COURT OF APPEALS DIV #1**  
**STATE OF WASHINGTON**  
**2010 JAN - 7 AM 10:55**

I, BARBARA TOMFORD, certify that on January 6, 2010, I caused to be served copies of the JOINT RESPONSE BRIEF OF RESPONDENTS and this CERTIFICATE OF SERVICE on all parties or their counsel of record as follows:

John C. Belcher Belcher Swanson Law Firm PLLC 900 Dupont Street Bellingham, WA 98225 Counsel for Appellants	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Legal Messengers <input type="checkbox"/> Next Day Air <input type="checkbox"/> Fax:
---	---

///

**ORIGINAL**

<p>Karen N. Frakes  Civil Deputy Prosecuting Attorney  Whatcom County Prosecuting  Attorney  311 Grand Avenue, Suite 201  Bellingham, WA 98225</p> <p>Counsel for Respondent Whatcom  County</p>	<p><input checked="" type="checkbox"/> U.S. Mail  <input type="checkbox"/> State Campus Mail  <input type="checkbox"/> Hand Delivered  <input type="checkbox"/> Legal Messengers  <input type="checkbox"/> Next Day Air  <input type="checkbox"/> Fax:</p>
--	--

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

DATED this 6<sup>th</sup> day of January 2010.

*Barbara Tomford*  
BARBARA TOMFORD  
Legal Assistant  
Natural Resources Division  
(360) 586-3690