

No. 43808-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LARRY and STACY BIRINDELLI,

Appellants,

v.

WASHINGTON DEPARTMENT OF FISH & WILDLIFE,

Respondent.

BRIEF OF APPELLANTS

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BY _____
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I. INTRODUCTION

This case involves the Washington Department of Fish & Wildlife's (WDFW) failure to enforce the state's hydraulic code after WDFW entered into a special relationship with the Appellant Birindellis. The Birindellis were given specific assurances by WDFW Sergeant Matt Nixon that WDFW would prevent defendants Brogan & Anensen LLC and the other entities owned by Brogan & Anensen (Capital Contracting Inc. dba Capital Investments Company, Civil Investments, LLC and Hicklin Estates) from entering into a fish bearing stream just upstream of the Birindelli property and caused damage by grading, filling, and stripping the banks of vegetation and doing work in the stream without the required Hydraulic Permit under RCW 77.15.300 and RCW 77.55.021. The trial court erred by dismissing the Birindellis' claims against WDFW on Summary Judgment when issues of material facts existed.

II. STATEMENT OF THE CASE

Larry and Stacy Birindelli (Birindelli) own real property on Elma-Hicklin Road in Grays Harbor County. Mohny Creek, a fish bearing stream, flows through Birindellis' property and the properties owned, during the relevant time periods, by Defendants Brogan & Anensen LLC, Capital Contracting Inc., d/b/a Capital Investments Company, Civil Investments LLC, and Hicklin Estates (hereinafter all referred to as

Defendants Brogan.) Defendants Brogan were all created and owned by the same people: Kenneth Brogan individually or Kenneth Brogan in partnership with Garry Anensen. The Birindelli property is downstream of Defendants Brogan's properties. (CP 67-95.) SEE Appendix A.

On or about July 10, 2008, Mr. Birindelli personally informed Sergeant Matt Nixon at the WDFW Montesano office that Mr. Brogan had told Mr. Birindelli that he and his partner Gary Anensen were going to fill, grade, dig out, or relocate Mohny Creek on their upstream property in order to develop it into a subdivision. Mr. Birindelli received explicit and direct assurance from Sgt. Nixon of WDFW that should the Defendants Brogan proceed to grade, fill, or dig out, or move Mohny Creek that such action would be met with swift and vigorous enforcement. Mr. Birindelli relied upon these assurances of Sergeant Nixon. (CP 102-113.)

Just two weeks later, on the morning of July 23, 2008, Mr. Birindelli and other neighbors alerted WDFW staff that Defendants Brogan had entered the creek with heavy equipment and were stripping the creek. Gloria Rogers, a biologist with WDFW was in the area and came to observe. Within minutes, three additional WDFW enforcement staff arrived on scene but took no enforcement action. (CP 10-18.)

Three months later, on November 7, 2008, the Defendants Brogan again entered Mohny Creek and Wildcat Creek and graded and filled the

streams and flood plain and stripped vegetation from the stream banks. Again, Mr. Birindelli and other neighbors alerted WDFW's enforcement staff about the new violations but nothing was done by WDFW. (CP 102-113; CP 96-101.)

The changes in the streams by Defendants Brogan have caused and continue to cause increased flooding on the Birindelli property. The damages to the Birindellis' property are described in the report by Shane Cherry of Confluence Environmental Company, an expert witness in floodplain geomorphology. Mr. Cherry concludes that by excavating the Mohney Creek channel, removing vegetation from the streambanks, and filling in areas of Wildcat Creek and the floodplain, the Defendants Brogan damaged the Birindelli property. The combined actions by Defendants Brogan have resulted in exposed soil along the creek which is susceptible to erosion, increased flow velocity, and increased potential for further erosion. (CP114-221.)

Mr. Cherry further concludes that the Mohney Creek culvert under West Elma-Hicklin Road concentrates the majority of sediment load coming from upstream and delivers it to the Birindellis' property. The sediment derived from the Defendants Brogan property is delivered by Mohney Creek to the Birindelli property where the actions of Defendants Brogan increased the stream flow and created wetlands on the Birindellis' property. Sediment deposition at the transition to the grassy fields on the

southern portion of Birindellis' property filled in a portion of the channel and caused an increase in the amount of water flooding out of the channel. Over time, the size and extent of the wetlands on the Birindellis' property has increased as a result of changes in the stream and floodplain hydrology caused by the Defendants Brogan. (CP 114-221.)

All of the damage to the Birindelli's property could have been avoided if the employees and enforcement staff of WDFW had performed their enforcement duties as promised by Sergeant Matt Nixon and as required by law. (CP 114-221.)

III. PROCEDURAL HISTORY

On July 16, 2009 the Birindellis filed a Tort Claim against WDFW. The State of Washington did not respond to the Tort Claim. On July 15, 2009, the Birindellis filed the lawsuit against the Defendants seeking injunctive relief and damages against WDFW and requiring that WDFW take all necessary action to protect Birindelli's property and enforce remedial action. (CP 1-9.)

On April 5, 2012, WDFW moved for Summary Judgment. (CP 25-48.) Birindelli timely responded to the motion for Summary Judgment on April 26, 2012. (CP 58-66.) WDFW replied on May 1, 2012. (CP 222-229.) On July 10, 2012 Grays Harbor county Superior Court Judge Mark McCauley granted WDFW's Motion for Summary Judgment. (CP 230-

232.) The decision did not identify the reasons for granting WDFW's motion for Summary Judgment.

The Birindellis timely appealed. (CP 233-238.)

IV. ASSIGNMENT OF ERROR

1. The Superior Court erred by dismissing the Birindellis' claims against WDFW on Summary Judgment when there are genuine material issues of fact requiring a trial on the Plaintiffs' claims against Defendant Department of Fish & Wildlife.

V. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Whether genuine issues of material fact exist that precluded Summary Judgment on Birindellis' claims regarding the negligence of WDFW.

2. Whether genuine issues of material fact exist that precluded Summary Judgment on Birindellis' claims based upon WDFW's failure to enforce the state Hydraulic Code, Ch. 77.55 RCW.

3. Whether genuine issues of material fact exist that precluded Summary Judgment regarding Birindellis' request for injunctive relief against WDFW.

4. Whether genuine issues of material fact exist that precluded Summary Judgment on Birindellis' claims against WDFW based upon

the failure to enforce exception and special relationship exception of the Public Duty Doctrine.

VI. SUMMARY OF ARGUMENT

The trial court granted Summary Judgment dismissing the case against WDFW despite evidence presented by the declarations of Larry Birindelli, Donn McKnight, and Birindelli's expert witness, Shane Cherry which raised material issues of fact on Summary Judgment. (CP102-113, CP 96-101, CP 114-221.)

Given the record before the trial court, genuine issues of material fact existed that would preclude Summary Judgment on all of Birindellis' claims against WDFW in this matter. In order to prevail on their Motion for Summary Judgment WDFW had to meet the following standard by showing:

“(c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”
CR 56 (c).

The moving party has the burden of showing that there is no genuine issue of fact. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007). All reasonable

inferences are to be considered in the light most favorable to the non-moving party. *Enterprise Leasing Inc. v. Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999).

WDFW's Motion for Summary Judgment challenged Birindelli's claims of negligence and failure to enforce the state Hydraulic Code, Ch. 77.55 RCW. (CP 25-48, CP 222-229.) The declarations of Larry Birindelli (CP 102-113), Donn McKnight (CP 96-101), and expert witness Shane Cherry (CP 114-221) set forth genuine issues of material fact in this matter. Genuine issues of material fact precluded Summary Judgment on these claims. The trial court failed to recognize the contradictory evidence regarding the applications of the exceptions to the public duty doctrine to WDFW's negligence and failure to enforce the state's Hydraulic Code.

VII. ARGUMENT

WDFW's Motion for Summary Judgment challenged Birindellis' claims that WDFW was negligent in failing to enforce the state Hydraulic Code, Ch. 77.55 RCW and the specific assurances that Sergeant Nixon gave to the Birindellis. WDFW argues that the public duty doctrine requires dismissal of Birindellis' claims, however, issues of material fact regarding the special relationship exception and failure to

enforce exception to the public duty doctrine should have prevented summary judgment on these claims.

The Declarations of Larry Birindelli, Donn T. McKnight, and Shane Cherry set forth issues of fact in this matter. These issues involve whether WDFW failed to meet the standard of care and failed to enforce, and continues to fail to enforce, applicable law regarding the unpermitted activities of Defendants Brogan in Mohney and Wildcat Creeks despite WDFW Sergeant Nixon's explicit assurances to the Birindellis that enforcement action would be taken to prevent damages to the Plaintiffs' property. When all reasonable inferences are to be considered in favor of the Birindell's, there were issues of fact that should have been tried.

a. WDFW is not protected by the Public Duty Doctrine.

The public duty doctrine was adopted by the Washington Supreme Court for application in most tort cases against government entities, including the state.

The public duty doctrine provides that if the duty breached by the governmental entity was merely a breach of an obligation owed to the public in general, then a cause of action would not lie for any individual injured by the state's breach of that duty. Put another way, "a duty to all is a duty to no one." *Osborn v. Mason County*, 157 Wash 2d 18, 27, 134 P.3d 197 (2006) quoting *Taylor v. Stevens County* 111 Wash.2d 159, 164,

759 P.2d 447 (1988). The public duty doctrine is essentially a “focusing tool” used to determine whether the state owes a specific duty to an individual, the breach of which is actionable, or merely a duty to the “nebulous public,” the breach of which is not actionable. *Osborne v. Mason County* 157 Wash.2d 18, 27, 134 P.3d 197 (2006.)

In *Pierce v. Yakima County*, 161 Wash.App. 791, 251 P.3d 270 (2011) the court noted the four circumstances, referred to as “exceptions,” that exist to the public duty doctrine:

- 1.) where there is a “legislative intent” to impose such a duty;
- 2.) where the state is guilty of “failure to enforce” a mandatory statutory duty,
- 3.) where the government has engaged in “volunteer rescue” efforts, and
- 4.) where a “special relationship” exists between the plaintiff and the State.

Two exceptions apply to Birindelli’s claims in this matter and issues of fact exist which require trial on these exceptions.

b. Issues of Fact Exist Regarding WDFW’s failure to enforce Ch. 77.55 RCW

The Birindellis have shown negligence against WDFW for its failure to enforce Ch. 77.55 RCW. Proof of negligence is established by showing:

(1) that the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2.) that the defendant breached that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) that the plaintiff suffered legally compensable damages. *Restatement Second) of Torts section 282; Laymon v. Washington State Department of Natural Resources*, 99 Wash.App. 518; 529 (2000.) A duty is an "obligation" to which the law will give recognition and effect to conform to a particular standard of conduct toward another. *Transamerica Title Ins. Co., v. Johnson*, 103 Wash.2d 409, 413 (1985).

The state's hydraulic code, Ch. 77.55 RCW defines the duty WDFW owed to the Birindellis. The statute establishes the duty or obligation to conform to certain standards of conduct. WDFW breached that standard of conduct by failing to properly enforce applicable law.

Under RCW 77.55.011(8):

"Hydraulic project" means the construction of performance of work that will use, divert, obstruct or change the natural flow or bed of any of the salt or freshwaters of the state.

Under RCW 77.55.021(1)

Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency ***shall***,

before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life. (emphasis added.)

Under RCW 77.15.300

- (1) A person is guilty of unlawfully undertaking hydraulic project activities if the person constructs any form of hydraulic project or performs other work on a hydraulic project and:
 - (a) Fails to have a hydraulic project approval required under chapter 77.55. RCW for such construction or work;
.....
- (2) Unlawfully undertaking hydraulic project activities is a gross misdemeanor.

In addition, under WAC 220-110-080:

Channel changes/realignments are generally discouraged, and shall only be approved where the applicant can demonstrate benefits or lack of adverse impact to fish life. Channel change/realignment projects shall incorporate mitigation measures as necessary to achieve no-net-loss or productive capacity of fish and shellfish habitat.
.....

In this matter, WDFW failed to enforce these statutes and regulations and, to date, has failed to enforce mitigation requirements related to the unpermitted altering of Mohney and Wildcat Creeks. (CP 19- 20.) Sergeant Nixon gave specific assurances to the Birindellis that the law would be enforced. (CP 19-24.)

The “failure to enforce” exception applies when (1) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) a statutory duty exists to take corrective action, (3) the agents fail to take corrective action, and (4) the plaintiff is within the class the statute is intended to protect. *Halleran v. Nu West Inc.*, 123 Wash. App. 701, 714, 98 P.3d 52 (2004); *Smith v. State* 59 Wash.App. 808, 814, 802 P.2d 133 (1990); *Honcoop v. State* 111 Wash.2d 182, 190 (1988). The exception is applicable when the relevant statute mandates specific action to correct a violation. The action must be required by language within the statute. *Donohoe v. State* 135 Wash.App. 824, 849, 142 P.3d 654 (2006).

The facts here show that the configuration of a protected fish bearing stream was changed by the actions of the Defendants Brogan in entering the stream with heavy equipment, grading, and filling of the stream, and removing vegetation thereby causing destruction of the fish habitat and subsequent recurrent flooding and damages on Birindellis’ property.

The Declaration of Mr. Birindelli and Declaration of Donn McKnight show that there were numerous opportunities for WDFW to prevent the destruction to the stream, subsequent damage to Birindellis’ property, and to enforce applicable law against Defendants Brogan that

destroyed the stream. The Declarations raise issues of fact that various employees of WDFW knowingly and intentionally ignored their enforcement obligations. (CP 102-113; CP 96-101.)

The Birindellis have raised material issues of fact under the failure to enforce exception of the public duty doctrine. These material issues of fact prevent the court from ruling that the public duty doctrine applies as a matter of law. *Vergeson v. Kitsap County*, 145 Wash.App. 526, 186 P.3d 1140 (2008). It was error for the trial court to dismiss the negligence claims when issues of fact exist that required the superior court to weigh the credibility of witness testimony.

c. Issues of fact exist regarding WDFW's Special Relationship with Plaintiffs

The Birindellis have shown that WDFW's conduct created a special relationship with the Birindellis. The special relationship exception to the public duty doctrine is a "focusing tool" used to determine whether a government agency has a duty only to the general public or whether the government agency assumed a duty to an individual citizen. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786; 30 P.3d 1261 (2001).

Proof of a special relationship arises when (1) there is direct contact or privity between the public official and the injured plaintiff which sets

the plaintiff apart from the general public and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff. In other words, an individual must make a direct inquiry, the government must clearly give incorrect information that the government intends the individual to rely on, and the individual must rely on it to his or her detriment. *Babcock, Id.*; *Beal v. City of Seattle*, 134 Wn.2d 769, 785; 954 P.2d 237 (1998); *Meaney v. Dodd*, 111 Wn2d. 174, 180, 759 P.2d 455 (1988.)

There were material issues of fact that existed at the time of WDFW's motion for summary judgment regarding whether the special relationship exception to the public duty doctrine applied to this case. The material facts in dispute at the time of the motion are facts that only a fact finder could resolve. *Washburn v. City of Federal Way*, 169 Wash.App. 588; 283 P.3d 567 (2012). Where there was an express assurance involving a promise of future action, a plaintiff does not need to show that the assurance was false or inaccurate to establish a special relationship. *Munich v. Skagit Emergency Communication Center*, 175 Wash.2d 871; 288 P.3d 328 (2012).

The Declaration of Mr. Birindelli shows that Mr. Birindelli had direct contact with WDFW and personally went into Sergeant Nixon's office, personally spoke with Sergeant Nixon, specifically reported that

Defendants Brogan were going to grade, fill, or relocate the streams, a crime under the state Hydraulic Permit statute and made inquiry into whether WDFW would enforce against such actions. Sergeant Nixon made specific assurances to Mr. Birindelli that WDFW would take swift enforcement action to prevent unlawful activity and to prosecute the Defendants if unlawful activity occurred. Mr. Birindelli relied on the assurances that WDFW would take this violation seriously and engage in enforcement action that would protect the streams and Plaintiff's downstream property from damage. (CP 102-113.)

Instead of vigorously enforcing the law, WDFW ignored the violations, did not follow through with prosecution, and has failed to enforce mitigation measures, all of which has resulted in damage to Birindelli's property.

The Birindelli's have raised material issues of fact regarding the special relationship exception to the public duty doctrine. These material issues of fact should have prevented the court from ruling that the public duty doctrine applies as a matter of law.

CONCLUSION

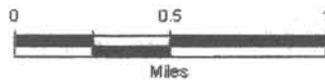
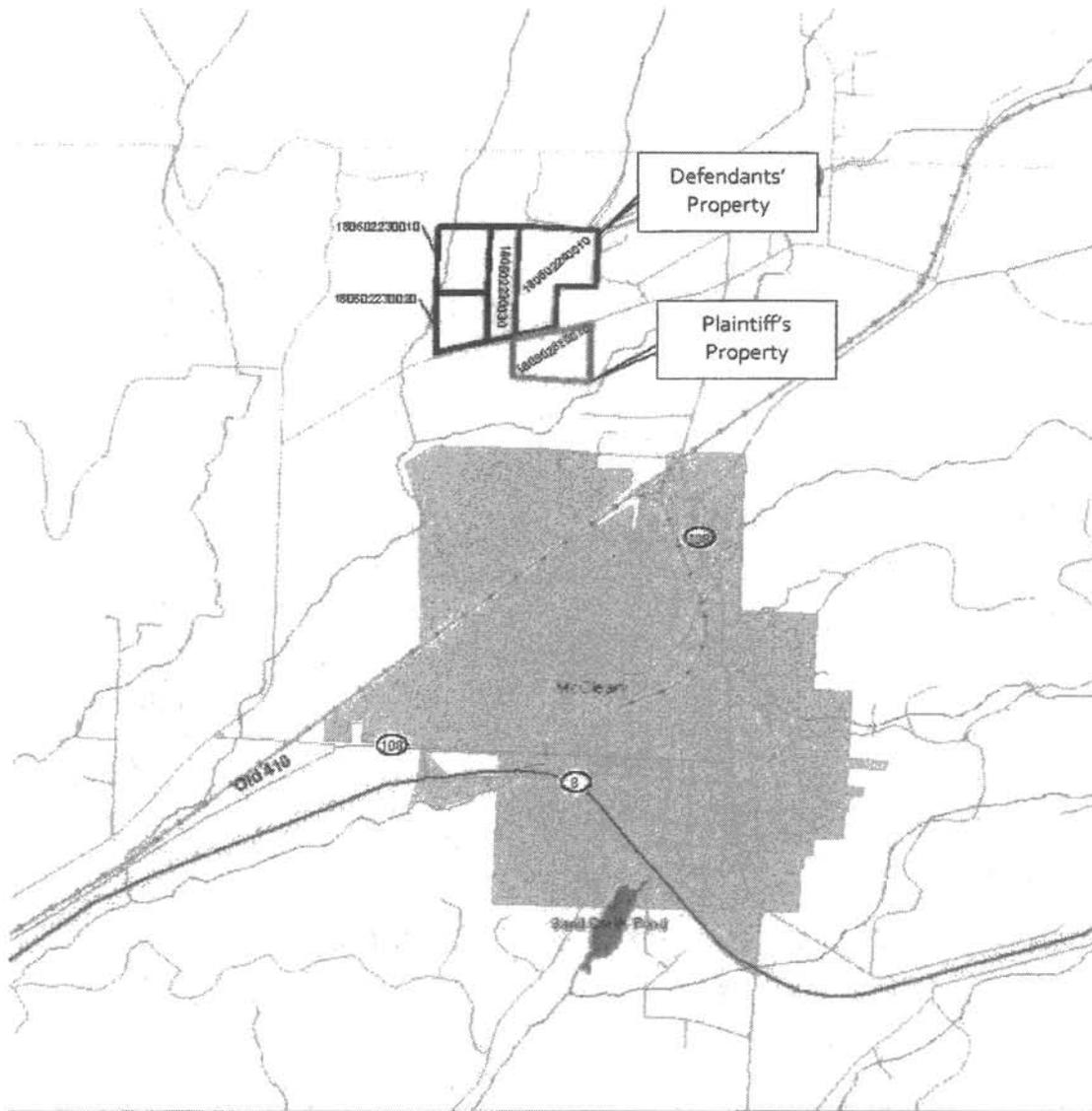
The Court of Appeals should conclude that there are genuine issues of material fact and reverse the trial court's order on Summary Judgment and remand this case for trial.

DATED this ^{27th} ___ day of March, 2013.



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Attorney for Plaintiffs

APPENDIX A



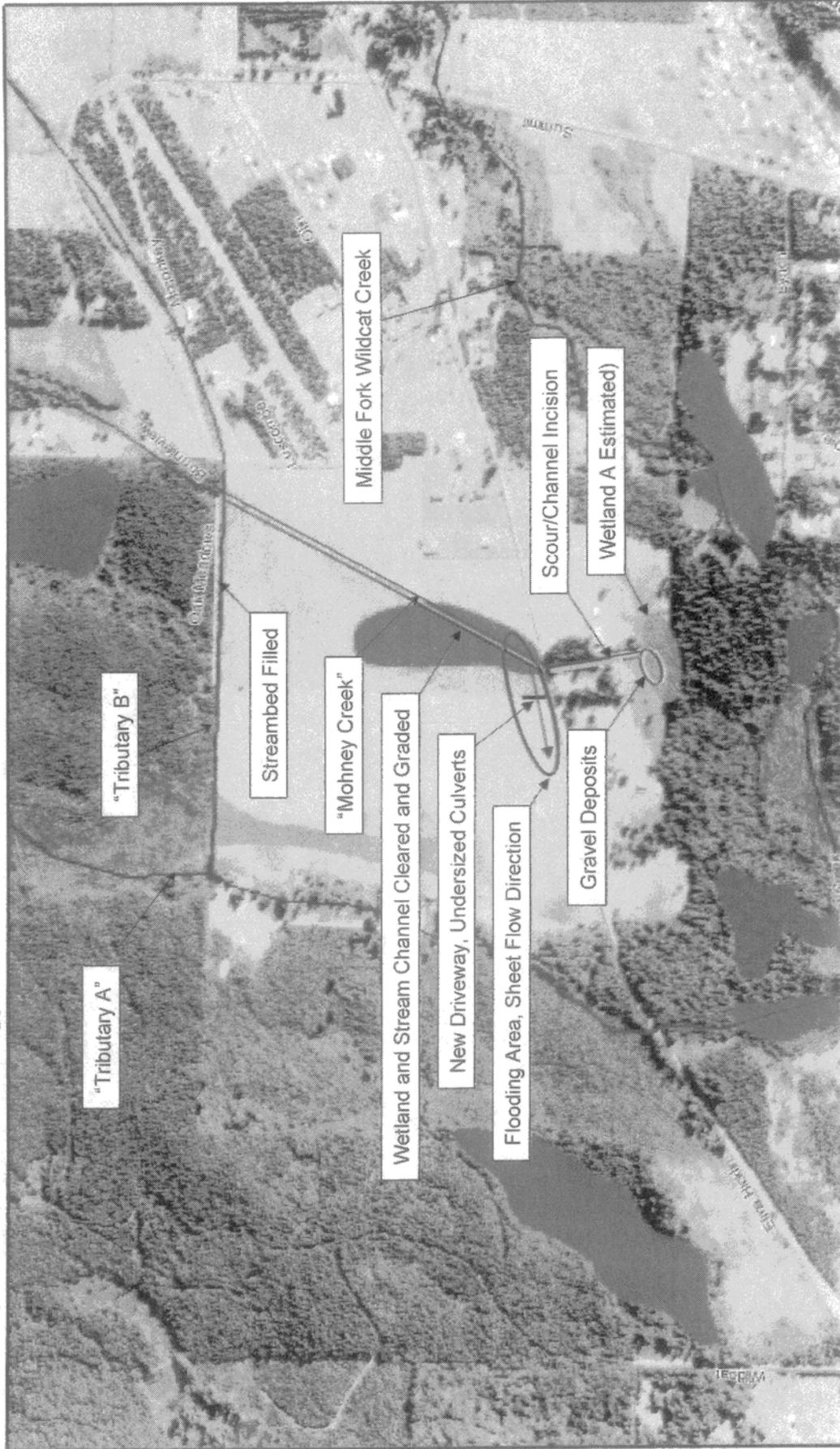
Sources: Landau, 2009, ESRI, 2008

FIGURE 1
Vicinity Map

CRITICAL AREAS ASSESSMENT
BIRINDELLI PROPERTY
Expert Report
McCleary, WA

4/25/2012

CP0141



Legend
 Wetlands
 Impacts

0 0.25 0.5
 Scale in Miles

Source: Washington State Department of Ecology.

Birindelli Property
 Grays Harbor County, Washington

**Illustration of Critical Areas
 and Impact Locations**

Figure
2

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DECLARATION OF SERVICE

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Vivian Miller declares:

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

That on March 29, 2013, I caused a copy of the Corrected Brief of Appellants and this Declaration of Service to be served to the following in the manner noted below:

WA State Court of Appeals Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> US Mail, Certified <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Email
Mark Jobson Assistant Attorney General Torts Division P. O. Box 40126 Olympia, WA 98504-0126	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> US Mail, Certified <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email

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

DATED this 29th day of March, 2013.

A handwritten signature in black ink, appearing to read "Vivian Miller", written over a horizontal line.

Vivian Miller
Paralegal to Allen T. Miller