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I. INTRODUCTION

The crux of this case is simple. The Department of Natural Resources made a binding commitment in 1997 to provide a specific amount of old forest habitat for federally threatened species, state listed species, federal candidate species, and other species of concern within a specified time frame. This commitment is explicit in the 1997 Habitat Conservation Plan (HCP), the Biological Opinion for the HCP, and the 2006 Policy for Sustainable Forests (PSF); and is integral to meeting the requirements and objectives of the HCP and PSF. However, in approving the About Time timber sale that is the subject of this appeal, DNR has ignored this habitat commitment.

In its response brief, DNR attempts to escape its commitment using two arguments, both of which are wrong. First, DNR argues that the commitments in the 1997 HCP and 2006 PSF are not really commitments or requirements but mere aspirations or predictions of future conditions. The Court should forcefully reject this attempted re-write of DNR's adopted policies and commitments.

Second, DNR attempts to re-define its commitments to grow older, structurally complex forests. Rather than preserve large stands of trees that are today very old (*i.e.*, approaching 90 years), DNR offers to preserve much younger trees. This is a bait and switch. DNR is required under the 2006 PSF to "actively manage suitable structurally complex forests to achieve older-forest structures across 10-15 percent of each Western Washington HCP planning unit in 70-100 years." AR 12591. DNR is trying to re-define young tree plantations as structurally complex forests, so that it can commercially log some of the last few stands of near-century-old, structurally complex forest that remain in Southwestern Washington. DNR does not dispute the fact that the forests to be logged will help DNR to meet its old structural forest

1 commitment if left standing. Nor does DNR dispute the fact that the forests to be logged are
2 exceedingly rare; or that these forests provide critical habitat for federal and state listed species
3 and other species of concern. Instead, DNR tries to claim in its response that it can ignore its
4 own policies and procedures, and commercially log these forests now, because it will eventually
5 achieve its commitments under the HCP 80 years from now in other forests that, today, are
6 immature. Even that erroneous claim is contradicted by the results of DNR's own analysis.
7

8 We will demonstrate below why the About Time timber sale violates the letter and spirit
9 of the 2006 PSF and 1997 HCP. Doing so will require a detailed look at the language used in
10 the 1997 HCP and 2006 PSF. The language can seem technical, and DNR attempts to
11 manufacture confusion makes it seem even more technical, but in reality, it is simple. In each
12 planning unit, DNR is required to provide fully functional or “older” forests on 10 to 15 percent
13 its land by 2097. Under the 1997 HCP, this means forests 150 years old or older. Under the
14 2006 PSF, this means, according to DNR’s own analysis, stands with trees at least 123 years
15 old, that possess certain characteristics of old growth forests, such as canopy diversity, dead
16 standing snags, and fallen forest debris.
17

18 The core of our argument is that DNR cannot log the About Time structurally complex
19 stand unless and until DNR can show that it has met its habitat commitment—which it has not.
20 The Center is not “challenging what DNR’s forested landscape might look like in 75 years.”
21 DNR Br., at 1. Rather, the Center is arguing that, today, DNR cannot log forests that are
22 structurally complex forest without clearly identifying how DNR will achieve its older forest
23 targets, which DNR has failed to do. This case is not only a “ripe” but one that is crucial to
24 DNR’s commitments under the 1997 HCP, and which will have future environmental
25 implications.
26
27

1 DNR’s own numbers demonstrate the agency cannot achieve its habitat commitments
2 unless it conserves structurally complex forests like those found in the About Time timber sale.
3 DNR’s inability to comply with its commitment to provide 10 to 15 percent old forests by 2097
4 is a mathematical fact that DNR can simply sugar-coat with wishful thinking or cavalierly
5 dismiss under the banner of “agency discretion.”
6

7 When DNR conducted its environmental review of the About Time timber sale, that
8 review was predicated on the notion that DNR *would* achieve its commitment to provide the
9 required old forest habitat for federal and state listed species and other species of concern named
10 in the 1997 HCP. However, the record shows this assumption is false. DNR will, in fact, miss
11 its habitat commitments. Therefore, this Court should reverse the About Time timber sale and
12 remand the matter to the Board and DNR to conduct environmental review predicated on the
13 fact that DNR is not on track to achieve its habitat commitments.
14

15 II. ARGUMENT

16 Below, we will establish that DNR and Murphy are mistaken to argue that the 1997
17 HCP does not include a binding commitment for DNR to grow fully functional old forests on a
18 portion of its millions of acres of state forests. We will establish the existence and nature of that
19 commitment—to provide 10 to 15 percent of each planning unit with stands aged 150 years or
20 older by 2097. And we will establish that DNR is not on track to achieve that commitment.
21

22 We will also establish that DNR and Murphy are mistaken to argue that the 2006 PSF
23 does not include a binding commitment to provide 10 to 15 percent of each planning unit with
24 stands at least 123 years old that exhibit characteristics of old growth forests by 2097. We will
25 establish that the 2006 PSF prohibits the logging of structurally complex stands, such as About
26 Time, until that commitment is achieved.
27

1 Finally, we will explain that DNR’s SEPA review was flawed, because it was predicated
2 on the incorrect assumption that DNR can and will comply with the 1997 HCP and 2006 PSF.
3 This case is not a collateral attack on the 1997 HCP or 2006 PSF, as DNR and Murphy wrongly
4 argue. Nor does it force to court to second-guess DNR’s determination that it still can meet its
5 commitments. This is simply a demand that DNR conduct SEPA in possession of information
6 sufficient to evaluate the impacts of its decision. Here, that means DNR must conduct SEPA
7 analysis of the About Time timber sale that evaluates the impacts of the sale in light of the
8 overwhelming facts in the record that DNR cannot mathematically or biologically comply with
9 the old forest commitments in its 1997 HCP and 2006 PSF and that this non-compliance has
10 environmental implications that must be disclosed today.
11

12 **A. DNR Is Not on Track to Comply with the 1997 HCP.**

13 **1. The 1997 HCP includes a binding habitat commitment.**

14 In exchange for regulatory certainty under the federal Endangered Species Act (ESA)
15 for both listed and unlisted species, DNR committed to a variety of forest management
16 principles. One of these commitments is to achieve “stand structure objectives at year 100.”
17 This is best evidenced in DNR’s HCP at Table IV.14 (AR 3654). This is the source of the
18 requirement for DNR to maintain 10–15 percent of each planning unit as “fully functional”
19 stands—and is a binding commitment, as we explained in our opening brief. Op. Br. at 6–7.
20 The table describes the “stand structure objectives” to be met at Year 100 of the HCP. AR 3654.
21 However, the HCP itself has a term of only 70 years, not 100 years. AR 3655, 3835. The HCP
22 includes provisions for up to three, 10-year extensions, thereby extending the HCP out to Year
23 100. *Id.* Whether these extensions will be granted depend on whether DNR is on track to achieve
24 the commitments of Table IV.14. AR 3654–3655. The HCP is very clear on this point. No less
25
26
27

1 than three times, the HCP describes the “commitments” of the HCP. It makes compliance with
2 these “commitments” a condition of obtaining the 10-year extensions. AR 3655.

3 It is not only the plain text of the HCP that refers to the stand structure objectives as
4 commitments. The biological opinion¹ that underlies the HCP uses the same term. It refers to
5 “DNR’s commitment to manage to HCP objectives for stand structures that would provide
6 habitat for all species...” AR 3873. Thus, “stand structure objectives” (the term used in Table
7 IV.14) are a “commitment,” according to the biological opinion.
8

9 The biological opinion also says, under the heading “Overall Spotted Owl Landscape
10 **Commitments**”:

11 Under the HCP, DNR **will meet** forest stand structure objectives on the West-
12 side Planning Units and the OESF. These objectives presented at year 100 are
13 currently provided in Appendix 3 of the FEIS, p. A3-81.

14 AR 3957 (emphasis added).

15 Appendix 3 of the Final Environmental Impact Statement (FEIS) for DNR’s HCP is at
16 AR 3260. It is a duplicate of the HCP’s Table IV.14, above, which sets the commitment at 10
17 to 15 percent fully functional forest by Year 100 (the years 2097). This text shows that the
18 habitat commitments in Table IV.14 are, indeed, commitments, not mere aspirations as DNR
19 and Murphy argue.
20

21
22

¹ The ESA (16 U.S.C. § 1531 et seq.) requires the U.S. Fish and Wildlife Service and the National
23 Marine Fisheries Services to prepare a biological opinion (Bi-Op) prior to approving a decades-long plan, like
24 DNR’s 70 year habitat conservation plan. 16 U.S.C. § 1536 (a)(2); (b)(3)(A). The Bi-Op must analyze the
25 biological impact(s) of the plan (whether it jeopardize the existence of species) on listed species or their designated
26 critical habitat. A Bi-Op goes hand-in-hand with the incidental take permit and consulting agencies have an on-
27 going duty to ensure that the basic assumptions of the biological opinion are maintained over time and that
operations authorized by the permit reflect changes in policy or biology. *Cottonwood Env. Law Ctr. v. U.S. Forest
Service*, 789 F.3d 1075, 1086 (9th Cir. 2015). In addition, while this case does not challenge the Bi-Op for DNR’s
HCP, it is well-settled in federal law that the “specific and binding” provisions and assumptions of a biological
opinion are crucial and provide an on-going guide to permit enforcement. *National Wildlife Fed. V. NMFS*, 524
F.3d 917, 936 (9th Cir. 2008).

1 DNR and Murphy fail to provide any response that is grounded in the text of the HCP,
2 or any of the HCP's supporting documents such as the biological opinion or the FEIS. Instead,
3 DNR's primary argument that DNR's old structural forest commitments are not mandatory rests
4 on a questionably timed letter from Bradley Thompson, an official at the U.S. Fish and Wildlife
5 service. *See* DNR Br. at 3 (citing letter, AR 9429–9431, at 9430). Indeed, DNR cites Mr.
6 Thompson's letter no less than four times throughout its brief, as does Murphy Co. However,
7 although respondents rest the bulk of their case on Mr. Thompson's letter, this should be given
8 no weight by the Court.
9

10 First, Mr. Thompson's letter was dated October 27, 2021 (AR 9430), whereas the About
11 Time timber sale decision was made September 7, 2021 (AR 463). Therefore, the Thompson
12 letter cannot have formed any part of the rationale for the timber sale. Agencies may not rely
13 on post-hoc rationalizations to justify their actions. *Aviation West Corp. v. Wash Dep't of Labor*
14 *and Indus.*, 138 Wn.2d 413, 446, 980 P.2d 701 (1999) (citing *Neah Bay Chamber of Commerce*
15 *v. Dep't of Fisheries*, 119 Wn.2d 464, 474–475, 832 P.2d 1310 (1992). On the contrary, “[i]t is
16 well-established that an agency's action must be upheld, if it all, on the basis articulated by the
17 agency itself.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50,
18 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Thus, Mr. Thompson's letter cannot be used to justify
19 the About Time timber sale.
20
21

22 Second, the 1997 HCP, its Draft EIS, and its Final EIS, were all published in the federal
23 register, as required by the implementing regulations of the Endangered Species Act. *See* 61
24 Fed. Reg. 15297; 61 Fed. Reg. 56563; 62 Fed. Reg. 8980 (publications); 50 C.F.R. § 17.22; 50
25 C.F.R. § 17.32(b)(1)(ii) (requirements to publish). These documents set forth the stand structure
26 objectives and call them commitments. Mr. Thompson's letter, which purports to eliminate the
27

1 stand structure commitments, was not published in the Federal Register. Therefore, it cannot be
2 construed as part of the HCP or the various supporting documents of the HCP. In the case of
3 inconsistency between Mr. Thompson’s letter and the HCP, the HCP must prevail.

4
5 Third, most glaringly, Mr. Thompson’s letter is at odds with the plain text of the HCP
6 (and the text of the biological opinion that explicates the HCP). Mr. Thompson writes that:

7 The projected distribution of stand development stages, as presented in the HCP
8 in Table IV.14 (WDNR 1997, p. IV.180) is not a management requirement or
9 activity such as the attainment of specific habitat thresholds in HCP-designated
10 northern spotted owl managements areas. Rather, it is a modeled estimate of the
11 likely outcome of HCP implementation after 100 years, based on the stand
12 inventory information that was available to DNR in 1997. As described in the
13 HCP, the estimated distribution of different forest development stages will be
14 used with other information by USFWS when considering an extension of the
15 HCP at year 70 (WDNR 1997, pp. IV. 180- 181). Therefore, the landscape
16 percentages presented in Table IV.14 (e.g., 10-15 percent of lands in fully
17 functional forest at least 150 years old) after 100 years of HCP implementation
18 does not represent an HCP commitment to be achieved in addition to the
19 conservation strategies for northern spotted owl, marbled murrelet, salmonids,
20 and uncommon habitats.

21 AR 9430.

22 This is incorrect. The mitigation assumptions contained in a biological opinion are
23 foundationally important. *Nat’l Wildlife Fed.*, 524 F. 3d at 936. Here, Mr. Thompson admits
24 his interpretation conflicts with specific language in the agency’s biological opinion, (AR 9430;
25 “We acknowledge that there are statements made in the USFW’s 1997 Biological Opinion that,
26 if taken out of context, could be interpreted as a USFWS expectation that WDNR was
27 committed to provide “certain percentages of stand structural classes...”). Given the
inconsistency between the biological opinion and the HCP, Mr. Thompson’s *ex post facto*
interpretation deserves little credence. As we have shown, the HCP itself *does* call Table IV.14
a “commitment.” AR 5653 (“DNR management activities that will occur under the HCP *will*
ensure a range of forest types in adequate amounts to provide for multi-species conservation

1 across the landscape by the HCP”) (emphasis added). The biological opinion is also explicit
2 that it is a commitment. Mr. Thompson cannot amend the text of the HCP merely by writing a
3 letter, behind closed doors, 24 years after the fact. Courts do not allow even individual
4 legislators to re-interpret legislative acts after the fact. *See State ex rel. Citizens Against Tolls*
5 *(CAT) v. Murphy*, 151 Wn.2d 226, 238, 88 P.3d 375 (2004). Still less should this Court allow
6 an individual agency staffer to re-interpret the 1997 HCP and accompanying biological opinion
7 after the fact. Neither Mr. Thompson nor DNR can point to any text in the HCP to support Mr.
8 Thompson’s opinion that the stand structure objectives are not binding commitments. By
9 contrast, the Center can point to several instances where the stand structure objectives are
10 referred to as commitments. The Court should conclude that Mr. Thompson and DNR’s opinion
11 about the meaning of the HCP is incorrect, because neither Mr. Thompson nor DNR can support
12 the opinion with citations to the HCP.
13
14

15 **2. Fully functional forests means stands with an age 150 years or older.**

16 In our opening brief, we explained the nature of the commitment under the 1997 HCP:
17 to preserve 10–15 percent of stands age as “fully functional,” meaning 150 years or older. *See*
18 *Op. Br.* at 6–7; 18–19 (citing definitions in HCP and biological opinion). In response, DNR
19 does not challenge the Center’s explication of the term “fully functional.” Indeed, DNR
20 explicitly acknowledges that “[i]n 1997, when the HCP was adopted, DNR used tree age as a
21 surrogate for structural development...” DNR Br. at 4, n. 5.
22

23 However, Murphy Co. does challenge the Center’s explication. Contrary to DNR and
24 the HCP, Murphy Co. argues that fully functional does not mean 150 years old. Instead, Murphy
25 Co. argues that “fully functional” means a stand whose characteristics are describes as:

26 The most complex of the forest structures, the Fully Functional forest has large-
27 scale habitat elements such as rotting fallen trees or “nurse logs,” onto which

1 trees and other vegetation grow. The added complexity enables the increased
2 interactions that provide for the life requirements of diverse vertebrates,
invertebrates, fungi and plants.

3 Murphy Br. at 9 (citing AR 17109).

4 First, Murphy is here citing the 2004 FEIS for the 2006 PSF. The 2004 FEIS was not
5 attempting to analyze or redefine the 1997 HCP. The 2004 FEIS was not drafted for that
6 purpose, so it cannot be used for that purpose. The documents that were drafted to analyze the
7 1997 HCP support the Center's use of 150 years as the definition of fully functional forest.
8

9 Second, the appendix to the 2004 FEIS reveals that it, too, used age to define and analyze
10 fully functional forest. At AR 17094, the 2004 FEIS uses a stand of age "MaxRD Age + 160"
11 to define fully functional forest. As we explained in our opening brief (Op. Br. at 24), the
12 MaxRD age for west-side Douglas-fir forests is 43 years, so the 2004 FEIS is saying that fully
13 functional forest begins at 43 + 160 years, or 203 years. In using the 1997 HCP's definition of
14 150 years, we are actually being more generous to the respondents than the 2004 FEIS they rely
15 on to answer the Center's charge.
16

17 Finally, the so-called definition Murphy cites does not actually define fully functional
18 forest. It only describes some of the characteristics of a fully functional forest—rotting fallen
19 trees or "nurse logs" onto which trees and other vegetation grow. Needless to say, this does not
20 mean that every stand with a rotting nurse log automatically becomes a fully functional forest.
21 It only means that fully functional forests tend to have these characteristics in abundance.
22

23 The Court should conclude that the term fully functional forest, as used in the 1997
24 HCP, means stands that are at least 150 years old. Thus, the commitment in the 1997 HCP to
25 achieve 10–15 percent fully functional forest means that 10–15 percent of each planning unit
26 must have stands 150 years old or older.
27

1 **3. DNR is far off-track to meet the commitment in the 1997 HCP.**

2 In our opening brief, we used DNR’s own inside-the-agency memo (not shared with the
3 public, but obtained through public disclosure) to demonstrate that DNR was far off-track from
4 meeting its commitment in the 1997 HCP—to have 10–15 percent of each planning unit in
5 “fully functional,” 150-year-old stands by Year 100 of the HCP (the year 2097). *See* Op. Br. at
6 18–20 (citing and explaining the Estep-Buffo memo, AR 1589). In response, DNR argues that
7 “[i]n May 2021, DNR modeled the growth of the forests, and its results show that more than 10
8 percent of the South Coast Planning Unit landscape will be older than 150 years by the year
9 2110. DNR Br. at 20. DNR asks the Court to “defer” to DNR’s “expertise” in calculating
10 whether DNR can meet its commitments. The Court should not do so in this instance, because
11 DNR’s summary assurances are completely unsupported by the record in this case.
12

13 The Court will first note that the year 2110 is thirteen years later than the year 2097.
14 Therefore, DNR’s response does not answer the Center’s charge. The HCP demands 10–15
15 percent fully functional forest by 2097. It does not demonstrate compliance with the HCP to
16 argue that there will be 10–15 fully functional forest by 2110.
17

18 Second, DNR’s citations do not back up its argument. DNR repeatedly cites AR 352 to
19 argue that it will achieve the 10–15 percent fully functional forest commitment. *See* DNR Br.
20 at 9, 13, 20. However, AR 352 does not say that DNR will achieve 10-15 percent fully
21 functional forest. It says DNR will achieve 10-15 percent “older forest conditions.” The term
22 “older forest conditions” does not come from the HCP; it comes from the 2006 Policy for
23 Sustainable Forest. We discussed this issue in our opening brief (Op. Br. at 23–25) and will
24 return to it below. (In a nutshell, DNR has defined older forest to be forests at least 123 years
25 old that also possess certain characteristics of old growth forests; whereas fully functional
26
27

1 forests are defined as forests at least 150 years old.) For now, suffice it to say that AR 352 is
2 referring to PSF compliance, not HCP compliance. It does not show HCP compliance, because
3 it does not discuss fully functional forests, the commitment set forth in the HCP.

4 DNR's other primary citation is to AR 400 and 406, two DNR PowerPoint slides titled,
5 "So...how are we doing?" and "Current and Projected Area of Older Forest Conditions." DNR
6 Br. at 9, 13, 20. Murphy Co. cites identical data in its brief. Murphy Br. at 6 (citing AR 1588).
7 The PowerPoint slides show an uptick in older forest. They purport to show that all planning
8 units are on track to achieve over ten percent older forest by the year 2100. However, as we
9 alluded to above and will discuss in more detail below, older forest is not the same as fully
10 functional forest. The PowerPoint slides at AR 400 and AR 406 do not show DNR on track to
11 achieve 10–15 percent fully functional forest by the year 2097.
12

13
14 The Court should conclude that the evidence supports the Center: DNR is not just "not
15 on track," but DNR will not achieve the required 10–15 percent fully functional forest in the
16 South Coast Planning Unit until the year 2110, thirteen years after the deadline in the 1997
17 HCP. DNR and Murphy cannot put forward any evidence to the contrary. The Court should
18 conclude that DNR is not on track to achieve compliance with its commitment in the 1997 HCP.

19 DNR also attempts to argue that, even if older forests will not be met in the future, the
20 Center's claim is not ripe because it is based on an injury that has not yet happened. The court
21 should roundly reject this argument. DNR's substantive and SEPA review and approval of the
22 About Time sale is *today*, not 70-80 years from today. If habitat that is required to sustain
23 federal and state listed species and other species of concern is eliminated before it can recover
24 to necessary levels, then the loss of that habitat injures those species that depend on that habitat.
25 DNR admits that fully functional habitat required by species that depend on it this type of
26
27

1 habitat is not available in areas that have been designated for conservation and will not recover
2 to desired levels for decades. AR 1589,16774.

3 DNR cites to nowhere in the record that, from a biological standpoint, DNR can cut
4 mature trees today and grow back older trees elsewhere. DNR's own records indicate that a
5 portion of the About Time timber sale currently provides suitable habitat for the marbled
6 murrelet, a federally listed species. AR 690. Common sense dictates that federal and state listed
7 species, and other species of concern that depend on habitat found in structurally complex
8 forests like those in About Time, cannot wait 70 years for them to grow back somewhere else
9 while their existing habitat is eliminated. Indeed, the HCP appears to condemn DNR's
10 reasoning that it can cut existing old forest on the specious promise that it might reach its target
11 in 70-80 years. AR 3655 ("Older stand structures (*i.e.*, structurally complex forests and fully
12 functional forests) *increase or remain constant* when comparing the current conditions with
13 those anticipated at the end of the permit period") (emphasis added).
14
15

16 The HCP's "achieve it before you cut it" premise is also reiterated in the 2006 PSF,
17 which commits DNR to reaching its targets *before* logging any surplus. AR 12283 ("...once
18 older-forest targets are met (expected to take 70 years or more), structurally complex forest
19 stands that are not needed to meet the targets may be considered for harvest activities"). In
20 other words, DNR does not account for time and loss of habitat by moving areas of forest around
21 as if 100-year-old forests are similar to a shell-game.²
22

23
24 ² DNR argues there are "no legal consequences" under the ESA if 10 percent of the trust lands are
25 not in the biological category of "fully functional" forests by 2097. DNR Br., at 3. This is simply wrong. First,
26 non-achievement of HCP commitments may result in the USFWS to suspend or revoke the HCP. AR 3835.
27 Second, non-achievement can require the USFWS, on its own or under court order requested by a third party, to
re-initiate biological consultation under Section 7 of the ESA. *Cottonwood Env. Law Ctr. v. USFWS*, 789 F.3d
1075, 1087-88 (9th Cir. 2015). Third, non-achievement (cutting old forests today without any concrete plan to
replace them) can have severe environmental consequences that must, under SEPA, be fully disclosed and
considered by DNR.

1 **4. DNR’s claim that it has set aside 50 percent of its landscape for**
2 **conservation is inaccurate, misleading, and irrelevant.**

3 To avoid its specific obligations to protect old, “fully functional” forests, DNR
4 repeatedly puts in front of the court an argument that DNR has already set aside 50 percent of
5 its forests for conservation. DNR Br., at 3 (“To implement the HCP during its 100-year term,
6 DNR restricted harvest on nearly half its land base.”); 5 (“About 49% of the forested lands in
7 western Washington are dedicated for conservation to meet the HCP’s conservation strategies
8 and the Board’s policy objectives.”). As we will explain below, DNR’s 50 percent figure is an
9 inaccurate and deceptive argument. It is also irrelevant, because, no matter how other land DNR
10 may have set aside for other purposes, it is still required to hit its habitat targets within the lands
11 subject to the HCP—that is, the lands subject to logging, such as the About Time timber sale
12 area.
13

14 DNR’s first error is that DNR is mis-counting the number of acres covered under the
15 HCP in Western Washington. The HCP covers a total of approximately 1.6 million acres of
16 land managed by DNR. AR 3321. DNR is dividing the total number of acres it claims are set
17 aside for conservation by 1.4 million acres, which artificially inflates the percentage of acres in
18 conservation status. AR 16774.
19

20 Second, the 50 percent figure that DNR cites is an average across all planning units in
21 Western Washington. The percentage of acres that are excluded from commercial harvest is far
22 lower in the South Coast planning unit. This is because there is virtually no protected spotted
23 owl habitat in the South Coast planning unit, and far fewer acres of suitable murrelet habitat
24 remaining in the South Coast planning unit than in other planning units, such as the OESF. AR
25 8219.
26
27

1 Third, the vast majority of areas that DNR is counting as “conservation areas” in the
2 South Coast planning unit are contained within narrow, stream buffer strips, referred to as
3 “riparian management zones” or RMZs. Although RMZs are intended to “contribute” to the
4 conservation of all aquatic and riparian obligate species, their primary purpose, according to
5 the Riparian Conservation Strategy of the 1997 HCP, is “to maintain or restore the ecological
6 functions in riparian and upland areas that directly influence salmonid freshwater habitat.” AR
7 3542. Accordingly, “the primary design criterion” for determining the width of the riparian
8 management zone is calculated such as to “provide the quantity and quality of instream large
9 woody debris that approximates that provided by unmanaged riparian ecosystems.” AR 3542-
10 3543. A riparian buffer equal in width to the site potential height of trees in a mature conifer
11 stand (150 feet on average) is considered sufficient to satisfy this criterion for fish bearing
12 streams. For intermittent, non-fish bearing streams, the stream buffer may be as narrow as 100
13 feet. AR 5426-5426.

14
15
16 A management approach that relies so heavily on narrow, stream buffer strips to meet
17 older-forest and fully functional stand structure objectives will result in a fragmented landscape
18 that is subject to edge effects, lacks interior forest habitat, lacks large conifers, and is often
19 dominated by alder and other early successional or invasive species. This approach to meeting
20 fully functional stand structure objectives is both unrealistic, and inconsistent with the intent of
21 the Multispecies Conservation Strategy of the 1997 HCP and the objectives of the 2006 PSF.

22
23 Fourth, DNR incorrectly counts approximately 45,000 acres that have been mapped as
24 "potentially unstable slopes" as conservation areas. AR 18122. About half those areas are also
25 located in riparian management zones. In practice, the remaining areas that are mapped as
26
27

1 potentially unstable slopes, which are located in upland forests and outside RMZ boundaries,
2 are rarely excluded from commercial harvest. AR 18122.

3 Finally, the percentage of acres on which DNR has “restricted harvest” deceptively
4 includes approximately about 120,000 acres of forests for which DNR had, in past years, sold
5 to the Washington trustlands transfer program and set aside as conservation reserves. AR
6 17803. DNR cannot be paid market compensation for these forests and, at the same time, claim
7 that it dedicated these forests for conservation under its HCP.
8

9 By lumping all of its protected lands together and suggesting it has already assumed
10 onerous conservation obligations, DNR conflates conservation which it must provide under
11 federal law with conservation DNR has “voluntarily” agreed to provide. DNR for example
12 concedes that approximately one-third of all of its forests were set aside to protect “aquatic
13 resources,” as *required* by the federal Endangered Species Act and federal Clean Water Act.
14 AR 17805. In addition, DNR has set aside approximately 252,000 acres (about 13 percent of
15 its 2 million acres of forest) for northern spotted owls, as also *required* by the ESA. AR 17812.
16 The protections DNR provides gives it regulatory certainty under federal law; it is not DNR’s
17 charity to the natural world.
18

19 Even with the various habitat set-asides described above, DNR still has commitments
20 within its lands that are subject to the HCP—that is, the lands that are subject to logging, such
21 as About Time. The 10–15 percent fully functional requirement applies to *these* lands; it cannot
22 be achieved by DNR’s habitat commitments on other lands. And, as DNR’s own numbers show,
23 DNR will not achieve its habitat commitment in the lands subject to the HCP.
24
25
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1 **B. DNR Is in Violation of the 2006 PSF.**

2 **1. The 2006 PSF sets forth binding commitments.**

3 The 2006 Policy on Sustainable Forests sets forth binding commitments for older forest
4 habitat, as we explained in our opening brief. *See* Op. Br. at 23–26. The 2006 PSF promises,
5 among other things, that DNR “will target 10–15 percent of each Western Washington Habitat
6 Conservation Plan planning unit for ‘older’ forests—based on structural characteristics—over
7 time.” *Id.* (citing AR 12592). Several times, this 10–15 percent objective is referred to as a
8 “target.” *Id.* (citing AR 12591, 12592, 12283).

9
10 Murphy’s response to this language is to argue that “There is no set-in-stone target under
11 the Policy...” Murphy Br. at 12. The Court can dismiss this argument out of hand. The 2006
12 PSF repeatedly uses the word “target,” so therefore, there is a target.

13
14 DNR acknowledges that the 2006 PSF does “set a target.” DNR Br. at 4. However, DNR
15 argues that the word “target” does not mean “requirement or mandatory.” DNR Br. at 12–13.
16 DNR does not explain what the word “target” does mean. But it does say:

17 The Center’s claim fails because the Strategy is not mandatory and it does not
18 prohibit timber harvest. Its purpose is to ensure that DNR’s management of the
19 trust lands between 2006 and 2106 will result in a larger percentage of the forests
on the landscape in older forest conditions.

20 DNR Br. at 13.

21 This is simply wrong. The Strategy, like all components of the 2006 PSF, is mandatory.
22 DNR’s regulations specifically provide that:

23 Department policies for the sale of timber from public lands are found under
24 DNR’s habitat conservation plans, any amendments to DNR’s habitat
25 conservation plans, or in the Policy for Sustainable Forests adopted in 2006 and
any future updates to the policy.

26 WAC 332-41-665(1)(f).
27

1 DNR’s argument to this Court is that it does not have to follow its own policy, The
2 Court should roundly reject this argument. The Court should treat DNR’s targets as targets.

3 **2. The 2006 PSF commits to preserving 10–15 percent “older forests,”**
4 **which means forests at least 123 years old.**

5 As DNR acknowledges, the binding commitment (“target”) of the 2006 PSF is for 10–
6 15 percent of each planning unit to be “older forest” within 70–100 years. DNR Br. at 4.³ As
7 the 2006 PSF clearly states (and as DNR agrees), the term “older forest” means “stands in the
8 fully functional or niche diversification stage of stand development.” AR 12591.

9
10 We have already seen, above, how the term “fully functional” is used in the 1997 HCP
11 to mean stands 150 years or older. But the term “niche diversification” is new. It appears in the
12 PSF but not the HCP. As we explained in our opening brief, “niche diversification” is defined
13 in the 2006 Policy for Sustainable Forests as “[a] forest stand development stage in which
14 structural complexity is evident and the stand has taken on characteristics of older forests.” AR
15 12603. That term is given more concrete meaning in the accompanying 2004 FEIS. According
16 to the 2004 FEIS, niche diversification begins at a stand’s “Max RD age” plus 80 years. AR
17 17094. A stand’s “Max RD age” is a silvicultural term, meaning the age at which a stand’s
18 annual growth reaches its maximum, as the Estep memo explains. AR 1581. For west-side
19 Douglas-fir forests, the Max RD age is 43 years, according to the Estep memo. AR 1583. Thus,
20 a west-side Douglas-fir stand like About Time enters the niche diversification stage at an age
21 of 123 years: 43 years (max RD) plus 80 years, according to DNR (2004 FEIS definition). Op.
22 Br. at 24.
23

24
25 ³ DNR describes the commitment as “10 percent of the trust lands to be ‘older’ forests by 2106,”
26 the 100-year mark of the 2006 PSF. DNR Br. at 4. In reality, the target is 10 to 15 percent, and the timeline is by
27 year 70 to 100. AR 12591. Right from the outset, DNR treats the higher percentage (15 percent) and the shorter
timeframe (70 years) as irrelevant, and instead aims to do the absolute bare minimum possible (10 percent, 100
years).

1 In its response brief, DNR confuses structurally complex forests with “older forests,”
2 stating that the “Center assumes that trees that are 123 years old automatically meet DNR’s
3 definition of structurally complex forest.” DNR Br. at 14. The Center assumes nothing of the
4 kind. DNR's own record clearly illustrates that older forests are a subset of structurally complex
5 forests—specifically, those forests that are in the fully functional and niche diversification
6 stages of development as described above and in our opening brief.
7

8 DNR also argues that the Center’s focus on age classes is out of date; that the new
9 methodology, as of the 2006 PSF, is to focus on “structural characteristics instead of age.” DNR
10 Br. at 14. Therefore, DNR argues, it does not matter how old the stands are; DNR will assess
11 its compliance with the 2006 PSF based solely on structure.
12

13 DNR’s breezy claim that the term “older forests” has nothing to do with forests’ age is
14 inconsistent with the methodology used by its own experts. The Estep-Buffo memo says:

15 DNR (2004) defined the niche diversification stage, in part, as stands at least 80
16 years older than the max RD age and the fully functional stage as stands least
17 160 years older than the max RD age.

18 AR 1582.⁴

19 The Estep-Buffo memo’s reference to “DNR (2004)” is explained in its list of
20 references, AR 1590. DNR (2004) is, indeed, the 2004 FEIS the Center has referenced for its
21 definitions above. Thus, Estep-Buffo and the Center both agree that niche diversification means
22 MaxRD + 80 years, or 123 years.

23 The Estep-Buffo memo goes on to say that:

24 Multiple canopy layers is another component of the definition of stand
25 development stage. Both the niche diversification and fully functional stages can
26 be defined in part by the presence of more than one canopy layer. Figure 1 shows
27 the average number and variability of canopy layers in stands of different ages.

1 By about age 80, stands average over 2 canopy layers and have 90 percent
2 confidence intervals above 2 layers.

3 AR 1583.

4 The memo is correct that there is more to niche diversification than just the age of a
5 stand. The diversity of its canopy also matters. It certainly might be the case that a stand of 123-
6 year-old trees might lack a diversified canopy. In such a case, the stand might not be in the
7 niche diversification stage. But it is certainly the case that age is also a component of niche
8 diversification. Thus, even an 80- or 90-year-old stand with a diversified canopy would not be
9 in the niche diversification stage.
10

11 The memo also goes on to note that:

12 The niche diversification and fully functional stand development stages include
13 biological legacies in the form of snags and woody debris. DNR's data show
14 that stands over about 90 years old average more than 3 snags per acre over 20
15 inch in diameter, with 90 percent confidence intervals extending only slightly
below 3 snags per acre (Figure 2). Likewise stands over 115 years old average
more than 2,400 cubic feet of dead and down woody debris per acre (Figure 3).

16 AR 1583.

17 Certainly, a stand that is 115 years old would expect to develop more of the
18 characteristics of a niche diversification stand than a stand that is only 90 years old, and the
19 Estep-Buffo memo's data bear out this intuitive understanding.
20

21 Thus, under the 2006 PSF, as explicated in the Estep-Buffo memo, niche diversification
22 means at least 123 years old *and* having the characteristics of diversified canopy and density of
23 snags and down woody debris set forth in the memo. For this reason, DNR is incorrect when it
24 argues that stand characteristics have replaced age as a measure of "older forest" for purposes
25 of the 2006 PSF. On the contrary, age remains relevant. The structural characteristics described
26
27

1 above *complement* the age requirement but do not eliminate the age requirement. Even in 2006,
2 it remains impossible to make an older forest out of younger trees.

3 **3. A structurally complex forest cannot be harvested until DNR has**
4 **achieved compliance with the 2006 PSF commitments.**

5 The Center does not concede that DNR can harvest About Time if 10 percent of the
6 landscape will be in older forest conditions by 2097, as DNR would like to have the court
7 believe. DNR Br. at 11. As we argued in our opening brief, the 2006 PSF provides that a
8 “structurally complex” stand can be harvested **once older-forest targets are met**. Op. Br. at 25
9 (quoting AR 12592). Simply put, DNR must achieve the target before logging structurally
10 complex forests that provide interim older forest habitat. DNR conveniently leaves out the
11 crucial clause “once older-forest targets are met,” and attempts to claim that the PSF simply
12 allows that “structurally complex forest stands that are not needed to meet the targets may be
13 considered for harvest activities.” DNR Br. at 12. But that is not what the PSF says.

14
15 DNR cannot argue that the older forest targets in the 2006 PSF have already been met.
16 As we showed in our opening brief, the South Coast Planning Unit has, today, only achieved
17 0.2 percent older forest. Op. Br. at 25–26 (citing AR 1588). DNR has a long way to go to
18 achieve 10-15 percent older forests in the South Coast planning unit. DNR argues that it “will
19 meet” the PSF’s 10 percent target by 2100. DNR Br. at 9, and therefore acknowledges that it
20 will not meet its older forest target for almost another 80 years. But even this claim is
21 misleading. We have already shown above, in our opening brief, that DNR is wrongly counting
22 narrow, stream buffer strips; areas mapped as potentially unstable slopes; and small pockets of
23 older forest as small as 5 acres in size as contributing to meeting its older forest target. Op. Br.
24 at 20. The only way to interpret the terms of the PSF, and the results of DNR's own analysis, is
25
26
27

1 that the PSF prohibits logging complex stands until the target has been met; and that DNR will
2 not meet its older-forest target for many decades. AR 12592.

3 DNR also attempts to argue that it has "designated 22 acres adjacent to the sale area for
4 long-term growth, in addition to including seven acres of "leave" trees within the sale unit."
5 DNR Br. at 7. DNR claims that these areas, which "constitute 27 percent of the total harvest
6 area" will "contribute to the older forest targets". DNR Br. at 7-8. This argument is false and
7 misleading. In fact, the 22 acres that DNR is referencing are contained within the previously
8 identified RMZ's that are already designated to meet older forest targets. AR 712. These are
9 not additional, newly "designated" areas. The additional 7 acres of "leave trees" will not
10 contribute to older-forest targets. Not only can these trees be harvested at a later date, but this
11 statement directly contradicts DNR's own record, which states that "areas outside of the
12 conservation areas will not support older forests." AR 1581.

13
14
15 DNR argues that the PSF "does not prohibit timber harvest" and accuses the Center of
16 trying to "conserve all trees in Western Washington." DNR Br. at 12-13. This is a gross
17 misrepresentation of the Center's position. Nowhere does the Center argue that DNR must
18 conserve all trees in Western Washington. DNR remains free to log non-complex stands any
19 time it likes, regardless of whether it has achieved its commitment under the 2006 PSF. And
20 DNR may also log complex stands **once older-forest targets are met**. Thus, DNR has multiple
21 logging options available to it under the PSF. But it may not log structurally complex forests
22 until the older-forest targets are met, which they have not been.

23
24 This requirement is also explicit in DNR's policy PR 14-004-046 ("Identifying and
25 Managing Structurally Complex Forests to Meet Older Forest Targets (Westside) January
26 2007"), AR 1268-1270. The policy provides that:

1 The identification and review of landscape level management strategies to
2 achieve the 10 to 15 percent older forest target will be completed during the
3 forest land planning process that will be conducted for each HCP planning unit.
4 However, until that time, the following programmatic guidance to aid in
5 identifying appropriate stands to manage to meet older forest targets **must be**
6 **followed**. Prior to development of a forest land plan, proposed harvest activities
7 in FMUs that are considered **structurally complex forests must be**
8 **accompanied by the following information**: a) an assessment of forest
9 conditions using readily available information, b) an analysis of the known
10 landscape management strategies and, **c) role of the structurally complex**
11 **stand in meeting older forest targets**. For the actions listed below, the Land
12 Management Division has sources of information it will make available.

13 AR 1269 (emphasis added).

14 This policy ensures that, if a structurally complex forest is targeted for logging, it will
15 be reviewed to ensure that its logging will not adversely affect DNR's progress toward its older-
16 forest commitment in the 2006 PSF.

17 **4. The About Time timber sale is structurally complex. It has not**
18 **undergone review consistent with policy PR 14-004-046.**

19 In our opening brief, we showed that the About Time timber sale is, today, structurally
20 complex, and thus precluded from logging until DNR has achieved its commitment under the
21 2006 PSF. *See Op. Br. at 26* (citing definition of structurally complex to include "botanically
22 diverse" stands such as About Time). In response, DNR argues that "About Time is a 75-acre
23 sale of 74 to 83-year old timber." DNR Br. at 7. This statement is contradicted by DNR's own
24 stand assessment report, prepared on October 18, 2021, which states that the stand is
25 approximately 84 years of age. AR 1045.

26 DNR further argues that "the diverse forest includes 80-year-old second-growth trees
27 re-planted by Weyerhaeuser." DNR Br. at 15.

DNR's own record also contradicts this argument: "It is not likely that the parcel of land
owned by the State was re-planted." AR 1044. Furthermore, the planting of trees within

1 portions of the sale area does not preclude the forest from qualifying as structurally complex.
2 DNR's own analysis found that the stand is “diverse in nature due to the timing of the original
3 harvest and the history of natural disturbances creating a mosaic of different stand types across
4 the sale area;” and that “portions of the overstory are comprised of open grown Douglas-fir
5 with some codominant western hemlock while others have hemlock higher percentage of
6 western hemlock with some codominant Douglas-fir.” AR 1045. The forest in About Time is
7 described by DNR as being in a “botanically diverse” development stage, because it “contains
8 timber that falls within several different stages of stand development.” As we demonstrated in
9 our opening brief, a “botanically diverse” stand is, by definition, structurally complex. *See Op.*
10 *Br.* at 26. Thus, DNR agrees with the Center that the About Time sale is today structurally
11 complex. Therefore, it cannot be logged until DNR has achieved compliance with the habitat
12 commitment in the 2006 PSF and met its older forest target.
13
14

15 In addition, the About Time sale has not undergone review consistent with policy PR
16 14-004-046, described in the preceding section. There is no forest land plan for the South Coast
17 planning unit, and DNR did not provide any of the required information described above with
18 the FPA or SEPA checklist. This in itself constitutes a violation of DNR’s policy. It is all the
19 more reason to conclude that this structurally complex stand cannot be logged until DNR has
20 achieved compliance with the 2006 PSF commitments.
21

22 **5. DNR’s claim that it will provide 20 percent of Western Washington**
23 **Forests in older forest conditions by 2100 is misleading and**
24 **irrelevant to this case.**

25 As shown above, and in our opening brief, DNR consistently over-estimates and
26 misrepresents the percentage of the land that is both excluded from commercial harvest, and
27 capable of contributing to fully functional and older forest targets. DNR acknowledges in their

1 response brief that it will not meet the 10 percent target described in the PSF until 2100. DNR
2 Br. at 9. DNR's argument that it will provide 20 percent older forest conditions by 2100 in
3 Western Washington is irrelevant to this case, because the older forest targets apply to
4 individual planning units, not to all of Western Washington. This fact has been consistently
5 supported by DNR in its written correspondence with the Center, and in its presentations to the
6 Board of Natural Resources. For example, "DNR implements a policy to achieve older forest
7 conditions across 10-15% of **each** Western Washington HCP Planning Unit within 70-100
8 years" (AR 1722) (emphasis added); "DNR implements practices to achieve older forest
9 conditions across 10-15 percent of **each** Western Washington HCP Planning Unit over a 70-
10 100 year time period" (AR 1777) (emphasis added); and DNR's Chair Report on Older Forest
11 Policy provides older forest conditions by 2100 for each planning unit (AR 0406).
12

13
14 **C. The Center's Claim Is Justiciable and Ripe.**

15 DNR admits the Center's appeal must "identify how About Time fails to comply with
16 the existing framework or identify an error in the SEPA threshold determination." DNR Br., at
17 10. That is exactly what the Center is doing in this case. For the reasons described above, the
18 Center has shown that the About Time sale is inconsistent with the 1997 HCP and 2006 PSF.

19 Having tried to deny that the commitments of the 1997 HCP and 2006 PSF are actually
20 commitments; and having tried to redefine the terms of those commitments; DNR and Murphy
21 Co.'s final card is to argue that the Court cannot adjudicate the case. They argue that the Center
22 is actually challenging the adoption of the 1997 HCP and 2006 Policy, which are too late to
23 challenge (Murphy Br. at 3; DNR Br. at 18); and they argue that the Center is merely
24 "speculating" that DNR will fail to comply with the 1997 HCP and 2006 PSF (Murphy Br. at
25
26
27

1 10; DNR Br. at 18). In other words, the Center is both too late and too early to do anything
2 about DNR’s non-compliance with its habitat commitments.

3 These responses are easily disposed of, because they lack merit. The Center is not
4 making the arguments that DNR and Murphy wish it was making—namely, that the 1997 HCP
5 or 2006 PSF are invalid, or that the Center is seeking redress for environmental harms that will
6 occur in 2097, when DNR misses its habitat commitments. The Center is not requesting an
7 “advisory opinion” on whether DNR is in compliance with its HCP and PSF, is not asking for
8 judicial review of the 16-year-old PSF, and is not asking the Court to find DNR out of
9 compliance with its HCP, a matter which lies in federal court under federal law.
10

11 The Center is making a much more focused argument than that—one with far less far-
12 reaching implications than the respondents want this Court to imagine. SEPA requires that
13 environmental review of every proposal be “based upon information reasonably sufficient to
14 evaluate the environmental impact of a proposal.” WAC 197-11-335; WAC 197-11-055(2);
15 WAC 197-11-100(2). When DNR conducted its SEPA analysis for the About Time sale, that
16 analysis was predicated on the notion that the sale would be achieve older forest habitat targets
17 under the 1997 HCP and the 2006 PSF. *See* AR 711. According to the SEPA checklist prepared
18 by DNR for the About Time sale, “[t]he South Coast HCP Planning Unit will meet at least 10
19 percent older forest within conservation areas by 2100.” AR 714–715. However, as shown
20 above, that statement is false. Therefore, DNR’s environmental analysis of the About Time
21 timber sale is erroneous.
22

23
24 Nor have the environmental impacts of the About Time sale previously been considered
25 in the various EISs. DNR Br. at 24–26. These EISs, like the About Time SEPA review, were
26 all predicated on the notion that DNR would achieve its commitments. (Indeed, the occasion
27

1 for the EISs was the establishment of the habitat targets as binding commitments.) As the record
2 shows, this will not happen. DNR is not on track to achieve compliance with the 1997 HCP,
3 and the logging of structurally complex forests in advance of compliance with the 2006 PSF
4 commitments is a violation of the PSF. Nothing in the EISs analyzed what would be the
5 environmental impacts of a failure to comply with the HCP and PSF.
6

7 The remedy is to reverse the timber sale and remand the SEPA analysis to DNR to
8 evaluate the sale's impacts in light of DNR's failure to comply with its own policies and
9 procedures, and its failure to achieve the commitments set forth in the 1997 HCP and 2006 PSF.
10 What the environmental ramifications will be of DNR's failure to achieve its commitments is
11 not known at present; it will be the subject of the remanded SEPA review.
12

13 The claim is justiciable because superior courts have jurisdiction over SEPA appeals,
14 including the adequacy of an agency's SEPA determination of nonsignificance when such
15 SEPA decisions are made in conjunction with an actual agency decision. RCW 43.21.075. The
16 claim is ripe because the faulty environmental analysis for the About Time sale has already
17 been published; and the decision to place About Time up for sale has been made. Nothing the
18 Center asks this Court to do requires the Court to overturn the 1997 HCP or 2006 PSF; or
19 speculate about environmental harm decades hence. All the Center asks is that this Court require
20 DNR to comply with its own policy, which DNR cites as mitigation for the About Time timber
21 sale; and perform its environmental review of About Time based on accurate information, not
22 wishful thinking.
23

24 **D. The Court Should Order DNR to Pay the Costs of the Administrative**
25 **Record.**

26 DNR cannot point to any language in the statute to support its argument that a party
27 other than the applicant for a timber sale must pay the costs of the record. DNR does not argue

1 that the Center for Responsible Forestry is the applicant for a timber sale. DNR does argue that
2 DNR is *not* the applicant for the About Time timber sale. DNR Br. at 28. DNR is mistaken; it
3 was the agency that placed the About Time timber sale before the Board of Natural Resources.
4 *See* AR 489–492 (DNR proposal).

5
6 Regardless of whether DNR is the applicant, the Center certainly is not. The Center is
7 only the appellant, and the statute does not name the appellant as the party to pay record costs.
8 DNR argues that an unsuccessful appellant is responsible for all costs, including record costs,
9 but that is not what the statute says.

10 **E. The Center Is Entitled to Attorney Fees if It Prevails.**

11 As DNR notes, the Equal Access to Justice Act provides that a party who prevails in an
12 appeal of agency action is entitled to attorney fees. RCW 4.84.340. EAJA further provides that
13 “‘Agency action’ means agency action as defined by chapter 34.05 RCW [the Administrative
14 Procedures Act].” *Id.* -340(2).

15
16 DNR argues that this means only agency actions appealed under the APA are subject to
17 EAJA. But “agency action” also exists when an agency is not subject to the APA. This is what
18 EAJA says. EAJA references the APA only as the source of the definition of agency action. It
19 does not say that the APA must be the cause of action for EAJA to apply.

20
21 The APA defines agency action as “licensing, the implementation or enforcement of a
22 statute, the adoption or application of an agency rule or order, the imposition of sanctions, or
23 the granting or withholding of benefits.” RCW 34.05.010(3). The decision to place About Time
24 up for sale is a license (to harvest timber); the implementation of a statute (the Public Lands
25 Act); and the granting of benefits (in the form of a public resource placed into private hands).
26 Therefore, it is an agency action, and EAJA applies to the appeal of that action.
27

1 **F. If the Supreme Court Significantly Modifies the Trust Mandate During the**
2 **Pendency of This Appeal, this Court Should Reverse the About Time Sale**
3 **and Remand to DNR.**

4 DNR concedes that its interpretation and application of the “old forest” issue in this case
5 was based on and assumed the agency’s historic interpretation of its legal trust mandate: “All
6 DNR management decisions must be made in the best interests of the beneficiaries, no matter
7 how laudable other objectives may be.” DNR Br., at 2 (citing *Skamania v. State*, 102 Wn.2d
8 127, 134, 685 P.2d 576 (1984)). DNR similarly concedes that its interpretation of the trust
9 mandate drove its decision whether or not protecting older forests was required by its HCP and
10 PSF or offered only “extraneous” conservation, conservation DNR alleges would be violate its
11 the trust mandate. DNR Br., at 13 (“In fact, setting aside extraneous land would likely violate
12 DNR’s fiduciary duty obligation to generate revenue for the trust beneficiaries and its statutory
13 direction to manage lands for timber production.”). In other words, DNR concedes that, but-
14 for its interpretation and application of its applicable fiduciary standard, DNR might have made
15 a different decision on the old forest issue presented in this sale.
16

17 A case “on all four legs” that will, at long last, interpret DNR’s “trust mandate” is
18 currently before the Supreme Court of Washington in *Conservation Northwest v. Franz*, No.
19 99183-9. The case will decide whether DNR must manage the state forests as if they were
20 private trusts or trusts that were created for the benefit of “all the people,” terms in the State
21 Constitution. This case was argued on October 21, 2021, there are no procedural issues that
22 might prevent a decision on the merits, and the Court’s “Issue Summary” clearly reflects that
23

1 the Court intends to decide this crucial issue of how and for whose benefit must DNR manage
2 its forests.⁵

3 In general, a court can affirm or reverse a decision on any basis in the record. *Bavand*
4 *v. One West Bank*, 96 Wn. App. 813, 825, 385 P.3d 233 (2016). While this principle is generally
5 applied to appellate court review of trial court decisions, there is no reason why it should not
6 apply here, where the Grays Harbor County Superior Court is effectively conducting appellate-
7 like record review of DNR’s decision on both legal and factual issues. Here, because DNR
8 concedes its interpretation of its old forest obligations hinge heavily (if not entirely) on DNR’s
9 interpretation of its trust mandate management standard, the Grays Harbor County Superior
10 Court should reverse and remand this case to the Board of Natural Resources if the Court issues
11 an opinion modifying the trust mandate standard prior to the court issuing a decision in this
12 case.⁶ The Grays Harbor County Superior court cannot and should not permit DNR’s
13 interpretation of its obligations and duties to protect older forests to stand because this
14 interpretation is inextricably intertwined with the trust mandate issue.
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17 III. CONCLUSION

18 Appellant respectfully requests the following relief:

- 19 1. An order reversing the Board’s approval of the About Time project for auction.
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22 ⁵ The Court’s issues summary provides: Declaratory Judgment—Federal Enabling Act—State
23 Constitution—Public Lands—Management Duty—Scope. Whether in this declaratory judgment action brought
24 under article XVI, section 1 of the Washington Constitution, which provides that public lands are held in trust for
25 “all the people,” the Commissioner of Public Lands and the Washington State Department of Natural Resources
26 have the constitutional authority and obligation to manage the state’s federally-granted lands in a manner that is
27 consistent with the best interest of all Washington citizens or exclusively in the best economic interest of select
institutional beneficiaries. No. 99183-9, *Conservation Nw., et al. (appellants) v. Comm’r of Pub. Lands, et al.*
(respondents). (Oral argument: 10/21/21) (emphasis added). See [Sep2021.pdf \(wa.gov\)](#).

⁶ Plaintiffs will promptly advise the Court if and when the Supreme Court decides the *CNW v.*
Franz case. Plaintiffs will, in addition, work with DNR and the intervenors to brief this issue further for the court,
if necessary, after that decision.

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