

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CASCADIA WILDLANDS, an Oregon  
non-profit corporation; AUDUBON  
SOCIETY OF PORTLAND, an Oregon  
non-profit corporation; THE CENTER  
FOR BIOLOGICAL DIVERSITY, a  
California corporation; and JOSHUA  
LAUGHLIN,

Petitioners-Appellants,

v.

OREGON DEPARTMENT OF STATE  
LANDS, an administrative agency of the  
State of Oregon,

Respondent-Respondent,

and

SENECA JONES TIMBER  
COMPANY, LLC, an Oregon limited  
liability company,

Intervenor-Respondent.

Lane County Circuit Court  
Case No. 621407847

CA A159061

**PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD**

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Appeal from the Judgment of the Circuit Court for Lane County  
Honorable Karsten Rasmussen, Presiding Judge

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September 2015

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## **STATEMENT OF THE CASE**

### **Nature of the Proceeding and Relief Sought**

This is an action under ORS 183.484 in which three non-profit environmental organizations and one individual have challenged a final agency order of the Oregon Department of State Lands to sell 788 acres of public forestland in the Elliott State Forest to a private timber company. Pursuant to ORS 183.484, Petitioners filed a petition for review of Respondent's final agency order in Lane County Circuit Court, ER 5-15, ER 16-26, and now present this case on appeal from a general judgment dismissing that petition for review. ER 49. The Circuit Court dismissed the petition for review without addressing the validity of the agency order, holding that, while the agency order was a "final order" subject to judicial review, Petitioners lacked standing to challenge it. ER 35-48.

Petitioners seek to have the judgment of the Circuit Court reversed and remanded with instructions to issue judgment in favor of Petitioners. Petitioners specifically seek an order from this Court that (1) Petitioners have standing to challenge the agency order in question, (2) the agency order is a final order, (3) the agency order violates ORS 530.450, and (3) ORS 530.450 is constitutional. Petitioners further seek an order vacating the unlawful agency order and granting such other ancillary relief as the court finds necessary to

redress the effects of the unlawful order, including returning the land in question back to the Department of State Lands.

### **Nature of the Trial and Nature of the Judgment**

A hearing on the merits was held before the Circuit Court on September 11, 2014. No witnesses were called at that hearing, but rather the parties stipulated to the admissibility to all documents, exhibits, and declarations that had previously been submitted to the court with the parties' briefing. Tr 4-5. The material facts of this case are not in dispute, and so the hearing consisted entirely of arguments on the application and interpretation of the law.

The Circuit Court issued an Opinion and Order on February 18, 2015, which did not address the validity of the challenged agency order, but which found against Petitioners for lack of standing. ER 35-48. The Court entered a General Judgment dismissing the petition for review on March 3, 2015. ER 49.

### **Jurisdiction**

This Court has jurisdiction pursuant to ORS 19.205 and ORS 19.270.

### **Notice of Appeal and Timeliness of Appeal**

Petitioners timely filed and served their notice of appeal on March 20, 2015 from the judgment entered in the trial court register on March 3, 2015.

### **Jurisdictional Basis for Agency Action**

This action involves a final agency order of the Oregon Department of State Lands (“the Department”) to sell approximately 788 acres of state-owned public forestland. The Department has general statutory authority to acquire and dispose of real property. ORS 273.055. The Department was created by ORS 273.041, and acts pursuant to that statute under the State Land Board.

The State Land Board was created by and derives its authority directly from Article VIII, section 5 of the Oregon Constitution, which states:

(1) The Governor, Secretary of State and State Treasurer shall constitute a State Land Board for the disposition and management of [Common School Fund lands] and other lands owned by this state that are placed under their jurisdiction by law. Their powers and duties shall be prescribed by law.

(2) The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.

The Circuit Courts have jurisdiction to review final agency orders, either in Marion County or in the county where a Petitioner resides or has its principle business office. ORS 183.484(1). Petitioner Joshua Laughlin resides in Lane County, Oregon. ER 27.



## **Questions Presented**

1. Do Petitioners have standing to challenge the order of the Department of State Lands to sell 788 acres of the Elliott State Forest?
2. Is the challenged agency order a final order that violates state statute, namely ORS 530.450, and is ORS 530.450 constitutional?

## **Summary of Argument**

### **1. The Petitioners Have Standing**

Respondent violated ORS 530.450 when it sold 788 acres of public forestland in the Elliott State Forest to a private timber company. The vast majority of this parcel, called the East Hakki Ridge parcel, was part of the National Forest system on February 25, 1913, and was selected by, and patented to, the State of Oregon for the purpose of establishing the Elliott State Forest.

The sale of such land is expressly prohibited by ORS 530.450, which states,

Any lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale except as provided in ORS 530.510. The state forest shall be known as the Elliott State Forest.

The one exception under ORS 530.510, which relates to land exchanges, does not apply in this case. Respondent's order for the sale of the East Hakki Ridge parcel is thus "in violation of a constitutional or statutory provision," is "outside the range of discretion delegated to the agency by law," and therefore "shall" be remanded to the agency or set aside. ORS 183.484(5).

Petitioners have standing to challenge this patently unlawful agency action. Under Oregon's Administrative Procedure Act, standing is conferred on "any person adversely affected or aggrieved by an order." ORS 183.480. "Person" includes both individuals and organizations. ORS 183.310(8).

Petitioners are "aggrieved" by the challenged order because (1) they have suffered an injury to a substantial interest resulting directly from the challenged governmental action, (2) they seek to further an interest that the legislature expressly wished to have considered, or (3) they have such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding. *See People for the Ethical Treatment of Animals v. Institutional Animal Care And Use Committee Of The University of Oregon*, 312 Or 95, 101-02, 817 P2d 1299 (1991) ("*PETA*") (setting forth a three-prong test to determine if a person is "aggrieved" by an agency order). Petitioners also have standing because they are "adversely affected" by the unlawful agency order.

**2. The Trial Court erred in not reaching the merits of petitioners' case, and this Court should do so now**

Having erroneously dismissed Petitioners' case for lack of standing, the trial court erroneously did not decide the validity of the challenged agency order. This Court should do so now. The remaining issues to be decided are all questions of law, do not involve any dispute of material fact, and can be fairly and adequately addressed by this Court at this time. Petitioners have conferred

with both Respondent and Intervenor and, in the event that Petitioners are found to have standing, none of the parties are opposed to this Court reaching the merits of the case.

**i. The challenged order is a final order**

The order for the sale of the East Hakki Ridge parcel is a “final order” subject to judicial review under ORS 183.480(3). The Purchase and Sale Agreement for the East Hakki Ridge parcel, which is a binding contract, is a final order. Alternatively, the final closing documents, the filing of the sale deed, or the recording of the sale deed are final orders subject to judicial review under ORS 183.484. Petitioners adequately pled in their petition for review and their amended petition for review that each of these documents is a final order subject to the court’s review. ER 13, ER 23

**ii. The challenged order is unlawful**

The final agency order for the sale of the East Hakki Ridge parcel violates ORS 530.450, which expressly prohibits the sale of lands that were part of the National Forest system on February 25, 1913, and that were selected by, and patented to, the State of Oregon for the purpose of establishing the Elliott State Forest. Respondent’s final agency order for the sale of the East Hakki Ridge parcel is therefore “in violation of a constitutional or statutory

provision,” is “outside the range of discretion delegated to the agency by law,” and therefore “shall” be remanded to the agency or set aside. ORS 183.484(5).

Intervenor (though not Respondent) has argued that, because the East Hakki Ridge parcel was conveyed by a presidential proclamation and by the approval of written instruments known as “clearlists,” the parcel was not strictly “patented to” the State of Oregon. *See* ORS 530.450 (applying to lands “selected by, and patented to, the State of Oregon”). Intervenor’s exceedingly narrow interpretation of the phrase “patented to” is inconsistent with the plain language of the statute and would impermissibly strip ORS 530.450 of all meaning and applicability.

Petitioners and Respondent agree ORS 530.450 applies to the East Hakki Ridge parcel. ER 33-34 (“There is no dispute between petitioners and the Department on the application of ORS 530.450, if valid, to TL 1500, 300 and 304”). The sale of this parcel clearly violates the statute, and the agency order must therefore be remanded or set aside.

### **iii. ORS 530.450 is constitutional**

Having acknowledged that ORS 530.450 applies to the East Hakki Ridge parcel, Respondent argues that the statute is an undue legislative burden on the agency and therefore an unconstitutional violation of the separation of powers.

Respondent is wrong and fails to meet its very heavy burden of invalidating a statute as unconstitutional.

Here, the Oregon Constitution expressly provides that the powers and duties of the State Land Board to dispose of and manage state lands “shall be prescribed by law.” Oregon Constitution, Article VIII, section 5. As the Supreme Court has explained, “the powers and duties of the Land Board were and are to be prescribed by law...Reading this provision according to its most plain and practical meaning, and consistently with the legislative history, the determination of the proper use of common school funds is a legislative one.” *Johnson v. Dept of Rev*, 292 Or 373, 382, 639 P2d 128 (1982). The legislature did not violate the separation of powers when it enacted ORS 530.450 because the Constitution itself directs the legislature to prescribe the State Land Board’s authority.

### **Summary of Facts**

As part of the Oregon’s admission to the union in 1859, the federal government granted two square miles of land in every township, or a total of about 3.4 million acres statewide, to the State of Oregon “for the use of schools.” 11 Stat 383 section 4 (1859). These lands later became known as “Common School Fund” lands. For several years, the State of Oregon “followed the policy of disposing of these lands, with the result that by 1913

only a comparatively small area remained.” 32 Or Atty Gen Op 100 (1964), 1964 WL 76273. The remaining parcels were scattered and often within the boundaries of national forests, making them difficult to access and manage. *Id.*

In the early 1900s, Oregon’s first state forester, Francis Elliott, “started a movement to exchange such lands with the federal government for a solid block of national forest land.” 32 Or Atty Gen Op 100 (1964), 1964 WL 76273. One of the first steps in this process was the passage of a bill in 1913 “for the purpose of meeting the federal requirements that any national forest land patented to the state should be withdrawn from sale for a period of 50 years.”

*Id.* In pertinent part, the 1913 bill states:

Whereas, it appears that the State is about to secure from the federal government, through an exchange of certain of its school sections, a compact body of timbered lands in the Santiam national forest; and

Whereas, it is the desire that said tract be set aside as a State forest and administered for the permanent good of the State and its educational institutions, and the revenue derived therefrom turned into the common school fund of the State;

Be it enacted by the People of the State of Oregon:

Section 1. That any lands now in the national forests selected by and patented to, the State for the purpose of establishing a State forest shall be withdrawn from sale for a period of 50 years.

\* \* \*

1913 Or Laws 124.

While the Santiam National Forest (now the Willamette National Forest) was the original focus of the land exchange, the parties eventually settled on a block of land at the southern end of the Siuslaw National Forest in Coos and Douglas Counties. The exchange was embodied and authorized in a Presidential Proclamation of April 28, 1927. 45 Stat 2907. Oregon selected the lands by way of several written instruments titled “clearlists,” and the federal government “approved Oregon’s clearlists and transferred title to Oregon to 68,666.1 acres of land pursuant to the 1927 Presidential proclamation.” *State of Oregon By & Through Div of State Lands v. Bureau of Land Mgmt, Dep’t of the Interior, US*, 876 F2d 1419, 1421 (9th Cir 1989).

The 1913 law withdrawing this land from sale for fifty years is now codified at ORS 530.450. A 1957 amendment to the statute removed the fifty-year limitation and named the land the Elliott State Forest. 1957 Or Laws 240, Section 1. In its current form, ORS 530.450 states:

Any lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale except as provided in ORS 530.510. The state forest shall be known as the Elliott State Forest.

The East Hakki Ridge parcel is located in Township 22 South, Range 11 West, and includes Section 3 (tax lot 1500), Section 9 (tax lots 100 and 304) and Section 10 (tax lot 1300). ER 1. The parties all agree, and the trial court record undisputedly shows, that majority of the East Hakki Ridge Parcel

(specifically, tax lots 1500, 300, and 304) was part of the 68,666.1-acre land exchange with the federal government that resulted in the formation of the Elliott State Forest.

On April 15, 2014, the Department of State Lands, through its Director Mary Abrams, signed a Purchase and Sale Agreement for the East Hakki Ridge parcel with Seneca Jones Timber Company. ER 1-4. The Purchase and Sale Agreement identifies both the seller and purchaser, as well and the specific purchase price. *Id.* It states that the Respondent “shall convey title” to the parcel, ER 1, and that “closing must occur” within forty-five days. ER 3. The agreement “is binding upon the heirs, personal representatives, successors and assigns of Prospective Purchaser and Seller.” ER 3.

Petitioners filed this action on April 21, 2014, within sixty days of the execution of the Purchase and Sale Agreement. ER 5-15. Then, between May 12 and 27, 2014, Respondent, through its Director Mary Abrams, executed the final closing documents for the sale of the East Hakki Ridge parcel, including the approval for the preliminary title report, the preliminary statement regarding seller’s tax-exempt status, the seller’s settlement statement, the sale escrow instructions, and at least two addenda to the sale escrow instructions. Rec 002262-002283. The sale deed was filed with the Douglas County Clerk and recorded on May 27, 2014. Rec 002284. Petitioners filed an amended petition



on July 3, 2014, alternatively alleging that these closing documents were final orders, within sixty days of the execution of the closing documents and the filing and recording of the sale deed. ER 16-26.

### **FIRST ASSIGNMENT OF ERROR**

The trial court erred in dismissing the petition for review on the basis that Petitioners lacked standing.

#### **Preservation of Error**

Pursuant to ORS 183.484(3), the Petitioners' Petition and Amended Petition sets forth the nature of Petitioners' interest and the facts showing how the Petitioners are adversely affected or aggrieved by the challenged agency order. ER 8-10, ER 19-21. Petitioners also submitted a declaration of Petitioner Joshua Laughlin, which sets forth the basis for Petitioners' standing. ER 27-32. The parties stipulated to the admissibility of this declaration. Tr 4-5.

Petitioners fully addressed their standing to pursue this action in both their opening and reply briefs to the Circuit Court, and Petitioners further addressed standing during oral arguments on the merits on September 11, 2014. Tr 6-17, Tr 74-79.

#### **Standard of Review**

Whether the facts submitted by Petitioners are sufficient to establish standing is a question of law. *Patterson v. Foote*, 226 Or App 104, 112 n 2, 204

P3d 97 (2009) ("review of a trial court's determination whether petitioner met a specified burden of proof \* \* \* is always a question of law").

“When it is ruling on a standing issue, a reviewing court must focus on the wording of the particular statute at issue, because standing is not a matter of common law but is, instead, conferred by the legislature.” *Local No 290, Plumbers and Pipefitters v. Oregon Dept of Environmental Quality*, 323 Or 559, 566, 919 P2d 1168 (1996).

### **Argument**

Petitioners have standing. Under Oregon’s Administrative Procedure Act, “any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.” ORS 183.480. “Person” includes both individuals and organizations. ORS 183.310(8). The Supreme Court has explained that a person is “aggrieved” for purposes of ORS 183.480

if the person shows one or more of the following factors: (1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the person seeks to further an interest that the legislature expressly wished to have considered; or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding.

*PETA*, 312 Or at 101-02 (internal citations omitted).

Although a person establishes standing if any one of these factors is met, *PETA*, 312 Or at 101-02, Petitioners here have demonstrated all three.

**1. Petitioners have suffered an injury to a substantial interest resulting directly from the challenged governmental action**

Petitioners have suffered an injury to a substantial interest as a direct result of the sale of the East Hakki Ridge parcel to a private timber company. As established by Petitioners' standing declaration, the Elliott State Forest in general, and the East Hakki Ridge parcel in particular, are very important to Petitioners. ER 27. Mr. Laughlin states in his declaration that he has personally visited the East Hakki Ridge parcel "to enjoy hiking, looking for wildlife, and experiencing the peace and solitude of some of the last intact and unlogged coastal forests in Oregon." ER 27-28. At the time of the unlawful agency order, Mr. Laughlin had concrete plans to return to the East Hakki Ridge parcel to once again use and enjoy the land as he had done in the past. ER 28. When Mr. Laughlin attempted to access the East Hakki Ridge parcel on July 10, 2014, shortly after the sale of the parcel closed, he was confronted by "no trespassing" signs and threats of criminal prosecution. ER 28, 31. The privatization of the East Hakki Ridge parcel has directly and concretely prevented Mr. Laughlin from using, enjoying, and experiencing the land that I once used and had a legal right of access to.

Further, Mr. Laughlin states that he is the Campaign Director for Petitioner Cascadia Wildlands. ER 29. In that capacity, he has spent years of his life working to protect the forests, waters, and wildlife of the Elliott State

Forest from clearcutting and other environmentally harmful practices. ER 28-29. Cascadia Wildlands has a significant interest in the protection and recovery of the Elliott State Forest, and the organization has dedicated a substantial amount of time, money, and energy into preserving the Elliott State Forest as a public space for public use and for the continuing benefit of the people, forests, waters, and wildlife of this state. ER 29. Cascadia Wildlands has hosted public outreach and educational events in and about the Elliott State Forest, including presentations, outdoor excursions, and other on-site and off-site events. ER 29. Privatizing the East Hakki Ridge parcel will prevent Cascadia Wildlands from going there and using the land for public hikes, educational events, and other outdoor activities. ER 29-30. Selling the land to Seneca Jones Timber Company to be clearcut, aerially sprayed, and industrially managed will directly affect Cascadia Wildlands' ongoing mission to protect the land, its habitat, and the wildlife that live there, and to keep the land open for public use and enjoyment. ER 29-30.

To Petitioners' knowledge, state courts in Oregon have never been asked to address whether the use and enjoyment of public land, wildlife, or other resources is sufficient to convey standing under Oregon's Administrative Procedure Act. However, this Court need not start from scratch, as the "adversely affect or aggrieved" standard from Oregon's Administrative

Procedure Act comes directly and verbatim from the federal Administrative Procedure Act, 5 USC § 702 (conferring a right of judicial review on any person “adversely affected or aggrieved by agency action”), and there is a wealth of federal caselaw applying this standard to facts that are materially identical to this case.

For example, in *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 US 669, 683-7, 93 S Ct 2405 (1973), the Supreme Court held that a plaintiff was adversely affected or aggrieved by a government decision impacting public lands when it “used the forests, streams, mountains, and other resources in the [area] for camping, hiking, fishing, and sightseeing” and when “this use was disturbed by the adverse environmental impact caused by the [challenged government action].”

In *Sierra Club v. Morton*, 405 US 727, 734, 92 S Ct 1361 (1972) the Supreme Court explained that recreational and aesthetic interests are real and substantial interests that confer a right of judicial review under the APA:

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

*Id.* The Court held, however, that in order for recreational or aesthetic interests to be sufficient, the plaintiff must establish that he or she has used the area in

question and that the challenged activity will negatively impact plaintiff's recreational or aesthetic interests:

The impact of the proposed changes in the environment \* \* \* will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area], and for whom the aesthetic and recreational values of the area will be lessened by the [challenged government action].

*Id.* As the Supreme Court neatly summarized in *Summers v. Earth Island Institute*, 555 US 488, 494, 129 S Ct 1142 (2009), “while generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.”

For more than forty years, federal courts have routinely and consistently held that plaintiffs establish standing when they aver that they use and enjoy an area, that they have concrete plans to return, and that those plans will be negatively impacted by the challenged government actions. *See, e.g., Friends of the Earth, Inc v. Laidlaw Environmental Services (TOC), Inc.*, 528 US 167, 183, 120 S Ct 693 (2000)(plaintiffs establish standing to challenge government actions on public lands “when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity”); *Alliance for the Wild Rockies v. Cottrell*, 632 F3d 1127, 1135 (9th Cir 2011)(the loss of use and enjoyment of public land

causes significant and irreparable injury, even when there are other similar areas nearby that the plaintiffs could continue to utilize); *Lujan v. Defenders of Wildlife*, 504 US 555, 562-63, 112 S Ct 2130 (1992)(“the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing”).

Though federal caselaw is not strictly binding on this Court, state courts should still look to federal cases for guidance when state law parallels federal law. *Portland State University Chapter of American Ass'n of University Professors v. Portland State University*, 352 Or 697, 710-11, 291 P3d 658 (2012). In fact, the two Oregon Supreme Court cases that most thoroughly discuss standing under Oregon’s APA, explicitly cite and rely on federal cases that interpret the parallel federal provisions. *See PETA*, 312 Or at 101 (*citing Flast v. Cohen*, 392 US 83, 99, 88 S Ct 1942 (1968); *Baker v. Carr*, 369 US 186, 204, 82 S Ct 691 (1962)); *Oregon Newspaper Publishers Ass'n v. Peterson*, 244 Or 116, 121, 415 P2d 21 (1996) (*citing Pierce v. Society of Sisters*, 268 US 510, 45 S Ct 571 (1925)).

The trial court found that Petitioners had not established standing, explaining, “no Oregon courts have found standing predicated upon a substantial interest of access to and use of public land. This Court does not intend to expand the definition of standing to designate such an interest as

‘substantial.’” ER 43. However, Petitioners are not asking this Court to “expand” anything. Petitioners are asking this Court to apply the law to facts that have not been litigated in this jurisdiction before, in a manner that is consistent with four decades of thoroughly argued and well reasoned caselaw from identical federal standards.

Petitioners’ interest is not abstract, and it does not arise merely from Petitioners’ general disagreement over Respondent’s decision or their general interest in preserving public lands. Petitioners have a real and substantial interest in this particular parcel of land that is greater and categorically different than that of the general public – an interest that is supported both by Petitioners’ history of using this specific area and by Petitioners’ concrete plans to return. Petitioners’ interest has been directly and negatively impacted by the unlawful sale of the parcel to a private timber company.

**2. Petitioners seek to further an interest that the legislature expressly wished to have considered**

Petitioners also have standing because they seek to further an interest that the legislature expressly wished to have considered. *See PETA*, 312 Or at 101-02. On its face, the sole interest expressed in ORS 530.450 is to prevent the sale of the Elliott State Forest. This is precisely the interest that Petitioners seek to uphold. Petitioners bring this action not only to protect their own use and enjoyment of the East Hakki Ridge parcel, but also to “maintain the public



ownership of the Elliott State Forest in general, and the East Hakki Ridge parcel in particular, to be held as a lasting and enduring asset and legacy for the people, waters, and wildlife of this state.” ER 30.

The preamble to the original version of ORS 530.450 states, “it is the desire that said tract be set aside as a State forest and administered *for the permanent good* of the State and its educational institutions.” 1913 Or Laws 124 (emphasis added). While the Elliott State Forest was originally withdrawn from sale for only fifty years, the legislature removed that limitation in 1957, evidencing its desire that the land be withdrawn from sale permanently. 1957 Or Laws 240, Section 1.

Further, under Article VIII, section 5(2) of the Oregon Constitution, lands under the jurisdiction of the State Land Board shall be managed “with the object of obtaining the greatest benefit for the people of this state, *consistent with the conservation of this resource* under sound techniques of land management.” The legislature has also expressed interest in having the Elliott State Forest managed for, among other things, recreation, fish and wildlife protection, carbon sequestration, and land conservation. ORS 530.500(3), (4), (7), and (8). These are all interests that Petitioners seek to uphold. ER 28-30.

The trial court found that Petitioners did not establish standing under this prong of *PETA*, holding that “the interest that the Legislature expressly wished

to have considered is the benefit and funding of the common schools of the State of Oregon through the Common School Fund lands.” ER 45. The trial court was wrong for two reasons.

First, ORS 530.450 does one thing and one thing only: it prohibits the sale of the Elliott State Forest. The statute is titled simply “Withdrawal from sale of the Elliott State Forest.” ORS 530.450. It says nothing about schools or funding. Therefore, as an initial matter, the trial court incorrectly concluded that the legislative interest expressed in ORS 530.450 was in the funding of the common schools. *See United States v. Palmer*, 16 US 610, 630 (1818) (“When the legislature manifests [a] clear understanding of its own intention, which intention consists with its words, courts are bound by it”).

Second, the trial court applied the incorrect legal standard. Petitioners need only establish that they seek to further “an” interest that the legislature expressly wished to have considered, not “the” interest or “the primary” interest. *PETA*, 312 Or at 101-02. Thus, while the trial court found that “the” interest of the legislature in enacting of ORS 530.450 was to benefit schools, the legislature has also clearly expressed other interests as well, including maintaining public ownership of the land, recreation, fish and wildlife protection, carbon sequestration, and land conservation. ORS 530.500.

Petitioners seek to further “an” interest that the legislature expressly wished to have considered, and therefore Petitioners have standing.

**3. Petitioners have such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding**

Petitioners also have standing because they have such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding. This is not a particularly high burden for Petitioners to meet: a “personal stake in the outcome” means only that “the agency's decision will legally affect the petitioner in some way.” *PETA*, 312 Or at 104.

Petitioner Joshua Laughlin used and enjoyed the East Hakki Ridge parcel prior to the unlawful sale of the parcel to Intervenor, and Petitioners’ use of that public parcel was legally protected. OAR 141-088-0004(1) (Lands under the jurisdiction of the State Land Board are “open and available for public recreational use”); OAR 141-088-0006(2), (3) (The State Land Board may not close its land to public use, except under specifically enumerated and narrowly defined circumstances, and any closure must be “as limited in area, duration and scope as necessary to address the identified need for the restriction or closure”).

Now, because of the unlawful sale of the East Hakki Ridge parcel to a private timber company, Petitioners’ continued use of the East Hakki Ridge

parcel is a criminal offense. ORS 164.245 (criminal trespass). In fact, upon acquiring the East Hakki Ridge parcel, Intervenor immediately posted “no trespassing” signs that threatened criminal prosecution. ER 31. As a direct result of the challenged order, Mr. Laughlin’s use and enjoyment of the East Hakki Ridge parcel have gone from being legally protected to criminally prohibited. Thus, the unlawful agency order has legally affected Petitioners “in some way.”

In many ways, Petitioners’ use of the East Hakki Ridge parcel, which is legally protected but non-possessory, is similar to an easement. *See State v. California Oregon Power Co.*, 225 Or 604, 609, 358 P2d 524 (1961); *Steelhammer v. Clackamas County*, 170 Or 505, 515, 135 P2d 292 (1943). Petitioners formerly enjoyed a legally protected to use and enjoy the East Hakki Ridge parcel, despite not having a personally possessory interest in the land.

Although there have been no states case in Oregon applying the APA’s standing requirements to the facts of this case, having an easement or an easement-like interest is substantial enough to allow judicial review in other civil causes of action. *See, e.g., Vance v. Ford*, 187 Or App 412, 416 (2003) (an easement holder is “entitled to appropriate relief from a person who has substantially interfered with his or her easement rights”)(*citing Landauer v. Steelman*, 275 Or 135, 141, 549 P2d 1256 (1976)). The interference with an

easement holder's easement rights is compensable under tort law, and non-possessory interests in lands are recognized "property" rights in Oregon. *See Burnell v. Bernau*, 125 Or App 440, 442 (1993).

Additionally, organizational Petitioners have a personal stake because they have hosted events in and about the Elliott State Forest, and have invested a significant amount of time and recourses in the protection of the Elliott State Forest. The sale of the East Hakki Ridge parcel prevents Petitioners from using the parcel for events, hikes, and other educational activities, impairs Petitioners' organizational missions, and diminishes the return on Petitioners' investment into the protection of the Elliott State Forest. ER 29-30; *see Waterwatch of Oregon, Inc v. Water Resources Commission*, 193 Or App 87, 95-96, 88 P3d 327 (2004), *rev'd on other grounds*, 339 Or 275, 119 P3d 221 (2005) (a non-profit organization had standing to challenge an agency order appropriating water from Tenmile Creek, where the organization had invested "time, money and effort" to protect the creek from water appropriations, and where the agency order would "diminish" that investment).

Like the "adversely affected or aggrieved" standard, the third prong of the *PETA* standing test comes directly from federal caselaw. *See Lujan*, 504 US at 583 (standing under federal law requires that "a plaintiff must have a personal stake in the outcome sufficient to assure that concrete adverseness

which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions”). Like federal courts have consistently and repeatedly done, this Court should find it sufficient that Petitioners “use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *See Friends of the Earth*, 528 US at 183.

#### **4. Petitioners are adversely affected by the challenged order**

While the decision in *PETA* addressed only the “aggrieved” prong of ORS 183.840, 312 Or at 101-02, Petitioners also submit that, for all of the reasons already explained, they are also “adversely affected” by the challenged agency order. For all of these reasons, Petitioners have standing to challenge this clearly unlawful agency action, the court has jurisdiction to review this matter, and the trial court’s judgment dismissing the Petition for Review should be reversed.

### **SECOND ASSIGNMENT OF ERROR**

The trial court erred in not reaching the merits of Petitioners’ case, and this Court should do so now.

#### **Preservation of Error**

The merits of this case were fully briefed and argued to the trial court by the Petitioners. Petitioners argued that the challenged order is a final order in

their opening brief to the trial court at pages 19-25, as well as their reply brief at pages 25-28. Petitioners argued that the challenged order violates ORS 530.450 in their opening brief to the trial court at pages 7-9 and in their reply brief at pages 4-8. Petitioners argued that ORS 530.450 is constitutional and not an undue burden on the agency Respondent in their opening brief to the trial court at pages 13-15, and in their reply brief at pages 8-14. Petitioners also addressed the constitutionality of ORS 530.450 at the hearing. Tr 18-34.

### **Standard of Review**

“On appeal from the circuit court's review of an order in other than a contested case, we essentially review the agency’s order directly, applying the standard of decision set out in ORS 183.484(5).” *Bridgeview Vineyard, Inc v. State Land Bd.*, 211 Or App 251, n3, 154 P3d 734 (2007).

Under ORS 183.484 (5), the Court “shall” remand the order to the agency “if it finds the agency’s exercise of discretion to be outside the range of discretion delegated to the agency by law” or “otherwise in violation of a constitutional or statutory provision.” ORS 183.484(5)(b). “If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall: (A) Set aside or modify the order; or (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.” ORS 183.484(5)(a). Finally, “[t]he

court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.484(5)(c).

“The reviewing court’s decision under ORS 183.482 or ORS 183.484 may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition.” ORS 183.486(1). In addition to setting aside unlawful agency action, the reviewing court may “order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.” ORS 183.486(1)(b).

### **Argument**

Having erroneously dismissed Petitioners’ case for lack of standing, the trial court erroneously did not decide the validity of the challenged agency order. This Court should do so now for several reasons. First, this is an appeal from a final judgment, and so the Court of Appeals has jurisdiction. ORS 19.205. Second, “[o]n appeal from the circuit court’s review of an order in other than a contested case, we essentially review the agency’s order directly, applying the standard of decision set out in ORS 183.484(5).” *Bridgeview Vineyard, Inc v. State Land Bd.*, 211 Or App 251, n.3, 154 P3d 734 (2007).



Thus, there is no particular deference to the trial court's decision. Finally, there is no dispute over any material facts, and a resolution of the merits would not be based on the credibility of any witness or the weighing of any evidence.

Beyond standing, there are only a three purely legal issues for this Court to resolve. The first is whether the challenged order is a "final order" subject to judicial review. The second is whether the challenged order violates ORS 530.450. The third is whether ORS 530.450 is constitutional. These are each questions of law, do not involve any dispute of material fact, and can be fairly and adequately addressed by this Court at this time.

Petitioners have conferred with both Respondent and Intervenor and, in the event that Petitioners are found to have standing, none of the parties are opposed to this Court reaching the merits of the case.

**1. The agency order for the sale of the East Hakki Ridge parcel is a final order**

The agency order for the sale of the East Hakki Ridge parcel is a final order and therefore subject to judicial review. Under ORS 183.480(3), "No action or suit shall be maintained as to the validity of any agency order except a final order as provided in this section and ORS 183.482, 183.484, 183.490 and 183.500." The term "final order" is defined by ORS 183.310(6)(b):

Final order means final agency action expressed in writing. Final order does not include any tentative or preliminary agency declaration or statement that:

- (A) Precedes final agency action; or
- (B) Does not preclude further agency consideration of the subject matter of the statement or declaration.

ORS 183.310(6)(b).

“A final order is neither tentative nor preliminary but is the complete statement of the agency's decision on the matter before it.” *Grobovsky v. Board of Medical Examiners*, 213 Or App 136, 143, 159 P3d 1245 (2007). “The question is the order's place in the process of which it is a part - whether it is a preliminary step in reaching some later decision or is, itself, the ultimate decision.” *Id.* “Thus, whether an agency's order is final for the purpose of judicial review depends on the context of the regulatory scheme within which the agency issued the order.” *Id.*

On April 15, 2014, the Department of State Lands, through its Director Mary Abrams, signed a Purchase and Sale Agreement for the East Hakki Ridge parcel with Seneca Jones Timber Company. ER 1-4 This document was completed after Respondent had undergone a nearly yearlong pre-decisional process that included several preliminary agency actions and determinations. The Purchase and Sale Agreement identifies both the seller and purchaser, as well and the specific purchase price. ER 1. It states that the Respondent “shall convey title” to the parcel, and that “closing must occur” within forty-five days. ER 1, ER3. It also states that the agreement “is binding upon the heirs, personal

representatives, successors and assigns of Prospective Purchaser and Seller.”

ER 3. It includes signatures from both Respondent and a representative of Seneca Jones Timber Company. ER 4.

It is, in every respect, a final agency action. It is neither preliminary nor tentative, but is rather a written expression of Respondent’s decision to sell the East Hakki Ridge Parcel to Intervenor. It does not precede final agency action and, on its face, it precludes further agency consideration of the matter. ER 1, ER 3 (Respondent “shall convey title” to Seneca and “closing must occur” within forty-five days). The Purchase and Sale Agreement is a binding contract that expresses the agency’s ultimate decision to sell a particular parcel of land to a named entity within a determinate period of time and for a specific amount of money.

The Court of Appeals has consistently held that the award of a contract by a state agency is a reviewable “final order.” *Pen-Nor, Inc v. Oregon Dept of Higher Educ*, 84 Or App 502, 504-05, 734 P2d 395 (1987) (the award of a construction contract by a state agency was a final agency order “because it is an ‘agency action expressed in writing’ and is not a tentative or preliminary decision”). In fact, the Respondent in this action has previously argued, and the Court of Appeals agreed, that the agency’s entry into a contract for the lease of grazing land constituted a final agency order. *Mendieta v. State*, 148 Or App

586, 591, 598-99, 941 P2d 582 (1997). Similarly, the Department of State Lands' rejection of an offer to purchase land was deemed to be a final agency order subject to judicial review. *Lake County v. State*, 142 Or App 162, 165, 920 P2d 1115 (1996).

The decision before the agency here was whether or not to sell the East Hakki Ridge parcel. The Purchase and Sale Agreement is a binding contract that expresses the agency's ultimate decision to sell the East Hakki Ridge parcel to a named entity within a determinate period of time and for a specific amount of money. There is nothing tentative or preliminary about it.

The applicable regulatory scheme is also instructive: under the Oregon's Administrative Rules governing the sale of state lands, once a state agency reaches a final agreement to sell state land to a purchaser, the agency is compelled to complete the transaction by the terms of that agreement. OAR 125-045-0235(10) ("If the Disposing Agency and a Proposer reach a final agreement on the Terminal Disposition of the State Real Property Interest and this agreement, where required, is approved by the Attorney General pursuant to ORS 291.047, the Disposing Agency must transfer the State Real Property Interest to the successful Proposer in accordance with the terms of the agreement").

The trial court was correct in deciding that the Purchase and Sale Agreement is a final agency order and is subject to this Court's review. *See* ER 41-42.

Alternatively, Petitioners have sufficiently pled and argued that the sale of the parcel, the written closing documents, and/or the conveyance of the title to the land are "final orders" subject to judicial review. ER 23; Tr 72-73. If, for some reason, the Purchase and Sale Agreement is not a final order, Petitioners have sufficiently pled and identified every other written instrument that could conceivably be a final order for the sale of the East Hakki Ridge parcel. The order for the sale of the East Hakki Ridge parcel is a final order subject to judicial review.

**2. The agency order for the sale of the East Hakki Ridge parcel violates ORS 530.450**

Respondent violated ORS 530.450 when it sold the East Hakki Ridge parcel to Intervenor. It is undisputed that the majority of this parcel (specifically, tax lots 1500, 300, and 304) was part of the National Forest system on February 25, 1913, and was selected by, and conveyed by written instruments to, the State of Oregon for the purpose of establishing the Elliott State Forest. The sale of such land is expressly prohibited by ORS 530.450, which states,

Any lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale except as provided in ORS 530.510. The state forest shall be known as the Elliott State Forest.

The exception under ORS 530.510 does not apply in this case. *See* ORS 530.510 (relating to land exchanges). The final agency order for the sale of the East Hakki Ridge parcel is thus “in violation of a constitutional or statutory provision,” is “outside the range of discretion delegated to the agency by law,” and therefore “shall” be remanded to the agency or set aside. ORS 183.484(5).

Respondent acknowledges that ORS 530.450 applies to the East Hakki Ridge parcel and Respondent thus never attempts to reconcile the agency action with the applicable statute. ER 33-34 (“There is no dispute between petitioners and the Department on the application of ORS 530.450, if valid, to TL 1500, 300 and 304”).

Intervenor alone argued below that ORS 530.450 does not apply to the East Hakki Ridge parcel because, according to Intervenor, the lands were transferred from the federal government to the state by way of a clearlist and not a patent. It is undisputed that the lands were in the national forests on February 25, 2013 and that the State of Oregon “selected” them for purposes of establishing a state forest. It is also not disputed that title to the lands was conveyed to the State of Oregon from the United States by way of a written instrument titled a clearlist under the authority of the Presidential Proclamation

of April 28, 1927. Intervenor challenges the application of ORS 530.450 only on the ground that, because these written conveyance instruments were described as “clearlists” and not “patents,” the lands were never technically “patented to” the state as required.

Intervenor’s exceedingly narrow interpretation of the phrase “patented to” is incorrect for several reasons. First, it is worthy of mention that the owner of the land – the state itself – takes the view that the land was in fact “patented to” the state. ER 33-34 (“There is no dispute between petitioners and the Department on the application of ORS 530.450, if valid, to TL 1500, 300 and 304”). In addition, both the Oregon Attorney General and the United States Department of the Interior have weighed in on the subject and agreed and “verified” that the clearlists (also called “selection lists”) that conveyed the Elliott State Forest to the State of Oregon were in fact “patents.” 32 Atty Gen Op 100 (1964), 1964 WL 76273 (“The indemnity selection lists Nos. 45 and 46 were verified by the Chief of the Branch of Facilitating Services of the Department of Interior – Bureau of Land Management under date of September 23, 1964, as being the only *patents* embracing the above described lands issued by the United States of America”).

Second, Intervenor’s interpretation is inconsistent with the plain language of the statute. In the context of a land transfer, a patent is defined broadly as “an

instrument by which the government conveys a grant of public land to a private person.” Black’s Law Dictionary 1147 (7th ed 1999); *McCarty v. Helbling*, 73 Or 356, 370 (1914) (“A ‘patent’ is the instrument by which the United States conveys to persons entitled thereto the legal fee-simple title to public lands”). The clearlists at issue here fit squarely within this definition.

The language of ORS 530.450 itself leaves little doubt as to what the phrase “patented to” means. The first sentence of the statute states, “[a]ny lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale.” ORS 530.450. Taken alone, this sentence might leave some uncertainty. The very next sentence, however, states, “[t]he state forest shall be known as the Elliott State Forest.” *Id.* The legislature used the definite article “the” in this second sentence - “*the* state forest shall be known as the Elliott State Forest” – in direct reference the lands that were just described as having been “selected by and patented to the State of Oregon.” The legislature has thus expresses its clear intent, by the plain language of the statute itself, that the Elliott State Forest was indeed “selected by and patented to the State of Oregon.”

Third, Intervenor’s unnecessarily narrow interpretation of the single phrase “patented to” would render the rest of the statute entirely meaningless.



The Elliott State Forest – every one of the 68,666.1 acres conveyed by the federal government – was conveyed to the state by way of written instruments titled clearlists. If “patented to” is defined so narrowly as to exclude this conveyance, then ORS 530.450 has no meaning or applicability whatsoever.

The statute cannot be interpreted in such a manner. *Envtl Quality Comm’n v. City of Coos Bay*, 171 Or App 106, 110, 14 P3d 649 (2000) (“We are required, if possible, to avoid construing statutes in a way that renders any provision meaningless”); *Bolt v. Influence, Inc*, 333 Or 572, 581, 43 P3d 425 (2002) (“we are to construe multiple provisions, if possible, in a manner that will give effect to all”); ORS 174.010.

The Legislature amended ORS 530.450 in both 1955 and 1957, more than twenty years after the land was conveyed to the state by the clearlists. 1955 Or Laws 121, Section 1; 1957 Or Laws 240, Section 1. The legislature would not have gone through this repeated legislative process unless it intended for the law to have some meaning or applicability.

Both Petitioner and Respondent are correct that ORS 530.450 applies to the East Hakki Ridge parcel. The sale of such lands is therefore unlawful under ORS 530.450, and the agency order for the sale of this land must be set aside or remanded to the agency. ORS 183.484(5).

### 3. ORS 530.450 is Constitutional.

In challenging a final agency order, Petitioners have the burden of establishing only that the order is “outside the range of discretion delegated to the agency by law” or “otherwise in violation of a \* \* \* statutory provision.” ORS 183.484(5)(b). As explained above, Petitioners have met that burden.

Respondent, having made no attempt to reconcile the agency order with the applicable statute, argued below that ORS 530.450 is unconstitutional. Specifically, Respondent posits that ORS 530.450 is an undue legislative burden on the State Land Board and therefore a violation of the separation of powers. Respondent has not met its very heavy burden of invalidating a statute.

“A party has a heavy burden when it challenges a statute as being unconstitutional.” *Salahub v. Montgomery Ward & Co.*, 41 Or App 775, 786, 599 P2d 1210 (1979). As the Supreme Court has long held, “it is elementary that every reasonable presumption is in favor of the validity of a statute and the court will not declare a law unconstitutional except in clear cases.” *Bowden v. Davis*, 205 Or 421, 433, 289 P2d 1100 (1955). “[W]hen the life of a statute is at stake it is entitled to the benefit of every reasonable doubt.” *Sadler v. Oregon State Bar*, 275 Or 279, 289, 550 P2d 1218 (1976); *see also Jehovah's Witnesses v. Mullen*, 214 Or 281, 293, 330 P2d 5 (1958) (“Every statute is presumed to be constitutional, and all doubt must be resolved in favor of its validity”); *State v.*

*Collins*, 243 Or 222, 231, 413 P2d 53 (1966) (“In construing a statute we must be guided by the established rule that every presumption is in favor of its validity and we must seek a construction which will avoid unconstitutionality”).

Respondent and Intervenor cannot meet this very heavy burden. ORS 530.450 is a valid and constitutional exercise of the legislature’s authority. It was passed originally in 1913, and then renewed and made permanent in 1957, through a deliberate and thoughtful legislative process “with all the forms and ceremonies requisite to give [it] the force of law.” *Fleischner v. Chadwick*, 5 Or 152, 153-54 (1874).

ORS 530.450 does not violate the separation of powers under the Oregon Constitution. The separation of powers doctrine in Oregon comes from Article III, section 1 of the Oregon Constitution, which states:

The powers of the Government shall be divided into three separate [*sic*] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, *except as in this Constitution expressly provided.*”

(emphasis added).

The State Land Board was created by and derives its authority from Article VIII, section 5 of the Oregon Constitution, which states:

(1) The Governor, Secretary of State and State Treasurer shall constitute a State Land Board for the disposition and management of [Common School Fund Lands] and other lands owned by this state that are placed under their jurisdiction by law. *Their powers and duties shall be*

*prescribed by law.*

(emphasis added). Thus, by the terms of the Constitution itself, the duties and authorities of the State Land Board are to be prescribed by the legislature. As the Supreme Court has explained

Section 5, as amended, calls for the formation of the State Land Board to dispose of and manage lands described in section 2, and also lands owned by the state placed under the State Land Board's jurisdiction by law. *The powers and duties of the Land Board were and are to be prescribed by law.* Section 5(2) contains the requirement that such lands be managed with the object of obtaining the greatest benefit for the people of Oregon. Reading this provision according to its most plain and practical meaning, and consistently with the legislative history, *the determination of the proper use of common school funds is a legislative one*, subject to the overall requirement that the use have as its goal the greater public benefit.

*Johnson*, 292 Or at 382 (emphasis added). There can be no separation of powers violation here because the Constitution itself “expressly provides” that the legislature shall prescribe the State Land Board’s authority.

The Supreme Court has recognized that “the separation of powers does not require or intend an absolute separation between the departments of government.” *Rooney v. Kulongoski*, 322 Or 15, 28, 902 P2d 1143, 1151 (1995). “Rather, the court has cautioned that a violation of separation of powers may be found only if the problem is clear, and has set out two inquiries to determine whether there is a separation-of-powers violation.” *Id.*

The first inquiry is whether one department of government has “unduly burdened” the actions of another department in an area of responsibility

or authority committed to that other department. That inquiry corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influence between governmental departments. The second inquiry is whether one department is performing the functions committed to another department. That inquiry corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for concentration of separate powers in one department.

*Id.* (Internal citations omitted).

It is not at all “clear” that ORS 530.450 was enacted by legislature to have a coercive effect on the State Land Board. To the contrary, the statute was enacted pursuant to the legislature’s authority under Article VIII, section 5, and to fulfill the State’s original promise to the federal government that the once-federal land would not be removed from state ownership. 32 Or Atty Gen Op 100 (1964), 1964 WL 76273.

It is also not clear that ORS 530.450 unconstitutionally concentrates power in one department. Upon its admission, the State of Oregon was given 3.4 million acres of land “for the use of schools.” 11 Stat 383 section 4 (1859). The statute at issue here, ORS 530.450, applies to less than 69,000 acres – approximately two percent – of the original land base set aside for the use of schools. Within that two percent, ORS 530.450 prohibits only the outright disposal of the land from state ownership. It does not prohibit the State Land Board from managing or developing the land for the benefit of schools. It does not restrict leasing, logging, mining, grazing, charging recreation fees or

generating revenue for schools in any way other than by selling it. It does not restrict the sale of the more than 3.3 million acres of other lands granted to the state, as evidenced by the fact that the state has already sold the overwhelming majority such lands.

The legislature did not unduly burden the State Land Board by precluding one particular management option from two percent of the Common School Fund land base. ORS 530.450 does not limit the Board's authority to manage the Elliott State forest, and it does not limit the Board's ability to sell the hundreds of thousands of acres of other land that it owns.

Article VIII, section 5 explicitly gives the legislature authority to prescribe the powers and duties of the State Land Board to manage and dispose of Common School Fund lands. *See McCarthy v. Coos Head Timber Co.*, 208 Or 371, 390 (1956) (rules and actions of the State Land Board must be within the powers defined to the Board by the legislature). ORS 530.450 is a valid and very minor exercise of that authority. ORS 530.450 does not unduly burden or interfere with the State Land Board's authority or responsibilities, and it does not violate the separation of powers.

### **CONCLUSION**

For all of the reasons set forth above, Petitioners respectfully request that the judgment of the Circuit Court be reversed and remanded with instructions

issue judgment in favor of Petitioners. Petitioners specifically seek an order from the Court of Appeals that (1) Petitioners have standing to challenge the final agency order in question, (2) the agency order is a final order that violates ORS 530.450 and is therefore outside the range of discretion delegated to the agency by law, and (3) ORS 530.450 is not an unconstitutionally undue burden on the State Land Board nor otherwise a violation of the separation of powers. Petitioners further seek an order vacating and setting aside the unlawful agency order and returning the land subject to that unlawful agency order back to the Department of State Lands.

RESPECTFULLY SUBMITTED this 11th day of September, 2015.



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**CERTIFICATE OF FILING AND PROOF OF SERVICE**

I certify that on September 11, 2015, I filed the original of this Opening Brief and Excerpts of Record with the Appellate Court Administrator by using the Court's electronic filing system. I further certify that on September 11, 2015, I served a true copy of this Opening Brief and Excerpts of Record by email and by using the Court's eService system, on:

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**CERTIFICATE OF COMPLAINT WITH BRIEF LENGTH AND  
TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief is 9,814 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).



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SENECA SAWMILL CO.

003/012

## OREGON DEPARTMENT OF STATE LANDS PURCHASE AND SALE AGREEMENT

**1. PRICE/PARCEL DESCRIPTION: Prospective Purchaser (Print Name)**  
Seneca Jones Timber Company

offers to purchase from Seller (the State of Oregon, acting by and through the State Land Board/Department of State Lands), the following described real property ("the Parcel") situated in the State of Oregon, County of Douglas and commonly identified as East Hakki Ridge

Map No. 22-11W-03-01500; 22-11W-00-00100; 22-11W-00-00304; 22-11W-10-00300  
(Parcel Name; Map and Tax Lot Number)  
for the purchase price of (in U.S. currency)

on the following terms: Earnest money herein receipted for \$ 189,500.00

at closing and upon delivery of deed the remaining balance of \$ 1,705,500.00

**2. PROSPECTIVE PURCHASER REPRESENTATION:** As of the date of signing this agreement, Prospective Purchaser has sufficient funds available to close this transaction in accordance with the terms proposed in this agreement and is not relying on any contingent source of funds or financing. Prospective Purchaser acknowledges that the earnest money provided to Seller will be forfeited to Seller, if the remaining balance is not provided by 5:00 p.m. Pacific Time on the 45th business day, after acceptance of this Purchase and Sale Agreement.

Prospective Purchaser Initials

Date 4/11/2014

**3. PARCEL TITLE/DEED:** Seller shall convey title to the Parcel in fee simple, excepting and reserving subsurface and geothermal rights, reserving access rights, and creating easement maintenance obligations. Seller shall convey marketable title to the Prospective Purchaser by statutory Bargain and Sale Deed (ORS 93.860) subject to the following:

Excepting and reserving to Grantor, its successors, and assigns:

Mineral Rights

"Excepting and reserving to itself, its successors, and assigns all minerals as defined in ORS 273.775 (1), including soil, clay, stone, sand and gravel, and all geothermal resources, as defined in ORS 273.775 (2), together with the right to make such use of the surface as may be reasonably necessary for prospecting for, exploring for, mining, extracting, reinjecting, storing, drilling for, and removing, such minerals, materials, and geothermal resources.

In the event use of the premises by a surface rights owner would be damaged by one or more of the activities described above, then such owner, shall be entitled to compensation from state's lessee to the extent of the diminution in value of the real property, based on the actual use by the surface rights owner at the time the state's lessee conducts any of the above activities."

Access Easement

"Reserving to Grantor, the Oregon Department of Forestry ("ODF"), and to each of their successors and assigns, a perpetual, non-exclusive easement for ingress and egress by any means and for any lawful

purpose over, across, and upon all roads on the Property for the benefit Grantor's and ODF's appurtenant properties (the "Roads"), together with the right to construct and reconstruct the Roads to accomplish the purposes of this easement. Grantee, Grantor, and the successors and assigns of each, shall, pursuant to ORS 105.170 – 105.185, share maintenance obligations and related costs in proportion to their use of the Roads. Grantor and Grantee intend for this maintenance agreement to touch and concern the Property, bind their successors and assigns, and run with the Property in perpetuity. Nothing in this road maintenance agreement is to be construed as permitting any violation of Article XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon."

4. **TIMBER PROCESSING RESTRICTION:** Prospective Purchaser shall comply with all laws of the State of Oregon relating to the cutting, sale, or harvest of timber, and Prospective Purchaser shall further ensure that any timber that is cut or otherwise harvested from the Parcel shall not be sold or exported unless the timber is processed in Oregon, unless Prospective Purchaser receives written authorization from Seller, or Seller's designee, that such timber may be processed outside of Oregon. Prospective Purchaser and Seller intend for this restriction to: (1) be a binding covenant of Prospective Purchaser for as long as Prospective Purchaser holds title to the Parcel; (2) be enforceable by Seller, its successors and assigns to the fullest extent allowable under Oregon law, with all remedies legal and equitable available to Seller, including injunctive relief; and (3) survive closing (as defined below) and not merge with the deed.

5. **SELLER REPRESENTATIONS:** Prospective Purchaser should satisfy itself with the information evaluated prior to the sale and not rely solely on any representations made by the Seller. Seller is not responsible for the Prospective Purchaser's inability to inspect the Parcel.

The Parcel has not been surveyed. Parcel size has been estimated through GIS mapping. Seller is not responsible for inaccuracies in the size of the parcel and has made every effort to provide a reasonably accurate size. Similarly, the Seller has relied on a number of sources for all available information and makes no guarantee or warranties for its accuracy.

Seller knows of no material defects in or about the Parcel. Seller has no knowledge of unrecorded access easements on the Parcel and no knowledge of past or present non-resource use (such as but not limited to cemeteries, landfills, dumps) on the Parcel. Seller is not "a foreign person" under the Foreign Investment in Real Property Tax Act.

Seller agrees to promptly notify Prospective Purchaser if, prior to closing, Seller receives notice of any event or condition which could result in making any previously disclosed material information relating to the Parcel misleading or incorrect.

Prospective Purchaser acknowledges that the above representations are not warranties regarding the condition of the Parcel and are not a substitute for, nor in lieu of, Prospective Purchaser's own responsibility to conduct a thorough and complete investigation, including the use of professionals, where appropriate, regarding all material matters bearing on the condition of the Parcel, its value and its suitability for Prospective Purchaser's intended use.

6. **"AS-IS":** Prospective Purchaser is purchasing the Parcel "AS-IS", in its present condition and with all defects apparent or not apparent.

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7. **CONTINGENCIES:** This Agreement is contingent upon (1) seller securing permanent, non-exclusive, appurtenant easement(s) for vehicular ingress and egress to the Parcel on or before closing; and (2) approval by the Oregon Department of Justice, if required.

8. **TITLE INSURANCE:** A preliminary title report has been made available through the Seller. If Prospective Purchaser does not fully understand the preliminary title report, Prospective Purchaser should contact the title company for clarification. Seller shall convey marketable title to the Parcel to the Prospective Purchaser. The Seller is NOT furnishing Seller's title insurance on the Parcel. The Prospective Purchaser is responsible for title insurance on the Parcel if desired.

9. **LEVY OF PROPERTY TAXES:** As property of the State of Oregon the Parcel has NOT been subject to property tax. Once title is transferred into private ownership, the Parcel will be taxable. The Prospective Purchaser is responsible for obtaining an estimate of annual property taxes from the County Assessor, prior to bidding on the Parcel. There are no penalty taxes for the prior state ownership.

10. **CLOSING COSTS:** The Prospective Purchaser is responsible for obtaining all title insurance, and paying for all closing costs, including, but not limited to, recording fees, document preparation fees and escrow fees. Seller has paid for an appraisal of the Parcel and its timber (if applicable), and endangered plant and animal species review.

11. **ESCROW:** This transaction will be closed at Fidelity National Title Insurance, a neutral escrow located in the State of Oregon. All costs of escrow and closing fees must be paid by the Prospective Purchaser.

12. **CLOSING:** Closing must occur by 5:00 p.m. Pacific Time on the forty-fifth (45) business day after acceptance of the Purchase and Sale Agreement. "Closing" occurs when the purchase price for the Parcel is paid to Seller in full and the deed transferring ownership is recorded. Seller and Prospective Purchaser acknowledge that for closing to occur by the closing deadline, it may be necessary to execute documents and deposit Funds in escrow prior to that date.

13. **EARNEST MONEY PAYMENT/ REFUND:** If through no fault of the Prospective Purchaser (1) Seller fails to deliver marketable title, or (2) Seller fails to complete this transaction in accordance with this agreement; this agreement will terminate and all earnest money must be promptly refunded to Prospective Purchaser. If all contingencies provided in Section 7 are satisfied and: (1) Prospective Purchaser's bank does not pay, when presented, any check given as earnest money; or (2) Prospective Purchaser fails to complete this transaction in accordance with this agreement; Prospective Purchaser shall forfeit all earnest money paid or agreed to be paid to Seller either as liquidated damages or as otherwise allowed under Oregon law, and this transaction will be terminated. It is the intention of the parties that the Seller's sole remedy against the Prospective Purchaser for failure to close this transaction be limited to the amount of the earnest money and all legal fees and collection fees required to collect the earnest money from the Prospective Purchaser.

14. **BINDING EFFECT/CONSENT:** This agreement is binding upon the heirs, personal representatives, successors and assigns of Prospective Purchaser and Seller. However, the Prospective Purchaser's rights under this agreement or in the Parcel are not assignable without prior written consent of Seller.

15. **WAIVER OF RIGHT OF RECISSION:** In signing this agreement, the Prospective Purchaser waives any right of recission unless: (1) a material condition or event alters the Parcel; or (2) Seller fails to deliver marketable title to the Parcel.

16. **APPROVED PROPERTY USES:** THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE

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PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

PROSPECTIVE PURCHASER SIGNATURE: COMPANY NAME (If applicable): Seneca Jones Timber CompanyPOSITION: Manager

DATE: 4/11/2014

DSL OFFICIAL: DATE: 15 April 2014POSITION: Director

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

CASCADIA WILDLANDS, an Oregon non-profit corporation; AUDUBON SOCIETY OF PORTLAND, an Oregon non-profit corporation; the CENTER FOR BIOLOGICAL DIVERSITY, a California corporation; and JOSHUA LAUGHLIN,

Petitioners,

vs.

OREGON DEPARTMENT OF STATE LANDS, an administrative agency of the State of Oregon,

Respondent.

Case No.

**PETITION FOR REVIEW OF AN AGENCY ORDER**

(Administrative Procedure Act, ORS 183.310 *et seq.*)

**INTRODUCTION**

1.

Petitioners Cascadia Wildlands, the Audubon Society of Portland, the Center for Biological Diversity, and Joshua Laughlin (hereafter “Petitioners”) bring this Petition for Review of an agency order against the Oregon Department of State Lands (hereafter “DSL” or “Respondent”) under the provisions of the Oregon Administrative Procedure Act, ORS 183.310 *et seq.*

2.

On April 15, 2014, Respondent entered into a Purchase and Sale Agreement, a final agency order, to sell 788 acres of the Elliott State Forest to Seneca Jones Timber Company. A copy of the Purchase and Sale Agreement is attached hereto.

3.

The vast majority of the parcel, called the East Hakki Ridge parcel, was part of the National Forest System on February 25, 1913, and was selected by, and patented to, the State of Oregon for the purpose of establishing the Elliott State Forest.

4.

The sale of such lands is expressly prohibited by ORS 530.450.

5.

Petitioners seek a declaration, pursuant to ORS 183.484(6) or other authority, that (1) Respondent has erroneously interpreted a provision of law and that a correct interpretation compels the withdrawal of the East Hakki Ridge parcel from sale, (2) that the sale of the East Hakki Ridge parcel and the final agency order for the sale of the parcel is outside the range of discretion delegated to Respondent by law and otherwise in violation of a constitutional or statutory provision, namely ORS 530.450, and (3) that the final agency order is not supported by substantial evidence in the record.

6.

Petitioners further seek an injunction against the sale of the East Hakki Ridge parcel, and to have the agency order finalizing the sale vacated, reversed, set aside and/or remanded to the agency pursuant to ORS 183.484(5).

### **PARTIES**

7.

Petitioner CASCADIA WILDLANDS is an Oregon non-profit corporation headquartered in Eugene, Oregon. Founded in 1998, Cascadia Wildlands represents over 15,000 members and supporters, and has a mission to educate, agitate, and inspire a movement to protect and restore Cascadia's wild ecosystems. Cascadia Wildlands envisions vast old-growth forests, rivers full of salmon, wolves howling in the backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia Bioregion. Cascadia Wildlands has been extensively involved in the conservation and management of the Elliott State Forest over the past 12 years. Cascadia Wildlands'



1 principle business office is in Lane County, Oregon.

2 8.

3 Petitioner AUDUBON SOCIETY OF PORTLAND is an Oregon non-profit  
4 corporation with a mission to promote the enjoyment, understanding and protection of  
5 native birds, other wildlife and their habitats. Audubon Society of Portland currently has  
6 approximately 14,000 members, including many who use Oregon's coastal forests for a  
7 wide variety of recreational purposes. Audubon Society of Portland been involved with  
8 state forest-related issues over the past five years including sitting on three different  
9 advisory committees that looked at issues including the "greatest permanent value" of  
10 state-owned forest lands, Oregon Department of Forestry funding, marbled murrelet  
11 management, and conservation issues with the Board of Forestry. Audubon Society of  
12 Portland has also testified numerous times regarding harvest levels on state forests and  
13 state forest management plans.

14 9.

15 Petitioner CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a  
16 California non-profit corporation dedicated to the preservation, protection and restoration  
17 of biodiversity, native species, and ecosystems. The Center has over 50,000 members  
18 worldwide, including members within this county. The Center has offices in Tucson,  
19 Arizona; Silver City, New Mexico; Washington, D.C., San Francisco, Los Angeles, and  
20 Joshua Tree, California; Portland, Oregon; Seattle, Washington; Minneapolis, Minnesota;  
21 Richmond, Vermont; and Anchorage, Alaska. The Center is actively involved in oversight  
22 of state forest management in Oregon, including o the Elliott State Forest.

23 10.

24 Petitioner JOSHUA LAUGHLIN is an adult citizen of the United States and a  
25 resident of Lane County, Oregon. He is employed by Cascadia Wildlands, but brings this  
26 action in his individual capacity.

11.

Respondent OREGON DEPARTMENT OF STATE LANDS (“DSL”) is an administrative agency of the Oregon State Land Board. DSL, by and through its director Mary Abrams, entered into the Purchase and Sale Agreement for East Hakki Ridge parcel on April 15, 2014.

### THE NATURE OF PETITIONERS’ INTERESTS

12.

Petitioner Joshua Laughlin has visited the Elliott State Forest on numerous occasions, including the East Hakki Ridge parcel. Mr. Laughlin has spent years of his life working to protect the forests, waters, and wildlife of the Elliott State Forest from clearcutting and other environmentally destructive practices. Mr. Laughlin enjoys visiting the Elliott State Forest and the East Hakki Ridge parcel, including hiking, looking for wildlife, and experiencing the peace and solitude of some of the last intact and unlogged coastal forests in Oregon. Mr. Laughlin has definite plans to return to the Elliott State Forest and the East Hakki Ridge parcel.

13.

Mr. Laughlin will be adversely affected and aggrieved by the sale of the East Hakki Ridge parcel because privatization will prevent him from using, enjoying, and experiencing the land in the future. Selling the land to Seneca Jones Timber Company to be clearcut will further affect and aggrieve Mr. Laughlin’s use and enjoyment of the land because clearcutting causes irreparable damage to the native forests and unique habitat that currently exists there. The native forests of the East Hakki Ridge parcel are more than one hundred years old, and provide a unique and increasingly rare experience for Mr. Laughlin. If logged, these forests will not grow back within Mr. Laughlin’s lifetime.

14.

Petitioners Cascadia Wildlands, Center for Biological Diversity, and Audubon Society of Portland are all registered non-profit corporations with charitable missions that include protecting and restoring Oregon’s environment, wildlife, and biological diversity.

1 Petitioners have a specific and particular interest in the protection and recovery of the  
2 Elliott State Forest and the imperiled wildlife that lives there. The Elliott State Forest plays  
3 a unique and important role in restoring and maintaining the balance and health of  
4 Oregon's greater natural environment. The Elliott State Forest is a 93,000 acre mostly  
5 contiguous block of coastal rainforest located between Reedsport and Coos Bay, Oregon,  
6 just inland from the Pacific Ocean. The Elliott State Forest contains some of the last  
7 unlogged coastal rainforest in Oregon, and is critically important habitat for endangered  
8 species such as coastal coho salmon, northern spotted owls, and marbled murrelets. For  
9 this reason and others, Petitioners have advocated for years for the conservation and  
10 protection of the Elliott State Forest.

11 15.

12 Many of Petitioners' staff, boards, and members have been to the Elliott State  
13 Forest, including the East Hakki Ridge parcel, and some have worked and recreated on the  
14 Elliott State Forest on a regular basis. Petitioners have hosted and continue to host public  
15 outreach and educational events in and about the Elliott State Forest, including  
16 presentations by experts, film showings, outdoor excursions, and other on-site and off-site  
17 events. The Elliott State Forest is regularly featured in Petitioners' newsletters, on their  
18 websites, and other published materials.

19 16.

20 Petitioners have a real and direct interest in the conservation of the Elliott State  
21 Forest and have dedicated substantial time, money, and resources toward that goal. Selling  
22 this public land to the highest bidder to be clearcut will adversely affect Petitioners in a  
23 variety of ways. Privatizing the East Hakki Ridge parcel will prevent Petitioners from  
24 going there and using the land for public hikes, educational events, and other outdoor  
25 activities. Selling the land to Seneca Jones Timber Company to be clearcut, aerially  
26 sprayed, and industrially managed will directly affect Petitioners' ongoing mission to  
27 protect the land, its habitat, and the fish and wildlife that live there. Petitioners cannot  
28 fulfill their organizational missions and goals to protect the Elliott State Forest if it is

1 privatized. Respondent's action causes severe and direct injury to Petitioners interests in  
2 the conservation of the Elliott State Forest because the agency is disposing of 788 acres of  
3 the forest. The disposal of the Elliott State Forest may also limit the ability of Petitioners  
4 to attract new members, retain current members, and to obtain financial support for their  
5 continuing work.

6 17.

7 Petitioners have further interest in the proper and lawful management of Oregon's  
8 state lands, and in Respondent's compliance with Oregon laws surrounding the Elliott State  
9 Forest. By this action, Petitioners seek to further interests that the legislature expressly  
10 wished to have considered.

11 18.

12 Petitioners' injuries are irreparable, and there is an appreciable threat of ongoing  
13 harm to Petitioners. Once the land is privatized, public access and Petitioners' ability to  
14 use and enjoy the land as they currently do is permanently impeded. The loss of native  
15 forests in particular, which cannot be replaced in the span of a lifetime, causes Petitioners  
16 ongoing and irreparable harm for which there is no remedy at law. The environmental  
17 harm from converting a mature native public forest to a private industrial tree farm cannot  
18 be remedied by monetary damages and is permanent and irreparable.

### 19 JURISDICTION AND LEGAL BACKGROUND

20 19.

21 Judicial review of an agency order in other than a contested case is governed by  
22 ORS 183.480 and 183.484. ORS 183.480(1) states, "any person adversely affected or  
23 aggrieved by an order or any party to an agency proceeding is entitled to judicial review of  
24 a final order, whether such order is affirmative or negative in form."

25 20.

26 "Jurisdiction for judicial review of orders other than contested cases is conferred  
27 upon the Circuit Court for Marion County and upon the circuit court for the county in  
28 which the petitioner resides or has a principal business office." ORS 183.484(1).

21.

“The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall: (A) Set aside or modify the order; or (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.” ORS 183.484(5)(a).

22.

“The court shall remand the order to the agency if it finds the agency’s exercise of discretion to be: (A) Outside the range of discretion delegated to the agency by law; (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) Otherwise in violation of a constitutional or statutory provision.” ORS 183.484(5)(b).

23.

“The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.484(5)(c).

24.

ORS 530.450 states, “Any lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale except as provided in ORS 530.510. The state forest shall be known as the Elliott State Forest.”

25.

“Final order” means final agency action expressed in writing. ORS 183.310(6)(b). The Purchase and Sale Agreement for the sale of the East Hakki Ridge parcel is a final order subject to judicial review under ORS 183.484.

**FACTUAL BACKGROUND**

26.

The Oregon Admission Act of 1859 granted the State of Oregon two square miles out of every thirty-six, sections 16 and 36 in each township and totaling approximately 3.5 million acres, with the income received therefrom to go to the benefit of the Common School Fund.

27.

For many years, the State of Oregon disposed of these lands to raise revenue, and by the early 1900s only about 130,000 acres of the land remained under state ownership. Such tracts were typically located within the boundaries of the national forests and were scattered and isolated, creating administrative challenges. It was for this reason that then-Oregon State Forester, Francis Elliott, along with then-Governor Oswald West, started a process to exchange the remaining scattered lands with the federal government for a solid block of national forest land.

28.

The Elliott State Forest was created when approximately 70,000 acres of state lands scattered within the national forests were exchanged for a solid block of national forest land, then the southern tip of the Siuslaw National Forest in Coos and Douglas Counties. In connection with this exchange, the state legislature withdrew the sale of the Elliott State Forest for fifty years, meeting the federal requirement that any national forest land patented to the state should be withdrawn from sale for a period of fifty years. In 1957, with the expiration of that fifty-year commitment approaching, the Oregon Legislature passed ORS 530.450 to reaffirm its commitment indefinitely.

29.

On December 10, 2013, the State Land Board authorized the Department of State Lands to pursue selling five tracts within the Elliott State Forest. The majority of one of these tracts, the East Hakki Ridge parcel, was in the national forest system on February 25,

1 1913 and was selected by, and patented to, the State of Oregon for the purpose of  
2 establishing the Elliott State Forest.

3 30.

4 The East Hakki Ridge parcel is a 788-acre parcel on the northern end of the Elliott  
5 State Forest, near the southern banks of the Umpqua River in Douglas County, Oregon.

6 31.

7 Before, during, and after the approval of this sale, Petitioners provided notice to the  
8 State Land Board and Respondents of the legal concerns at issue here, and specifically  
9 pointed Respondents to ORS 530.450 and the fact that the East Hakki Ridge parcel is  
10 withdrawn from sale by law. Petitioners have also previously contacted the purchaser,  
11 Seneca Jones Timber Company, to advise it that purchasing and logging this area is  
12 unlawful.

13 32.

14 Respondents entered into a Purchase and Sale Agreement for the East Hakki Ridge  
15 parcel on April 15, 2014, finalizing the agency's action in writing and ripening this case for  
16 judicial review. Petitioners were provided a copy of the final agency order after 5:00pm on  
17 Friday, April 19, 2014.

18 **GROUND FOR RELIEF**

19 33.

20 Petitioners incorporate by reference all preceding paragraphs.

21 34.

22 The majority of the East Hakki Ridge parcel was within the national forest system  
23 on February 25, 1913 and was selected by, and patented to, the State of Oregon, for the  
24 purpose of establishing the Elliott State Forest. The sale of such land is expressly  
25 prohibited by law. ORS 530.450.

26 35.

27 On April 15, 2014, Respondent entered into a Purchase and Sale Agreement, a final  
28 agency order, to sell the East Hakki Ridge parcel to Seneca Jones Timber Company.

36.

The sale of this land is not an exchange of land pursuant to ORS 530.510.

37.

The final agency order for the sale of the East Hakki Ridge parcel is outside the range of discretion delegated to Respondent by law and otherwise in violation of ORS 530.450.

38.

Respondents have erroneously interpreted a provision of law, and the correct interpretation requires that the East Hakki Ridge parcel be withdrawn from sale.

39.

The final order for the sale of the East Hakki Ridge parcel is not supported by substantial evidence in the record.

40.

The final agency order authorizing the sale of the East Hakki Ridge parcel must be vacated, reversed, set aside and/or remanded to the agency under ORS 183.484.

### **PETITIONERS' PRAYER FOR RELIEF**

41.

Petitioners respectfully request that this Court:

1. Declare that the sale of the East Hakki Ridge parcel and the final agency order for the sale of the parcel violates state law, specifically ORS 530.450 and the Oregon Administrative Procedure Act;
2. Vacate, reverse, set aside and/or remand the final agency order, and enjoin Respondent from selling the East Hakki Ridge parcel in violation of ORS 530.450;
3. In the event that the sale is finalized or the deed for the land is transferred prior to the conclusion of this case, vacate and reverse the sale of the land and order that the deed for the land be transferred back to the state;
4. Award Petitioners their reasonable costs and attorneys' fees pursuant to ORS 183.497 or other authority; and



5. Grant Petitioners such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 21<sup>st</sup> day of April, 2014.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

CASCADIA WILDLANDS, an Oregon non-profit corporation; AUDUBON SOCIETY OF PORTLAND, an Oregon non-profit corporation; the CENTER FOR BIOLOGICAL DIVERSITY, a California non-profit corporation; and JOSHUA LAUGHLIN,

Petitioners,

vs.

OREGON DEPARTMENT OF STATE LANDS, an administrative agency of the State of Oregon,

Respondent,

and

SENECA JONES TIMBER COMPANY, LLC,

Intervenor-Respondent.

Case No. 62-14-07847

**SUPPLEMENTAL PETITION FOR REVIEW OF AN AGENCY ORDER**

(Administrative Procedure Act, ORS 183.310 *et seq.*)

**INTRODUCTION**

1.

Petitioners Cascadia Wildlands, the Audubon Society of Portland, the Center for Biological Diversity, and Joshua Laughlin (hereafter “Petitioners”) bring this Petition for Review of an agency order against the Oregon Department of State Lands (hereafter “DSL” or “Respondent”) under the provisions of the Oregon Administrative Procedure Act, ORS 183.310 *et seq.*.

2.

On April 15, 2014, Respondent entered into a Purchase and Sale Agreement to sell 788 acres of the Elliott State Forest to Seneca Jones Timber Company. Within the past sixty (60) days, the sale of this land closed and the land and title to the land were conveyed to Seneca Jones Timber Company.

3.

The vast majority of the parcel, called the East Hakki Ridge parcel, was part of the National Forest System on February 25, 1913, and was selected by, and patented to, the State of Oregon for the purpose of establishing the Elliott State Forest.

4.

The sale of such lands is expressly prohibited by ORS 530.450.

5.

Petitioners seek a declaration, pursuant to ORS 183.484(6) or other authority, that (1) Respondent has erroneously interpreted a provision of law and that a correct interpretation compels the withdrawal of the East Hakki Ridge parcel from sale, (2) that the sale of the East Hakki Ridge parcel and the final agency order for the sale of the parcel is outside the range of discretion delegated to Respondent by law and otherwise in violation of a constitutional or statutory provision, namely ORS 530.450, and (3) that the final agency order is not supported by substantial evidence in the record.

6.

Petitioners further seek an injunction against the sale of the East Hakki Ridge parcel, to have the agency order finalizing the sale vacated, reversed, set aside and/or remanded to the agency pursuant to ORS 183.484(5), and an order reversing and vacating the closing of the sale and the transfer of the title and further granting any ancillary relief that is necessary to redress the effects of Respondent's actions wrongfully taken. ORS 183.486.

## **PARTIES**

7.

Petitioner CASCADIA WILDLANDS is an Oregon non-profit corporation

1 headquartered in Eugene, Oregon. Founded in 1998, Cascadia Wildlands represents over  
2 15,000 members and supporters, and has a mission to educate, agitate, and inspire a  
3 movement to protect and restore Cascadia's wild ecosystems. Cascadia Wildlands  
4 envisions vast old-growth forests, rivers full of salmon, wolves howling in the  
5 backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia  
6 Bioregion. Cascadia Wildlands has been extensively involved in the conservation and  
7 management of the Elliott State Forest over the past 12 years. Cascadia Wildlands'  
8 principle business office is in Lane County, Oregon.

9 8.

10 Petitioner AUDUBON SOCIETY OF PORTLAND is an Oregon non-profit  
11 corporation with a mission to promote the enjoyment, understanding and protection of  
12 native birds, other wildlife and their habitats. Audubon Society of Portland currently has  
13 approximately 14,000 members, including many who use Oregon's coastal forests for a  
14 wide variety of recreational purposes. Audubon Society of Portland been involved with  
15 state forest-related issues over the past five years including sitting on three different  
16 advisory committees that looked at issues including the "greatest permanent value" of  
17 state-owned forest lands, Oregon Department of Forestry funding, marbled murrelet  
18 management, and conservation issues with the Board of Forestry. Audubon Society of  
19 Portland has also testified numerous times regarding harvest levels on state forests and  
20 state forest management plans.

21 9.

22 Petitioner CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a  
23 California non-profit corporation dedicated to the preservation, protection and restoration  
24 of biodiversity, native species, and ecosystems. The Center has over 50,000 members  
25 worldwide, including members within this county. The Center has offices in Tucson,  
26 Arizona; Silver City, New Mexico; Washington, D.C., San Francisco, Los Angeles, and  
27 Joshua Tree, California; Portland, Oregon; Seattle, Washington; Minneapolis, Minnesota;  
28

Richmond, Vermont; and Anchorage, Alaska. The Center is actively involved in oversight of state forest management in Oregon, including o the Elliott State Forest.

10.

Petitioner JOSHUA LAUGHLIN is an adult citizen of the United States and a resident of Lane County, Oregon. He is employed by Cascadia Wildlands, but brings this action in his individual capacity.

11.

Respondent OREGON DEPARTMENT OF STATE LANDS (“DSL”) is an administrative agency of the Oregon State Land Board. DSL, by and through its director Mary Abrams, entered into the Purchase and Sale Agreement for East Hakki Ridge parcel on April 15, 2014.

### THE NATURE OF PETITIONERS’ INTERESTS

12.

Petitioner Joshua Laughlin has visited the Elliott State Forest on numerous occasions, including the East Hakki Ridge parcel. Mr. Laughlin has spent years of his life working to protect the forests, waters, and wildlife of the Elliott State Forest from clearcutting and other environmentally destructive practices. Mr. Laughlin enjoys visiting the Elliott State Forest and the East Hakki Ridge parcel, including hiking, looking for wildlife, and experiencing the peace and solitude of some of the last intact and unlogged coastal forests in Oregon. Mr. Laughlin has definite plans to return to the Elliott State Forest and the East Hakki Ridge parcel.

13.

Mr. Laughlin will be adversely affected and aggrieved by the sale of the East Hakki Ridge parcel because privatization will prevent him from using, enjoying, and experiencing the land in the future. Since the sale of the parcel closed, signs have been posted on the property reading “PRIVATE PROPERTY – AREA CLOSED TO ALL PUBLIC USE.” As a result of the sale’s closing, Mr. Laughlin is now prohibited from entering the land to use and enjoy it as he has in the past and as he had definite plans to do. Selling the land to

1 Seneca Jones Timber Company to be clearcut will further affect and aggrieve Mr.  
2 Laughlin's use and enjoyment of the land because clearcutting causes irreparable damage  
3 to the native forests and unique habitat that currently exists there. The native forests of the  
4 East Hakki Ridge parcel are more than one hundred years old, and provide a unique and  
5 increasingly rare experience for Mr. Laughlin. If logged, these forests will not grow back  
6 within Mr. Laughlin's lifetime.

7 14.

8 Petitioners Cascadia Wildlands, Center for Biological Diversity, and Audubon  
9 Society of Portland are all registered non-profit corporations with charitable missions that  
10 include protecting and restoring Oregon's environment, wildlife, and biological diversity.  
11 Petitioners have a specific and particular interest in the protection and recovery of the  
12 Elliott State Forest and the imperiled wildlife that lives there. The Elliott State Forest plays  
13 a unique and important role in restoring and maintaining the balance and health of  
14 Oregon's greater natural environment. The Elliott State Forest is a 93,000 acre mostly  
15 contiguous block of coastal rainforest located between Reedsport and Coos Bay, Oregon,  
16 just inland from the Pacific Ocean. The Elliott State Forest contains some of the last  
17 unlogged coastal rainforest in Oregon, and is critically important habitat for endangered  
18 species such as coastal coho salmon, northern spotted owls, and marbled murrelets. For  
19 this reason and others, Petitioners have advocated for years for the conservation and  
20 protection of the Elliott State Forest.

21 15.

22 Many of Petitioners' staff, boards, and members have been to the Elliott State  
23 Forest, including the East Hakki Ridge parcel, and some have worked and recreated on the  
24 Elliott State Forest on a regular basis. Petitioners have hosted and continue to host public  
25 outreach and educational events in and about the Elliott State Forest, including  
26 presentations by experts, film showings, outdoor excursions, and other on-site and off-site  
27 events. The Elliott State Forest is regularly featured in Petitioners' newsletters, on their  
28 websites, and other published materials.

16.

Petitioners have a real and direct interest in the conservation of the Elliott State Forest and have dedicated substantial time, money, and resources toward that goal. Selling this public land to the highest bidder to be clearcut will adversely affect Petitioners in a variety of ways. Privatizing the East Hakki Ridge parcel will prevent Petitioners from going there and using the land for public hikes, educational events, and other outdoor activities. Selling the land to Seneca Jones Timber Company to be clearcut, aerially sprayed, and industrially managed will directly affect Petitioners' ongoing mission to protect the land, its habitat, and the fish and wildlife that live there. Petitioners cannot fulfill their organizational missions and goals to protect the Elliott State Forest if it is privatized. Respondent's action causes severe and direct injury to Petitioners interests in the conservation of the Elliott State Forest because the agency is disposing of 788 acres of the forest. The disposal of the Elliott State Forest may also limit the ability of Petitioners to attract new members, retain current members, and to obtain financial support for their continuing work.

17.

Petitioners have further interest in the proper and lawful management of Oregon's state lands, and in Respondent's compliance with Oregon laws surrounding the Elliott State Forest. By this action, Petitioners seek to further interests that the legislature expressly wished to have considered.

18.

Petitioners' injuries are irreparable, and there is an appreciable threat of ongoing harm to Petitioners. Once the land is privatized, public access and Petitioners' ability to use and enjoy the land as they currently do is permanently impeded. The loss of native forests in particular, which cannot be replaced in the span of a lifetime, causes Petitioners ongoing and irreparable harm for which there is no remedy at law. The environmental harm from converting a mature native public forest to a private industrial tree farm cannot be remedied by monetary damages and is permanent and irreparable.

**JURISDICTION AND LEGAL BACKGROUND**

19.

Judicial review of an agency order in other than a contested case is governed by ORS 183.480 and 183.484. ORS 183.480(1) states, “any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.”

20.

“Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office.” ORS 183.484(1).

21.

“The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall: (A) Set aside or modify the order; or (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.” ORS 183.484(5)(a).

22.

“The court shall remand the order to the agency if it finds the agency’s exercise of discretion to be: (A) Outside the range of discretion delegated to the agency by law; (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) Otherwise in violation of a constitutional or statutory provision.” ORS 183.484(5)(b).

23.

“The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.484(5)(c).

24.



25.

## FACTUAL BACKGROUND

The Oregon Admission Act of 1859 granted the State of Oregon two square miles out of every thirty-six, sections 16 and 36 in each township and totaling approximately 3.5 million acres, with the income received therefrom to go to the benefit of the Common School Fund.

27.

28.

SUPPLEMENTAL PETITION FOR REVIEW OF AN AGENCY ORDER - Page 8 of 11

1 Forest for fifty years, meeting the federal requirement that any national forest land patented  
2 to the state should be withdrawn from sale for a period of fifty years. In 1957, with the  
3 expiration of that fifty-year commitment approaching, the Oregon Legislature passed ORS  
4 530.450 to reaffirm its commitment indefinitely.

5 29.

6 On December 10, 2013, the State Land Board authorized the Department of State  
7 Lands to pursue selling five tracts within the Elliott State Forest. The majority of one of  
8 these tracts, the East Hakki Ridge parcel, was in the national forest system on February 25,  
9 1913 and was selected by, and patented to, the State of Oregon for the purpose of  
10 establishing the Elliott State Forest.

11 30.

12 The East Hakki Ridge parcel is a 788-acre parcel on the northern end of the Elliott  
13 State Forest, near the southern banks of the Umpqua River in Douglas County, Oregon.

14 31.

15 Before, during, and after the approval of this sale, Petitioners provided notice to the  
16 State Land Board and Respondents of the legal concerns at issue here, and specifically  
17 pointed Respondents to ORS 530.450 and the fact that the East Hakki Ridge parcel is  
18 withdrawn from sale by law. Petitioners have also previously contacted the purchaser,  
19 Seneca Jones Timber Company, to advise it that purchasing and logging this area is  
20 unlawful.

21 32.

22 Respondents entered into a Purchase and Sale Agreement for the East Hakki Ridge  
23 parcel on April 15, 2014. Within the past sixty (60) days, the sale of this land closed and  
24 the land and title to the land were conveyed to Seneca Jones Timber Company.

### 25 **GROUND'S FOR RELIEF**

26 33.

27 Petitioners incorporate by reference all preceding paragraphs.

28 34.

1 The majority of the East Hakki Ridge parcel was within the national forest system  
2 on February 25, 1913 and was selected by, and patented to, the State of Oregon, for the  
3 purpose of establishing the Elliott State Forest. The sale of such land is expressly  
4 prohibited by law. ORS 530.450.

5 35.

6 On April 15, 2014, Respondent entered into a Purchase and Sale Agreement to sell  
7 the East Hakki Ridge parcel to Seneca Jones Timber Company. Within the past sixty (60)  
8 days, the sale of this land closed and the land and title to the land were conveyed to Seneca  
9 Jones Timber Company.

10 36.

11 The sale of this land is not an exchange of land pursuant to ORS 530.510.

12 37.

13 The final agency order for the sale of the East Hakki Ridge parcel is outside the  
14 range of discretion delegated to Respondent by law and otherwise in violation of ORS  
15 530.450.

16 38.

17 Respondents have erroneously interpreted a provision of law, and the correct  
18 interpretation requires that the East Hakki Ridge parcel be withdrawn from sale.

19 39.

20 The final order for the sale of the East Hakki Ridge parcel is not supported by  
21 substantial evidence in the record.

22 40.

23 The final agency order authorizing the sale of the East Hakki Ridge parcel must be  
24 vacated, reversed, set aside and/or remanded to the agency under ORS 183.484.

25 **PETITIONERS' PRAYER FOR RELIEF**

26 41.

27 Petitioners respectfully request that this Court:

1. Declare that the sale of the East Hakki Ridge parcel and the final agency order for the sale of the parcel violates state law, specifically ORS 530.450 and the Oregon Administrative Procedure Act;
  2. Vacate, reverse, set aside and/or remand the final agency order, and enjoin Respondent from selling the East Hakki Ridge parcel in violation of ORS 530.450;
  3. In the event that the sale is finalized or the deed for the land is transferred prior to the conclusion of this case, vacate and reverse the sale of the land and order that the deed for the land be transferred back to the state;
  4. Award Petitioners their reasonable costs and attorneys' fees pursuant to ORS 183.497 or other authority; and
  5. Grant Petitioners such other and further relief as the Court deems just and equitable.
- Respectfully submitted and dated this 3rd day of July, 2014.

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FILED  
14 JUL 11 PM 4:45  
CIRCUIT/DISTRICT COURTS  
OF OREGON  
FOR LANE COUNTY

BY                     

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

CASCADIA WILDLANDS, et al.,  
  
Petitioners,  
  
vs.  
  
OREGON DEPARTMENT OF STATE  
LANDS,  
  
Respondent,  
  
and  
  
SENECA JONES TIMBER COMPANY, LLC,  
  
Intervenor-Respondent.

Case No. 62-14-07847

SECOND DECLARATION OF  
JOSHUA LAUGHLIN

I, Joshua Laughlin, do hereby declare under penalty of perjury:

I am an adult citizen of the United States, a resident of Lane County, Oregon, and a  
Petitioner in this action. I have lived in Lane County, Oregon for more than twenty years.

The Elliott State Forest is an approximately 93,000-acre public forest in the Oregon  
Coast Range, located just south of the Umpqua River near Reedsport, Oregon. The East Hakki  
Ridge parcel, which is the subject of this litigation, is an approximately 788-acre parcel of  
forested land in the northwestern corner of the Elliott State Forest. The East Hakki Ridge  
parcel was once part of the Elliott State Forest, but was recently sold to the Seneca Jones  
Timber Company.

The Elliott State Forest in general, and the East Hakki Ridge parcel specifically, are very  
important to me. I have been to the Elliott State Forest dozens of times for work, recreation,  
and personal use, including to the East Hakki Ridge parcel. I have visited the East Hakki

621407847  
DD  
Declaration  
2866867



JUL 14 2014  
map

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Ridge parcel to enjoy hiking, looking for wildlife, and experiencing the peace and solitude of some of the last intact and unlogged coastal forests in Oregon. I have personally used and enjoyed the East Hakki Ridge parcel, and I plan to continue using and enjoying the East Hakki Ridge parcel in the future.

I attempted to go to the East Hakki Ridge parcel most recently on July 10, 2014. For the first time, I was confronted by "no trespassing" signs as I approached the parcel. Each sign read:

PRIVATE PROPERTY  
AREA CLOSED TO  
ALL PUBLIC USE  
Trespassing Will Be Prosecuted To The Full  
Extent Of The Law Under ORS 164.245  
This Private Property Owned and Managed by:  
Seneca Jones Timber Company

Attached to this declaration are two pictures that I took on July 10, 2014 of the signs that I saw as I approached the East Hakki Ridge parcel. I am the person in the second picture. I counted at least five different "no trespassing" signs flanking the parcel.

Since seeing these signs, it is clear to me that I am no longer permitted to use and enjoy the East Hakki Ridge parcel. I was not able to visit and enjoy the once-public East Hakki Ridge parcel as I planned to on July 10, 2014, and I do not now believe that I will be permitted to use and enjoy it again in the future.

The sale of the East Hakki Ridge parcel, and the conversion of the parcel from public land to private land, has caused me substantial and direct harm. I cannot use and enjoy the land as I once did and as I planned to do again. The privatization of this public land has directly and concretely prevented me from and experiencing an area that I once used and had legal access to.

I care significantly about this land. I have spent years of my life working to protect the forests, waters, and wildlife of the Elliott State Forest from clearcutting and other environmentally harmful practices. The Elliott State Forest is important to me because it contains some of the last unlogged coastal rainforest in Oregon, and provides critically important habitat for endangered species such as coastal coho salmon, northern spotted owls,

1 and marbled murrelets.

2 The loss of 788 acres of the Elliott State Forest harms me both personally and  
3 professionally. Selling the land to be intensely managed for timber production will cause  
4 further harm because clearcutting causes severe environmental damage to the native forests  
5 and unique forested habitat that I use and enjoy. The native forests of the East Hakki Ridge  
6 parcel are more than one hundred years old, and provide me a unique and increasingly rare  
7 outdoor experience. If logged, these forests will not grow back into maturity within my  
8 lifetime. Now that the land is private, it can be clearcut with fifteen days notice, and I  
9 understand that that timeframe can be shortened or waived upon request.

10 I am also the Campaign Director for Petitioner Cascadia Wildlands. Cascadia Wildlands  
11 is an Oregon non-profit corporation whose mission is to educate, agitate, and inspire a  
12 movement to protect Cascadia's wild ecosystems. The organization represents 18,000  
13 members and supporters, most whom live in Oregon. We envision vast old-growth forests,  
14 rivers full of wild salmon, wolves howling in the backcountry, and vibrant communities  
15 sustained by the unique landscapes of the Cascadia bioregion. I have worked for Cascadia  
16 Wildlands for 13 years.

17 Cascadia Wildlands has a significant interest in the protection and recovery of the Elliott  
18 State Forest, and the organization has dedicated a substantial amount of time, money, and  
19 energy into preserving the Elliott State Forest as a public space for public use and for the  
20 continuing benefit of the people, forests, waters, and wildlife of this state.

21 Cascadia Wildlands has hosted and continues to host public outreach and educational  
22 events in and about the Elliott State Forest, including presentations, outdoor excursions, and  
23 other on-site and off-site events. The Elliott State Forest is regularly featured in Cascadia  
24 Wildlands' newsletters, on its website ([http://www.cascwild.org/campaigns/protecting-forests-  
25 and-wild-places/save-the-elliott-rainforest/](http://www.cascwild.org/campaigns/protecting-forests-and-wild-places/save-the-elliott-rainforest/)), and other published materials.

26 Privatizing the East Hakki Ridge parcel will prevent Cascadia Wildlands from going  
27 there and using the land for public hikes, educational events, and other outdoor activities.  
28 Selling the land to Seneca Jones Timber Company to be clearcut, aerially sprayed, and

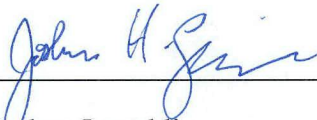


1 industrially managed will directly affect Cascadia Wildlands' ongoing mission to protect the  
2 land, its habitat, and the wildlife that live there. Cascadia Wildlands cannot fulfill its mission  
3 and goals to protect the Elliott State Forest if it is privatized.

4 I have a personal interest in protecting my own use, enjoyment, and access to the East  
5 Hakki Ridge parcel, and I have a direct stake in the outcome of this case. Cascadia Wildlands  
6 and I also have an interest in maintaining the public ownership of the Elliott State Forest in  
7 general, and the East Hakki Ridge parcel in particular, to be held as a lasting and enduring  
8 asset and legacy for the people, waters, and wildlife of this state.

9 I hereby declare that the above statement is true to the best of my knowledge and belief,  
10 and that I understand it is made for use as evidence in court and is subject to penalty for  
11 perjury.

12 Dated this 11th day of July, 2014.

13  
14   
15 Joshua Laughlin

16  
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27  
28

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# PRIVATE PROPERTY

AREA CLOSED TO  
ALL PUBLIC USE

Trespassing Will Be Prosecuted To The Full  
Extent Of The Law Under ORS 164.245

THIS PRIVATE PROPERTY OWNED AND MANAGED BY



**Seneca Jones Timber Company**

PO Box 10265, Eugene, OR 97440 Ph. 541-689-1011  
PO Box 2129, Roseburg, OR 97470 Ph. 541-673-0084







1 In that same meeting, the Department requested authorization to sell, among several others, a  
 2 parcel within the Elliott State Forest commonly referred to as East Hakki Ridge. AR pp 593-  
 3 601. The Board approved the sale. AR p 608.

4 East Hakki Ridge comprises four tax lots in Douglas County. Prior to the sale, these four  
 5 tax lots were assets of the Common School Fund. Declaration of Mary Abrams (“Abrams  
 6 Dec.”), ¶¶ 3-7, Ex. 102, 103.<sup>1</sup> The State acquired tax lot (“TL”) 100 from a private party and not  
 7 from the United States. Abrams Dec., Ex. 104. The State acquired the remaining three lots from  
 8 the United States in 1927 “in lieu” of lands owed to the State but unavailable for transfer when  
 9 Oregon was admitted to the Union in 1859. Abrams Dec., ¶¶ 3-7, Ex. 102, 103.

10 Following the December 2013 State Land Board meeting, the Director of the Department,  
 11 Mary Abrams, implemented the decision of the State Land Board, by initiating an open bidding  
 12 process for the sale of the East Hakki Ridge parcel. AR pp 2100-2187, 2213-14 (supplemental  
 13 bid packet, auction notice). The Department received one bid. AR pp 2240-50. On April 15,  
 14 2014, Director Abrams entered into a purchase and sale agreement with the sole bidder, Seneca  
 15 Jones Timber Company, for the sale of East Hakki Ridge. AR p 2244.

16 Petitioners sought judicial review of the purchase and sale agreement and a preliminary  
 17 injunction preventing the parties from closing the sale. In their petition and motion, petitioners  
 18 argued that the sale of East Hakki Ridge is prohibited by ORS 530.450 and the purchase and sale  
 19 agreement constitutes a final agency order.

20 The statute on which petitioners rely provides: “Any lands in the national forests on  
 21 February 25, 1913, selected by and patented to, the State of Oregon, for the purpose of  
 22 establishing a state forest, hereby are withdrawn from sale \* \* \*.”<sup>2</sup> There is no dispute between

23  
 24 <sup>1</sup> References within this brief to the Declaration of Mary Abrams are to the Declaration dated  
 25 May 1, 2014, and filed by the Department in opposition to the petitioners’ motion for  
 preliminary injunction.

26 <sup>2</sup> Originally, ORS 530.450 contained a 50-year prohibition on the sale of land. The prohibition  
 was set to expire in 1963; however, the Legislative Assembly amended the statute in 1957. 1957  
 Or Laws ch. 240, section 1.

petitioners and the Department on the application of ORS 530.450, if valid, to TL 1500, 300 and 304. The question is whether the Board is bound by the statute.

This Court heard petitioners' Motion for Preliminary Injunction on May 8 and denied it on May 9. Subsequently, the parties closed on the sale of East Hakki Ridge. On May 27, 2014, Director Abrams completed the final paperwork and the State received payment. Supplemental Administrative Record ("SAR") pp 2262-83. The title company recorded the deed transferring ownership of East Hakki Ridge to Seneca on May 27. SAR pp 2284-2302.

Petitioners amended the Petition by adding allegations that the sale of the land closed and title transferred to the buyer. The Amended Petition seeks to vacate or reverse the "final agency order authorizing the sale" or the "final agency order for the sale." Amended Petition, ¶¶ 35, 37, 39, 40. It is unclear from the Amended Petition what document petitioners contend to be the final agency order.

### III. STANDARD OF REVIEW UNDER APA

Petitioners have petitioned for judicial review under the Administrative Procedures Act (APA), ORS 183.484. ORS 183.484 is the sole and exclusive remedy available for review of a state agency order in other than a contested case. ORS 183.480 (2). Petitioners allege that the agency "erroneously interpreted a provision of law" by selling East Hakki Ridge and specifically, that it violated ORS 530.450 by selling the parcel. ORS 183.484 (5) (a). The Court's role is to determine whether the agency correctly applied the law. *Bertsch v DLCD*, 252 Or App 319, 324-325 (2012) (involving statutory interpretation).

### IV. ARGUMENT

#### A. Petitioners Fail to Establish a Justiciable Controversy.

Petitioners contend they are harmed by the lack of access to recreational and educational use of the Elliott State Forest and by harvest of the timber on the land. These contentions fail to



FILED  
AT 1:06 P.M. FEB 18 2015

FEB 18 2015

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

Circuit Court for Lane County, Oregon  
By CE

CASCADIA WILDLANDS, an Oregon non-profit corporation; AUDOBON SOCIETY OF PORTLAND, an Oregon non-profit corporation; the CENTER FOR BIOLOGICAL DIVERSITY, a California corporation; and JOSHUA LAUGHLIN,

Petitioners,

vs.

OREGON DEPARTMENT OF STATE LANDS,  
an administrative agency of the State of Oregon,

Respondent,

SENECA JONES TIMBER COMPANY, LLC,  
an Oregon limited liability company

Intervenor-Respondent.

Case No. 62-14-07847

OPINION and ORDER

THIS MATTER came before the Court on Petitioners Cascadia Wildlands, Audobon Society of Portland, the Center for Biological Diversity, and Joshua Laughlin's ("Petitioners") *Petition for Judicial Review of an Agency Order*<sup>1</sup> ("Petition") (filed April 21, 2014). Petitioners dispute the Department of State Land's ("DSL") final agency order selling 788 acres (a parcel known as East Hakki Ridge) of the Elliott State Forest to Seneca Jones Timber Company ("Seneca"). Petitioners request that the Court vacate and reverse DSL's final agency order for the sale of the East Hakki Ridge.

On September 11, 2014, the Court held a hearing on the Petition. Daniel Kruse and Nicholas Cady represented Petitioners, Christina Beatty-Walters of the Oregon Department of

<sup>1</sup> Petitioners filed a *Supplemental Petition for Review of an Agency Order* on July 8, 2014.

FEB 20 2015

Justice represented DSL, and Dominic Carollo of Yockim Carollo LLP represented Seneca.

ORS 183.484 governs this Court's judicial review of the final agency order. Having reviewed the final agency order pursuant to ORS 183.484(5), the Court dismisses the Petition for judicial review of DSL's sale of the East Hakki Ridge parcel.

### **Background**

East Hakki Ridge is a parcel within the Elliot State Forest. The parcel is comprised of four tax lots in Township 22, located in Douglas County. Prior to the sale to Seneca, the four tax lots were assets of the Common School Fund.

The State acquired one of the tax lots from a private company, Thornton Oar Creek Timber Company, in 1983. As part of Oregon's admission to the Union in 1859, the federal government granted an amount of land in every township to the state for the use of schools. In 1927, the remaining three tax lots were selected as lands the State would acquire from the United States in lieu of lands which were owed to the State but unavailable when the State joined the Union.

The Common School Fund lands, which include the East Hakki Ridge parcel, began experiencing losses in revenue in 2013. For the fiscal year 2013, the net operating income was negative \$2,353,775. The prior fiscal year netted \$6,299,086 in operating income.

As a result of the significant decrease in the Common School Fund's revenue, the DSL Board authorized research regarding the sale or exchange of the parcels, including East Hakki Ridge. In December 2013, the DSL recommended that the Board give the Director of DSL approval to sell the East Hakki Ridge. Director Mary Abrams initiated an open bidding process for the sale of East Hakki Ridge, closing April 2014. DSL received one bid and entered into a purchase and sale agreement with that bidder, Seneca, on April 15, 2014.

Petitioners filed the original *Petition for Judicial Review of an Agency Order* in this Court on April 21, 2014. Seneca subsequently moved to intervene on May 2, 2014.

### **Standard of Review**

This *Petition for Review of an Agency Order* is governed by ORS 183.484 as a review of a final order in other than a contested case. Pursuant to ORS 183.454(5),

- (a) “The court may affirm, reverse, or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
  - (A) Set aside or modify the order, or
  - (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
- (b) The court shall remand the order to the agency if it finds the agency’s exercise of discretion to be:
  - (A) Outside the range of discretion delegated to the agency by law;
  - (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
  - (C) Otherwise in violation of a constitutional or statutory provision.
- (c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.”

### **Discussion**

#### **I. Final Agency Order**

Pursuant to ORS 183.480(3), “[n]o action or suit shall be maintained as to the validity of any agency order except a final order as provided in this section.” ORS 183.310(6)(b) defines a “final order” as a final agency action expressed in writing. A “final order” does not include any tentative or preliminary agency declaration or statement that precedes final agency action or does

not preclude further agency consideration of the subject matter of the statement or declaration. ORS 183.310(6)(b)(A), (B).

Petitioners argue that the Purchase and Sale Agreement for the East Hakki Ridge parcel is a final agency order. In the alternative, Petitioners argue that the execution of the final closing documents, the filing of the sale deed or the recording of the sale deed, amount to a final agency order. DSL argues that the Purchase and Sale Agreement is not a final agency order because it preceded the final agency action of transferring ownership of East Hakki Ridge to Seneca. DSL argues that the Purchase and Sale Agreement memorializes the parties' mutual promises to purchase and sell, but it establishes contingencies that were to be met before the transfer of title, thus requiring additional agency action for the sale to be final.<sup>2</sup> Seneca notes amongst its argument regarding standing that "petitioners have not sufficiently identified the 'order in other than contested case' they are challenging." Intervenor-Resp't's Opening Br. 32.

A purchase offer refusal and an "override" to objections to a land sale are orders within the meaning of ORS 183.484. *Lake County v. State of Oregon*, 142 Or App 162, 165 (1996). In *Lake County*, the State of Oregon rejected Plaintiff Lake County's offer to purchase one of the parcels the State was proposing to sell within Lake County. *Id.* at 164. Several weeks later, the State accepted an offer from the United States Fish and Wildlife Service to purchase the entire area for sale. Pursuant to ORS 273.413(6), the State was required to obtain approval of the governing body of the county in which the land is located. *Id.* Plaintiff objected and filed the initial complaint in the action. *Id.* at 164-65. The State decided to "override" Plaintiff's objections to the sale. *Id.* at 165. The Oregon Court of Appeals determined that the State's refusal to accept Plaintiff's purchase offer and the State's decision to "override" Plaintiff's

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<sup>2</sup> However, DSL "agrees that the Purchase and Sale Agreement precluded further substantive consideration of whether or not to sell East Hakki Ridge to Seneca." Resp't's Resp. Br. 4.



objections to the sale both constituted reviewable orders within the meaning of ORS 183.484. *Id.* at 165.

Whether an agency's order is "final" depends on the context of the regulatory scheme in which the agency's statement or declaration was made. *Oregon Restaurant Services, Inc. v. Oregon State Lottery*, 199 Or App 545, 556 (2005). In *Oregon Restaurant*, a financial analyst with the Oregon State Lottery sent Petitioner letters explaining that several of Petitioner's restaurants were not compliant with the lottery's rule that lottery commissions cannot exceed two-thirds of a restaurant's total income. *Id.* at 551. The letter explained that Petitioner had six months to bring the restaurants into compliance with the aforementioned rule. *Id.* at 552. Petitioner sought judicial review of the letters, asserting that they were final orders. *Id.* The trial court concluded that each letter was a final order and reviewable under ORS 183.484. *Id.* at 553. The Court of Appeals concluded that the trial court erred in determining that the letters were final orders. *Id.* at 558. It reasoned that the letters were merely initial steps in the process of ensuring compliance. *Id.* at 556-57. The Court of Appeals noted that the lottery was required to take additional steps to complete the review process, such as permitting Petitioner to hire an independent CPA to contest the lottery's review. *Id.* at 557.

A contract award based on submitted bids is a final decision. *Pen-Noir, Inc. v. Oregon Department of Higher Education*, 84 Or App 502, 505 (1987). In *Pen-Noir*, Petitioner submitted bids to primary contractors that had bid on a construction project for Portland State University. *Id.* at 504. The primary contractor job was awarded to Hyland & Sons, Inc., who did not select Petitioner as a subcontractor. *Id.* Petitioner was notified orally that the Oregon Department of Higher Education and the Oregon State Board of Higher Education had determined that Hyland & Sons had made a "good faith effort" to meet the Minority Business Enterprise goals and had

awarded Hyland & Sons the contract. *Id.* Petitioner sought review, arguing that the Oregon State Board of Higher Education's determination that Hyland & Sons met the "good faith effort" requirement was a final order subject to review. *Id.* The Oregon Court of Appeals, noting that the Oregon State Board of Higher Education conceded that the contract award was an order, determined that it must also be final because it is an "agency action expressed in writing" and is not a tentative or preliminary decision. *Id.* at 505 (citing ORS 183.310(5)(b); *Fitzgerald v. Oregon Board of Optometry*, 75 Or App 390 (1985)).

This case is analogous to *Lake County* and *Pen-Noir*. First, similar to *Lake County*, the Purchase and Sale Agreement for East Hakki Ridge is an order. In *Lake County*, the Court of Appeals held that the agency's decision to reject the plaintiff's purchase offer was an order reviewable within the meaning of ORS 183.484. Here, the agency, DSL, has accepted Seneca's offer to purchase the East Hakki Ridge. DSL and Seneca entered into a purchase and sale agreement which states that "Seneca Jones Timber Company offers to purchase from Seller (the State of Oregon, acting by and through the State Land Board/Department of State Lands), the following described real property ('the Parcel') situated in the State of Oregon, County of Douglas and commonly identified as East Hakki Ridge." Resp't's Ex. 101. The Purchase and Sale Agreement was signed by the DSL Director on April 15, 2014.

The Court sees no difference between refusing a purchase offer and accepting a purchase offer and entering into a purchase and sale agreement. Therefore, the Purchase and Sale Agreement for East Hakki Ridge is a reviewable order within the meaning of ORS 183.484.

Second, similar to *Pen-Noir*, the Purchase and Sale Agreement is a final order. The Court of Appeals, in *Pen-Noir*, determined that the contract award, which was conceded to be an order, must also be final because it was an agency action expressed in writing and it was not a

tentative or preliminary decision. Here, DSL's action was also expressed in writing via the Purchase and Sale Agreement. Furthermore, the Purchase and Sale agreement reflects that DSL's decision to sell East Hakki Ridge to Seneca was a final decision. In the agreement, under the clause titled "Binding Effect/Consent," the Purchase and Sale Agreement reads that "[t]his agreement is binding upon the heirs, personal representatives, successors and assigns of Prospective Purchaser and Seller." Resp't's Ex. 101. The Purchase and Sale Agreement also contains a provision titled "Waiver of Right of Recission," which states that "[i]n signing this agreement, the Prospective Purchaser waives any right of recission unless: (1) a material condition or event alters the Parcel; or (2) Seller fails to deliver marketable title to the Parcel." Resp't's Ex. 101.

Both the purchaser, Seneca, and the seller, DSL, were bound under the "Binding Effect/Consent" provision in the Purchase and Sale Agreement. Additionally, under the "Waiver of Right of Recission" provision, Seneca was prevented from rescinding its offer unless there was a material defect or unmarketable title. Thus, DSL's decision to enter into the Purchase and Sale Agreement with Seneca was a final, rather than tentative or preliminary, decision.

Furthermore, the context of the regulatory scheme surrounding DSL's sale of East Hakki Ridge indicates that DSL's decision regarding the sale was final. OAR 125-045-0235(10) states that if "the Disposing Agency and a Proposer reach a final agreement on the Terminal Disposition of the State Real Property Interest and this agreement, where required, is approved by the Attorney General pursuant to ORS 291.047, the Disposing Agency must transfer the State Real Property Interest to the successful Proposer in accordance with the terms of the agreement." This regulatory scheme indicates that the Purchase and Sale Agreement was a final decision by DSL.

Therefore, the Purchase and Sale Agreement is a final agency order reviewable under ORS 183.484.

## **II. Standing**

Pursuant to ORS 183.480, a petitioner has standing if the petitioner is adversely affected or aggrieved by the agency order. An organization petitioner cannot rely on “representational” standing, rather the organization must show how the organization is adversely affected or aggrieved. *Local No. 290, Plumbers & Pipefitters v. Oregon Dept. of Environmental Quality*, 323 Or 559, 567 (1996). A petitioner is “aggrieved” under ORS 183.480 if (1) the petitioner has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the petitioner seeks to further an interest that the legislature expressly wished to have considered; or (3) the petitioner has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding. *People for Ethical Treatment of Animals v. Inst. Animal Care & Use Committee of University of Oregon*, 312 Or 95, 101-02 (1991). These three factors are discussed individually in detail below.

### **A. Injury to a Substantial Interest Resulting Directly from the Governmental Action.**

Petitioners argue that they have suffered an injury to a substantial interest because Petitioners are no longer able to access East Hakki Ridge as they were able to prior to the land sale. DSL argues that Petitioners fail to establish standing under this factor because DSL’s action (selling East Hakki Ridge) did not cause Seneca to deny permission to use the property and because even if the State had retained ownership of East Hakki Ridge, permission to enter also could have been denied. Seneca also argues that Petitioners’ alleged injury is not a result of the actions of DSL, rather the result of the actions of Seneca, a private party.

All parties agree that Oregon courts have not addressed whether access to and use of public land is a “substantial interest.” Because of this, Petitioners cite several federal cases addressing federal standing requirements.

Petitioners’ alleged injury to a substantial interest is based solely on access to and use of East Hakki Ridge. Petitioners, in support of their argument, point to one of the declarations of Petitioner Joshua Laughlin. In part, Mr. Laughlin’s declaration states

“The Elliot State Forest in general, and the East Hakki Ridge parcel specifically, are very important to me. I have been to the Elliot State Forest dozens of times for work, recreation, and personal use, including to the East Hakki Ridge parcel. I have visited the East Hakki Ridge parcel to enjoy hiking, looking for wildlife, and experiencing the peace and solitude of some of the last intact and unlogged coastal forests in Oregon. I have personally used and enjoyed the East Hakki Ridge parcel, and I plan to continue using and enjoying the East Hakki Ridge parcel in the future.

...

Cascadia Wildlands has hosted and continues to host public outreach and educational events in and about the Elliot State Forest, including presentations, outdoor excursions, and other on-site and off-site events. The Elliot State Forest is regularly featured in Cascadia Wildlands’ newsletters, on its website . . . , and other published materials.

Privatizing the East Hakki Ridge parcel will prevent Cascadia Wildlands from going there and using the land for public hikes, educational events, and other outdoor activities.”

Second Decl. of Joshua Laughlin 1-2, 3-4.

As the parties acknowledge in their briefings, no Oregon courts have found standing predicated upon a substantial interest of access to and use of public land. This Court does not intend to expand the definition of standing to designate such an interest as “substantial.”

Therefore, Petitioners have not established standing under this factor.

**B. Furthering an Interest the Legislature Expressly Wished to Have Considered.**

Petitioners argue that they have standing because they seek to further an interest that the Legislature expressly wished to have considered, namely preventing the sale of the Elliot State Forest. DSL argues that Petitioners fail to meet the second factor for standing because Petitioners' objectives conflict with the legislative intent apparent on the face of the statute. DSL asserts that Petitioners' interest simply equates to the interest of the public generally and it does not establish standing. Seneca similarly argues that Petitioners are not furthering an interest the Legislature intended to consider.

ORS 530.450, the governing statute, states that “[a]ny lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale except as provided in ORS 530.510. The state forest shall be known as the Elliot State Forest.”

ORS 530.460 states that

“(1) The Department of State Lands and the State Board of Forestry shall designate and set aside those lands owned by the State of Oregon, under the jurisdiction of the Department of State Lands, which are primarily suited for the growing of timber and other forest products.

(2) The state-owned lands shall be designated and set aside pursuant to ORS 530.470 and 530.480, and when so designated and set aside, shall be known as the Common School Forest Lands and **hereby are dedicated for the primary purposes stated in subsection (1) of this section** and shall be withdrawn from sale except as provided in ORS 530.450.”

(emphasis added).

ORS 530.490(1) states that the

“State Forester hereby is authorized, under the supervision of the State Board of Forestry and the regulations of that board, to manage, control and protect the Elliot State Forest Lands. In each instance the State Forester shall manage,

control and protect such forests and forestlands so as **to secure the greatest permanent value of the lands** to the whole people of the State of Oregon, **particularly for the dedicated purposes of the lands and the common schools to which the resources of the lands are devoted.**”

(emphasis added). ORS 530.500(3) further provides that

“In order to accomplish the purposes of ORS 530.490, the State Forester may:

(3) Permit the use of the lands for other purposes, including but not limited to fish and wildlife environment, landscape effect, protection against flood and erosion, recreation and production and protection of water supplies **when the use is not detrimental to the purpose for which the lands are dedicated.**”

(emphasis added).

Reviewing the statutes cited above, in addition to the remaining statutes within the “Elliot State Forest; Common School Forest Lands” subcategory of ORS Chapter 530, the Court finds that the interest that the Legislature expressly wished to have considered is the benefit and funding of the common schools of the State of Oregon through the Common School Fund lands.

In arguing that Petitioners seek to further interests that the Legislature expressly wished to have considered, Petitioners list several interests that they wish to uphold. First, Petitioners assert that they are furthering the sole interest expressed in ORS 530.450, to prevent the sale of the Elliot State Forest. Petitioners additionally allege that they seek to further the interests of recreation, fish and wildlife protection, carbon sequestration, and land conservation. Petitioners assert that

“[i]n addition to Petitioners’ interest in their own use and enjoyment of the East Hakki Ridge parcel, Petitioners, as public-interest advocacy organizations, also have a stated interest ‘in maintaining the public ownership of the Elliot State Forest in general, and the East Hakki Ridge parcel in particular, to be held as a lasting and enduring asset and legacy for the people, waters, and wildlife of this state.’”

Pet’rs’ Reply Br. 23.

It appears that Petitioners propose to substitute or add interests that have arguably evolved socially and politically. Regardless of the importance of those issues, Petitioners may not supplant their desired interests for those interests the Legislature purposefully intended to promote via legislation. The legislative purpose of the aforementioned statutes is clear; namely, funding the common schools of the State of Oregon.<sup>3</sup>

Petitioners' interests do not align with the interests the Legislature expressly considered in the "Elliot State Forest; Common School Forest Lands" subcategory of ORS Title 44, Chapter 530.<sup>4</sup> Therefore, Petitioners have not established standing under this factor.

**C. Personal Stake in the Outcome of the Controversy as to Assure Concrete Adverseness to the Proceeding.**

The Oregon Supreme Court has held that a "personal stake in the outcome means that the agency's decision will legally affect the petitioner in some way." *PETA*, 312 Or at 104. "[Z]eal does not provide the requisite 'personal stake' in the outcome." *Id.*

Petitioners argue that they have standing under this factor because the sale of East Hakki Ridge has affected their legal rights. Petitioners assert that Mr. Laughlin used and enjoyed the East Hakki Ridge pursuant to the lawful access he had of the public land. As a result of the sale, Mr. Laughlin's right to access the parcel has been terminated by Seneca.

Petitioners further assert that Cascadia Wildlands, Audubon Society of Portland, and the Center for Biological Diversity have hosted events in and about the Elliot State Forest and have invested a significant amount of time and resources in the protection of the Elliot State Forest.

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<sup>3</sup> If Petitioners believe that their elected legislators are not pursuing the interests they value, Petitioners may seek a change through our established democratic election process.

<sup>4</sup> In the event that Petitioners seek to further the interest of the correct application of ORS 530.450, such interest does not confer standing. The Oregon Supreme Court concluded that a "plaintiff must show some injury or other impact on a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." *Budget Rent-A-Car of Washington-Oregon, Inc. v. Multnomah County*, 287 Or 93, 95 (1979).



The organizational Petitioners allege that the “sale of the East Hakki Ridge parcel prevents Petitioners from using the parcel for events, hikes, and other educational activities, impairs Petitioners’ organizational missions, and diminishes the return on Petitioners’ investment into the protection of the Elliot State Forest.” Pet’rs’ Opening Br. 28.

DSL argues that Petitioners’ do not have a legally cognizable interest because Petitioners’ ability to use East Hakki Ridge is not coextensive with public ownership and because Petitioners do not have a cognizable legal right to access land owned by the State. Seneca argues that Petitioners do not have a legally cognizable interest in the land sale because East Hakki Ridge was granted to the State of Oregon for the sole benefit of the common schools. Seneca further argues that Petitioners have no legally cognizable interest in the application of ORS 530.450 to the land sale because Petitioners are a bystander to the sale and do not have statutorily imposed involvement in the statutory scheme.

Apart from federal cases, Petitioners rely only on *Waterwatch of Oregon, Inc. v. Water Resources Commission* to establish standing under this factor. 193 Or App 87 (2004) *vacated*, 339 Or 275 (2005). However, *Waterwatch* is not similar to the case at bar.

In *Waterwatch*, a nonprofit water rights organization sought judicial review of the Water Resources Commission’s approval of a water appropriation permit pursuant to ORS 537.720. *Id.* at 90. In determining standing, the Court of Appeals concluded that

“Oregon’s water law statutes include specific provisions governing judicial review in these circumstances. Those water law statutes contain different standing requirements from the general APA provision cited above. To the extent that the more general provisions of the APA and the specific water law statutes concerning judicial review are different, the water law statutes control.”

*Id.* at 92. The Court of Appeals further concluded that the water law statutes provided standing when a party is affected by an order, rather than adversely affected or aggrieved as required

under the general APA standing analysis. *Id.* at 93. Ultimately, the court determined that petitioner had standing pursuant to ORS 536.075, the applicable water law statute. *Id.* at 96.

Again, addressing the federal cases that Petitioners cite, this Court is not inclined to extend the definition of standing. Petitioners have provided no Oregon cases where similar facts established standing as legally affecting a petitioner in some way.

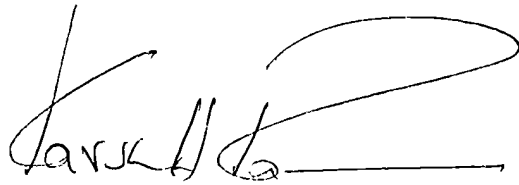
For the aforementioned reasons, Petitioners have not established standing under the third and final factor.

### Conclusion

In conclusion, Petitioners have not established standing under the analysis outlined above. Therefore, Petitioners are not entitled to judicial review of DSL's sale of East Hakki Ridge and the Petition is accordingly DENIED.<sup>5</sup>

Christina Beatty-Walters shall prepare a judgment which shall expressly incorporate this Order therein.

Dated this 18 day of February, 2015.



Karsten H. Rasmussen, Presiding Judge

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<sup>5</sup> In light of this Court's ruling on standing, it cannot reach the merits of the case. A discussion of hypothetical jurisdiction can be found in *Dippold v. Cathlamet Timber Co.*, 98 Or 183, 188 (1920). The Court notes that it makes no determinations or conclusions regarding the merits of the Petition.

FILED  
AT 3:10.06 PM  
MAR 2 2015Circuit Court for Lane County, Oregon  
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CIRCUIT COURT, LANE CO

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF LANECASCADIA WILDLANDS, an Oregon non-  
profit corporation; AUDUBON SOCIETY OF  
PORTLAND, an Oregon non-profit  
corporation; the CENTER FOR  
BIOLOGICAL DIVERSITY, a California  
corporation; and JOSHUA LAUGHLIN,

Petitioners,

v.

OREGON DEPARTMENT OF STATE  
LANDS, an administrative agency of the State  
of Oregon,

Respondent,

SENECA JONES TIMBER COMPANY,  
LLC, an Oregon limited liability company,

Intervenor-Respondent.

Case No. 621407847

GENERAL JUDGMENT

Pursuant to the Opinion and Order issued by this Court on February 18, 2015, the contents  
of which are incorporated herein by reference, it is herebyADJUDGED that judgment is entered in favor of the Respondents and against the  
Petitioners, and the Amended Petition for Review of an Agency Order—which was originally  
titled a Supplemental Petition for Review but by August 6, 2014, Order was thereafter considered  
an Amended Petition for Review of an Agency Order that superseded and replaced the original  
Petition for Review of an Agency Order—is DISMISSED, with prejudice.DATED this 27 day of Feb., 2015.HONORABLE KARSTEN H. RASMUSSEN  
Circuit Court JudgeSubmitted by: Christina L. Beatty-Walters  
Senior Assistant Attorney General  
Of Attorneys for Respondent

MAR 3 2015