

Hearing Date: October 30, 2023  
Hearing Time: 1:30 p.m.

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

BRAD CAREY, PAMELA ROGERS, and  
LIBERTY MANAGEMENT LLC, a  
Washington State limited liability company,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT  
OF NATURAL RESOURCES, a public  
agency,

Defendant.

NO. 19-2-00737-23

**PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

**I. INTRODUCTION AND RELIEF REQUESTED**

Wood Lake ("Lake") is an 11.4-acre lake in Mason County entirely situated on Defendant's, Washington State Department of Natural Resources' ("DNR's"), property. On December 1, 2016, DNR, without obtaining any of the required permits, negligently and recklessly caused the sudden release of tens of millions of gallons of impounded water from Wood Lake into Caldervin Creek ("the Creek"). The unmitigated release of water flooded Plaintiffs' downstream residential lots, caused damage, and significantly and detrimentally altered the Creek's streambed and hydrology so as to subject Plaintiffs' properties to subsequent and recurrent flooding and continued elevated flood risk. The continued unnatural erosion continues to date. This release of water also destroyed productive salmon spawning

1 habitat, extinguished an entire year-class of salmon, and resulted in ecological, cultural, and economic  
2 impacts to the surrounding region.

3 The outflow of Wood Lake is a 4-foot-diameter culvert on the Lake's southern bank. The culvert  
4 had become blocked with debris causing 6 feet of water to be impounded above the Lake's usual overflow  
5 level (the bottom of the culvert). Rather than slowly release this impounded water, DNR employees  
6 cavalierly removed the obstruction with heavy equipment and allowed the impounded water to drain  
7 through the entire culvert without restriction. It has since been calculated that DNR's unplugging of the  
8 culvert resulted in a flow of water that not only surpassed the modeled 100-year flood event, but was  
9 "nearly twice the flow" of a 500-year event. Simply, DNR, in violation of its many duties, did not take  
10 any effort to modulate the flow of water and released the entire 6 feet of head (the amount of water above  
11 the bottom of the culvert) as fast as the 4-foot-wide culvert could flow.

12 It is negligent to release impounded water without due regard to the foreseeable effects of the  
13 release. Indeed, in addition to common sense, the State's own manuals and guidance require the  
14 controlled release of water in these exact situations.

15 The torrent of water immediately flooded portions of Plaintiffs' properties and caused physical  
16 damage to improvements, loss of usable area, and required Plaintiffs to install "ugly" concrete walls to  
17 mitigate the immediate impacts and prevent further flooding. Even more detrimental than the immediate  
18 effect of the flood was the resultant hydrological alteration of the Creek and its streambed caused by  
19 DNR's sudden release of water. Sediment, scoured by the torrent of water rushing along the higher  
20 reaches of the Creek, was deposited and continues to this day to migrate downstream, resulting in the  
21 heightened elevation of the Creek's streambed and restricts its outflow into Hood Canal. In addition to  
22 causing direct damage to Plaintiffs' properties, such a consequence has also destroyed productive salmon  
23 spawning habitat, impeded fish migration, and decimated formerly productive oyster beds.

24 Plaintiffs have attempted to mitigate the consequences and have collectively built approximately  
25 400 feet of reinforced concrete flood walls to protect their property and have undertaken stop-gap  
26 measures to contain the water in the Creek. Given the scope of the problem, however, such has only

1 partially addressed the problems caused by DNR and more work is needed to restore the Creek's  
2 functions and values to its pre-2016 condition and to return the risk of flooding to its pre-2016 state.

3 Plaintiffs brought suit against DNR alleging, negligence, trespass, waste, tortious injury to real  
4 property, inverse condemnation, and violation of the Public Trust Doctrine. DNR has denied all  
5 responsibility and has not assisted in any mitigation or restoration efforts that the Plaintiffs have  
6 undertaken and requested.

7 Accordingly, Plaintiffs Brad Carey ("Carey"), Pamela Rogers ("Rogers"), and Liberty  
8 Management LLC ("Liberty") through their attorneys, Nicholas Power of the Law Office of Nicholas  
9 Power, PLLC, and James P. Grifo of the Law Office of James P. Grifo, LLC, move this Court for  
10 summary judgment and respectfully request the following relief:

11 1. A finding that DNR acted negligently when it released the impounded waters of Wood  
12 Lake on December 1, 2016;

13 2. A finding that DNR tortiously injured Plaintiffs' real properties when it unplugged the  
14 Caldervin Creek culvert;

15 3. A finding that DNR unlawfully trespassed on the properties of the Plaintiffs;

16 4. A finding that DNR committed waste under RCW 4.24.630;

17 5. A finding that DNR inversely condemned the property of Plaintiffs;

18 6. A finding that DNR's actions (and inaction) caused damage to the Plaintiffs and their  
19 properties;

20 7. A finding that DNR violated the Public Trust Doctrine when it breached its fiduciary  
21 duty to maintain, manage, and preserve public trust assets;

22 8. A finding that DNR is liable for treble damages pursuant to RCW 4.24.630.

23 9. Entry of a money judgment in favor of the Plaintiffs in the sum of \$1,427,490.00.

24 10. Entry of a money judgment in favor of Plaintiffs for all reasonable attorneys' fees and  
25 costs, including without limit expert witness fees, associated with this litigation, in an amount to be  
26 determined at a subsequent proceeding;

1           11.     Entry of an Order directing DNR to submit a remediation plan to the Court for approval  
2 and to undertake appropriate remediation to restore the functions and values and hydrology of Caldervin  
3 Creek to its pre-2016 condition, as recommended by qualified habitat biologists and engineers (including  
4 Fisher and Novak).

5           12.     Entry of an Order retaining jurisdiction over this matter to allow for further proceedings  
6 to determine the sufficiency and the completeness of ordered remediation and any other further relief.

7           This motion is made pursuant to CR 56 on the grounds that no genuine issues of material fact  
8 exist regarding the issues set forth above, and that Plaintiff is entitled to judgment as a matter of law.

## 9                               **II.     STATEMENT OF FACTS**

### 10                   **A.   Plaintiffs and Their Properties.**

11           Plaintiffs own eight separate parcels of real property along Caldervin Creek, in or near the town  
12 of Tahuya, in Mason County, Washington. Carey, as an individual, owns a parcel which has been assigned  
13 Assessor's Tax Parcel No. 32227-54-00015 ("the Carey Property"). Rogers, as an individual, was<sup>1</sup> the  
14 owner of that certain tract that has been assigned Assessor's Tax Parcel No. 32227-54-00020 ("the Rogers  
15 Property"). Liberty Management LLC ("Liberty") is wholly owned by Plaintiff Carey and Mr. Wade  
16 Anderson ("Anderson"). Liberty is the owner of parcels which have been assigned Assessor's Tax Parcel  
17 Nos. 32227-54-00049, 32227-54-00050, 32227-54-00051, 32227-54-00054, 32221-44-00010, and 32223-  
18 23-30000 ("the Liberty Properties").  
19

### 20                   **B.   Wood Lake, the Culvert, and Caldervin Creek.**

21           Plaintiffs' parcels are approximately a mile below the culvert, which is the outflow of Wood Lake  
22 (an 11.4-acre lake), and which is the headwater of Caldervin Creek.  
23

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24  
25           <sup>1</sup> Rogers subsequently sold her property in 2019.  
26

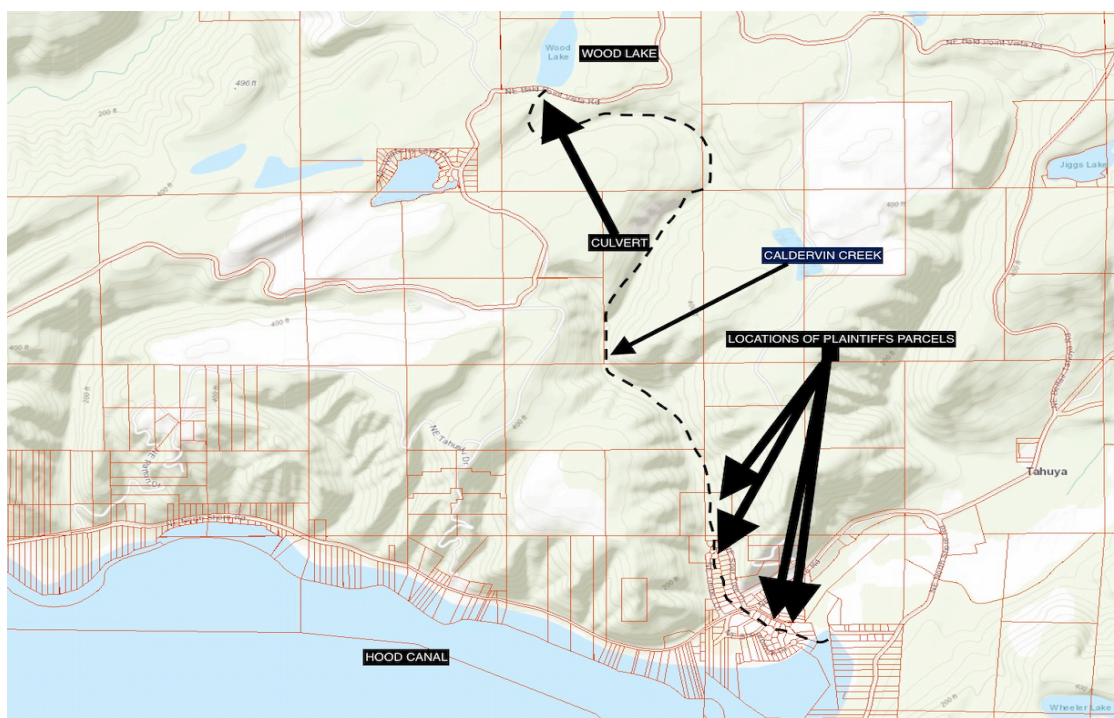




Photo 1. Wood Lake

Fisher Report at 2. Photo 1.

Plaintiffs' parcels are adjacent to (and in the instance of certain Liberty Properties, straddle) Caldervin Creek. The annotated map<sup>2</sup> below shows the general location of the effected properties:



<sup>2</sup> Because of the scale of the map and the size of the parcels, it is impossible to specifically identify the smaller Liberty Parcels. The locations of the Liberty parcels are generally depicted by the two arrows north of NE North Shore Rd. The individual Carey and Rogers parcels are depicted by the two arrows south of the NE North Shore Rd, with the eastern arrow the Carey parcel and the western arrow the Rogers' parcel.

1 Caldervin Creek originates from a four-foot-diameter culvert that serves as the outflow of Wood  
2 Lake. Fisher Declaration, Ex. A. The culvert passes under a gravel road, Bald Point Vista Rd., which  
3 provides access to other DNR parcels and private properties. *Id.*



### 13 C. Plugged Culvert, Impounded Water, and Sudden Release.

14 In November 2016, “two or three weeks prior” to the unplugging, DNR’s Hood Canal District  
15 Manager, Nathan McReynolds who, at the time was DNR’s Belfair Unit Forester, observed that woody  
16 debris had plugged the culvert and as a consequence, water was being impounded in Wood Lake. Power  
17 Declaration, Ex. A (at 10-11).

18  
19 McReynolds did not perceive the impounded water as an emergency requiring immediate  
20 measures and DNR waited several weeks before attempting to address the situation. McReynolds  
21 testified as follows:

22 Q: When you observed the lake level was too high, was it an emergency?

23 Mr. Hornbrook: Objection; calls for a legal conclusion. Go ahead, please.

24 A: I mean, an emergency, no, as in I don’t need to do it tomorrow. But it does need to be dealt  
25 with? Yes.  
26

1 Power Decl., Ex. A (at 39).

2 By December 1, 2016, however, the water had fully submerged the culvert, but it was still below  
3 the surface of the road. Id. (at 15). When asked specifically about the photo above, McReynolds testified  
4 that he observed the water level to be where the text “CEP 13ft” at the left of the photo. Id. (at 32).  
5 Jason Sharp, DNR’s Forrest Practice Regulator, likewise testified that the water level was near the level  
6 of the road and “definitely over” the top of the culvert. Power Decl., Ex. D (at 10-11).

7 Without securing any permit – though such were required<sup>3</sup> – and despite having knowledge that  
8 Caldervin Creek was a fish bearing stream, Power Decl., Ex. A (at 34), DNR employees used an excavator  
9 to dislodge the obstruction from the culvert, which released – without restriction or any efforts at  
10 mitigation or control – a torrent of water into Caldervin Creek. Id. (at 21-22).

12 **D. Downstream Effects of the Torrential Release.**

13 Shortly thereafter, residents began to notice that the Creek was swollen and flowing in excess to  
14 its normal flow even after storm events. Carey Decl., at ¶15-16. The properties of the Plaintiffs were  
15 threatened as the torrent of water rushed down Caldervin Creek. Id. In addition to immediate clean-up,  
16 the Creek now requires costly remediation to restore the Creek so it can safely drain water as the scouring  
17 during the event deposited sediment throughout the system, and elevated the lowest portions (thalweg<sup>4</sup>)  
18 of the streambed. See Fisher Decl., Ex. A.

19  
20 Landscaped yards were eroded and flushed into Hood Canal, cobbles and debris were deposited  
21 in an unnatural way and interfered with the normal functioning of the Creek. See Rogers Decl.; Carey  
22 Decl.; Anderson Decl.; Fisher Decl., Ex. A; Novak Decl., Ex. A.

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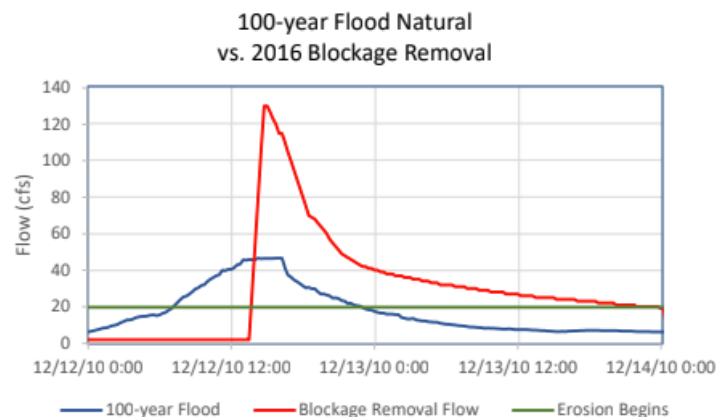
24  
25 <sup>3</sup> A Hydraulic Project approval from WDFW and a Clean Water Act (CWA) Section 401/404 permit was required for  
26 such activity in the Creek. See also, RCW 77.55.021, discussed infra. Expedited and after-the-fact permits are available  
under both those sections. DNR did not obtain or attempt to obtain those permits.

<sup>4</sup> In geography and fluvial geomorphology, a **thalweg** or **talweg** is the line of lowest elevation within a valley or  
watercourse.



Retained to study the impact of the December 1, 2016, release, Engineer Martin Fisher calculated that some 58,344 gallons of water were released through the culvert every minute while draining. Fisher Decl., Ex. A (at 3-4). Even when the water level in Wood Lake had dropped to a height equal to the top of the culvert, the culvert was flowing at a rate of 70 cubic feet per second<sup>5</sup> or 31,416 gallons per minute. Id., (at 3). To put that amount of water in some perspective, Wood Lake was discharging roughly enough water to fill six Olympic-sized swimming pools every hour.<sup>6</sup>

In hydrogeologic terms, and as depicted by the red line in the chart below, “the peak flow resulting from the sudden release of water stored in Wood Lake caused a flow rate in the creek that was about 3 times greater than the peak flow rate of a 100-year flood event” and “nearly twice the flow of the 500-year flood.” Id., (at 5). Quite literally, the flood was a millennial event.



It was not only the volume and velocity of water that caused damage, but the duration of time of the increased flow. The rushing water was sawing away at the banks of Caldervin Creek for a remarkably

<sup>5</sup> There are 7.48 gallons in a cubic foot. So  $70\text{cfs} \times 7.48 \times 60 = 31,416$ .

<sup>6</sup> Per international rules, an Olympic sized swimming pool must measure: 50 meters long, 25 meters wide and be at least 2 meters deep. Resulting in a volume of 2,500,000 liters or 660,430 gallons of water. See Olympic Facilities Rules, Fédération Internationale De Natation. Found at [https://www.fina.org/sites/default/files/finafacilities\\_rules.pdf](https://www.fina.org/sites/default/files/finafacilities_rules.pdf). Last visited 10/4/2023.

1 long time, as the duration of the flow remained elevated above 20 cfs for more than twice as long as it  
2 would have during a 100-year flood event.

3 The release of water by DNR from Wood Lake has altered the physical characteristics of  
4 Caldervin Creek. As the water rushed down the Creek it scoured the Creek's banks and deposited bank  
5 material (sediment) into the thalweg, which elevated the streambed. Indeed, one of the most dramatic  
6 examples of erosion occurred at one of the Liberty properties where an access road was washed out, and  
7 all of the material (sediment) was deposited throughout the Creek downstream:  
8



16  
17 Novak Decl., Ex. A (at 26, photo 18).

18 In unrefuted testimony, Engineer Fisher explains, “instances of unnatural sediment deposits  
19 resulting from the high flow rates on December 1, 2016, were observed at several locations throughout  
20 Caldervin Creek.” Fisher Decl., Ex. A (at 6). Engineer Fisher documented fully mature trees standing in  
21 the main channel, now submerged even at times of moderate flow, which is an unnatural condition. *Id.*  
22  
23  
24  
25  
26



The elevation of the streambed is likewise visible even to the untrained eye when historic photos of the bridge across the Creek are compared. Mason County's file picture of the bridge from February 1970 shows several feet of freeboard whereas the post-event photo from 2018 depicts a foot or less of clearance.





2018



In other words, not only did the release of water cause immediate damage to Plaintiffs' properties in December of 2016, but it altered the geomorphology of the Creek, which has caused subsequent flooding and subjects Plaintiffs' properties to continued elevated risk of flooding in the future. As Engineer Fisher explains "the increased elevation of the streambed means that during high-flow events,

1 such as the 2-year-flood, the channel of Caldervin Creek can no longer accommodate natural increases in  
2 flow rate in the system. As a result, and as was reported by Mr. Carey and others during the site visit,  
3 following the December 1, 2016, event, properties adjacent to Caldervin Creek now suffer from increased  
4 flooding during high flow events. This is consistent with what would be expected from a stream channel  
5 that has been filled in with sediment, since even slight increase in water volume and flow can often crest  
6 streambanks that are lower in elevation relative to the stream's thalweg (lowest part of the channel bed)."

7 Fisher Decl., Ex. A (at 7).

8  
9 As a result of DNR's unplugging of the culvert, an immediate flash flood raced down Caldervin  
10 Creek, which caused damage to Plaintiffs' Properties, destroyed approximately 100-feet of Plaintiff  
11 Liberty's access road, and caused gravel and silt to be unnaturally deposited throughout Caldervin Creek  
12 elevating the Creek's thalweg. In addition, DNR's unplugging of the culvert also decimated productive  
13 salmon spawning habitat.

14 Plaintiffs requisitioned an ecological impact assessment to fully ascertain the effect of the flooding  
15 and the result of the altered geomorphology caused by DNR's unplugging of the culvert. It is undisputed  
16 that Caldervin Creek is a "Type F Stream" meaning that it is a stream that the State of Washington  
17 recognizes as a fish bearing stream. In fact, in the past, WDFW operated a salmon hatchery on what is  
18 now the Liberty property. Carey Decl., at ¶26. WDFW has also performed annual fish counts on  
19 Caldervin Creek. Novak Decl., at Ex. A. This data clearly evidences that the uncontrolled release of water  
20 absolutely decimated an entire class of salmon. Id. Indeed, in 2019, after the sediment had migrated to  
21 the mouth of Creek, no salmon were observed. Id., (at 6). Notably, in the years preceding the 2016 event,  
22 some 2500 salmon had been observed. Id.



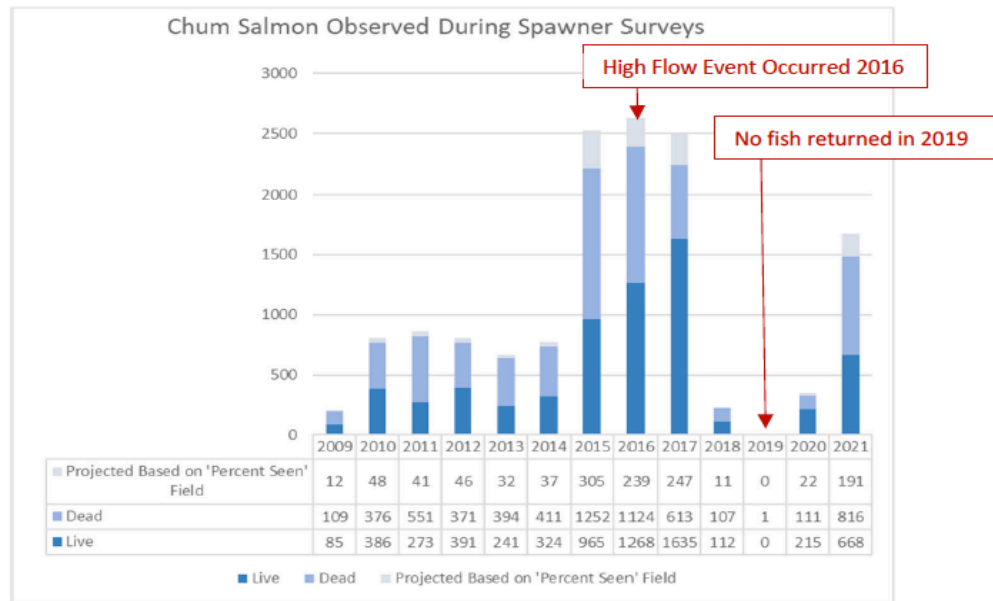


Figure 4. Annual Spawner Survey Counts in Caldervin Creek.

The dearth of salmon in 2019 was caused by DNR’s release of the impounded water. As Biologist Novak explains: “Scouring and smothering of the chum salmon nests and eggs almost certainly killed the entire 2016-year class of salmon eggs that were in the gravel stream bed at the time of the high flow event. This direct mortality led to a reduction in chum spawner run size in subsequent years. In addition to the direct mortality of eggs and fry, the high flow led to unnaturally high scouring of the streambed that altered chum salmon spawning habitat. Such effects to spawning salmon and their habitat reduced the ability of chum to reach their spawning grounds and reduced their effectiveness when spawning. The reduced annual returns of spawning chum salmon would have been felt in the local food web that is so strongly supported in the Pacific Northwest by salmon.” Novak Decl., Ex. A (at 4) (internal citations omitted).

In simple terms the sediment that migrated as a result of the release of water created a plug that restricted salmon from being able to enter Caldervin Creek, degraded productive salmon spawning

1 habitat, and decimated what was once a productive oyster bed. Fisher Decl., Ex. A (at 10); Novak Decl.,  
2 Ex. A. Again, a comparison of historic photos with modern photos is worth 1000 words:



Photo 5. Historic Photo of Channel at Mouth



Photo 6. Recent Photo of Channel at Mouth

1 As Engineer Fisher notes: “A comparison of the foreground in the photographs shows that land  
2 that was once capable of supporting oyster cultivation is no longer capable of supporting such life as a  
3 result of the increased sedimentation and vegetation. The geomorphology of this nexus between the  
4 Caldervin Creek outfall to Hood Canal was significantly altered as a result of the December 1, 2016,  
5 event.” Fisher Report at 10.

6 In February of 2019, after waiting for DNR to produce the public records they had requested,  
7 Plaintiffs finally confirmed that DNR was responsible for clearing Wood Lake’s four-foot-wide culvert.  
8 Accordingly, March of 2019, Plaintiffs submitted an SF210 claim to the Office of Risk Management  
9 (“ORM”), in an effort to achieve an early and inexpensive resolution. In July of 2019, Plaintiffs discovered  
10 that their claims had been denied by ORM, but no explanation for the denial has ever been provided to  
11 the Plaintiffs. In November of 2019, Plaintiffs again submitted SF210 claims to the ORM, which reflected  
12 what Plaintiffs then believed to be the actual damages suffered by Plaintiffs as a result of DNR’s actions.  
13 Plaintiffs’ damages have increased since November of 2019.

14 The discovery cut-off in this matter ended on September 1, 2023. Court file. While DNR has  
15 tendered some responsive documents in response to discovery requests, DNR has not identified any  
16 experts or other witnesses capable of refuting the expert or lay testimony presented in support of  
17 Plaintiffs’ Motion for Summary Judgment. Accordingly, there are no genuine issues of material fact in  
18 dispute, and this Court can decide this case as a matter of law.

### 21 **III. ISSUES PRESENTED**

22 The following issues are presented for resolution by the Court:

- 23 1. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary  
24 judgment as a matter of law finding that DNR negligently damaged Plaintiffs’ real properties  
25 when it unplugged the Wood Lake culvert;  
26

2. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary judgment as a matter of law finding that DNR tortiously injured Plaintiffs' real properties when it unplugged the Wood Lake culvert;
3. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary judgment as a matter of law finding that DNR unlawfully trespassed (and continues to trespass) on Plaintiffs' real properties when it unplugged the Wood Lake culvert;
4. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary judgment as a matter of law finding that DNR substantially and unreasonably interfered with Plaintiffs' use and enjoyment of Plaintiffs' real properties;
5. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary judgment as a matter of law finding that DNR wrongfully caused waste and injury to Plaintiffs' real properties under RCW 4.24.630;
6. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary judgment as a matter of law finding that DNR inversely condemned, took, and/or damaged Plaintiffs' real properties without having first paid just compensation under Article I, Section 16 of the Washington State Constitution;
7. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to summary judgment as a matter of law finding that DNR breached its fiduciary duties under the Public Trust Doctrine;
8. Whether, based upon the undisputed facts in the record, Plaintiffs are entitled to an award of damages (trebled) as a result of DNR's unplugging of the Wood Lake culvert; and,
9. Whether Plaintiffs are entitled to an award of their attorneys' fees and costs incurred as a result of DNR's unplugging of the Wood Lake culvert.

#### **IV. EVIDENCE RELIED UPON**

1 This motion is based on all the pleadings and papers filed in this action, including the  
2 declarations filed in support of this motion, and all attachments thereto, and all of which are  
3 incorporated herein by this reference.

## 4 V. LEGAL AUTHORITY AND ARGUMENT

### 5 A. Standard of Review.

6 This motion is made pursuant to CR 56(a) and (c), which provide in relevant part:

#### 7 **RULE 56. SUMMARY JUDGMENT**

8 **(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross  
9 claim, or to obtain a declaratory judgment may, after the expiration of the period  
10 within which the defendant is required to appear, or after service of a motion for  
summary judgment by the adverse party, move with or without supporting affidavits  
for a summary judgment in the party's favor upon all or any part thereof.

11 ...  
12 **(c) Motion and Proceedings....**The judgment sought shall be rendered forthwith if  
13 the pleadings, depositions, answers to interrogatories, and admissions on file, together  
with the affidavits, if any, show that there is no genuine issue as to any material fact  
and that the moving party is entitled to a judgment as a matter of law.

14 CR 56(a), (c). The moving party bears the burden of demonstrating both the absence of a genuine  
15 issue of material fact and entitlement to judgment as a matter of law. *Knox v. Microsoft Corp.*, 92 Wn.  
16 App. 204, 207, 962 P.2d 839 (1998). A material fact is one upon which the outcome of a claim depends.  
17 *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998). Summary judgment should be  
18 granted when the declarations and affidavits show that there are no genuine issues of material fact,  
19 and the moving party is entitled to judgment as a matter of law. *See Knox*, 92 Wn. App. 204, 207 (1998).

### 20 21 **B. DNR Negligently Unplugged the Wood Lake Culvert, and DNR's Failure to Follow 22 its Own Manual and to Obtain all Required Permits Prior to Unplugging the Culvert is Further Evidence of DNR's Negligence.**

23 Negligence will be found when a plaintiff demonstrates (1) the existence of a duty, (2) a breach  
24 of that duty, (3) a resulting injury, and (4) proximate cause. *Degel v. Majestic Mobile Manor, Inc.*, 129  
25 Wn.2d 43, 48, 914 P.2d 728 (1996). At the root of any common law negligence action is the common  
26

1 law duty to exercise reasonable care (or, in alternative terms, the common law duty to exercise at least  
2 as much care as a reasonable person would exercise under the same or similar circumstances). *Estate*  
3 *of Templeton v. Daffern*, 990 P.2d 968, 98 Wn. App. 677 (Wash. App. 2000); *see also*, *Mathis v. Ammons*, 84  
4 Wn. App. 411, 415-16, 928 P.2d 431 (1996) (review denied); *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App.  
5 33, 41, 920 P.2d 241 (1996), *aff'd*, 133 Wn.2d 192, 943 P.2d 286 (1997); *Schooley v. Pinch's Deli Market,*  
6 *Inc.*, 80 Wn. App. 862, 866, 912 P.2d 1044, *aff'd*, 134 Wn.2d 468, 951 P.2d 749 (1998); *Fink v. Dixon*,  
7 46 Wn.2d 794, 797, 285 P.2d 557 (1955); *Gall v. McDonald Indus.*, 84 Wn. App. 194, 203, 926 P.2d 934  
8 (1996) (review denied), 131 Wash.2d 1013, 932 P.2d 1256 (1997). This duty is breached when a  
9 defendant fails to exercise ordinary care. *Gall*, 84 Wn. App. at 206, 926 P.2d 934 (1996); *Schooley*, 80  
10 Wn. App. at 874, 912 P.2d 1044 (1998); *System Tank Lines v. Dixon*, 47 Wn.2d 147, 151, 286 P.2d 704  
11 (1955); *Mathis*, 84 Wn. App. at 416, 928 P.2d 431 (1996); *Fink*, 46 Wn.2d at 797, 285 P.2d 557 (1955).  
12 Any such failure is “negligence.” *See*, *Mathis*, 84 Wn. App. at 416, 928 P.2d 431 (1996); *System Tank*  
13 *Lines*, 47 Wn.2d at 151, 286 P.2d 704 (1955).

14  
15  
16  
17 **1. DNR had a Duty to Exercise Due Care When it Unplugged the Wood Lake Culvert.**

18 Whether a duty exists is a question of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979  
19 P.2d 400 (1999). Where a government provides drainage by channeling surface water into a  
20 watercourse or drainway, it must exercise reasonable care not to substantially increase the volume or  
21 velocity of water in a way that causes damage to adjacent land. *Colella v. King County*, 72 Wn.2d 386,  
22 391, 433 P.2d 154 (1967). "We have also held that a landowner may not increase drainage of surface  
23 water into a drainway to such an extent that the capacity of the drain is overtaxed." *Strickland v. City of*  
24 *Seattle*, 62 Wn.2d 912, 916-17, 385 P.2d 33 (1963). Where the municipality assumes the maintenance  
25 duties and control over a drainage system, it has a duty to exercise reasonable care in the repair and  
26

1 maintenance of the system. *Sigurdson v. City of Seattle*, 48 Wn.2d 155, 159-62, 292 P.2d 214 (1956);  
2 *Tombari v. City of Spokane*, 197 Wash. 207, 211-12, 84 P.2d 678 (1938); *Boyer v. City of Tacoma*, 156 Wn.  
3 280, 287-88, 286 P. 659 (1930); *Hayes v. City of Vancouver*, 61 Wn. 536, 538, 112 P. 498 (1911). This  
4 duty exists regardless of who constructed the drainage system. *Phillips v. King County*, 136 Wn.2d 946,  
5 966, 968 P.2d 871 (1998). As a general rule, one who undertakes to act in a given situation has a duty  
6 to follow through with reasonable care, even though he or she had no duty to act in the first instance.  
7 *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998); *Brown v. MacPherson's, Inc.*, 86 Wn.2d  
8 293, 299, 545 P.2d 13 (1975); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 857, 5 P.3d 49 (2000)  
9 (review denied); W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS §  
10 56 at 380 (5th ed.1984); *see also Phillips*, 136 Wash.2d at 968, 968 P.2d 871 (1998) (noting that if the  
11 County participated in the creation of the problem, it may participate in the solution). *Borden v. City of*  
12 *Olympia*, 53 P.3d 1020, 113 Wn. App. 359 (2002). DNR had a duty not to release water from Wood  
13 Lake into Caldervin Creek in a manner that would cause destruction to downstream property owners  
14 and the Creek system.

## 15 16 **2. DNR Breached its Duty to Exercise Due Care and Minimize Unnecessary Impacts.**

17 While question of breach is generally a question of fact left to the trier of fact, the question  
18 may be decided as a matter of law where reasonable minds could reach but one conclusion from the  
19 evidence presented. *Id.* Here, the facts are not in dispute. DNR breached its duty to exercise due  
20 care when it unplugged the Wood Lake culvert.

21 There is no dispute that DNR unplugged the Caldervin Creek culvert. Power Decl., Ex. A (at  
22 7):

23 “Q: When you say what occurred, are you talking about the incident in early December 2016  
24 at Wood Lake?”  
25  
26



1 “A: Yes.”

2 “Q: And the clearing of the culvert?”

3 “A: Yes.”

4 “Q: Were you on site for that operation?”

5 “A: Yes, I was.”

6 “Q: Were you in charge of that operation?”

7 “A: Yes. I would have been considered in charge of the operation.”);

8  
9 Id. (at 10):

10 “Q: Were [Jeremy Marquardt and Nick Chicano] actually the people who were doing the  
11 actual physical work of unclogging the culvert?”

12 “A: Yes. And I helped as well.”

13 “Q: Were there any other people who actually physically did any work on the unclogging of  
14 the culvert?”

15 “A: No.” Id. (at 14):

16 “Q: How long did it take to clear out the obstruction in the culvert, would you say?”

17 “A: I would have to guess, but I would say probably maybe a couple hours, maybe an hour  
18 or so. . . .”

19 “Q: What sort of equipment was used?”

20 “A: It was a little excavator that the recreation programs owns. . .”).

21  
22 There is no dispute that DNR simply removed the debris that was blocking the culvert, and  
23 this resulted in a “rush of water” that was “like a fire hose.” Id. (at 12-13):

24 “Q: Did you create a plan about what you were going to do to try and rectify the situation with  
25 the culvert?”  
26



1 “A: Yes, but nothing was – I mean, a plan insomuch as it’s in your head and you talk about it  
2 on the ground and say this is how we are going to do x, y, z.”; *Id.* (at 20-22):

3 “Q: Did you instruct those two gentlemen about what they should do to unplug the culvert?”

4 “A: We all had a discussion between ourselves and decided what was the most efficient way  
5 to complete the task at hand.”

6 “Q: What was the decision that you arrived on?”

7 “A: It was to – first we dug it. We just used the bucket. There was a bigger stick – I don’t  
8 know what you want to call it – that we grabbed, and we used that to push the debris out of the pipe.”

9 “Q: Did you push it out from the downhill side of the culvert, or did you push from the uphill  
10 side of the culvert?”

11 “A: The uphill side.”

12 “Q: So, you pushed the occlusion through the culvert; is that correct?”

13 “A: Yes.”

14 “Q: What was the culvert occluded with?”

15 “A: Sticks, debris.”

16 “Q: When the water was released and going through the culvert freely, was it audible?”

17 “A: I guess as much as water makes noise, yes. I don’t know exactly what you are asking.”

18 “Q: What was the size of that culvert? Three or four feet, something like that?”

19 “A: I think so, yeah. That sounds about right.”

20 “Q: It’s transmitting water fully because the water is over the top of that culvert when you  
21 release that water; isn’t that correct?”

22 “A: Yes.”

1 “Q: What I imagine is that there was like a fire hose coming out of that thing. There was a  
2 rush of water, wasn’t there?”

3 “A: Yes.”

4 “Q: . . . Was Caldervin Creek flowing quickly after the release of water?”

5 “A: Yes.”

6 “Q: Was the water level increasing in height in Caldervin Creek?”

7 “A: Yes.”. Bruce Meyer, the Forest Practice District Manager for the South Puget Sound  
8 Region of the Department of Natural Resources, testified that it would be appropriate to consider the  
9 speed at which water is going to be released through a culvert when unplugging it, but no one at DNR  
10 had prepared any calculations to determine how much water would flow into Caldervin Creek once  
11 the culvert blockage had been removed in advance of clearing the culvert. Power Decl., Ex. B (at 18-  
12 20):

13  
14 “Q: Do you think it would be appropriate to consider the speed at which water is released  
15 through a culvert when unplugging it?”

16 “A: Yes.”

17 . . .  
18

19 “Q: Do you think that the uncontrolled release of water could affect the streambed  
20 downstream of the culvert?”

21 “A: Yes, I do. It could.”

22 “Q: Could DNR have syphoned or pumped water to relieve the water above the culvert.”

23 . . .  
24

25 “A: They could.” Power Decl., Ex. A (16-24):  
26

1 “Q: Did you ever do a calculation of how many gallons per minute were going through that  
2 culvert when you unplugged it?”

3 “A: I attempted an estimation at one point in time, but there were a bunch of different  
4 calculating effects and I couldn’t come up with any really good numbers that were consistent.”

5 “Q: Why did you attempt to do that estimate?”

6 “A: Because I was just curious.”

7 “Q: Do you do an estimate [like] that whenever you unplug a culvert?”

8 “A: No. This one was particular. It was different because of the phone calls that we received.”

9 “Q: What phone calls are those?”

10 “A: I think it was Brad. I think Brad called. I can’t remember if he called me directly or if he  
11 called somebody else within the region.”

12 “Q: Brad called and wanted an estimate as to the flow rate through the culvert?”

13 “A: No. He wanted to know what was going on.”

14 ...

15 “Q: Did Mr. Roach [boss] ask you to prepare a calculation as to what the flow was?”

16 “A: No. I didn’t prepare a calculation for him. That’s outside of the scope of anything that I  
17 would do in my professional job.”

18 “Q: This is something that you did just because you were interested in it as an extracurricular  
19 activity?”

20 “A: Yes. Like I said, I just did it because I was curious.”

21 ...

22 “Q: But DNR, to your knowledge, hasn’t conducted any calculation?”

1 “A: No, not that I know of. Like I said – well, other than me, I guess, because I’m the DNR.”.  
2 Mr. Meyer further testified that other techniques could have been employed if DNR had wanted to  
3 moderate the velocity of the flow from the culvert; if they had wanted to do so. Power Decl. Ex. B  
4 (at 19-20):

5 “Q: Has DNR ever syphoned or pumped water to de-water a pond without using the main  
6 channel or the usual channel for the water’s egress?”

7 “A: I don’t know. I’m sure they have at some point, but I have not witnessed that.”

8 “Q: As somebody who is an expert in forestry practice why would you do that?”

9 “A: Why would you do that? That would be to isolate the work area from sediment delivery  
10 into the water. You would pump around that. Or if you were trying to maintain some kind of fish  
11 species or something in a certain portion and not have them just flush out. Those are some cases you  
12 would want to be very careful with how you release water.”

13 “Q: You could also do that to moderate the tempo of the outflow; isn’t that correct?”

14 “A: Yeah.”

15 McReynolds further testified that DNR did not consider ecological impact of its action, Id.,  
16 Ex A (at 34):

17 “Q: Did you give any consideration to the fact that it was a spawning creek when you  
18 undertook the efforts to unclog the culvert?

19 A: That was not a consideration we needed to do, no.”

20 DNR wholly failed to consider how much impounded water would be released downstream  
21 when it unplugged the culvert, where all of that water would go, and how it might affect the  
22 environment, the hydrology of Caldervin Creek, salmon habitat and spawning beds, and privately-  
23 owned properties adjacent to the stream. By neglecting to consider the consequences, and by failing  
24  
25  
26

1 to release the impounded water in a manner that would not have destroyed Caldervin Creek and  
2 Plaintiffs' private properties, DNR breached its duty to exercise reasonable care.

3  
4 **3. DNR's Unplugging of the Culvert Proximately Caused Damage to Natural Resources**  
5 **and Plaintiffs' Real Properties.**

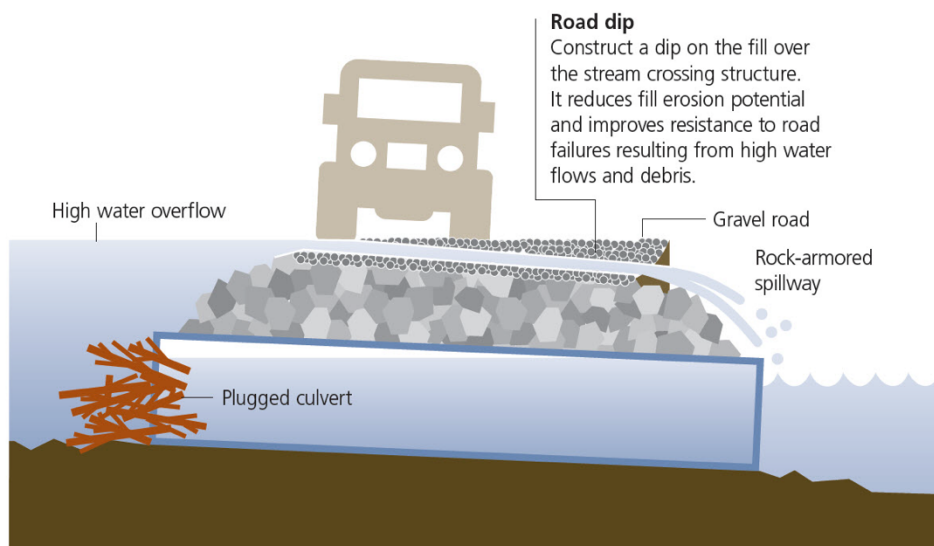
6 Washington law recognizes two elements to proximate cause: "cause in fact" and "legal  
7 causation." *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 475, 656 P.2d 483 (1983). "Cause in fact"  
8 refers to the "but for" consequences of an act – the physical connection between an act and an injury.  
9 *King v. Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974). "Legal causation," on the other hand involves  
10 a determination of whether liability should attach as a matter of law given the existence of cause in  
11 fact. If the factual elements of the tort are proved, determination of legal liability will be dependent  
12 upon mixed considerations of logic, common sense, justice, policy, and precedent. *Hartley v. State*, 103  
13 Wn.2d 768, 778-79, 698 P.2d 77 (1985); *see also, King v. Seattle*, 84 Wn.2d at 250, 525 P.2d 228 (1974).

15 Here, the undisputed facts in the record demonstrate that "but for" DNR's unplugging of the  
16 Wood Lake culvert, the torrent of water released from Wood Lake would never have occurred, and  
17 the Caldervin Creek hydrology would not have been drastically altered, productive salmon spawning  
18 habitat would not have been destroyed (along with an entire year class of salmon), Liberty  
19 Management LLC's road would not have been demolished, Plaintiffs' properties would not have been  
20 inundated with water, Plaintiffs' real properties would not have been physically reduced in size, and  
21 Plaintiffs would not have had to install concrete walls to defend their properties from the continuing  
22 consequences of the now-elevated streambed and frequent flooding that results. Common sense,  
23 logic, justice, and policy all demand that DNR be held responsible for the true harms that Plaintiffs  
24  
25  
26

1 have had to endure as a result of DNR's cavalier, poorly planned, unpermitted decision to unplug the  
2 Wood Lake culvert in the fashion it did.

3 While DNR certainly gave no advance consideration to the effects of releasing millions of  
4 gallons of water into a narrow, well-known salmon spawning stream that is heavily populated with  
5 private residences along its banks, unrefuted expert testimony confirms that DNR's unplugging of the  
6 culvert released millions of gallons of water into Caldervin Creek, which caused massive disruption to  
7 the hydraulics of the stream system, including depositing unnaturally large amounts of sediment  
8 throughout the stream, significantly altered the streambed and stream channel, destroyed the access  
9 road serving Liberty Management's LLC property, caused and continues to cause increased flooding  
10 on privately owned properties, and wiped out an entire year class of spawning salmon and has reduced  
11 habitat quality for those salmon. Fisher Decl., Ex. A ("... the peak flow that occurred immediately  
12 after removal of the blockage on December 1, 2016, was between 115 cubic feet per second (cfs) and  
13 130 cfs. For civil engineers and hydrologists working in the United States, cfs is the most commonly  
14 used measure of flow rate in a stream. 1 cfs refers to a volume of one cubic foot of water passing by  
15 a stationary location in one second. Thus 130 cfs refers to a volume of 130 cubic feet passing by a  
16 location in one second. Outside of civil engineering and hydrology, the most common volume used  
17 for measurement of fluids in the US is a gallon. There are 7.48 gallons of water in 1 cubic foot, which  
18 can be used to convert cubic feet to gallons and represent 130 cfs as equal to **58,3844 gallons of**  
19 **water per minute.** ... This means that not only did the blockage removal flow greatly exceed the  
20 100-year flood flow rate and duration, but it also imposed the larger than normal flood impacts on the  
21 stream channel and floodplain on a day when no flooding would have occurred, leading to bed and  
22 bank erosion that would not have occurred if the blockage removal had not been done or at least if it  
23  
24  
25  
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1 had been done in accordance with standard practices (such as Washington State's Forest Practices  
2 Board Manual attached as Appendix B; [excerpt from Appendix B inserted here for ease of reference:]



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14 . . . Based upon the channel hydraulics and geomorphology present during the site visit, it became  
15 apparent that the December 1, 2016, high flow event caused the rapid erosion and ultimate destruction  
16 of this access road. . . . It is my professional opinion that DNR's removal of the culvert blockage on  
17 December 1, 2016, caused significant impacts to the hydrology and geomorphology of Caldervin  
18 Creek. The removal of the culvert blockage produced an unnaturally large increase in both the flow  
19 rate and duration of flow within the system – in fact, the calculated flow rates **were well in excess of**  
20 **the 500-year flood.**” (emphasis supplied); Novak Decl., Ex A (“Reductions in spawning chum salmon  
21 can be clearly seen in 2018, 2019, 2020, and 2021, from 2 to 5 years after the 2016 high flow event  
22 (Figure 4). Returns dropped from a high of approximately 2600 spawners in 2016 to only 230  
23 spawners in 2018, 0 spawners in 2019, and 348 in 2020. These effects are almost certainly attributable  
24 to the unplugging of the culvert which scoured the streambed and flushed eggs and fry out of the  
25  
26

1 Creek in 2016, and which restricted migration and reduced spawning habitat due to the increased  
2 sedimentation. . . . Steep eroding banks, numerous small landslides, an extremely high number of fallen  
3 trees, large volumes of sediment in the stream channel, and the stream flowing beneath the surface of  
4 the substrate observed during the February 2023 site visit **all lead to the conclusion that the high  
5 flow event destabilized the streambank, degraded stream habitat, and, more specifically,  
6 reduced salmon spawning habitat**”) (emphasis supplied).

7  
8 This expert testimony is unrefuted and confirms what the Plaintiffs themselves experienced.  
9 When DNR unplugged the Wood Lake culvert, massive amounts of water rushed down into Caldervin  
10 Creek in unprecedented amounts and with unnaturally large velocity, toppled massive trees,  
11 unnaturally deposited sediment throughout the stream system, raised the elevation of the streambed,  
12 inundated Plaintiffs’ private properties with water, and destroyed the access road serving the Liberty  
13 Management LLC properties. *See* Power Decl. Ex. A; Anderson Decl.; Carey Decl.; Rogers Decl.;  
14 Novak Decl.; Fisher Decl.

#### 15 **4. DNR’s Unplugging of the Culvert Caused Damages.**

16 The unrefuted evidence shows that DNR’s careless, poorly planned, unpermitted unplugging  
17 of the Wood Lake culvert caused damages to the Plaintiffs’ private properties, to Caldervin Creek,  
18 including its hydrology, to the salmon spawning habitat, and eliminated an entire year-class of salmon.  
19 *See* Power Decl. Ex. A; Anderson Decl.; Carey Decl.; Rogers Decl.; Novak Decl.; Fisher Decl.

20  
21 As for Plaintiffs’ private properties, the rush of water released from the Wood Lake culvert  
22 completely destroyed Liberty Management LLC’s access road. Anderson Decl. ¶12, (“Shortly after  
23 the December 2016 DNR flooding event, I visited this exact same site and saw that the previously  
24 dredged streambed was all filled in with gravel and other debris – realizing with absolute certainty that  
25 this was material from the Liberty Management LLC access road that had been previously located  
26



1 upstream. It ended up being transported as a result of the unmitigated flow of water from Wood Lake  
2 into Caldervin Creek caused by DNR's unpermitted unplugging of the Wood Lake culvert."); Carey  
3 Decl., ¶ 26 ("To my absolute shock and horror, our access road was completely gone. It had literally  
4 disappeared! We lost about 100 lineal feet of our access road, as well as all of the foliage and tree  
5 buffers that had existed between our access road and Caldervin Creek. Prior to its complete  
6 destruction, the width of the 100-foot-long piece of missing road, trees, and foliage was about 40 feet,  
7 and the depth of the washout appeared to be about 10-12 feet. Literally, all that was left was just a  
8 huge crater. To date, our road has not been repaired and we have not been able to get motor vehicles  
9 or equipment to the north end of our property, which prevents us from fully using and enjoying our  
10 property, and from obtaining development permits to pursue our affordable housing and other  
11 projects. Concerned about liability, since our access road literally just disappears into a deep, 100-  
12 foot-long gulley, I flagged the washout with caution tape and later placed a physical barricade to  
13 prevent injury to any unsuspecting driver or pedestrian. These unfortunately dangerous conditions  
14 persist."); Carey Decl., ¶ 27 ("I have over 30 years' experience in excavating and building roads. It is  
15 my opinion, given the location of the washed-out road, the size of the crater DNR caused, and the  
16 fish bearing stream requirements for armoring the salmon stream embankment and restoring fertile  
17 habitat, nobody will be able to restore our road to its pre-December 1, 2016, DNR flash flood  
18 condition for less than \$339,430.00."); Carey Decl., Ex. B.

21 It is estimated to cost at least \$339,430.00 (not including any permits, bonds, sales, or use  
22 taxes) to rebuild this destroyed access road, and to do it in such fashion as will protect salmon  
23 spawning habitat from the impacts of rebuilding the access road. Carey Decl., Ex. B (also see photo  
24 above of washed-out road).

1 Since the costs of permitting that will be required to conduct this restoration work in a fish  
2 bearing stream are extremely difficult to predict with any certainty in advance, Plaintiffs respectfully  
3 request that the Court award Plaintiffs the sum of \$339,430.00 (trebled per RCW 4.24.630), for  
4 rebuilding the destroyed access road, and award Plaintiffs all costs and fees (including attorneys, land  
5 use planners, and consultants) incurred for all associated permits to perform this work, with a  
6 determination of the specific amount reserved for a subsequent proceeding.

7  
8 Like the destruction of the Liberty Management LLC access road, DNR's unplugging of the  
9 Wood Lake culvert also inundated Plaintiffs' private properties with water, which caused damage to  
10 their properties and required costly mitigation. Rogers Decl. ¶¶9, 11, 13, 24 (recounting soaking and  
11 collapse of insulation and vapor barrier being buried in silt, describing garage floor filled with about  
12 one foot of dried silt, need to install unsightly cement fence, remove tree, install sump pumps and  
13 french drain, and removal of deck to accommodate the cement fence; declaring \$65,500.00 for loss of  
14 value due to flooding disclosure, loss of property, unsightly cement wall, reduced deck, and need for  
15 sump pumps; \$8,600.00 for cleaning up property from flood damage; \$20,000.00 for installation of  
16 cement fence). Carey testifies that he has lost the use of six feet of physical real property along the  
17 creek frontage; \$128,000 to build an ugly concrete fence and remove the flood damaged wooden fence  
18 and \$10,000 fair market value for the physical loss of property). Decl. Of Brad Carey ¶¶24-25.

19  
20 DNR's unplugging of the culvert also damaged Caldervin Creek, which includes damage to  
21 productive salmon spawning habitat, and altered the hydrology of the system. Fisher Decl., Ex. A.  
22 ("It is my professional opinion that DNR's removal of the culvert blockage on December 1, 2016,  
23 caused significant impacts to the hydrology and geomorphology of Caldervin Creek. The removal of  
24 the culvert blockage produced an unnaturally large increase in both the flow rate and duration of flow  
25 within the system – in fact, the calculated flow rates were well in excess of the 500-year flood.  
26

1 Conditions during the site investigation evidenced that this event caused dramatic erosion, increased  
2 sedimentation, sediment transport, and deposited sediment into the stream channel, which caused the  
3 elevation of the streambed to increase in height, altered the geomorphology of the stream system  
4 (including significant lateral migration of the stream bed in certain locations), destabilized the  
5 streambanks, and significantly altered the hydrology and geomorphology of where Caldervin Creek  
6 flows into Hood Canal. Because of the significance of these impacts, without restoration and  
7 intervention it is unlikely that the Caldervin Creek system will return to the healthy ecosystem in  
8 dynamic equilibrium that existed prior to the December 1, 2016, event. . . . In short, a main channel  
9 must be dredged to an appropriate depth, location and gradient.”; Novak Decl., Ex. A (“In 2016, the  
10 nests and eggs of 2600 chum salmon were scoured from the stream bed and either washed  
11 downstream or smothered. Consequently, 12,000 to 19,000 chum salmon that should have returned  
12 to spawn in Caldervin Creek between 2017 and 2025 did not return. These lost returns represent an  
13 ecological, cultural, and economic impact to the surrounding region.” (footnote omitted)). DNR made  
14 no attempt to survey Caldervin Creek either before or after DNR decided to unplug the Wood Lake  
15 culvert. Power Decl., Ex. A (at 30) (confirming that no surveys or investigations were performed in  
16 advance of removal); Power Decl., Ex. A (at 23-28) (confirming that DNR employees only monitored  
17 the effects for about one hour and returned a few days later and only performed a drive-by inspection).

20 Since there are no material facts in dispute, this Court should rule as a matter of law that  
21 DNR’s unplugging of the Wood Lake culvert caused damage to the hydrology and geomorphology of  
22 the Caldervin Creek stream system, including the destruction of an entire year class of salmon, and  
23 significantly reduced salmon spawning habitat. As such, Plaintiffs respectfully request that the Court  
24 retain jurisdiction over this matter and order DNR to submit a proposed restoration plan (consistent  
25 with the findings and conclusions set forth in the Fisher Declaration and the Novak Declaration) that  
26

1 includes, at a minimum, dredging of sediment throughout the Creek system, developing a sediment  
2 management system for sediment not removed by dredging, and restoring salmon spawning habitat  
3 to substantially similar conditions existing prior to the December 1, 2016 event. Plaintiffs respectfully  
4 request that the Court Order DNR to present such a remediation plan to the Court for its review and  
5 approval within 90 days from the date of entry of the Court's Order on Plaintiffs' Motion for Summary  
6 Judgment and retain jurisdiction thereafter to ensure that DNR timely implements all aspects of any  
7 such approved restoration plan.

8  
9 **5. Further Evidence of DNR's Negligence is that DNR Failed to Obtain Required  
Permits or Follow its Own Manual When it Unplugged the Culvert.**

10 "A breach of a duty imposed by statute, ordinance, or administrative rule shall not be  
11 considered negligence per se, **but may be considered by the trier of fact as evidence of**  
12 **negligence; . . .**" RCW 5.40.050 (emphasis supplied). Further evidencing DNR's negligence is  
13 DNR's total failure to apply for or obtain any permits prior to unplugging the culvert, and its failure  
14 to follow guidance required by its own manual. RCW 77.55.021(1) requires: "in the event that any  
15 person **or government agency** desires to undertake a hydraulic project, the person **or government**  
16 **agency shall, before commencing work thereon,** secure the approval of the department in the  
17 form of a permit as to the adequacy of the means proposed for the protection of fish life." RCW  
18 77.55.021(1) (emphasis supplied). "A hydraulic project is the construction or performance of work  
19 that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of  
20 the state. Unless otherwise provided, any person who wants to conduct a hydraulic project must get  
21 a construction permit called the hydraulic project approval (HPA) from the department [WDFW].  
22 The purpose of the HPA is to ensure that construction or performance of work is done in a manner  
23 that protects fish life." WAC 220-660-010. DNR will argue under RCW 77.55.361 and RCW  
24  
25  
26

1 76.09.040 the requirements of the hydraulic code rules no longer apply to any forest practices hydraulic  
2 project. However, even if DNR's unplugging of the Wood Lake culvert could be characterized as a  
3 "forest practice," which it was not, then DNR was still required to engage in the concurrence review  
4 process outlined in WAC 220-660-060. Notably, WAC 220-660-060(2)(b) states that for FPAs (forest  
5 practices applications) "that include a forest practices hydraulic project involving fish-bearing waters  
6 . . . the department (WDFW) **must review the forest practices hydraulics projects and either**  
7 **provide comments to the department of natural resources (DNR), or document that the**  
8 **review has occurred without the need for comments.**" (Emphasis supplied). And even if it could  
9 be characterized as a forest practices activity, then WAC 222-16-025 confirms that under RCW  
10 76.09.040(3)(a), the fish protection standards in the hydraulic code rules applicable to forest practices  
11 activities are incorporated into the forest practices rules. WAC 222-16-050(5)(h)(ii) defines the activity  
12 as a "Class III" forest practices act, which includes "movement of material that has a direct potential  
13 for entering Type S, F or flowing Type Np Waters or Type A or B Wetlands." There is no dispute  
14 that Caldervin Creek is a flowing Type F water, and that DNR's activities resulted in the movement  
15 of material that entered into this regulated water. *See Power Decl., Ex. A (at 34).*

16  
17  
18 At a minimum, DNR was required to obtain either an HPA or a Forest Practices HPA prior  
19 to unplugging the Wood Lake culvert. There is no dispute that this did not occur. *Power Decl., Ex.*  
20 *A (at 31).* ("Q: Did you participate in obtaining any permits for the work on the culvert in December  
21 2016?" "A: No." "Q: Did you know of anyone who on behalf of DNR obtained a permit for the work  
22 done on the culvert?" "A: No."). In fact, DNR further admits that it specifically did not consider the  
23 affects the activity would have on this well-known salmon spawning creek (a Type F Water). *Power*  
24 *Decl., Ex. A (at 34):* ("Q: Is Caldervin Creek a salmon spawning creek?" "A: I believe so. I haven't  
25 looked into it." "Q: Do you know if it's classified as an F-Type stream?" "A: I'm sure it is. I'm  
26

1 assuming it is. I haven't looked specifically, but just given the nature of it, portions of it are definitely."  
2 "Q: Did you give any consideration to the fact that it was a spawning creek when you undertook the  
3 efforts to unclog the culvert?" "A: That was not a consideration that we needed to do, no.").

4 In addition to an HPA, DNR was also required to obtain a permit under Section 404 of the  
5 Clean Water Act, Section 401 of the Clean Water Act and/or Section 10 of the Rivers and Harbors  
6 Act of 1899, prior to unplugging the Wood Lake culvert. Section 404 of the Clean Water Act is a  
7 program designed to regulate the discharge of dredged or fill materials in waters of the United States.  
8 Under Section 404 no discharge of dredged or fill material may be permitted if (1) a practicable  
9 alternative exists that is less damaging to the aquatic environment or (2) the nation's waters would be  
10 significantly degraded. *See* 33 U.S.C. Section 1344. DNR's use of an excavator to dig in and around  
11 the mouth of the plugged culvert caused there to be the discharge of fill materials into the waters of  
12 the United States, and DNR did not obtain any permit from the U.S. Army Corps of Engineers prior  
13 to unplugging the culvert. Similarly, Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C.  
14 Section 401 *et seq.*, contains a regulatory permit program that is designed to protect navigable waters  
15 when there is construction and excavation in a regulated water. 33 U.S.C. Section 403 prohibits the  
16 unauthorized alteration of any navigable water of the United States. The accomplishment of any work  
17 affecting the course, location, condition, or physical capacity of such waters is unlawful unless the  
18 work has been recommended by the Chief of Engineers. There is no dispute that Caldervin Creek  
19 constitutes a federal navigable water of the United States, *see, Sackett v. Environmental Protection Agency*,  
20 143 S. Ct. 1322 (2023), and that unplugging of the Wood Lake culvert constituted work affecting the  
21 course, location, condition, and physical capacity of Caldervin Creek and its nexus with Hood Canal.  
22 Again, there is no dispute that DNR made absolutely no attempt to obtain any such permit.  
23  
24  
25  
26

1 Finally, DNR made no attempt to obtain a permit under Section 401 of the Clean Water Act.  
2 Section 401 permits are designed to allow the Department of Ecology to review and condition  
3 projects, actions, and activities that can affect water quality in Washington State. All projects affecting  
4 navigable and protected waters in Washington State are subject to Section 401 water quality  
5 certification, which includes coastal and marine environments, rivers, streams, lakes, and wetlands. 33  
6 U.S.C. 1341; 40 CFR 121. Again, there is no question that DNR wholly failed to obtain any permit  
7 whatsoever for its unplugging of the Wood Lake culvert, and this unpermitted excavation resulted in  
8 a violation of Chapter 90.48 RCW (“Washington State Water Pollution Control Act”). This Court  
9 should consider DNR’s complete failure to obtain any permits whatsoever as further evidence that  
10 DNR negligently unplugged the Wood Lake culvert, damaged Caldervin Creek and downstream  
11 landowners, and caused pollution in violation of State environmental laws and regulations.  
12

13 Finally, this Court should consider the fact that DNR’s own guidelines specifically detail how  
14 DNR should have unplugged the Wood Lake culvert, and DNR completely ignored its own manuals.  
15 To the extent the unplugging of the Wood Lake culvert can be characterized as a forest practices  
16 activity, the Forest Practices Board Manual, which is an advisory technical supplement to Title 222  
17 WAC, clearly demonstrates that there was a preferred technique to releasing the water impounded in  
18 Wood Lake. Fisher Decl., Ex. A (at Ex. B). Instead of simply clearing the debris in the culvert with  
19 an excavator, DNR could have constructed an armored dip on the road and an armored spillway, and  
20 then released the Wood Lake water in a controlled manner. This exact situation is depicted in the  
21 Forest Practices Board Manual, but DNR completely ignored this guidance. Power Decl. Ex. B (at  
22 21): (“Q: Would you agree with me that the schematic that is depicted in Figure 18-A [on Page B5-40  
23 of the Forest Practices Board Manual] generally depicts the situation that existed as it was described  
24 to you by Mr. Sharp and Mr. McReynolds?” “A: Yes.” “Q: Do you see how [the Forest Practices  
25  
26

1 Board] recommends dealing with such a situation?” “A: Yes.” “Q: They do it not by unplugging the  
2 culvert. They do it by letting the water slip over and armoring a spillway; is that correct?” “A: That is  
3 what that manual or that page says.”).

4 In short, this Court should consider DNR’s complete failure to obtain required permits, and  
5 DNR’s total disregard for its own guidance and best management practices, as evidence of DNR’s  
6 negligent unplugging of the Wood Lake culvert.

### 7 **C. DNR’s Unplugging of the Culvert Constitutes Trespass.**

8 The elements of an action in trespass, which includes trespass by water, *Hedlund v. White*, 67  
9 Wn. App. 409, 418 n.12, 836 P.2d 250 (1992), are the intentional or negligent intrusion onto or into  
10 the property of another by the defendant. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 624, 870  
11 P.2d 1005 (citing Restatement (Second) of Torts Sec. 158, 165, 166 (1965)).

12 To establish intentional trespass, a plaintiff must show (1) an invasion of property affecting  
13 an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability that the act  
14 would disturb the plaintiff’s possessory interest; and (4) actual and substantial damages. *Bradley v. Am.*  
15 *Smelting & Ref. Co.*, 104 Wn.2d 677, 692-93 (1985).

16 Here the evidence set forth *supra* demonstrates that DNR intentionally caused water to intrude  
17 onto Plaintiffs property, that it was foreseeable that Plaintiffs’ possessory interests would be disturbed,  
18 and that Plaintiffs were (and continue to be) substantially harmed by said trespasses. Accordingly,  
19 judgment in favor of Plaintiffs on this theory is likewise appropriate.

### 20 **D. DNR’s Unplugging of the Culvert is a Nuisance.**

21 The flooding caused by DNR constituted a nuisance under RCW 7.48. RCW 7.48.120 defines  
22 nuisance as the “interference with the comfortable enjoyment of life and property” and the “doing  
23 an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the  
24  
25  
26



1 comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs  
2 or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal  
3 or basin, or any public park, square, street or highway; or in any way renders other persons insecure  
4 in life, or in the use of property” RCW 7.48.010 and RCW 7.48.120.

5 Such nuisances are further categorized as "public," RCW 7.48.130, and "private," RCW  
6 7.48.150. A nuisance "which affects equally the rights of an entire community or neighborhood" is a  
7 public nuisance. RCW 7.48.130. Among the enumerated public nuisances is "[t]o obstruct or impede,  
8 without legal authority, the passage of any river, harbor, or collection of water." RCW 7.48.140(3).  
9 Generally, an action may be maintained by "any person whose property is injuriously affected or whose  
10 personal enjoyment is lessened by the nuisance." RCW 7.48.020. However, in the case of a public  
11 nuisance, a private person may maintain a civil action only if the nuisance is "specially injurious" to  
12 him. RCW 7.48.210.

14 Here, Plaintiffs have standing to assert both public and private nuisance. Not only were  
15 Plaintiffs’ private properties specifically damaged, but the entire neighborhood was affected by the  
16 flooding resulting from DNR’s unplugging of the culvert. Moreover, the effects of the unmitigated  
17 release of water into Caldervin Creek significantly altered the hydrology of the Creek system and  
18 destroyed productive salmon spawning habitat. Accordingly, this Court may find that there is no  
19 dispute of material fact that prevents entry of judgment in favor of Plaintiffs on its claims of public  
20 and private nuisance.

22 **E. DNR’s Unplugging of the Culvert Constitutes Actionable Waste Under RCW 4.24.630.**

23 DNR committed “waste” under RCW 4.24.630 when it wrongfully caused injury to Plaintiffs’  
24 real properties and improvements located thereupon. RCW 4.24.630, entitled "Liability for Damage  
25 to Land and Property," provides in relevant part:  
26

1 Every person who goes onto the land of another and who removes timber, crops,  
2 minerals, or other similar valuable property from the land, or wrongfully causes waste  
3 or injury to the land, or wrongfully injures personal property or improvements to real  
4 estate on the land, is liable to the injured party for treble the amount of the damages  
5 caused by the removal, waste, or injury.  
6 RCW 4.24.630(1). It goes on to provide that for purposes of this section, "a person acts 'wrongfully'  
7 if the person intentionally and unreasonably commits the act or acts while knowing, or having reason  
8 to know, that he or she lacks authorization to so act." *Id.*

9 As demonstrated at length above, the facts that are not in dispute demonstrate that Defendant  
10 DNR committed waste under RCW 4.24.630 by wrongfully injuring Plaintiffs' real properties and the  
11 improvements located thereon when knowing or have reason to know that DNR lacked authorization  
12 to so act. Such a theory serves as an independent basis for liability and treble damages, and the same  
13 should be awarded Plaintiffs in a Judgment in their favor.

14 **F. DNR's Unplugging of the Culvert, and the Attendant Consequences, Constitutes**  
15 **Inverse Condemnation.**

16 Recovery for the taking or damaging of land by the government is provided for in the  
17 Washington State Constitution, which states, "No private property shall be taken or damaged for  
18 public . . . use without just compensation having been first made{.}" Const. Art. I, Sec. 16 (amendment  
19 9). While the constitution guarantees recovery for a taking, not every trespass upon or tortious  
20 damaging of real property becomes a constitutional taking or damaging simply because the trespasser  
21 or tortfeasor is the state or one of its subdivisions. *Miotke v. City of Spokane*, 101 Wn.2d 307, 334, 678  
22 P.2d 803 (1984) (citing *Olson v. King County*, 71 Wn.2d 279, 284, 428 P.2d 562, 24 A.L.R.3d 950 (1967)).  
23 Whether a taking has occurred depends on the nature of the interference.

24 A constitutional taking is a permanent or recurring invasion of private property, whereas a  
25 temporary interference which is not continuous nor likely to be reoccurring, does not constitute  
26

1 condemnation without compensation. *Hoover v. Pierce County*, 79 Wn. App. 427, 432, 903 P.2d 464  
2 (1995) (citing *Northern Pac. Ry. v. Sunnyside Valley Irrigation Dist.*, 85 Wn.2d 920, 924, 540 P.2d 1387  
3 (1975)), review denied, 129 Wn.2d 1007 (1996). Also, the damage to the property must be permanent  
4 to be compensable. *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 816, 701 P.2d 518 (1985).

5 In cases of water damage caused by street drainage, a municipality is not liable for  
6 consequential damages caused by the increased flow of surface water resulting from the presence of  
7 streets. *Wilber Dev. Corp. v. Les Rowland Constr., Inc.*, 83 Wn.2d 871, 874, 523 P.2d 186 (1974), overruled  
8 on other grounds by *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). However, the  
9 municipality may not collect surface water by artificial means, channel the water, and deposit it on  
10 private property, thereby causing damage, unless the municipality compensates the owner. *Id.* at 874-  
11 75. Thus, the injurious flow of water upon a person's land will support an inverse condemnation  
12 action in the proper case. *B & W Constr., Inc. v. City of Lacey*, 19 Wn. App. 220, 223, 577 P.2d 583  
13 (1978). Although purchasers may not recover for a prior taking, they may sue for any new takings  
14 that occur after acquiring the property. *State v. Sherrill*, 13 Wn. App. 250, 257 n.1, 534 P.2d 598, review  
15 denied, 86 Wn.2d 1002 (1975); 29A C.J.S., Eminent Domain sec. 384, at 758-59 (1992).

16 Here, the flooding and erosion caused by DNR invaded the property of Plaintiffs by  
17 destroying Liberty's access road and flushing a significant portion of Roger's and Carey's lots into  
18 Hood Canal. Such is constitutionally impermissible taking and recovery on this basis is appropriate.

#### 21 **G. DNR Breached its Fiduciary Duty Under the Public Trust Doctrine.**

22 The Public Trust Doctrine requires government stewardship of the natural resources upon  
23 which society depends for continued existence. The Public Trust Doctrine has been called "the oldest  
24 expression of environmental law," Mary Christina Wood, *Advancing the Sovereign Trust of*  
25 *Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological*  
26

1 Realism and the Need for A Paradigm Shift, 39 ENVTL. L. 43, 69 (2009), and its roots extend at least  
2 as far back as sixth century Rome, DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST  
3 DOCTRINE TO WORK 4 (2nd ed. 1997) (citing “Institutes of Justinian”). Under the Public Trust  
4 Doctrine, the State serves as Trustee, who holds the trust property and is subject to fiduciary duties  
5 to manage trust assets for the benefit of the trust’s beneficiaries. The trust’s assets are natural  
6 resources, which include wildlife, *see, e.g., Geer v. Connecticut*, 161 U.S. 519, 534 (1896), and water-related  
7 resources, *Arnold v. Mundy*, 6 N.J.L. 1 (1821) (navigable waters); *Martin v. Waddell’s Lessee*, 41 U.S. 367  
8 (1842) (navigable waters and lands under them); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (lands  
9 under navigable waters), and non-navigable waterways, *see, Galt v. State*, 731 P.2d 912, 915 (Mont.  
10 1987) (“All waters are owned by the State for the use of its people.”) (emphasis in original); *Parks v.*  
11 *Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) (“[A]ll waters within South Dakota . . . are held in trust by  
12 the State for the public.”).

14 Here, the State of Washington, including the Department of Natural Resources, has a fiduciary  
15 duty to manage water resources, navigable waters, submerged and submersible lands, shorelands and  
16 coastal areas, wildlife, and fish as public trust assets, and to protect these assets from substantial  
17 impairment, for the benefit of all people of the State of Washington, including the Plaintiffs. The  
18 public trust doctrine evolved out of the public necessity for access to navigable waters and shorelands.  
19 *Orion Corp. v. State*, 109 Wn.2d 621, 640, 747 P.2d 1062 (1987) (cert. denied, 486 U.S. 1022, 108 S.Ct.  
20 1996, 100 L.Ed.2d 227 (1988)). It is partially encapsulated in the language of our State’s Constitution,  
21 which reserves State’s ownership in "the beds and shores of all navigable waters in the state." Const.  
22 Art. 17, § 1. The doctrine has always existed in the State of Washington. *Caminiti v. Boyle*, 107 Wn.2d  
23 662, 670, 732 P.2d 989 (1987) (cert. denied, 484 U.S. 1008, 108 S.Ct. 703, 98 L.Ed.2d 654 (1988)). The  
24 public trust doctrine is based on the common law, but Article XVII of the Washington Constitution  
25  
26

1 "partially encapsulate[s]" the public trust doctrine. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232,  
2 858 P.2d 232 (1993). Specifically, Article XVII, Section 1 asserts State ownership of "the beds and  
3 shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters  
4 where the tide ebbs and flows, and up to and including the line of ordinary high water within the  
5 banks of all navigable rivers and lakes." "Under the public trust doctrine, DNR must protect various  
6 public interests in state-owned tidelands, shore lands and navigable water beds. The traditionally  
7 protected interests include commerce, navigation, and commercial fishing. *Orion Corp. v. State*, 109  
8 Wn.2d 621, 641, 747 P.2d 1062 (1987). But our Supreme Court has expanded this list to include  
9 "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes  
10 generally regarded as corollary to the right of navigation and the use of public waters." *Caminiti v.*  
11 *Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987) (quoting *Wilbour v. Gallagher*, 77 Wash.2d 306, 316,  
12 462 P.2d 232 (1969)). This necessarily obligates the state to balance the protection of the public's right  
13 to use resources on public land with the protection of the resources that enable these activities." *State*  
14 *Geoduck Harvest Ass'n v. State DNR*, 124 Wn. App. 441, 101 P.3d 891, 895 (2004).

15  
16 Washington State, through DNR, breached its fiduciary duties under the Public Trust  
17 Doctrine when it unplugged the Wood Lake culvert and caused rampant destruction to Caldervin  
18 Creek and its salmon spawning habitat. In unrefuted testimony, biologist Novak concluded: "In 2016,  
19 the nests and eggs of 2600 chum salmon were scoured from the stream bed and either washed  
20 downstream or smothered. Consequently, 12,000 to 19,000 chum salmon that should have returned  
21 to spawn in Caldervin Creek between 2017 and 2025 did not return. These lost returns represent an  
22 ecological, cultural, and economic impact Assuming a 7-pound average fish weight and \$1.32 ex-vessel  
23 sale price (ADFG 2023), lost chum would have a wholesale value between \$65,000.00 and \$81,000.00)  
24 to the surrounding region. . . In 2023, Seaview Environmental rated Pool Quality, Streambank  
25  
26

1 Stability, Percent Pools, and Mass Wasting as Poor using the same rating criteria used by May and  
2 Peterson in their 2003 assessment. All of these habitat factors were almost certainly negatively  
3 impacted by unplugging the 48-inch diameter upstream culvert in 2016. . . . Based on my professional  
4 experience, salmon migration and spawning habitat in Caldervin Creek requires restoration.” Novak  
5 Decl., Ex. A. DNR had (and has) a fiduciary duty to the Plaintiffs, and all other citizens of the State  
6 of Washington, to manage and preserve the Caldervin Creek system, which previously boasted vitally  
7 important salmon spawning habitat. DNR breached its duty by carelessly releasing tens of millions of  
8 gallons of water through the Wood Lake culvert and significantly altering the hydrology of Caldervin  
9 Creek, which destroyed and degraded productive salmon spawning habitat, impeded (and continues  
10 to impede) fish migration, and wiped out an entire year class of salmon.

12 This Court should retain jurisdiction over this matter and order DNR to submit a proposed  
13 restoration plan (consistent with the findings and conclusions set forth in the Fisher Declaration and  
14 the Novak Declaration) that includes, at a minimum, dredging of sediment throughout the creek  
15 system, developing a sediment management system for sediment not removed by dredging, and  
16 restoring salmon spawning habitat to substantially similar conditions existing prior to December 1,  
17 2016. The Court should also direct DNR to pay the sum of \$73,000.00 (average fair market value of  
18 the lost salmon) to a Court-approved salmon habitat restoration fund. Plaintiffs respectfully request  
19 that the Court Order DNR to present a remediation plan to the Court for its review and approval  
20 within 90 days from the date of entry of the Court’s Order on Plaintiffs’ Motion for Summary  
21 Judgment and retain jurisdiction thereafter to ensure that DNR timely implements all aspects of any  
22 such approved restoration plan.

23  
24 **H. Plaintiffs are Entitled to Their Attorneys’ Fees and Costs.**  
25  
26

1 Plaintiffs are entitled to recovery their attorneys' fees and costs incurred, including their expert  
2 witness fees, under RCW 4.24.630, for their successful claim of inverse condemnation (RCW  
3 8.25.075), and/or pursuant to the common benefit exception to the usual no-attorneys-fees rule. *Crane*  
4 *Towing, Inc. v. Gorton*, 89 Wn.2d 161, 176, 570 P.2d 428, 97 A.L.R.3d 482 (1977). The Supreme Court  
5 first applied this "common fund" exception to the no-attorney-fees rule where the litigant preserved  
6 or created a specific monetary fund for the benefit of others as well as himself. *Peoples Nat'l Bank v.*  
7 *Jarvis*, 58 Wn.2d 627, 364 P.2d 436 (1961). The Court then broadened the exception in that it is no  
8 longer limited to situations where the litigant preserved or created a specific monetary fund. The  
9 exception now extends to situations where the litigant confers a substantial benefit on an ascertainable  
10 class. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 P. 647 (1911); *Grein v. Cavano*, 61 Wn.2d 498,  
11 379 P.2d 209 (1963). Here, by securing the restoration of the stream bed, Plaintiffs have conferred a  
12 substantial benefit all beings, human or otherwise, citizens of the State of Washington and Native  
13 persons, who depend on the health and vitality of the Puget Sound salmon population and protection  
14 of riparian habitats. Plaintiffs respectfully request that this Court award Plaintiffs their attorneys' fees  
15 and costs (including expert witness fees) and determine the appropriate amount of fees and costs to  
16 be awarded at a subsequent proceeding.

17  
18  
19 **I. Plaintiffs are Entitled to Recover Their Damages, Which Should be Trebled.**

20 RCW 4.24.630 specifically provides for treble damages, attorney's fees and costs in cases such  
21 as the one at bar.

22 Section .630 reads in its entirety:

23  
24 (1) Every person who goes onto the land of another and who removes timber, crops,  
25 minerals, or other similar valuable property from the land, or wrongfully causes waste  
26 or injury to the land, or wrongfully injures personal property or improvements to real  
estate on the land, is liable to the injured party for treble the amount of the damages  
caused by the removal, waste, or injury. For purposes of this section, a person acts

1 "wrongfully" if the person intentionally and unreasonably commits the act or acts while  
2 knowing, or having reason to know, that he or she lacks authorization to so act.  
3 Damages recoverable under this section include, but are not limited to, damages for the  
4 market value of the property removed or injured, and for injury to the land, including  
the costs of restoration. In addition, the person is liable for reimbursing the injured  
party for the party's reasonable costs, including but not limited to investigative costs  
and reasonable attorneys' fees and other litigation-related costs.

5 (2) This section does not apply in any case where liability for damages is provided under  
6 RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability  
under RCW 64.12.035.

7 Here, the unrefuted testimony of Plaintiffs establishes that they have already suffered  
8 economic damages in the amount of \$1,427,490.00, which is comprised of the costs of mitigation  
9 efforts, costs of restoration, and damage and loss of property. See Carey Decl., Rogers Decl., Anderson  
10 Decl. A money judgment in treble this amount should be entered by the Court.

11 In measuring damages, one of the first questions is whether the damage to the property is  
12 permanent, or whether the property may be restored to its original condition. If the injury is  
13 permanent, the general rule applicable is the difference between the market value of the property  
14 immediately before the damage and its market value immediately thereafter. If, however, the property  
15 may be restored to its original condition the measure of damages is the reasonable expense of such  
16 restoration, and in a proper case the loss of use or of income therefrom for a reasonable time pending  
17 such restoration. *Kincaid v. City of Seattle*, 74 Wash. 617, 134 P. 504, 135 P. 820; *Messenger v. Frye*, 176  
18 Wash. 291, 28 P.2d 1023; *Armstrong v. City of Seattle*, 180 Wash. 39, 38 P.2d 377, 97 A.L.R. 826; *Ghione*  
19 *v. State*, 26 Wash.2d 635, 175 P.2d 955; 3 Sedgwick on Damages (9th ed.) 1916, § 932. *Colella v. King*  
20 *County*, 72 Wn.2d 386, 433 P.2d 154 (Wash. 1967).

21  
22 In addition, because further remediation is required, and because that exact cost cannot be  
23 ascertained in advance, the Court should find that DNR is liable for appropriate costs necessary to  
24 restore Caldervin Creek to its pre-event condition and find that Plaintiffs are entitled to a further  
25 award in a sum that is treble whatever those costs are on completion of the restoration. Accordingly,  
26



1 Plaintiffs request that this Court retain jurisdiction over this matter until that time. In an effort to  
2 estimate at least the scale of those costs, Plaintiffs requested a qualified contractor to submit a bid for  
3 restoration work just to reinstall the access road and restore the Creek surrounding it at the Liberty  
4 Property. *See Fisher Decl., Ex. C.* For repair of the Liberty property access road the contractor bid<sup>7</sup>  
5 is currently \$339,430.00. This sum is dated and does not include the cost of dredging or restoring  
6 areas north or south of the affected Liberty Property.

7  
8 In addition, the flooding, threat of further flooding, and unsightliness of flood control devices  
9 has decreased the values of Plaintiffs' properties. In her Declaration, Rogers describes the difficulty  
10 she had finding a buyer for her property and the necessary price concession of at least \$65,500.00  
11 because of the increased threat of flood and loss of real property; cleanup costs of \$8,600.00; and  
12 concrete wall construction costs of \$20,000.00; for a total of \$94,100.00 damages incurred by Rogers.  
13 *Rogers Decl., at ¶24.* Pursuant to RCW 4.24.630, such sum is properly trebled.

14 Likewise, Carey demonstrates damages of \$128,000.00 in costs to remove and build a concrete  
15 fence, \$10,000.00 in damage to his deck, and \$8,000.00 in lost usable space and diminution of value  
16 totaling Carey's losses at \$146,000. *Carey Decl., at ¶25.* Pursuant to RCW 4.24.630, such sum is  
17 properly trebled.  
18

19 Finally, Liberty's loss totals \$339,430.00 for the restoration of the access road; and some  
20 \$27,700.00 in costs largely associated with stabilizing the banks appurtenant to the various smaller lots  
21 along Caldervin Creek. *Carey Decl., ¶¶ 28 & 29.*

22 In sum, without taking into consideration any cost of restoring the functions and values of the  
23 Creek and returning its ability to transport water in its natural state (and provide important habitat for  
24

25  
26 <sup>7</sup> Notably that bid remained viable only for 30 days and did not include survey, permitting, bonding, sales engineering and  
a host of other potential requisites. See Standard Exclusions and Conditions clause of Bid.

1 spawning salmon), Plaintiffs have demonstrated damages in the total amount of \$475,830.00, which  
2 sum when trebled equals \$1,427,490.00.

### 3 4 **VI. CONCLUSION**

5 For all of the foregoing reasons, Plaintiffs respectfully requests the Court grant the instant Motion  
6 for Summary Judgment and respectfully request the following relief:

- 7 1. A finding that DNR acted negligently when it released the impounded waters of Wood Lake on  
8 December 1, 2016;
- 9 2. A finding that DNR tortiously injured Plaintiffs' real properties when it unplugged the Caldervin  
10 Creek culvert;
- 11 3. A finding that DNR unlawfully trespassed on the properties of the Plaintiffs;
- 12 4. A finding that DNR committed the tort of waste;
- 13 5. A finding that DNR inversely condemned the property of Plaintiffs;
- 14 6. A finding that DNR's actions (and inaction) caused damage to the Plaintiffs and their properties;
- 15 7. A finding that DNR violated the Public Trust Doctrine when it breached its fiduciary duty to  
16 maintain, manage, and preserve public trust assets;
- 17 8. A finding that Plaintiffs are entitled to treble damages pursuant to RCW 4.24.630.
- 18 9. Entry of a money judgment in favor of the Plaintiffs in the sum of \$1,427,490.00.
- 19 10. Entry of a money judgment in favor of Plaintiffs for all reasonable attorneys' fees and costs  
20 associated with this litigation, including expert witness fees, in an amount to be determined at a  
21 later proceeding;
- 22 11. Entry of an Order commanding DNR or allowing Plaintiffs to undertake appropriate remediation  
23 to return the drainage from Wood Lake so as to restore the Wood Lake culvert, Caldervin Creek,  
24 and restore its functionality as a fish bearing creek.
- 25 12. Entry of an Order retaining jurisdiction over this matter to allow for further proceedings to  
26 determine the sufficiency and the completeness of ordered remediation, and to determine the

costs of restoration.

13. For any such further relief that is equitable and just.

DATED this 28<sup>th</sup> day of September 2023.

The Law Office of James P. Grifo, LLC

The Law Office of Nicholas Power

s/ James Grifo

James P. Grifo, WSBA No. 45192  
Attorney for Plaintiffs

s/ Nick Power

Nicholas Power, WSBA No. 45974  
Attorney for Plaintiffs