

HOUSE BILL REPORT

EHB 1128

As Passed House

April 16, 1997

Title: An act relating to necessary emergency measures for the Loomis state forest.

Brief Description: Implementing a recovery plan for dead and at-risk timber in the Loomis state forest.

Sponsors: By House Committee on Natural Resources (originally sponsored by Representatives Thompson, Sump, McMorris, Mielke, Mulliken, Buck, Sheldon and Schoesler).

Brief History:

Committee Activity:

Natural Resources: 2/14/97, 2/27/97 [DP];

Appropriations: 3/6/97, 3/7/97 [DP].

Floor Activity:

Passed House: 4/16/97, 63-34.

HOUSE COMMITTEE ON NATURAL RESOURCES

Majority Report: Do pass. Signed by 8 members: Representatives Buck, Chairman; Sump, Vice Chairman; Thompson, Vice Chairman; Alexander; Chandler; Hatfield; Pennington and Sheldon.

Minority Report: Do not pass. Signed by 3 members: Representatives Regala, Assistant Ranking Minority Member; Butler, Assistant Ranking Minority Member; and Anderson.

Staff: Linda Byers (786-7129).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass. Signed by 20 members: Representatives Huff, Chairman; Alexander, Vice Chairman; Clements, Vice Chairman; Wensman, Vice Chairman; Doumit, Assistant Ranking Minority Member; Benson; Carlson; Cooke;

Crouse; Dyer; Grant; Kessler; Lisk; Mastin; McMorris; Parlette; D. Schmidt; Sehlin; Sheahan and Talcott.

Minority Report: Do not pass. Signed by 9 members: Representatives H. Sommers, Ranking Minority Member; Gombosky, Assistant Ranking Minority Member; Chopp; Cody; Keiser; Kenney; Linville; Regala and Tokuda.

Staff: Nancy Stevenson (786-7137).

Background:

The Loomis Forest

The Loomis State Forest is a block of forest land in Okanogan County managed by the Department of Natural Resources (DNR) for the benefit of the common school trust. The forest is approximately 134,000 acres in size, with an average elevation of 6,000 feet. The forest was created from federal grant lands, and the Legislature and the department must manage the forest in a way that satisfies the state's fiduciary responsibilities to the common school trust beneficiaries.

Until the late 1950s, the primary management activities in the forest were fire suppression and cattle grazing. In the 1960s, the department expanded the road network into the forest and completed the first inventory of the forest's resources. There were some timber harvests, for example of Douglas fir, in the 1970s and early 1980s, partly in response to an infestation of spruce budworm. Lodgepole pine stands in the forest reached the mature age of 80 years old but were not harvested.

In 1987, bark beetles began infesting lodgepole pine in the Loomis Forest. According to the judge's findings of fact in the litigation discussed below, as of January 1996, some 20,025 acres of the forest had at least 40 percent dead lodgepole pines, and 28,351 acres had trees at risk of damage from infestation.

Since the late 1980s, management of the Loomis Forest has been the subject of great debate and controversy. Some citizen activists have expressed concern about management activities such as timber harvesting and road-building posing a risk to water quality, to the lynx (a species listed as threatened by the state), and to other environmental factors. Other citizen activists have argued that the department has not moved aggressively enough to deal with the beetle infestation and that the department is not meeting its fiduciary obligations in managing the trust.

In 1993, the department initiated a planning effort for the Loomis Forest. The first part of that planning effort was the appointment of a 13-member citizen advisory committee to recommend to the department goals and objectives for 10 resources of the forest: air, timber, wildlife, fish, water, grazing, minerals, soils, recreational,

and archaeological and cultural resources. The citizen committee completed its tasks in 1994, and the department began to develop a landscape management plan for the forest. The department completed its planning effort in June 1996.

Activity in the Legislative Arena

In 1995 and 1996, the Legislature considered measures dealing with the Loomis Forest. Various versions of the legislation directed the department to act expediently to resolve the forest health situation in the forest. No measure was enacted into law.

Loomis Forest Litigation

Beginning in 1994, Okanogan County and eventually 14 individual school districts brought an action in superior court alleging that the department has failed to properly manage the Loomis Forest. That case is now in process in Chelan County Superior Court. In their amended and supplemental petition to the court, the county and school districts asked the court to issue a writ of mandamus, a mandatory injunction, or other order requiring the department to implement a timber harvest and salvage plan to maximize the financial return to the common schools and reduce the risk of catastrophic fire in the forest. Specifically, the petitioners asked the court for an order to implement a plan such as the one they brought to the court as an exhibit. The petitioners asked for an order declaring an emergency under the administrative rules implementing the State Environmental Policy Act (SEPA) in order to exempt actions from SEPA review. The petitioners requested an order declaring that the department's preliminary landscape plan for the Loomis Forest fails to satisfy the department's trust obligations and enjoining the department from implementing its plan.

Okanogan County and the school districts also filed a \$250 million claim with the state for damages caused by an alleged breach of the state's fiduciary duties. They reserved the right to adjust their damage claim when the value of harvested timber is known.

In May, 1996, the court issued its first decision in the Loomis litigation. The court denied the petitioners' request for a permanent injunction. In evaluating their request for a preliminary injunction, the court evaluated the request in terms of three criteria: 1) whether they had proven a clear legal or equitable right; 2) whether they had proven a well-grounded fear of immediate invasion of that right; and 3) whether they had proven that the acts or inaction of the department would result in actual and substantial injury. With regard to the first criteria, the court determined that

Considering the complex interrelationship of the ten resources identified on the Loomis Forest, the long-term nature of the Department's duty to the trust beneficiaries, the lack of roads in the area of the green or at-risk

lodgepole timber, and the lack of an economic analysis comparing the Department's proposed harvest to Mr. Ebel's proposed harvest, the Court cannot find that the Department clearly breached the duties it owes to the trust beneficiaries, i.e., abused its discretion. Consequently, the Petitioners have failed to establish a clear legal or equitable right at this time. In order to obtain the extraordinary relief of a preliminary injunction before trial, such a right must be clearly established by the Petitioners. There has not been a clear showing DNR abused its discretion.–

With regard to the second criteria, the court found that

The bark beetle problem is a result of extensive fire suppression activities over a long period of time producing even aged lodgepole stands susceptible to infestation by the mountain pine beetle. A problem of this nature created over a long period of time will require a long-term solution involving the creation of a mosaic. There is insufficient evidence to support a finding that a catastrophic fire is imminent.

While the Department should act promptly in the exercise of its fiduciary duties owed the trust beneficiaries, the Petitioners have failed to prove a well grounded fear of immediate invasion.–

Finally, with regard to the third criteria, the court provided the following:

It is undisputed that if the Department fails to act in the manner proposed by the Petitioners before the trial of this matter, it will not result in any actual dollar lost to any of these Petitioners. They will suffer no monetary loss whatsoever if this Court denies Petitioners' request for a preliminary injunction. There is at most a question of fact as to whether or not the acts or lack of action on the part of the Department will result in actual or substantial injury to the trust fund over the long-term considering the multi-generational nature of the trust beneficiaries and the relative size of this particular trust asset.–

The court denied the request for a preliminary injunction against the department.

The court did grant the petitioners' request for a writ of mandamus with regard to a decision which the department had not officially made at the time. The court ordered the department to decide if the salvage of dead lodgepole pine trees on the Loomis Forest is in the best interests of the common school trust. The court directed the department to consider the net value of the timber and relevant elements of the physical and social environment when making its determination. The Board of Natural Resources adopted the Loomis State Forest Final Landscape Plan a few days after the judge's first decision. The department then provided information to the

court on the final plan, how the department intends to implement the plan, and how this will address the salvage of dead timber and the harvest of timber at risk of infestation.

Loomis Forest Landscape Plan

The Loomis State Forest Final Landscape Plan is a plan intended to guide the management of the Loomis Forest for the next eighty years. The plan contains the department's proposal for dealing with the harvest of at-risk and dead timber susceptible to fire, insects, and disease, with the construction and management of roads in the forest, and with managing the productivity of the forest to achieve a set of long-term goals in the key resource areas identified above.

Future Court Activity

The Loomis Forest litigation is currently scheduled to continue with a July 15 trial in Chelan County Superior Court. Issues remaining before the court include a resolution of the damage claim filed against the state.

Summary of Bill: The Legislature finds that an extremely serious forest health situation exists in the Loomis State Forest. The infestation of the mountain pine beetle and the presence of other insect and disease problems indicate the need for implementation of a decisive plan to address current forest health and to enhance habitat and long-term productivity of the forest. The Legislature further finds that the 1996 final landscape plan for the forest does not adequately address the emergency situation. The Legislature directs the Department of Natural Resources to adopt and immediately begin to implement a long-range management plan for the Loomis Forest that will result in a much healthier and more productive forest. The Legislature also directs the department to act in the immediate future to recover as much value as operationally and economically feasible from timber at risk or killed by the beetle infestation. In designing and implementing this new management plan, the department must comply with all applicable state and federal laws and conduct itself in a manner consistent with its obligations only to the trust beneficiaries.

The Legislature declares its intent to remain actively involved in the oversight of the management of the Loomis Forest. The department must carefully monitor the impacts to the forest of implementation of the new management plan and report to the Legislature on the condition of the forest at least annually for the next five years.

In a situation where: 1) the department has applied for a permit to conduct a forest practice to implement the management plan in the Loomis Forest, 2) a person has appealed to the Forest Practices Appeals Board, and 3) the appeals board has granted a stay of the implementation action, the appeals board must require the person requesting the stay to provide security to cover the amount of damages potentially

resulting from the stay. In no case may the security be less than \$100,000. The same provision applies to judicial review of an appeals board decision.

Appropriation: \$931,000 to the Department of Natural Resources from the resource management cost account.

Fiscal Note: Requested on February 7, 1997.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Natural Resources) This is the third year we have tried to pass this bill. The department has only done a minimal amount in the Loomis. Their effort has not been sufficient. There's been excuse after excuse. The landscape plan doesn't address the current problem. We can't keep doing business as usual. DNR has defied legislative direction. We are looking for professional management and are not getting it. We are not getting the rate of return we should be from the management of state trust lands. The rate of return is lower than the private sector. We have been following this issue for three years and are disgusted with DNR. There are many reasons why the Loomis is in bad shape, but there are no good excuses. The law requires prompt sale of damaged timber. DNR must protect trust lands from pests and diseases. This is a forest health emergency, a crime, and it's robbing our school kids. There is a big fire risk, which is a threat to public safety. The forest is not a park or a preserve and must be managed for the production of income. The Legislature needs to live up to its fiduciary duties. The current plan is a conservative approach to a large-scale problem. The problem is that the current plan is not being implemented because the sales are being appealed. Allowing continued appeals costs the buyers significant attorney fees and contractor costs for downtime, and this comes back to the trust in terms of lower bid prices. For several years, DNR's harvest activity stagnated. DNR was bending over to a handful of environmental extremists. The judge in the case either didn't understand or wimped out. The issue is accountability, and the Legislature has to hold DNR accountable. DNR managers tried to deal with the beetle and a salvage strategy several years ago, but every time they had a plan, it was stopped by a 32-cent stamp. Because a lot of the area is roadless, there aren't the firebreaks provided by roads; it may be no more likely that a fire will start there, but it will be a large one if one does. Action should have been taken five years ago to get the dead and dying trees when there was a good fiber market. Regardless of what resources you are for, fire will wipe all of it out, and the trust will lose revenue. This affects common schools across the state. The trust fund has insufficient revenues to meet school construction needs, and the department is not meeting its fiduciary duties. The litigation is now moving into part two; the judge thought there was reason to review the possibility of a damage claim. The pine beetle problem remains. Fire in the area would be devastating. A court-appointed expert found that more timber could be recovered than what is in DNR's plan. Something is wrong at DNR.

(Appropriations) If the bill had passed three years ago, there wouldn't be a problem. The pine beetle problem has been going on for eight years. Other states have been able to handle the problem. The private sector says roads can be built to get to the timber.

Testimony Against: (Natural Resources) There are special resources in the Loomis. There is scientific disagreement about the fire risk. The landscape plan is not an environmentalist's dream; it adds 200 to 350 miles of new roads into a last remaining block of roadless forest. A sampling in the forest shows that the beetle infestation has peaked. This is not a forest health crisis; address the forest health situation in a long-run way to generate revenue for the trust in an environmentally responsible way. This case is still in litigation, and the parties from both sides are testifying. The bill directs the department to do several things which the department feels it is already doing. The landscape plan is a decisive plan that was adopted unanimously by the Board of Natural Resources. The landscape plan has been submitted to the court, and the parties have not challenged its adequacy. The landscape plan calls for more harvest than the opposing parties' consultant's report recommends. Starting all over would be time-consuming and expensive and would not result in a plan much different than the current one. It would be better to spend this time harvesting timber. The Department of Fish and Wildlife has listed the lynx as a state threatened species and asked the Forest Practices Board for a rule. The three landowners with lynx instead offered to do management plans that considered the lynx. The lynx management plan is closely tied to the current landscape plan. The healthier forest will be better for the lynx.

(Appropriations) The existing Loomis plan cost over \$1 million to develop. Redoing the plan will cost more money. The current plan proposes to harvest 30 million board feet. The plan has been submitted to the court and has not been challenged.

Testified: (Natural Resources) Representative Bill Thompson, prime sponsor; Bonnie Lawrence, Okanogan Resource Council and Okanogan County Citizens Coalition; Jerry Theis, Omak Wood Products; Spence Higby, Okanogan County Commissioner; Russ Paul, Crown Pacific; Bill Pickell, Washington Contract Loggers Association; Bob Crocker, Quillayute Valley School District; and Bob Dick, Northwest Forestry Association (all in favor); Art Stearns and Stan Biles, Department of Natural Resources; Cyreis Schmitt, Department of Fish and Wildlife (all opposed); Mitch Friedman, Northwest Ecosystem Alliance; and David Braun.

(Appropriations) Representative Thompson, prime sponsor; and Art Stearns, Department of Natural Resources (con).