

# ZIONTZ CHESTNUT

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September 3, 2024

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Re: Forest Practices Application/Notification No. 2819518

To the Forest Regulation Division and Northwest Region Office,

We submit this comment on behalf of Lake Cavanaugh Trust regarding the Forest Practices Application/Notification No. 2819518 submitted by Timberline Logging, Inc. (Nielsen Brothers) on August 19, 2024. Lake Cavanaugh Trust incorporates previous comments and materials submitted on FPA No. 2819391 and the associated SEPA File No. 24-053001 by reference, including comments on the FPA submitted on May 30, 2024, SEPA comments submitted on June 13, 2024, and the expert report prepared by Dan McShane, L.E.G., M.Sc., dated May 27, 2024.

The application is the Nielsen Brothers' latest attempt at an extraordinarily risky proposal for logging and extensive road construction directly above private homes, a road, drinking water supply, and fisheries. It includes a revised report from Icicle Creek Engineering (ICE) but does not address the deficiencies identified in Lake Cavanaugh Trust's prior comments with respect to the prior FPA. The application still proposes unlawful forest practices on an alluvial fan and within a channel migration zone. The consequences of the likely impacts to public safety and public resources remain exceptionally high. Moreover, the proposal involves logging in or around a documented marbled murrelet nesting site, causing illegal "take" under the Endangered Species Act. The road construction is clearly linked to and premised on extensive future logging with similar environmental concerns.

As detailed below, DNR should deny the application because it is incomplete, inaccurate, and violates the Forest Practices Act and Forest Practices Rules. If DNR does not deny the

application outright, the agency must deny the application based on inadequate SEPA and initiate a SEPA process and fully consider the direct, indirect, and cumulative effects of the proposal. To avoid unlawful segmentation, the effects considered must include the reasonably foreseeable impacts of logging facilitated by the proposed road construction. DNR should make a determination of significance and require a preparation of an environmental impact statement, and then exercise its substantive SEPA authority to deny the application. WAC 332-41-665(3).

In addition to its statutory and regulatory authorities and duties, DNR faces potential legal liability for its decisions. Approval of the proposal and associated logging would create potential tort liability for both DNR and the Applicant for damage to private property and life. Approval also creates potential liability under the ESA, because “a governmental third party such as [Washington], pursuant to whose authority an actor exacts a taking of a threatened or endangered species, may be deemed to have violated the provisions of the ESA.” *Ctr. for Biological Diversity v. Little*, No. 1:21-CV-00479-CWD, 2024 WL 1178565, at \*12 (D. Idaho Mar. 19, 2024) (citing *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997)).

## Legal Background

DNR has the duty and authority to strictly enforce the Forest Practices Act and associated Forest Practices Rules, as informed by the Forest Practices Board Manual. The Forest Practices Act was passed in association with the Forest Practices Habitat Conservation Plan, which provides incidental take protection for harm to aquatic species, but not upland species such as the marbled murrelet.

DNR is also the lead agency under the State Environmental Policy Act, and therefore has a statutory responsibility to fully evaluate the potential impacts of the proposal and to public safety, drinking water quality, and environmental quality. The new FPA, FPA No. 2819518, constitutes a new proposal under SEPA that requires preparation of a new SEPA checklist and a new threshold determination. DNR has failed to identify FPA No. 2819518 on its SEPA Center website or otherwise solicit or consider public comment.<sup>1</sup>

SEPA policies related to the review of environmental impacts, conditioning, and disapproval of forest practices are adopted by the forest practices board and are contained in chapter 222-10 WAC. WAC 222-10-010 adopts by reference policies of SEPA as set forth in RCW 43.21C.020. Additionally, pursuant to WAC 332-42-665(2), DNR has adopted “the policies set forth in the State Environmental Policy Act, RCW 43.21C.020, as further basis for conditioning or denying a public or private proposal under SEPA.”

Those incorporated SEPA policies are to:

- (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (b) Assure for all people of Washington safe, healthful, productive, and

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<sup>1</sup> <https://www.dnr.wa.gov/northwest-0>

esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

### **Identity of the Landowner**

Like its predecessor, the application is deficient in that it incorrectly identifies the landowner as a small forest landowner as defined at RCW 76.09.450, with associated reduced compliance requirements for marbled murrelet surveys and road maintenance and abandonment planning. This incorrect information requires denial.

As detailed in their filings with the Washington Secretary of State, *see* Exh. A attached hereto, Timberline Logging, Inc., is a corporation held and controlled by Robert Nielsen and David Nielsen. The relationship between the Nielsen Brothers, Inc and Timberline Logging, Inc. is detailed in previous comments. Robert and David Nielsen are owners of Nielsen Brothers, Inc., a timberland manager, logging company, and associated flooring company that do not constitute small forest landowners. Notably, the Nielsen brothers also own West Side Logging, LLC, and through that company own the forested parcels that the road connects to. *See* Exh. B (tax parcel map and Secretary of State information for West Side Logging, LLC).

RCW 76.09.450 defines a small forestland owner as “an owner of forestland who, at the time of submission of required documentation to the department, **has harvested from his or her own lands** in this state no more than an average timber volume of two million board feet per year during the three years prior to submitting documentation to the department and who certifies that he or she does not expect to harvest from his or her own lands in the state more than an average timber volume of two million board feet per year during the ten years following the submission of documentation to the department.” (emphasis added). The statutory definition is focused on the actual person exerting the underlying control and ownership. This includes an accounting of all corporations owned and/or controlled by the underlying landowners. Here, those persons are the Nielsen brothers, not the corporate entity owned by the brothers.

This conclusion is buttressed by the regulatory definition of “forestland owner.” Under WAC 222-16-010, “‘Forest landowner’ means **any person in actual control of forest land**, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner.” (emphasis added). The Nielsen Brothers, as the sole governors of Timberline Logging, are the

“person” that have “actual control” of the forest land at issue, and thus are the owners.

There is precedent for DNR denying an application based on a similarly transparent attempt to work around the legal requirements for large forest landowners. In King County, DNR denied an FPA submitted by a corporation controlled by Erickson Logging, in part because it incorrectly identified as a small forestland owner to avoid marbled murrelet survey requirements. Erickson Logging later resubmitted a revised application based on correct information.<sup>2</sup>

The FPA must be denied based on incomplete and inaccurate information. Approval would bless an obvious and unlawful loophole circumventing the Forest Practices Act and Rules.

### **Alluvial Fans**

Timber harvest is forbidden on alluvial fans. This is a flat prohibition. WAC 222-30-021(2)(b)(vi) (“No timber harvest is permitted within an alluvial fan”). The Icicle Creek Engineers (ICE) report attached to the application concedes that the proposed road crosses what it characterizes as three alluvial fans, and that harvest is proposed on an alluvial fan. These concessions require denial of the application.

The applicant and ICE assert that the proposal complies with Forest Practices Rules because there is only timber harvest proposed on an alluvial fan that ICE describes as “relict.” These arguments fail for at least three reasons.

First, there is timber harvest proposed across all the alluvial fans. The proposal concedes that there would be timber harvest to facilitate road construction across the alluvial fans. Page 5 of the FPA describes “Unit 2” as for the “ROW” (right of way) and includes harvest of 15 mbf of timber. This proposed timber harvest would be on all the alluvial fan areas identified by the Applicant. Such timber harvest on alluvial fans is prohibited. There is no provision or basis for the Applicant’s attempt to “mitigate” the risk of timber harvest and road construction across the alluvial fans. The permit application must be denied.

Second, as explained in the McShane report, the asserted alluvial fan 2 is really a part of alluvial fan 3. Together they are one alluvial fan as defined under WAC 222-16-010. As explained in Mr. McShane’s report and not refuted in the revised ICE memo, there is no regulatory or scientific basis for the attempt to segregate off a portion of the alluvial fan for timber harvest.

Third, there is no scientific or regulatory basis for the assertion that logging may be permitted on a “relict” alluvial fan. The ICE report explains that they are referring to a sentence in the regulatory definition, which reads that “[a]lluvial fan does not include features that were formed under climatic or geologic conditions which are not currently present or that are no longer dynamic.” ICE reads that provision far too broadly to suggest that any temporary stability

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<sup>2</sup> <https://www.issaquahreporter.com/news/erickson-files-for-new-logging-permit-on-squak-mountain/>

of a feature means it is “relict” and not an alluvial fan. To the contrary, the regulatory definition refers to very long-term processes of climate and geology. In order to not qualify as an alluvial fan, the land feature must not have been dynamic for a period of time that is significant in a climatic or geological sense.

Here, Mr. McShane has documented a dynamic landscape with very recent and recurring debris flows and LiDAR evidence of swales and channels that suggest recent active channels. This evidence confirms that the alluvial fan is dynamic. The ICE report fails to rebut these documented examples. Instead, the ICE report relies on the assertion that the stream channel is incised. This argument fails because the relatively modest incision identified does not evidence different “climatic or geological conditions.” As noted by Mr. McShane, the Forest Practices Board Manual states that “[t]he degree of channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential, as infrequent but large flood events or debris flows can rapidly fill the channel.” (page M2-37 of Manual). This guidance is applicable to and supported by the documented conditions on the landforms at issue, and there is no basis to deviate from the Board Manual’s guidance.

For all the reasons stated above, the application must be denied for violation of WAC 222-30-021(2)(b)(vi).

### **Channel Migration Zone**

No logging is permitted in a channel migration zone. “No harvest, construction or salvage will be permitted within the boundaries of a channel migration zone except for the construction and maintenance of road crossings in accordance with applicable rules and the creation and use of yarding corridors consistent with WAC 222-24-020(6), 222-30-060(1), and 222-30-045(2).” WAC 222-30-020(13). “RMZs are measured horizontally from the outer edge of the bankfull width or channel migration zone, whichever is greater.” WAC 222-30-021.

Under Forest Practices Rules, a channel migration zone “means the area where the active channel of a stream is prone to move and this results in a potential near-term loss of riparian function and associated habitat adjacent to the stream, except as modified by a permanent levee or dike. For this purpose, near-term means the time scale required to grow a mature forest. (See board manual section 2 for descriptions and illustrations of CMZs and delineation guidelines.)” WAC 222-16-010.

The “near-term” in western Washington is generally 140 years. Chapter 2 of the Board Manual provides instructive guidance:

**By definition, the channels on alluvial fans migrate and are therefore subject to CMZ delineation.** Alluvial fans are also identified as “sensitive sites” in WAC 222-16-010 and no timber harvest is permitted within an alluvial fan (WAC 222-30-021(2)(b)(vi) and -022(2)(b)(ii)(C)(IV)). An alluvial fan will need CMZ delineation where historical map and aerial photograph and field evidence demonstrate that channel migration has occurred or can occur due to active fan

building processes upstream. Channels can be located anywhere on the fan and are best observed starting from the apex or upstream portion of the fan and following them downstream. **The CMZ will generally encompass the entire fan surface because of the difficulty in predicting the future channel location.**

All or some portions of the fan may no longer be subject to channel shifting if the fan-building processes have ceased or diminished. The degree of channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential, as infrequent but large flood events or debris flows can rapidly fill the channel. A relict fan may have one or more small modern fans building at the downstream margin of the larger feature. In this situation, only the smaller, active fan has a CMZ. Technical expertise may be necessary to evaluate the age and frequency of fanbuilding processes.

Board Manual M2-36 to 37 (emphasis added). Here, there should be channel migration zones identified for each of the streams crossed, with particular emphasis on the streams identified as Stream 1 and Stream 2.

The FPA includes “Appendix E,” which is the CMZ Assessment Form. The analysis fails to delineate the CMZ for the entirety of Stream 1 or any other stream based on the assertion that “[b]y rule” the CMZ only begins below the transition point from non-fish bearing stream to fish bearing (“Type F”) stream.

There is no scientific or regulatory basis for the assertion that a CMZ only exists for fish-bearing streams. The regulatory definition contains no such distinction, and the 64-page Board Manual Chapter 2 contains no reference to fish presence or water typing. The purpose of the CMZ rule is to protect riparian function, which includes water quality, and exists in both fish bearing streams and Np headwater streams. That is particularly true here, where the streams are all directly above homes, drinking water sources, and fish-bearing waters.

The application must be denied for a deficient CMZ analysis.

### **SEPA Timing and Comments**

The FPA is properly categorized as a “Class IV Special,” which constitutes an acknowledgment of the potential for probable significant, adverse environmental effects.

The Applicant resubmitted the FPA based on past deficiencies. There is a new FPA number, and it is a new application with new timelines. Accordingly, DNR must also restart the SEPA process and public comment opportunity. If DNR is pursuing an alternative strategy of preparing a SEPA Addendum based on new information, it must so notify the public and provide opportunity for comment and review.

Lake Cavanaugh Trust incorporates by reference its prior SEPA comments on the preceding FPA. We also request that DNR consider these comments as part of its decision

whether to require additional SEPA analysis.

In addition to the concerns already raised, we emphasize three points.

First, the current SEPA constitutes unlawful segmentation, also known as piecemealing. The clear purpose of the FPA is to construct a road to allow access to significant additional logging. The Nielsen brothers also own and control West Side Logging, LLC, which owns the forested parcels that the road connects to. *See* Exh. B. Those forested parcels contain mature timber that the current proposed road would be used to access. Road and bridge construction is very expensive. It is safe to say that but for the future logging, there would be no road.

Phased review is not appropriate or lawful because it “would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts.” WAC 197-11-060(5)(d)(ii). The classic, paradigmatic example of segmentation is this exact situation—in which the Forest Service attempted to separately analyze the impacts of a road from the anticipated logging, even though the logging was the purpose of construction of the road. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

Under WAC 197-11-060(3), which defines the appropriate scope of environmental review under SEPA:

- (b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
- (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
  - (ii) **Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.**

(emphasis added). Here, the proposed road and the future logging are clearly interdependent parts of a larger proposal. The Applicant would never build the proposed road, with its extensive, permanent infrastructure, but for the anticipated logging. The SEPA checklist must disclose, and DNR must analyze, not only the construction and timber harvest in the current FPA, but the reasonably foreseeable and connected actions of forest practices dependent on the road.

Second, DNR must consider the magnitude of consequence in evaluating impacts to public safety. The proposal is upslope of houses, drinking water supplies,<sup>3</sup> a public road, and an environmentally valuable lake. Meanwhile, the Applicant’s own report identifies “moderate risk” of channel avulsion on alluvial fan number one (*see* ICE Report at 5), and the construction,

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<sup>3</sup> The ICE Report refers to “unauthorized diversion” of streams for drinking water. Our understanding is that there are lawful, authorized diversions from one or more of the creeks impacted by the FPA for domestic water use.

use, and rainwater collection and diversion imposed by a new road would create ongoing increased risk of landslides. Under SEPA rules, significance depends on “context and intensity,” and “[t]he severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.” WAC 197-11-794(2). Here, the impacts are significant because there is at least moderate risk of debris flow, landslide, or other landform changes which would be catastrophic downstream.

Third, DNR must account for the disclosed and ongoing impacts to marbled murrelets and likely violation of the Federal Endangered Species Act. Under WAC 197-11-330(3)(e),

A proposal may to a significant degree:

- (i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;
- (ii) Adversely affect endangered or threatened species or their habitat;
- (iii) Conflict with local, state, or federal laws or requirements for the protection of the environment

Here, the timber harvest and construction of a road in and around a marbled murrelet nesting site would fragment marbled murrelet habitat, expose nesting murrelets to predation, and create long-term impacts through the noise and disturbance associated with road use. These impacts are well-documented in DNR’s own State Trust Lands Habitat Conservation Plan Marbled Murrelet Long-term Conservation Strategy and associated environmental review documents.

The Biological Opinion for the MMLTCS states that “[t]imber harvesting and road construction can result in both direct and indirect effects to murrelets. These effects can include the direct loss and fragmentation of nesting habitat, increased risk of nest predation near clearcut edges, habitat degradation associated with clearcut edges, disruption of nesting behaviors associated with audio and visual disturbance, and the potential for direct injury or mortality of murrelet eggs or chicks.”<sup>4</sup> The BiOp expressly recognizes “New Roads and Yarding Corridors in Occupied Sites and Buffers” as a significant source of “take” of marbled murrelets under the ESA.<sup>5</sup> Marbled murrelets have nesting fidelity to specific locations, so whether or not timing restrictions or other mitigation is imposed, fragmenting the nesting habitat and associated buffer is likely to cause take and inhibit reproduction.<sup>6</sup>

DNR’s SEPA analysis must disclose and consider impacts to marbled murrelets and violations of the Endangered Species Act. These impacts are one of several factors that require a determination of significance, preparation of an EIS, and denial of the application.

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<sup>4</sup> [https://www.dnr.wa.gov/publications/lm\\_mm\\_usfws\\_biological\\_opinion.pdf](https://www.dnr.wa.gov/publications/lm_mm_usfws_biological_opinion.pdf) at 85. Please review and incorporate the Biological Opinion into DNR’s permit file and SEPA record.

<sup>5</sup> *Id.* at 65-66.

<sup>6</sup> *Id.* at 86.



Forest Regulation Division

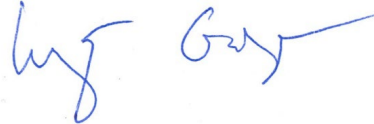
Sept. 3, 2024

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## Conclusion

The application and associated SEPA review are deficient and violate the Forest Practices Act, SEPA, and the Endangered Species Act. The proposed activities also impose unacceptable risk to public health and safety. We respectfully request that DNR must deny the application.

Ziontz Chestnut

A handwritten signature in blue ink, appearing to read "Wyatt Golding". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wyatt Golding

*Attorney for Lake Cavanaugh Trust*

Encl.

# **EXHIBIT A**

## BUSINESS INFORMATION

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Business Name:

**TIMBERLINE LOGGING, INC.**

UBI Number:

**601 298 396**

Business Type:

**WA PROFIT CORPORATION**

Business Status:

**ACTIVE**

Principal Office Street Address:

**900 DUPONT ST, BELLINGHAM, WA, 98225-3105, UNITED STATES**

Principal Office Mailing Address:

Expiration Date:

**02/28/2025**

Jurisdiction:

**UNITED STATES, WASHINGTON**

Formation/ Registration Date:

**02/04/1991**

Period of Duration:

**PERPETUAL**

Inactive Date:

Nature of Business:

**REAL PROPERTY INVESTMENT, TIMBER AND LOGGING OPERATIONS**

## REGISTERED AGENT INFORMATION

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Registered Agent Name:

**BRADLEY SWANSON**

Street Address:

**900 DUPONT ST, BELLINGHAM, WA, 98225-3105, UNITED STATES**

Mailing Address:

## GOVERNORS

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<b>Title</b>	<b>Governors Type</b>	<b>Entity Name</b>	<b>First Name</b>	<b>Last Name</b>
GOVERNOR	INDIVIDUAL		ROBERT	NIELSEN
GOVERNOR	INDIVIDUAL		DAVID	NIELSEN

# **EXHIBIT B**

## BUSINESS INFORMATION

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Business Name:

**WEST SIDE LOGGING, L.L.C.**

UBI Number:

**601 643 230**

Business Type:

**WA LIMITED LIABILITY COMPANY**

Business Status:

**ACTIVE**

Principal Office Street Address:

**100 PINE ST STE 301, BELLINGHAM, WA, 98225-5464, UNITED STATES**

Principal Office Mailing Address:

**PO BOX 2789, BELLINGHAM, WA, 98227-2789, UNITED STATES**

Expiration Date:

**07/31/2025**

Jurisdiction:

**UNITED STATES, WASHINGTON**

Formation/ Registration Date:

**07/17/1995**

Period of Duration:

**PERPETUAL**

Inactive Date:

Nature of Business:

**HOLDING COMPANY**

## REGISTERED AGENT INFORMATION

---

Registered Agent Name:

**TOM JESSUP**

Street Address:

**100 PINE ST STE 301, BELLINGHAM, WA, 98225-5399, UNITED STATES**

Mailing Address:

**PO BOX 2789, BELLINGHAM, WA, 98227-2789, UNITED STATES**

## GOVERNORS

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Title	Governors Type	Entity Name	First Name	Last Name
GOVERNOR	INDIVIDUAL		DAVID	NIELSEN
GOVERNOR	INDIVIDUAL		ROBERT	NIELSEN

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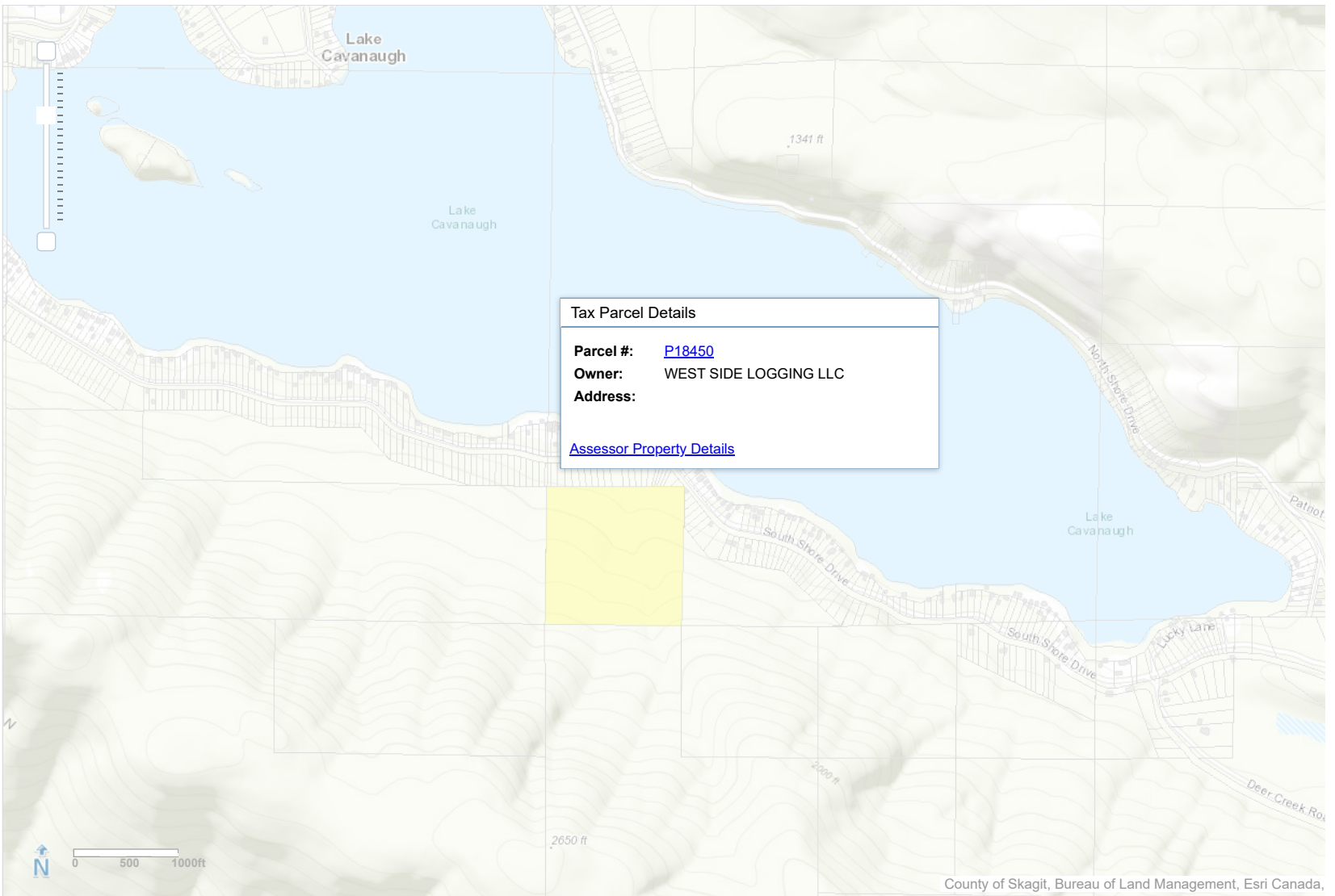
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P18450

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**Owner:** WEST SIDE LOGGING LLC  
**Address:**

[Assessor Property Details](#)

Map Description

Additional Maps

Legend

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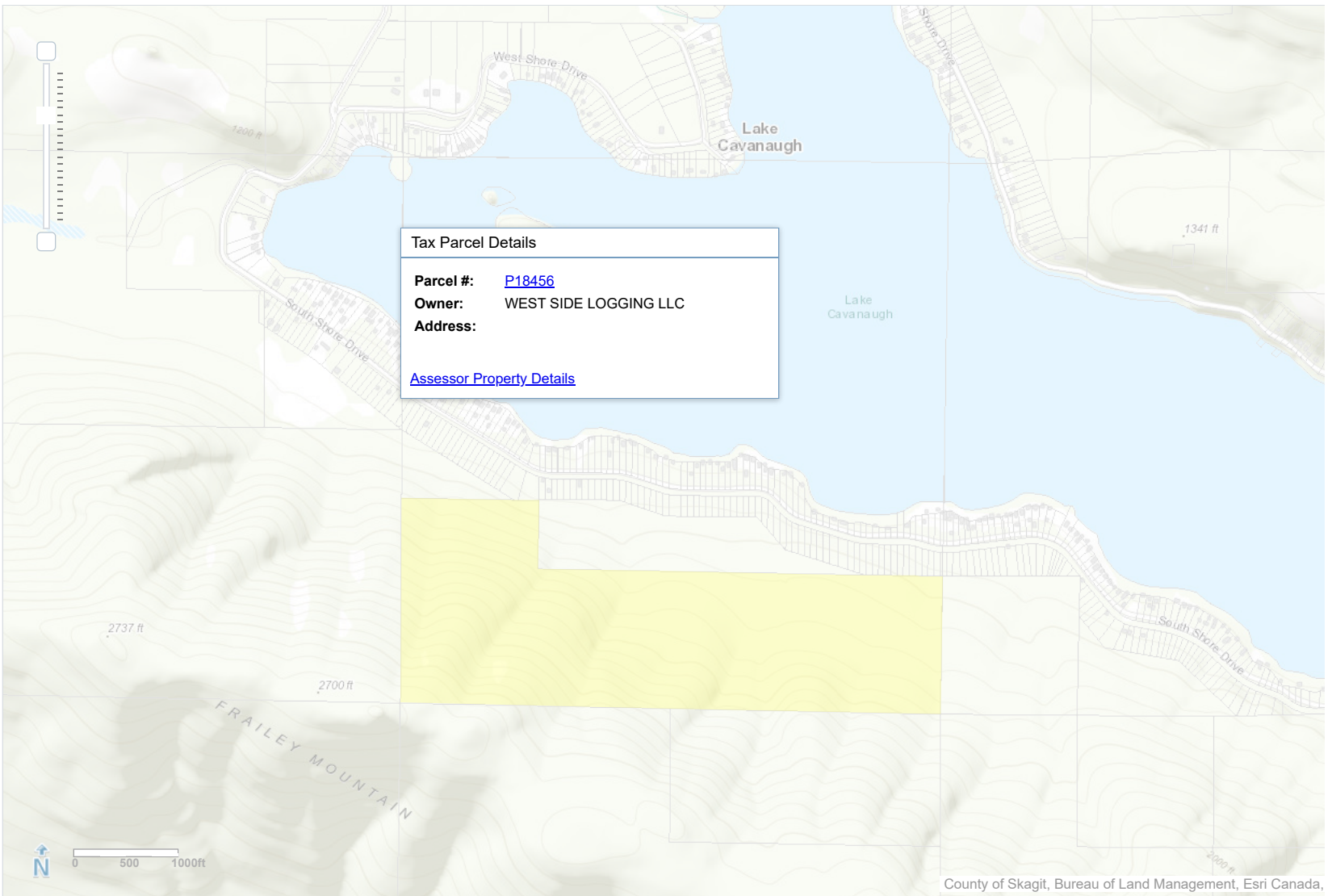
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P18456

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Map Description



Additional Maps

Legend

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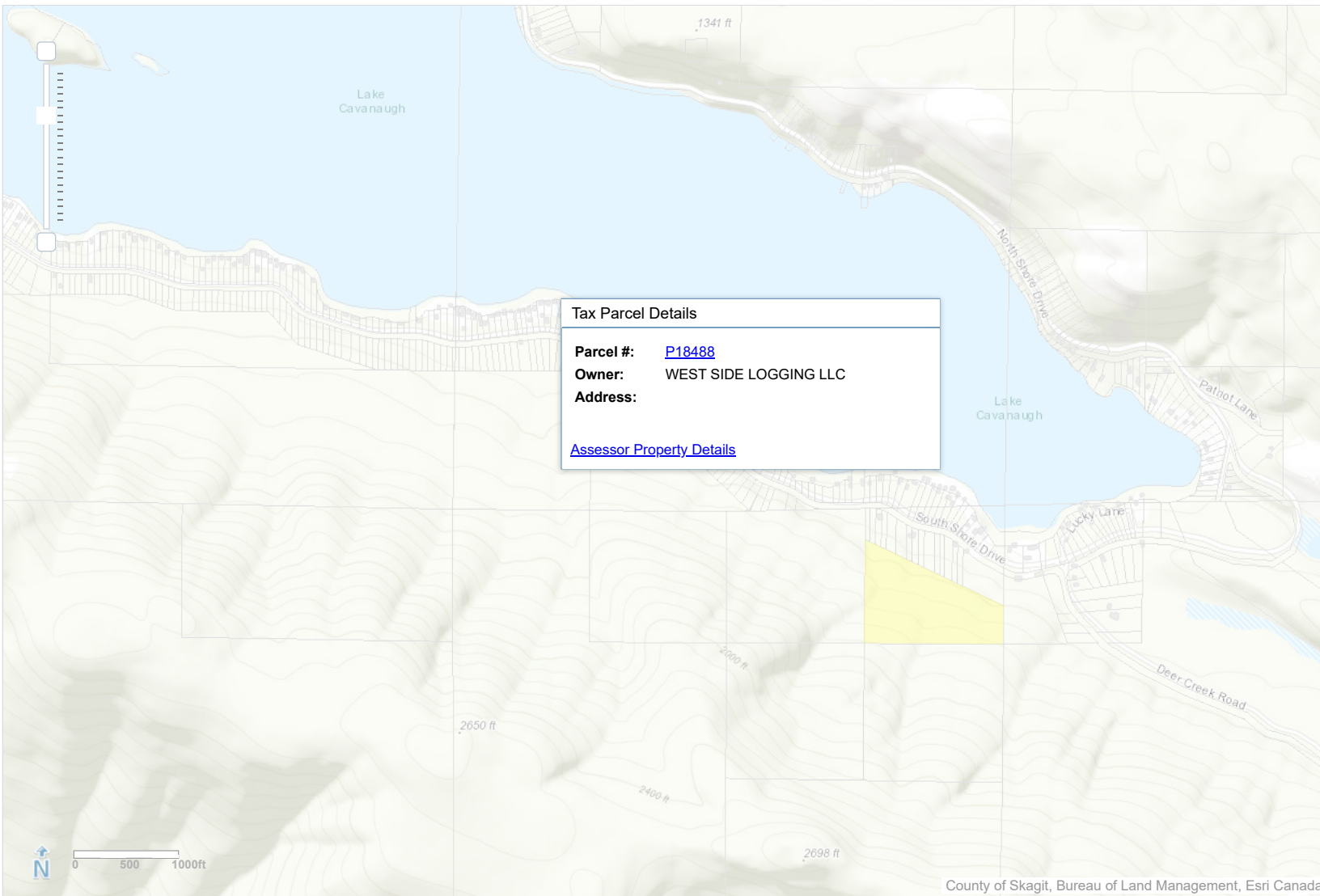
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Clear Search Graphic(s)



**Tax Parcel Details**

**Parcel #:** [P18488](#)

**Owner:** WEST SIDE LOGGING LLC

**Address:**

[Assessor Property Details](#)

Map Description







Additional Maps

Legend

Layer List

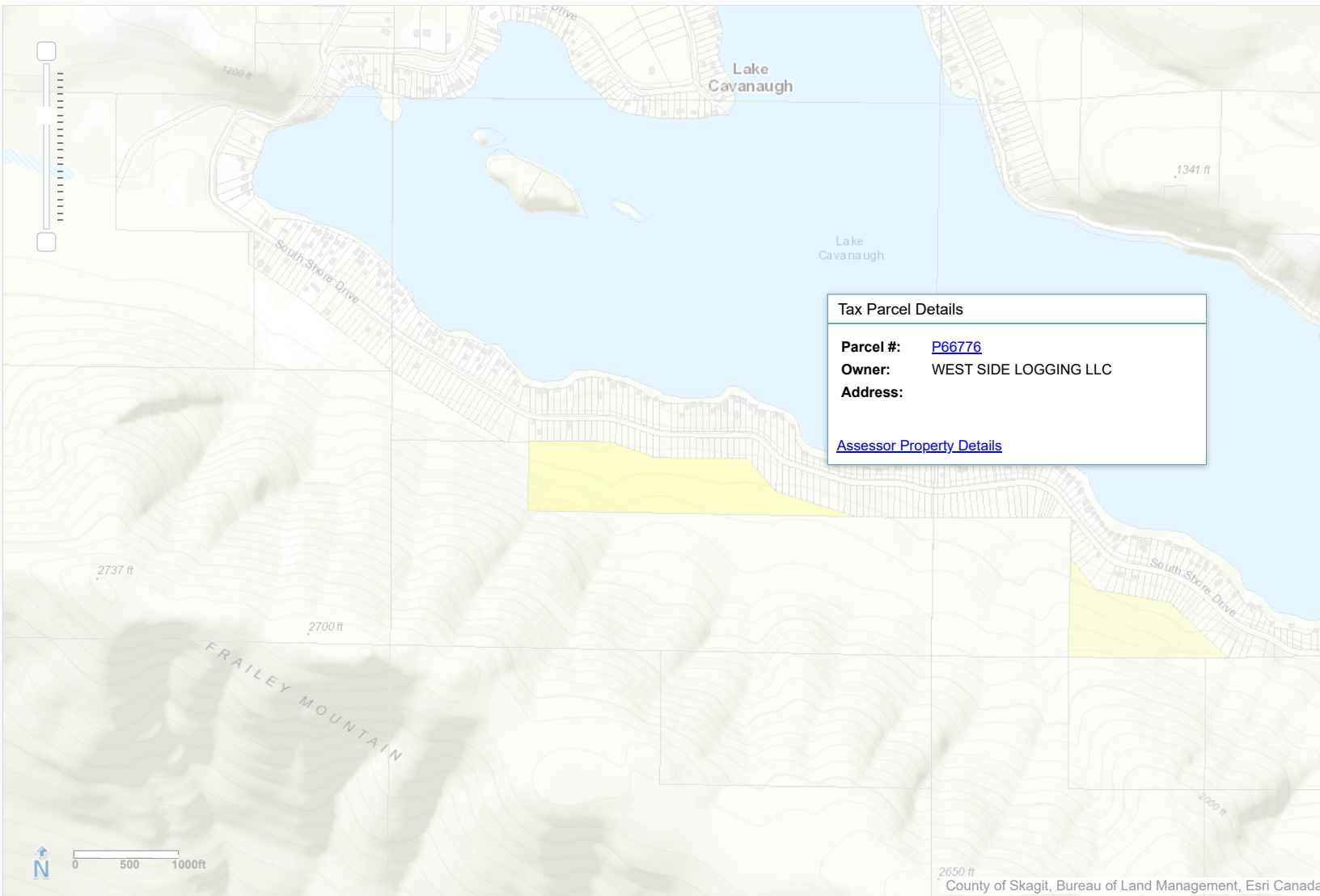
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Tax Parcel Details	
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<b>Address:</b>	
<a href="#">Assessor Property Details</a>	

Map Description

