

# ARTICLES

## A Trust for All the People: Rethinking the Management of Washington's State Forests

*Daniel Jack Chasan\**

The new millennium has dawned, but Washington State is still misinterpreting the 19th century. The state believes it cannot protect environmental or aesthetic values in its state forests unless someone actually buys the trees or land. If no one comes up with enough cold cash, it is just too bad about the animals that live on the land and the people who hike there.

Washington's courts and government agencies have assumed the following: (1) The land that the federal government gave Washington at statehood for the benefit of the "common schools" and other public institutions is held by the state as a trust. (2) This trust is exactly analogous to a private trust. (3) The state's "common school lands" and other granted lands must therefore be managed under the common law principles that govern private trusts. (4) The state owes a duty of "undivided loyalty" to the beneficiaries. (5) Undivided loyalty requires the state to manage the land for maximum revenue. (6) Revenue production cannot be sacrificed to the goal of preserving environmental or aesthetic values. In light of Washington's law and history, these conclusions are simply wrong. They find no support in federal statute, state constitutional language, the history of the lands, or state legislation. It is time to take a fresh look at the obligations Washington assumed with regard to managing its forests when it became a state.

If one actually looks at the history, the statutes, the state constitution, and a century of court decisions, the following becomes clear:

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- A broader public trust has always existed; the Washington Constitution explicitly recognizes this. Because of this broad, enduring trust, the environmental and aesthetic values of the granted lands must be safeguarded for all the people.
- Courts have incorrectly defined Washington's narrower fiduciary duty by equating the state's 1889 Enabling Act with the New Mexico-Arizona Enabling Act of 1910.
- The state's fiduciary duty prevents it from granting financial breaks to favored constituents, not from protecting species or habitat.
- Washington's constitutional framers consciously rejected the idea that granted lands should produce maximum revenue.
- Neither Congress nor the framers gave the State of Washington any guidance about the management of granted lands. They could not; no one managed American forests in 1889.
- Not one of the subsequent court rulings has required state land to be managed in any particular way and not precludes management that is guided in part by environmental values.

In this Article, I will first point out that neither the federal Enabling Act nor the Washington Constitution explicitly requires the state to hold its granted lands in trust for the common schools or other named institutions. Next, I will argue that even if the granted lands are trusts, they are not common law trusts and therefore should not be managed under common law trust principles. Third, I will demonstrate that neither Congress nor the framers of the Washington Constitution expected the lands to generate maximum revenue. Fourth, I will show that preventing thefts and giveaways of public land and timber was the only real legislative intent of both Congress and the framers. Fifth, I will demonstrate that that neither Congress nor the framers expected the lands to be managed in any particular way. Finally, I will argue that the Washington Constitution creates a broad constitutional trust, which requires the granted lands to be managed under the public trust doctrine.

## I. BACKGROUND

The stakes are high. The State of Washington owns some 2.1 million acres of forest, including more than 1.1 million acres managed for the benefit of the public schools. Most of this land is a legacy, at least indirectly, of statehood.<sup>1</sup>

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1. The state originally received 2,432,564 acres for the benefit of the common schools. It currently manages 1,781,617 acres of common school land. Of that total, 1,111,640 acres (62%)

When Washington entered the union in 1889, the federal government gave the state sections 16 and 36 in every township "for the support of common schools,"<sup>2</sup> and granted to the state other public land for support of an agricultural college, "a scientific school, normal schools, public buildings at the State capital, and State charitable, educational, penal, and reformatory institutions."<sup>3</sup> If someone else had already claimed the common school sections of a township, the state could choose other lands in lieu of those originally granted.<sup>4</sup>

The idea of granting lands to a state to support education was not new. Beginning with Ohio in 1803, every new state created from territory that was not part of the original 13 colonies received gifts of public land to support schools.<sup>5</sup> Until 1846, each new state received one section in every township to support public schools. However, a single section did not generate enough income to provide adequate support. A United States Land Commissioner observed that when Congress established the system of public lands, granting one section per township "doubtless appeared munificent, but experience has proved it to be inadequate."<sup>6</sup> People needed at least one school per township, but the single section of granted land in each township did not ordinarily produce enough annual revenue to pay a teacher for even one month.<sup>7</sup>

Starting in 1846, Congress granted each state two sections which, by the Land Commissioner's calculations, was also inadequate.<sup>8</sup> The

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are forested. WASHINGTON ST. DEP'T OF NAT. RESOURCES, STATE OF THE TRUSTS REPORT 17, 25 (1997).

2. Enabling Act, ch. 180, 25 Stat. 676 (1889).

3. § 17, 25 Stat. at 681. All public land that had not been part of the original 13 colonies was surveyed in townships and sections. Each township formed a six-mile square. Each 36 square miles were divided into 36 numbered sections.

4. § 10, 25 Stat. at 679.

5. "[T]he General Land Ordinance of 1785 . . . initiated the program of land grants for schools, providing that lot number sixteen in every township would be reserved 'for the maintenance of public schools within the said township.'" Sally K. Fairfax, et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 805 (1992).

6. THOMAS WILLIAM BIBB, HISTORY OF EARLY COMMON SCHOOL EDUCATION IN WASHINGTON (1929).

It is obviously necessary that at least one school should be established in each of these townships; and to do this they have only one section of land . . . worth about \$800. To invest this sum safely, it cannot be made to yield more than \$48 per annum, which will not pay the salary of a teacher for a single month; and the whole of the principal would not enable a township to erect a suitable common school edifice, and employ a teacher for one year. It is evident, therefore, that this provision does not go far to accomplish the original design; and that, without the aid of other means, the citizens of those growing states cannot obtain the advantages of a general system of education.

*Id.*

7. *Id.*

8. *Id.*

act that created Washington Territory in 1853 set aside two sections in each township to support the "common schools."<sup>9</sup> There was no mechanism for selling the lands, so the schools received no money benefit, but the principle of holding lands for the benefit of schools was established.

The Enabling Act merely carried out the basic design created in 1853. Territorial officials expected the federal grants to make the new state a player in the frenzy of land speculation that obsessed Washington's leading citizens.<sup>10</sup> Not wanting to leave the disposal of the granted lands entirely up to these officials, Congress laid down rules outlining how the lands could be sold and how the state should handle the proceeds of any sale. This Enabling Act specified that "all lands granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."<sup>11</sup> The Act also allowed the state to lease the lands for periods of not more than five years.<sup>12</sup>

The original text of the Washington State Constitution spells out how the granted lands and the resources they contain may be sold or leased, as well as how the state must treat the money from a sale or lease. Article XVI states, "[n]one of the lands granted to the state for education purposes shall be sold otherwise than at public auction to the highest bidder."<sup>13</sup> The land must be appraised and the price must at least equal the appraised value.<sup>14</sup> Under this article, no more than one-fourth of the land could be sold before January 1, 1895, and not more than half of the land could be sold before January 1, 1905.<sup>15</sup> Article IX states that the revenue from the sale of land or timber flows into the common school fund, and that all revenues from that fund "shall be exclusively applied to the support of the common schools."<sup>16</sup>

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9. Organic Act, ch. 90, § 20, 10 Stat. 172 (1853). "[W]hen the lands in said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory." *Id.*

10. EDMOND S. MEANY, HISTORY OF THE STATE OF WASHINGTON 316 (1909).

11. Enabling Act, ch. 180, § 11, 25 Stat. 679 (1889).

12. *Id.*

13. WASH. CONST. art. XVI, § 2.

14. *Id.*

15. *Id.* § 3.

16. WASH. CONST. art. IX, § 2 (amended 1966). Additions to the common school fund were derived from "the proceeds of the sale of, stone, minerals or property other than timber and other crops from school and state lands . . . [and] the principal of all funds arising from the sale of lands and other property which have been . . . granted to the state for the support of common schools." *Id.*

Article XVI allows the common school fund to be invested as authorized by law.<sup>17</sup>

Before statehood, territorial officials looked on the granted lands as a ticket to sudden riches. Territorial taxpayers expected the new lands to free them from the burden of school taxes. Statehood "was a plunge into an ocean of supposed wealth. . . . Everybody knew the State had abundant natural resources which would be developed at once. Therefore, all these were treated like money in the bank."<sup>18</sup>

The dream of overnight prosperity was never realistic. Most of the granted lands proved to be next-to-worthless in the short run. Mill companies, land speculators, prospectors, settlers, and the Northern Pacific Railroad had already done their best to lock up the most valuable acreage. "In locating an exact route from the Columbia to Puget Sound, [Northern Pacific Railroad] engineers tried to lay track through the most heavily timbered areas, so that valuable timberland would be included in the land grant."<sup>19</sup> Out of all the individuals and companies claiming land, the state institutions picked last. Even other public entities stood closer to the head of the line. "The state's granted trust lands were awarded after all of the other federal programs had received their land."<sup>20</sup> Much of the remaining land, however valuable it might become in the indefinite future, lay too far from navigable water or steel rails to be feasible for logging or even market farming. Not surprisingly, "[w]indfall profits anticipated from the state's land sales instead went to timber companies and railroad companies, which owned better positioned and more productive lands than did the state."<sup>21</sup>

Because the state received land after all other claimants, the common school lands never paid all the costs of public education. Taxpayers had their burden lightened, but not lifted. "Beginning at statehood and lasting for about 30 years, the granted trust lands provided very little money for the educational and institutional needs of the state."<sup>22</sup> The meager income from property taxes, general funds, and higher education tuitions kept the schools impoverished throughout Washington's early years.<sup>23</sup>

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17. WASH. CONST. art. XVI, § 5 (amended 1966).

18. MEANY, *supra* note 10, at 290.

19. ROBERT E. FICKEN, *THE FORESTED LAND: A HISTORY OF LUMBERING IN WESTERN WASHINGTON* 45 (1987).

20. WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 8.

21. *Id.* at 9.

22. *Id.* at 6.

23. *Id.* at 9.

The state quickly sold off all of its land that was marketable. In the first flush of statehood, every level of government rushed to spend and borrow money. To pay the bills and the interest, the first Washington legislature created a mechanism for the sale and lease of public lands and created a State Land Commission "to facilitate the process."<sup>24</sup>

After alert citizens had purchased the best public lands and stolen the timber off some of the rest, sales of public land largely ground to a halt. "Land that was expected to sell, by the year 1920, did not sell. Leasing and timber sales became the major revenue generating activities for state lands."<sup>25</sup>

By the 1920s, people started to recognize that Washington's forests were disappearing, just as the forests of Wisconsin and Michigan had vanished in the 19th century. There were no reforestation programs, and fire control was minimal or nonexistent. Many landowners simply cut trees and then abandoned the land. Fires often roared through the slash, and Washington counties took over miles of charred stumps in lieu of back taxes.

In the 1920s, as a step toward reforestation, the Washington legislature passed statutes enabling the state to acquire and manage cut-over land and hold tax-delinquent land in trust for the counties. Now, the state has acquired more than 600,000 acres of these "Forest Board lands" under the legislation of the 1920s.<sup>26</sup>

Around the same time that the legislature passed these statutes, the state began to contemplate setting up a sustained yield forest on federally granted land on the Olympic Peninsula. In 1932, the outgoing Commissioner of Public Lands, Clark V. Savidge, wrote that "[i]t would be a most unfortunate thing for the State of Washington if the great block of timber in the Olympic Peninsula is not kept together for a Sustained Yield Forest. Such a forest would . . . be the beginning of the policy of reforestation."<sup>27</sup> The state did establish a sustained yield forest, and in 1938, the Washington Supreme Court upheld the state's right to keep the forest intact rather than selling it

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24. MEANY, *supra* note 10 at 291. "[P]rovisions were promptly enacted by which the State, counties, cities, towns, and school districts could create bonded indebtedness. These new privileges were seized upon and used by the various boards and officers having authority. . . . [T]he greatest control of the new riches was centered in the Legislature, and to that arena was carried the battle of the spoils. . . . Of course it was recognized that all these expenditures must be met by revenue, and to stimulate this, efforts were made to hasten the realization of money from public lands and from taxation on newly developed resources." *Id.* at 290.

25. WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 9.

26. See 1921 Wash. Laws 169; 1923 Wash. Laws 154; 1927 Wash. Laws 288; WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 2.

27. COMMISSIONER OF PUB. LANDS BIENNIAL REP. 3 (1932).

piecemeal.<sup>28</sup> The court reasoned that "there is no provision in the constitution requiring the state to dispose of its granted lands."<sup>29</sup>

The overall management of state forests was neither rational nor efficient; it remained haphazard, negligent and, in some cases, corrupt. Management was split among a Commissioner of Public Lands, a State Forest Board, a Board of State Land Commissioners, a Capitol Committee, the Department of Conservation and Development's Division of Forestry, Sustained Yield Forest Committees, and, for certain specific functions, the Director of Licensing, the Tax Commission, and the Secretary of State.<sup>30</sup> No single agency was responsible for the forest land.

In 1942, Governor Arthur B. Langlie appointed a Forest Advisory Commission, which reported that "[t]he bulk of the state land has inadequate forest management, and county tax-delinquent lands in most cases are 'no-man's' land."<sup>31</sup> Among other things, the Commission urged the state to consolidate management of state forests into one agency, free of political influence.<sup>32</sup>

The state did not follow the Commission's recommendations. Ten years later, Special Assistant Attorney General Alfred McBee reported widespread mismanagement and theft of state timber, and claimed that a secretary for the Land Board had actively solicited bribes from people who wanted to cut state timber.<sup>33</sup> "[B]ribe money was demanded in order to get applications on the Board agenda. . . . The Secretary . . . solicited money from applicants . . . reminding [them] that political campaigns cost money, and that the donors to the campaign fund [of the Commissioner of Public Lands] . . . would receive prompt service."<sup>34</sup>

Finally, in 1957, after nearly 70 years of mismanagement and corruption, the state acted on some of the Forest Advisory Commission's recommendations and consolidated management of all federally granted and Forest Board lands in a new Department of Natural Resources.<sup>35</sup> However, management practices did not change over-

28. *State ex rel. Forks Shingle Co. v. Martin*, 196 Wash. 494, 83 P.2d 755 (1938).

29. *Id.* at 501, 83 P.2d at 759.

30. *See* 1957 Wash. Laws 38.

31. FOREST ADVISORY COMM., A LONG-RANGE FOREST PROGRAM FOR THE STATE OF WASHINGTON 9 (1942).

32. *Id.* at 28.

33. ALFRED MCBEE, REPORT ON DEPARTMENT OF PUBLIC LANDS OF STATE OF WASHINGTON 7-8 (1952).

34. *Id.* at 9, 11.

35. 1957 Wash. Laws 38. The 1957 legislature passed a bill introduced by the Washington State Legislative Council, a bipartisan committee of legislators who did research for and recommended legislation to their colleagues. The final version represented a compromise, with a bill

night. The new department did not even complete an inventory of its holdings until 1966.

By that time, state support of the public schools left a good deal to be desired. School districts routinely relied on special levies for up to 25% of their operating and maintenance budgets.<sup>36</sup> They relied on local bonds and a trickle of state bond money to build new schools. In the early and mid-1960s, Washington went through a population boom. Boeing added tens of thousands of workers to the Seattle area and the state's population mushroomed as job seekers moved in from other parts of the country. Public school districts were inundated by new students and were running out of space,<sup>37</sup> but local taxpayers were not eager to pay for new buildings.

School officials and PTAs consequently persuaded voters to pass two constitutional amendments.<sup>38</sup> One allowed the state more discretion in choosing how to invest the permanent common school fund.<sup>39</sup> The second created a Common School Construction Fund, into which all future revenue from the sale of common school lands and resources

introduced by the state school directors. Similar legislation had failed many times. Legislators had long realized that consolidation made sense, but they had disagreed on the details, above all on the role to be played by the Commissioner of Public Lands. Some favored abolishing the Land Commissioner's office, which had been linked more than once to corruption, and which kept management of the state forests in political hands. Obviously, they lost. See generally WASHINGTON ST. LEGIS. COUNCIL, SUBCOMM. ON ST. GOV'T, PROGRESS REPORT (1955); WASHINGTON ST. LEGIS. COUNCIL, REPORT ON RESULTS OF RECOMMENDATIONS TO 1957 LEGISLATURE AND WORK DURING THE SESSION (1958).

36. "More and more, school districts are being forced to rely on special levies for more and more of their total budgets. Many already fall back on the levy for as much as a quarter of operating and maintenance expenses." Robert Cour, *Schools Put Futures On Line*, SEATTLE POST-INTELLIGENCER, November 8, 1966, at 6.

37. "Superintendent [of Public Schools Louis] Bruno and his assistants Monday totaled up 30,000 new students in kindergarten through Grade 12 over last year's enrollment with more scheduled for next spring and fall when more workers bring their families to their new boom jobs." *Id.*

The Boeing boom accelerated a process that had started when aircraft, shipyard, and other workers moved to Washington during World War II.

Since World War II, all facilities from kindergarten through college have been strained to accommodate the swelling numbers caused by the population explosion and the popular demand for a college education. Overcrowding has been a problem. . . . By 1960, the enrollment in the state's high schools had reached 161,900; and in 1967, there were 331,081 secondary students.

CECIL DRYDEN, DRYDEN'S HISTORY OF WASHINGTON 365 (1968).

38. The chairman of the Statewide Parents and Citizens for Education Committee, which backed both amendments and a state bond issue, told voters that "The alternative to the state matching funds provided by these three . . . measures is higher local property taxes if necessary construction is to continue. And, at the rapidly expanding rate of school enrollment, massive construction programs are urgently needed." *Three Issues on Ballot Affect School-Building*, SEATTLE POST-INTELLIGENCER, November 6, 1966, at 82.

39. The amendment allows the state to invest the common school fund "as authorized by law." WASH. CONST. art. XVI, § 5 (amended 1966).



and all future interest on the permanent fund would flow.<sup>40</sup> Henceforth, the granted lands would finance bricks and mortar, not instruction. Evidently, local taxpayers thought these measures would help them escape the financial burden of building new schools.

The Common School Construction Fund has enabled the state to contribute nontax dollars to school construction costs, but the fund has always fallen far short of covering the full bill. Into the 1980s, it paid about one-half of new school construction costs. Funding at even that level, however, could not last. Construction costs were rising and construction needs were developing out of phase with the fluctuations of the timber market.

Compounding the problem, the state was deliberately liquidating its old-growth forests. At the given rate of liquidation, when the old growth was gone, the value of state timber sales was going to plunge. Federal listing of the old-growth-dependent Northern Spotted Owl and Marbled Murrelet as threatened species just accelerated the process. When the state set aside its remaining old growth as protected habitat, income from the state lands plummeted.

Currently, the income from the common school construction fund covers only about 25% of school construction costs.<sup>41</sup> This 25% represents the income from the more than 1.7 million acres of common school lands that the state still owns, including more than 1.1 million acres of forest. Neither the Enabling Act nor the Washington State Constitution says anything about *how* the state should manage these lands or the roughly 400,000 acres of granted forest land dedicated to other institutions. Major court decisions in Washington and elsewhere have made it clear that the land itself, the rights to use or extract resources from it, and the contractual obligations to pay for timber growing on it cannot be given away or sold without full compensation.<sup>42</sup> The courts have also stated that money generated by the sale of land, lease of land, or sale of resources from granted lands may be used only in very limited ways.<sup>43</sup> The courts have not, however, thoroughly considered forest management.

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40. WASH. CONST. art. IX, § 3 (amended 1966).

41. "In recent years, those revenues have been declining. For the 1999–2001 biennium . . . only \$78-85 million of the \$326 total (or 25%) [of the amount budgeted for capital construction] will come from trust land revenues." WASHINGTON ST. SCH. DIRECTORS ASS'N, 1999 LEGISLATIVE SUMMARY 6 (1999).

42. See, e.g., *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 469 (1966); *County of Skamania v. State*, 102 Wash. 2d 127, 685 P.2d 576 (1984).

43. See, e.g., *Ervien v. United States*, 251 U.S. 41 (1919); *State ex rel. Hellar v. Young*, 21 Wash. 391, 392, 59 P. 220 (1899).

In Washington, the supreme court's 1984 ruling in *County of Skamania v. State*<sup>44</sup> remains the last word on the granted lands. Two years before *Skamania*, while Washington was in the depths of a major recession that hit timber communities especially hard, the state legislature decided to let some timber companies escape or extend their contracts to cut timber on school and county trust lands.<sup>45</sup>

State timber is sold at auction. A company that submits a winning bid usually must post a relatively small performance bond and pay a ten-percent deposit; it can then wait two or three years before cutting the timber.<sup>46</sup> The purchaser company bases its bid on what it believes the market price for the lumber will be two or three years hence;<sup>47</sup> the companies that bought state timber from 1978 through 1980 guessed incorrectly. United States housing starts had hovered around two million per year in the late 1970s. Virtually everyone in the forest products industry assumed home construction rates would stay at that level through the 1980s. Because demand seemed a sure thing, a lack of raw material seemed the only variable that could prevent forest products companies from profiting. Companies that did not own their own timber, which included virtually all but the largest firms, raced to acquire timber on state and federal land. Timber prices shot up. In 1980, the average price of timber on state land was \$337 per thousand board feet.<sup>48</sup> The companies whose contracts were at issue in *Skamania* bid from \$300 to \$800 per thousand board feet.<sup>49</sup>

In the early 1980s, the housing market plummeted. In 1982, housing starts sank to 1.07 million, the lowest total since 1946.<sup>50</sup> Timber prices fell accordingly. By the start of 1982, the market price for a thousand board feet had dropped to \$175.<sup>51</sup> Companies that had bought state timber under the higher purchase price could not honor their contracts without losing money.<sup>52</sup>

In response to this crisis, the Washington legislature passed the Forest Products Industry Recovery Act of 1982, which enabled a com-

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44. *County of Skamania v. State*, 102 Wash. 2d 127, 685 P.2d 576 (1984).

45. RICHARD STRICKLAND & DANIEL JACK CHASAN, *COASTAL WASHINGTON* 178 (1989). Washington's unemployment rate averaged 12.1% in 1982, and the rates in timber-dependent counties were even higher. Grays Harbor County's unemployment rate averaged 15.5, Pacific County's 16.8, and Clallam County's 19.1. *Id.*

46. *Skamania*, 102 Wash. 2d at 129, 685 P.2d at 578.

47. *Id.* at 129, 685 P.2d at 578.

48. Daniel Jack Chasan, *Falling Timber*, *THE (SEATTLE) WEEKLY*, November 6-12, 1985, at 32.

49. *Skamania*, 102 Wash. 2d at 130, 685 P.2d at 578.

50. Chasan, *supra* note 48, at 32.

51. *Skamania*, 102 Wash. 2d at 130, 685 P.2d at 578.

52. *Id.* at 130, 685 P.2d at 578.

pany to either extend its contract at no cost or escape its contract with no penalty except forfeiture of the initial 10% deposit and a small administrative charge.<sup>53</sup> Any company that had defaulted on its contract before the Act passed was allowed to reinstate its contract pursuant to the Act.<sup>54</sup>

The legislature had been casting about desperately for ways to deal with the recession. Legislators reestablished a sales tax on food that the people had removed by initiative just five years before.<sup>55</sup> Although the legislature claimed it was passing the Forest Products Industry Recovery Act to benefit the entire state economy,<sup>56</sup> in reality, job losses and mill closures in the chronically depressed timber communities had little impact on the rest of the state.<sup>57</sup> This was not 1942, when an estimated 61 per cent of Washington jobs rested on the forest products industry.<sup>58</sup>

The Act contained some general statements asserting that what was good for the forest products industry was good for the trust beneficiaries,<sup>59</sup> but the legislation was clearly designed to benefit specific timber companies and specific rural timber counties, where unem-

53. *Id.* at 130, 685 P.2d at 578-79; see WASH. REV. CODE § 79.01.1335 (1991).

54. *Skamania*, 102 Wash. at 130, 685 P.2d at 579.

55. By 1982, with statewide unemployment at 12.5 percent, the Republican majority was willing to try just about anything to put some money into the state's coffers. . . . At the end of the 1982 session, with the help of a handful of Democrats eager to pass something and go home, they restored the sales tax on food, which the people had removed by initiative. They voted in a state lottery bill, which legislatures had been summarily rejecting for decades. . . . The legislature [had] started scrambling to get control of the budget in 1981. The House majority decided to underfund pensions, delay school funding, and borrow money from the school construction fund. . . . The House [subsequently] voted to reduce public school spending by 1 percent and to delay a pay raise for state workers.

DANIEL JACK CHASAN, SPEAKER OF THE HOUSE: THE POLITICAL CAREER AND TIMES OF JOHN L. O'BRIEN 179-81 (1990).

56. Forest Products Industry Recovery Act, ch. 222, § 1(1), 1982 Wash. Laws (expired 1984).

57. For example, in the timber-dependent communities of coastal Washington, [e]ver since World War II, unemployment . . . had been higher than Washington's average unemployment rate, anyway. The recession of the early 1980s just widened the gap. . . . The coast was simply falling further behind. In constant dollars, between 1977 and 1984, per capita personal income in Washington State rose a total of 5.5 percent. In Pacific County, it rose only 2.7 percent. In Grays Harbor County, it dropped 2 percent.

STRICKLAND & CHASAN, *supra* note 45, at 178.

58. Lloyd D. Weir, *Northwestern Forests Are Being Restored*, SEATTLE TIMES, January 4, 1942, at 6.

59. It began with a legislative finding that "[a] competitive, financially healthy forest products industry is important to the economic well-being of the state and the trust beneficiaries." Forest Products Industry Recovery Act, ch. 222, § 1(1)(a), 1982 Wash. Laws (expired 1984).

ployment figures were high and prospects for the future were increasingly bleak.<sup>60</sup>

In *County of Skamania v. State*, Skamania County sued the state, arguing that Washington had violated its fiduciary duty of undivided loyalty to the schools and counties that were the beneficiaries of the granted and forest board lands. The State Board of Education and the University of Washington Board of Regents subsequently joined the County of Skamania as plaintiffs.<sup>61</sup>

The court agreed with the plaintiffs. In a unanimous decision written by Justice Brachtenbach, the court assumed that the lands were trusts and looked beyond the legislative assurances that helping timber companies would ultimately help the beneficiaries.

[T]he Act provides direct, tangible benefits to the contract purchasers, at the expense of the trust beneficiaries. . . . [T]he primary purpose and effect of this legislation was to benefit the timber industry and the state economy in general, at the expense of the trust beneficiaries. This divided loyalty constitutes a breach of trust.<sup>62</sup>

The court also held that:

this Act . . . fails to satisfy the constitutional requirement that the State seeks full market value for trust assets. . . . [N]o pru-

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60. The timber industry has experienced a long-term decline as a proportion of employment in the state. The industry now accounts for 2 percent of the state's total employment, down from 11 percent in the late 1940s, 8 percent in 1960, and 4 percent in 1980. . . . The Washington State Economic Development Board acknowledged in 1988 that there are "two Washingtons"—the urban areas and the rural counties. While urban areas registered impressive job gains after the 1981-82 recession, many rural counties had not recovered even six years later.

MELANIE J. ROWLAND, ET AL., UNIVERSITY OF WASH. INST. FOR PUB. POLICY AND MANAGEMENT, OLD-GROWTH FORESTS AND TIMBER TOWNS: THINKING ABOUT TOMORROW 16 (1993).

Unemployment in King County may hover around the national average, but unemployment in the timber counties is never out of double digits. And even those horrendously high numbers probably tell less than the whole story; since they don't reflect the people who have exhausted unemployment benefits, have stopped looking for work, or have otherwise dropped out of the official statistics. Mark McDermott of the Senate Commerce and Labor Committee staff points out that in Grays Harbor County, for example, the percentage of the adult population in the work force dropped 12 percent in the past year. Add that 12 percent to the official unemployment figures, and you may have an unemployment rate that is 22 percent instead of the official 10.5 percent.

Daniel Jack Chasan, *Wilted Evergreen*, THE (SEATTLE) WEEKLY, April 15-April 21, 1987, at 32.

61. *Skamania*, 102 Wash. 2d at 131, 685 P.2d at 579.

62. *Id.* at 136, 685 P.2d at 581-82.

dent trustee could conclude that the unilateral termination of these contracts was in the best interests of the trusts.<sup>63</sup>

The court shot down the Act as a blatant legislative bailout for a particular industry and rebuked a legislature that had arguably broken faith with the public and had at least skirted the edges of its legal obligations.<sup>64</sup>

The state had already moved on. The recession ended in 1983 and voters elected a new group of legislators. If the court had merely struck down the Forest Products Industry Recovery Act of 1982, no one would remember *Skamania*. The decision has had lasting effect, however, because of its discourse on the granted lands.

Every court that has considered the issue . . . has concluded that these are real, enforceable trusts that impose upon the State the same fiduciary duties applicable to private trustees. . . . A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. . . [The state] may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be.<sup>65</sup>

People have inferred from these statements that the state cannot protect environmental or aesthetic values in its management of granted lands unless it compensates trust beneficiaries for the full market value for any revenue foregone or unless it follows the State Environmental Policy Act, the Forest Practices Act, or another law of general application.<sup>66</sup>

When the state has protected lands of particular environmental value as Natural Resource Conservation Areas, the legislature has appropriated money to replace the lands with others of equal value.<sup>67</sup>

When the state modified its management of 1.6 million acres and deferred harvesting 15,000 acres of old growth as part of a Habitat Conservation Plan (HCP) designed to protect spotted owl and marbled murrelet habitat, no land was set aside permanently, and the HCP was justified as a means of avoiding even more draconian restrictions on logging under the federal Endangered Species Act. As the Department of Natural Resources explained, "by anticipating the

63. *Id.* at 139, 685 P.2d at 583.

64. A recent study of American state trust lands calls the legislation itself "an ill-disguised raid on the trust." JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS* 162 (1996).

65. *Skamania*, 102 Wash. 2d at 136, 685 P.2d at 581-82.

66. See *Noel v. Cole*, 98 Wash. 2d 375, 655 P.2d 245 (1982); *West Norman Timber, Inc. v. State*, 37 Wash. 2d 467, 224 P.2d 635 (1950); 1996 Op. Wash. Att'y Gen. No. 11.

67. The state now manages 47,359 acres in 23 Natural Resource conservation Areas and 25,593 acres in 44 Natural Area Preserves. WASHINGTON ST. DEP'T OF NAT. RESOURCES, *INTERESTING FACTS ABOUT DNR AND STATE-OWNED LANDS*.

habitat needs of at-risk species and other species, the plan assures that DNR's long-term timber sales program can continue without major disruptions caused by federal listings of endangered species."<sup>68</sup> The Department said its "new sustainable harvest calculations indicate state trust lands can produce an average of 655 million board feet of timber each year under an HCP—higher than the 600 million board feet that DNR has been able to offer for sale in fiscal years 1995 and 1996."<sup>69</sup>

Critics have pointed out the logical flaws in the *Skamania* court's reasoning. Sally K. Fairfax<sup>70</sup> has written that the court relied on United States Supreme Court decisions about Arizona and New Mexico "without apparent awareness that these cases apply only to Arizona and New Mexico and are particularly inappropriate in the *Skamania* case."<sup>71</sup>

So far, however, the logical flaws have been legally irrelevant. *Skamania* provides a classic illustration of the old saw that the supreme court is not the supreme court because it is right; it is right because it is the supreme court. In a 1996 advisory opinion, the Washington Attorney General observed, "We are well aware that commentators have criticized *Skamania* for relying on cases that interpreted the New Mexico-Arizona Enabling Act and for failing to analyze the terms of Washington's Enabling Act. . . . The unanimous decision of our supreme court in *Skamania*, however, represents the law of this state."<sup>72</sup>

But *Skamania* left plenty of constitutional territory unexplored. Even if one overlooks the *Skamania* court's flawed reasoning and concedes that the lands are genuine trusts that the state must manage as a fiduciary, one may conclude that the state need not—in fact, must not—manage the granted lands solely to earn maximum revenue for the schools and other named beneficiaries.

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68. WASHINGTON ST. DEP'T OF NAT. RESOURCES ANN. REP. 5 (1996).

69. *Id.* Not everyone bought that argument. "I am not convinced that the proposed HCP as agreed to . . . is in either the immediate or long-term interests of the trust beneficiaries," said David Thorud, a [Board of Natural Resources] member who voted against the plan. "The board should not commit to a 70- to 100-year legally binding contract considering the numerous legal, fiduciary and ecological issues that have repeatedly been raised but still not satisfactorily addressed." . . . The plan was also faulted by the Washington Environmental Council . . . "[T]he plan guarantees a lifetime of logging, while gambling with public resources, such as clean water, wildlife and salmon," the WEC said in a statement." Hal Spencer, *Long-Term Timber Resource Plan Gets OK, Ensures Continued Harvest Over 1.63 Million Acres*, SEATTLE TIMES, November 6, 1996, at C5.

70. Associate Dean of the College of Natural Resources at the University of California at Berkeley and authority on granted lands.

71. Fairfax, et al., *supra* note 5, at 844.

72. 1996 Op. Wash. Att'y Gen. No. 11.

## II. ARGUMENT

A. *Washington Does Not Hold Its Granted Lands in Common Law Trust for the Public Schools or Any Other Specific Institution*

If Congress had meant to create trusts, with all the rigid fiduciary duties that the common law imposes, it would have explicitly done so. It did not; the Enabling Act never uses the word "trust."

A trust is defined as "a property right held by one party for the use of another."<sup>73</sup> It may also be defined as "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another."<sup>74</sup> Under any definition, one cannot create an express common law trust without demonstrating a clear intent to do so.<sup>75</sup> The Enabling Act of 1889, which made Washington a state, says merely that "upon the admission" of Washington, Montana, North Dakota or South Dakota to statehood, "sections numbered sixteen and thirty-six in every township . . . are hereby granted to said states for support of common schools."<sup>76</sup> The Act is consistent with the intent of the federal statute that created Washington Territory in 1853, which says, "when the lands in said Territory shall be surveyed under the direction of the government of the United States . . . sections numbered sixteen and thirty-six in each township . . . shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory."<sup>77</sup>

Subsequently, in the 1910 legislation that created the states of Arizona and New Mexico, Congress did use the word "trust."<sup>78</sup> It said flatly that any violation of the Enabling Act's terms would constitute "a breach of trust."<sup>79</sup> Washington's Enabling Act contains no such language. The fact that Congress used it in one place, but not another, indicates that Congress had no intent to create a trust in the earlier cases.<sup>80</sup>

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73. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* 2 (2d ed. 1978) (quoting *Kiplinger v. Kiplinger*, 113 N.E. 292, 293 (Ind. 1916)).

74. *Id.* at 1.

75. "An express trust . . . is created only if the settlor properly manifests an intention to create a trust." *Colman v. Colman*, 25 Wash. 2d 606, 609, 171 P.2d 691, 692 (1946). A court can establish a constructive trust without finding that any manifestation of intent existed on the part of the parties, but courts ruling on the status of granted lands have never suggested that they were doing so.

76. Enabling Act, ch. 180, § 10, 25 Stat. 679 (1889).

77. *Id.* § 20.

78. Act of June 20, 1910, ch. 310, § 28, 36 Stat. 557 (1910).

79. *Id.*

80. "We have found the trust documents not in a federal-state compact, but in state deci-

By its omissions, Washington's own constitution offers further evidence that the granted lands are not held in trust. The constitution never says that the lands are held "in trust" for schools or other named beneficiaries. Article IX merely defines the common school fund and says: "the entire revenue derived from the common school fund . . . shall be exclusively applied to the support of the common schools."<sup>81</sup>

Article XVI, however, does use the word "trust." It says: "All the public lands granted to the state are held in trust for all the people."<sup>82</sup> By using the word in Article XVI but not in Article IX, the framers showed that they did not mean to apply common-law trust principles to the common school lands. From their choice of language, one can infer that the lands are merely dedicated to public purposes, not held in trust for specific beneficiaries.<sup>83</sup>

Courts have not only ignored the lack of trust language in Washington's constitution and Enabling Act, they have also erred by wrongly equating pre-1910 enabling acts with an act passed in 1910. When the *Skamania* court said, "these are real, enforceable trusts that impose upon the State the same fiduciary duties applicable to private trustees," it cited *Lassen v. Arizona ex rel. Arizona Highway Dept.*, in which the United States Supreme Court, interpreting the Arizona Enabling Act, held that Arizona could not grant easements across granted lands without compensating the beneficiaries.<sup>84</sup> The Court stated that the Arizona Enabling Act "contains a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of other purpose."<sup>85</sup>

sions and state commitments." Fairfax, et al., *supra* note 5, at 908.

81. WASH. CONST. art. IX, § 2. "[T]he common school fund . . . shall be derived from [inter alia] . . . the sale of timber, stone minerals or other property from school and state lands . . . [and] the principal of all funds arising from the sale of lands and other property which have been . . . granted to the state for the support of common schools." WASH. CONST. art. IX, § 3.

82. WASH. CONST. art. XVI, § 1.

83. John B. Arum, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151 (1990).

The Enabling Act and the constitution do not create an express trust, but merely dedicate public lands for the purpose of supporting public education. The state should use principles normally applied to dedications of land. . . . A private dedication of land for a specified public purpose does not create a trust relationship unless the grantor explicitly imposes the equitable duties of a trustee upon the public agency accepting the grant.

84. *Lassen v. Arizona ex rel. Ariz. Highway Dept.*, 385 U.S. 458 (1967).

85. *Id.* at 467 (quoting *Ervien v. United States*, 251 U.S. 41 (1919)). Although *Lassen* involved a different enabling act, the principle of that decision applies to Washington's enabling act. See *United States v. 111.2 Acres of Land*, 293 F. Supp., 1042 (Wash. 1968). There the Court stated:

There have been intimations that school land trusts are merely honorary, that there is a "sacred obligation imposed on (the state's) public faith," but no legal obligation. These intimations have been dispelled by *Lassen v. Arizona*. This trust is real, not



By equating the Arizona statute with Washington's, the *Skamania* court erected a logical house of cards. It relied on a chain of cases that had little to do with the facts of *Skamania*, citing *111.2 Acres of Land*, which cited *Lassen*, which cited *Ervien*. *Lassen* applied only to the 1910 New Mexico-Arizona Enabling Act, which established many conditions for the "[d]isposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom," and explicitly declared that any violation of its terms would be a breach of trust.<sup>86</sup>

*Lassen's* key passage cites *Ervien* for the proposition that:

The [New Mexico-Arizona Enabling] Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts, and directs with great precision their administration. "Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen."<sup>87</sup>

In *Ervien*, the court was not generalizing; it focused narrowly on the details of the New Mexico-Arizona Enabling Act. *Lassen* however, quoted selectively from *Ervien*, and by doing so, misrepresented the significance of the holding. The full text of the *Ervien* sentence is: "Words more clearly designed *than those of the act of Congress* [i.e., the New Mexico-Arizona Enabling Act] to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen."<sup>88</sup> In other words, the *Ervien* court was talking about a particular piece of legislation, and it based its statement on the unusual specificity of that legislation.<sup>89</sup>

Another wall in this house of cards was the court's reliance on *111.2 Acres of Land* for the proposition that, "the principle of *Lassen*

illusory.

*Id.* at 1049.

86. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands, from which said money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

Act of June 20, 1910, ch. 310, § 28, 36 Stat. 557 (1910).

87. *Lassen*, 385 U.S. at 467 (quoting in part *United States v. Ervien*, 246 F. 277, 279 (8th Cir. 1917)).

88. *United States v. Ervien*, 246 F. 277, 279 (8th Cir. 1917) (emphasis added).

89. *Id.*

applies to Washington's enabling act."<sup>90</sup> *111.2 Acres of Land* compared apples to oranges when it equated Washington's Enabling Act with the significantly different New Mexico-Arizona Act at issue in *Lassen*.

Citing *Lassen* to prove that Congress actually created trusts in all the western states is ludicrous. Not only is the New Mexico-Arizona Enabling Act more specific than Washington's, it also declares that any violation of its terms is a breach of trust.<sup>91</sup> To extrapolate from a state in which Congress used the word "trust" to states in which it did not makes absolutely no sense.<sup>92</sup>

The United States Supreme Court, ruling shortly after Congress passed the New Mexico-Arizona Enabling Act, confirmed the view that earlier enabling acts created no legal obligations.

In *Alabama v. Schmidt*, a 1914 case involving Alabama's Enabling Act, Justice Holmes wrote that, "[t]he gift [of land] to the state is absolute, although, no doubt, as said in *Cooper v. Roberts*, 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary."<sup>93</sup> Reading *Schmidt* together with the New Mexico-Arizona Enabling Act, it is clear that Congress put specific trust language into the Act because it recognized that earlier legislation had not created trusts.

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90. *County of Skamania v. State*, 102 Wash. 2d 127, 133, 685 P.2d 576, 580 (1984).

91. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands, from which said money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

Act of June 20, 1910, ch. 310 § 28, 36 Stat. 557 (1910).

92. "Prior to 1910, the trust obligations that existed arose entirely from state commitments made in state constitutions." Fairfax, et al., *supra* note 5, at 809. The *Lassen* court recognized that earlier enabling acts had not created the same obligations. It explained that restrictions placed upon land grants to the States became steadily more rigid and specific in the 50 years prior to this Act, as Congress sought to require prudent management and thereby to preserve the usefulness of the grants for their intended purposes. The Senate Committee on the Territories, with the assistance of the Department of Justice, adopted for the New Mexico-Arizona Act the most satisfactory of the restrictions contained in the earlier grants. Its premise was that the grants cannot "be too carefully safeguarded for the purpose for which they are appropriated." Senator Beveridge described the restrictions as "quite the most important item" in the Enabling Act, and emphasized that his committee believed that "we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes."

*Lassen*, 385 U.S. at 467.

93. *Alabama v. Schmidt*, 232 U.S. 168, 173 (1914) (ruling that a citizen could take granted land through adverse possession because the grant to the state had been absolute, not legally conditioned on use for the benefit of the schools).

When Congress voted in 1990 to prevent Washington from selling logs to exporters in order to explicitly benefit small sawmills (which could not afford to pay the high prices earned by export sales) it did not change the Enabling Act, implying that the Enabling Act does not require undivided loyalty to the beneficiaries.

Congress made exactly the same trade-off that led to the *Skamania* litigation: exchanging income to the public schools for a handful of forest products jobs. The situations were similar to that faced by the State legislature in 1982. Instead of suffering from a recession, however, some small mills and timber-dependent towns had been hurt by a federal court injunction that prohibited cutting old-growth trees on federal land until the government complied with laws protecting the Northern Spotted Owl. This time, Congress did not even employ the legislature's earlier subterfuge of arguing that what helped the forest products industry ultimately helped the beneficiaries. Everyone knew exactly what was going on. "The U.S. Senate approved a ban on exports of raw logs from public land yesterday in an effort to ease the impact of spotted-owl protection on Northwest timber communities," *The Seattle Times* reported.<sup>94</sup> In 1997, the state calculated that the export ban cost the public schools \$90 million a year.<sup>95</sup>

Congress originally ordered the state to halt the export of timber from its public lands.<sup>96</sup> In other words, it ordered the state to act against the interests of the trust beneficiaries. If the Enabling Act had imposed a duty of undivided loyalty, the state would have been caught between two conflicting mandates, in which case Congress could logically have amended the Enabling Act as it had already done eight times before. Because Congress did not amend the Enabling Act, it must have assumed that the Act did not impose a duty of undivided loyalty on the state. Because the *Skamania* court ruled in 1984, it could not consider this implicit Congressional reasoning.

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94. David Schaefer & Tim Healy, *Senate OKs Ban on Export of Logs from Public Land; State School Fund Would Be Affected*, SEATTLE TIMES, August 1, 1990, at B1.

95. "The law was intended to help ailing mills throughout the Northwest, but . . . some officials call the export ban a subsidy borne by Washington taxpayers," the *Times* subsequently observed. Alex Fryer, *Cut Rate; In the Fight to Save Timber Jobs, Something Had to Give: In Washington's Case, It Was the Revenue That Builds Schools*, SEATTLE TIMES, July 27, 1997, at F1.

[T]he state estimates that the export ban costs \$90 million in lost revenue annually, revenue that would have gone into a fund specially designated for school construction in Washington. "Washington schoolchildren are subsidizing Oregon mill operators [who have been buying much of the timber at reduced prices]," said Phil Aust, an economist with the Washington State Department of Natural Resources.

*Id.*

96. This was found unconstitutional. Congress then passed a revised law that relied on the federal power to regulate foreign commerce.

The court could have clearly distinguished between the granted lands and the permanent funds that the Enabling Act established. It did not. In fact, many courts have failed to distinguish between the granted lands and the permanent funds supplied by revenue from the sale or lease of those lands. Obviously, the funds and the land are distinct entities. The fact that the *funds* are held in trust—if, indeed, they are—has no bearing on the status of the land.

*Lassen* relies heavily on language from *Ervien*,<sup>97</sup> which involved the use of money from a trust fund to advertise the state of New Mexico. *Ervien* talked about permissible uses of the permanent funds established by the New Mexico-Arizona Enabling Act, not about permissible uses of the land itself.

Washington's Enabling Act says that proceeds from the sale or lease of granted school lands shall "constitute a permanent school fund, the interest of which only shall be expended in support of said schools."<sup>98</sup> Article IX, section 3 of the Washington Constitution says that "[t]he principal of the common school fund shall remain permanent and irreducible" and "[t]he interest accruing on said fund . . . shall be exclusively applied to the current use of the common schools."<sup>99</sup> Originally, the constitution specified that the money could be invested only in federal, state, county or municipal bonds.<sup>100</sup> Courts have long viewed the permanent fund as a trust. In the 1903 case of *State ex rel. Hellar v. Young*, the Washington Supreme Court stated flatly that "the permanent school fund of this state must be regarded as a trust fund."<sup>101</sup>

Later courts have misinterpreted *Hellar* and rulings from other states that treat the permanent funds as trusts. *Skamania* cited *Hellar* as an example of "cases in which courts have applied private trust principles to federal land grant trusts."<sup>102</sup> The court also cited *Oklahoma Education Association v. Nigh*, in which an Oklahoma court found that "the use of trust fund assets for the purpose of subsidizing farmers and ranchers is contrary to the provisions of the Oklahoma Constitution, and to the provisions of the Oklahoma Enabling Act."<sup>103</sup> *111.2 Acres of Land* also cited *Hellar* inappropriately as authority for

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97. The Court cites both *Ervien v. United States*, 251 U.S. 41 (1919) and *United States v. Ervien*, 246 F. 277 (8th Cir. 1917).

98. Enabling Act, ch. 180, § 11, 25 Stat. 679 (1889).

99. WASH. CONST. art. IX, § 3.

100. WASH. CONST. art. XVI, § 5 (amended 1966).

101. *State ex rel. Hellar v. Young*, 21 Wash. 391, 392, 58 P. 220 (1899) (ruling that the state cannot invest permanent school funds in state warrants because warrants are not bonds, as the constitution requires).

102. *Skamania*, 102 Wash. 2d at 133, 685 P.2d at 80.

103. *Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982).

the position that Washington's granted lands are held in trust. According to *111.2 Acres of Land*, "Section 10 of the Enabling Act and Article XVI, section 1 of the Washington Constitution constitute a declaration of trust."<sup>104</sup>

Most of the land that the Department of Natural Resources now manages is not the same land that the Enabling Act and the Washington Constitution were written to protect. Some 483,000 acres of common school lands, which were not subject to the *in lieu* selection process established at statehood, were subsequently placed by Congress in the national forests.<sup>105</sup> The state and federal governments disagreed about whether or not the state held title to those lands. In 1913, the two governments negotiated an exchange,<sup>106</sup> which was completed eight years later.<sup>107</sup> Most of the original granted lands remained in isolated, largely unmanageable one-section parcels. After the Department of Natural Resources was created in 1957, "isolated parcels [were consolidated] into blocks of state lands through mutual land exchanges with private timberland owners, increasing management efficiency."<sup>108</sup>

Congress placed restrictions on the use of the lands specifically granted to the state for educational purposes. It did not explicitly permit the state to exchange those lands for others and it did not specify that restrictions applied to the granted lands would also apply to parcels for which the granted lands were exchanged. Thus, it is not clear that any land acquired after statehood, except that acquired through the *in lieu* selection process, is subject to the original restrictions.

*B. If the Granted Lands Are Trusts, They Clearly Are  
Not Private Trusts, and the Full Range of Common Law Trust  
Obligations Does Not Apply to Them*

The state clearly has some fiduciary duty to the beneficiaries, but the Enabling Act and the Washington Constitution do not state or imply that this duty is a trustee's duty. However, because the basic definition of a trust is a property right held by one party for the use of another,<sup>109</sup> the granted lands probably qualify, as do the Forest Board lands. The legislature explicitly said that the Forest Board lands

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104. *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (Wash. 1968).

105. COMMISSIONER OF PUB. LANDS, BIENNIAL REP. 5 (1917).

106. *Id.*

107. *Id.* at 3.

108. WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 11.

109. BOGERT & BOGERT, *supra* note 73, at 1.

would be held in trust.<sup>110</sup> It does not follow, however, in the words of Washington's Attorney General, that "the relationship between the state and the beneficiaries of its land trusts is in every respect like that of a private trustee."<sup>111</sup>

Because these land trusts have been established by statute, they are not common law trusts. Professor Bogert, cited in *Skamania* and by the Attorney General for his discussion of undivided loyalty and trustee duties, explains that "[s]ome . . . American statutes . . . not only create or provide for the creation of trusts but also give some details as to the method of execution of the trusts. . . . To this extent these statutory trusts are not normal trusts, and the general trust principles . . . do not apply to them."<sup>112</sup> In other words, the terms of a trust lie in the language and intent of the legislation that created them. To grasp the intent of legislation, one must look at the historical context in which it was passed.<sup>113</sup> The common law is largely irrelevant to this inquiry.

Before *Skamania*, no one in Washington applied a common law duty of "undivided loyalty" to the management of trust lands. Such a duty was not mentioned in the 1942 report of the Forest Advisory Commission or the 1938 *Forks Shingle Co.* decision. In fact, the *Forks Shingle Co.* court held that a law "having for its purpose the conservation of the state's forest resources" on granted land deserved special deference.<sup>114</sup> When Special Assistant Attorney General Alfred McBee described the theft and mismanagement of public timber and the criminality of state employees in 1952, he did not mention a duty of "undivided loyalty." He did suggest that "state timber lands constitute a trust for the benefit of our present and future school children," but he argued only that the trustees should be above suspicion—suggesting the kind of "honorary" obligation described in *Schmidt*, rather than a strict application of the common law.<sup>115</sup>

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110. 1927 Wash. Laws 288.

111. 1999 Op. Wash. Att'y Gen. No. 3.

112. BOGERT & BOGERT, *supra*, note 73, at 150.

113. "[A]s was said by Mr. Justice Field in *Winona & St. P. R. Co. v. Barney*, acts making grants 'are to receive such a construction as will carry out the intent of Congress. . . . To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.'" *Johanson v. State of Washington*, 190 U.S. 179, 184 (1903) (citations omitted).

114. *State ex rel. Forks Shingle Co. v. Martin*, 196 Wash. 494, 502, 83 P.2d 755, 759 (1938).

115. MCBEE, *supra* note 33, at 17. When allegations of timber thefts and giveaways arose earlier in the century, legislative investigators and newspaper headline writers expressed outrage over people stealing from the state. Cheating school children was not the issue, and evidently no one even thought about common law trust responsibilities. See Roy Otto Hoover, *The Public Land Policy of Washington State: The Initial Period, 1889-1912* 217-220 (1967) (unpublished

Similarly, no one talked about common law trust principles in 1966, when the people established the Common School Construction Fund, or in 1968, when the people voted down a ban on log exports from state land.<sup>116</sup> In 1974, when the Department of Natural Resources decided to reduce the timber cut in the Olympic Area before it reached a previously-scheduled peak, the Department explained that letting the harvest increase further and then decline "would have caused a surplus of loggers and equipment in the Olympic Area in the late 1970's."<sup>117</sup> In addition, "it seemed wise to avoid moving employees in for a few years, then moving them out."<sup>118</sup> The Department did not even pay lip service to common-law trust principles. It evidently had no need to do so.

Courts have already ruled that the legislature can pass laws of general application that limit use of or revenue from the granted lands.<sup>119</sup> "[A]dministration of the trust lands is subject to both state and federal laws of general application."<sup>120</sup>

*Skamania* distinguished between statutes passed under the police power and those that single out state trust lands.<sup>121</sup> "State law cannot single out the trust lands. . . . However, state laws of general applicability, such as a water quality regulation or historic preservation statute, can be applied to trust lands even if significant losses are imposed on the trust."<sup>122</sup> As long as the legislature does not burden the granted lands any more than it burdens other lands, it can act.

The argument that police power trumps trust obligations may reflect a necessary priority of governing, and should not distress anyone who does not want state forests logged in 19th-century fashion. This argument, however, is disingenuous. The fact is that the legislature can, and does, make exceptions to laws of general application,

Ph.D thesis, Washington State University) (on file with the Washington State University Library).

116. The Department of Natural Resources did not originally describe the various land-grant holdings as "trusts," either. It referred to them simply as "grants." See, e.g., DEPARTMENT OF NAT. RESOURCES, SOURCE OF INCOME BY LAND GRANT (1960); letter from Bert L. Cole to B.B. Brodin (May 17, 1960) (on file with author).

117. CHARLES J. CHAMBERS, JR. & EDWARD R. SUMMERFIELD, DEP'T OF NAT. RESOURCES, SUSTAINABLE HARVEST ANALYSIS FISCAL YEARS 1976 AND 1977 9 (1975).

118. *Id.*

119. *Noel v. Cole*, 98 Wash. 2d 375, 655 P.2d 245 (1982); *West Norman Timber, Inc. v. State*, 37 Wash. 2d 467, 224 P.2d 635 (1950).

120. 1996 Op. Wash. Att'y Gen. No. 11.

121. When the statute is passed pursuant to the police power, the only limitation . . . is that the statute must reasonably tend to correct some evil or promote some interest of the state, and not be contrary to any constitutional provision. Where the statute deals with state trust lands, however, the permissible goals . . . are more limited.

*Skamania*, 102 Wash. 2d at 132, 685 P.2d at 579-80.

122. SOUDER & FAIRFAX, *supra* note 64, at 163.

just as it has done in exempting the forest products industry from most environmental laws under recent forest and fish legislation. The legislature could make similar exceptions for state forests. By recognizing the legislature's right to limit management of granted and Forest Board lands with laws of general application, the courts have essentially recognized that private trust principles are not entirely appropriate to public land.

Private trust fiduciary principles do not merely require a trustee to treat beneficiaries no worse than it treats others. Private law trust fiduciary principles require a trustee to treat beneficiaries better than it treats others. Bogert says, "the trustee is expected to show more than ordinary candor, consideration and probity."<sup>123</sup> Cardozo talks about keeping "the level of conduct for fiduciaries . . . at a level higher than that trodden by the crowd."<sup>124</sup> Either the state is a trustee or it is not. If it is, and if it is permitted to pass laws that impinge on the interests of the trust beneficiaries, then it is not an ordinary trustee, and the school lands are not an ordinary trust.

The common school and other granted lands have never been treated as ordinary common-law trusts. For example, the public has been allowed to use state forest lands for camping, hunting, hiking, fishing, boating, and motorized off-road travel, even though those uses may substantially increase the risk of fire on these lands.<sup>125</sup>

The state has permitted grazing on trust lands at prices that fall below market rates and do not cover the damage inflicted on the forest.<sup>126</sup> In addition, state timber has often been sold primarily to bene-

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123. BOGERT & BOGERT, *supra* note 73, at 217.

124. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1929).

125. The Department of Natural Resources has "[b]uilt and maintained 141 trailheads and campgrounds, 400 miles of trails and other recreational facilities." WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 5.

126. There is, in the Loomis Forest, a "significant forest resource loss from animals" in the form of grazing cattle. Throughout our reconnaissance, deleterious effects from grazing were noted, mainly compacted soils and damage to riparian areas. Heavy puddling was observed in grazed areas after a rainfall indicating reduced infiltration rates. Substantial conifer damage and growth reduction were noted in numerous regeneration areas that would more successfully reforest with less interference from cows. . . . Natural vegetative diversity and composition are seriously reduced or altered in heavily grazed areas. It is difficult for us to imagine how the Department can justify grazing in light of their trust mandates to minimize loss, keep the forest whole and productive, and maintain undivided loyalty to the larger public beneficiaries.

PUBLIC FORESTRY FOUND., LOOMIS FOREST REPORT 12 (1994). In addition to its direct impact, grazing complicates the task of long-term forest management. "Due to effects on the rate of revegetation and impacts on riparian zones, the impacts of livestock grazing in an area following timber harvesting may be far greater than the impacts of either activity taken alone." V. Alaric Sample, *Assessing Cumulative Environmental Impacts: The Case of National Forest Planning*, 21 ENV'T L. 839, 852 (1991).



fit local mills rather than to earn top dollar for the common schools.<sup>127</sup> "The less competition a public forest has for its timber sales, the more closely sales need to be watched and accounted for."<sup>128</sup>

Indeed they do, but on the east side of the Cascades, sales to a single buyer have constituted business as usual for generations. In 1952, McBee observed, "In the pine territory east of the mountains, one firm has purchased most of the state timber offered for sale at the minimum prices fixed by the [Forest] Board (competitive bids being rare at such sales)."<sup>129</sup> He reported that the price was 10% to 30% below the prices that the Forest Service was getting from the same purchaser and that competitive bidding in 1950 and 51 might have yielded the state almost \$1 million more.<sup>130</sup>

The "trust beneficiaries" have suffered from such conduct. But the beneficiaries on the spot—that is, the local school districts closest to the sales—have not objected. Indeed, they have applauded and encouraged such sales.<sup>131</sup>

Forest Board lands are explicitly held in trust for the counties, but they were established for general public benefit.

In the early 1920s, "many lumbermen were concerned for the future of the region as they confronted three million logged-off acres in Washington and predictions that the state's virgin timber could last no more than sixty years."<sup>132</sup> The problem was simple: "[T]he record

127. "[T]he Loomis Forest has consistently produced timber for only one purchaser. . . Outside of one isolated sale of less than a million board feet in Lincoln County, Okanogan-Highlands-Loomis forest timber sales received the lowest average price per MBF [in the state]." PUBLIC FORESTRY FOUND., *supra* note 126 at 23.

128. *Id.* at 22.

129. MCBEE, *supra* note 33, at 3.

130. *Id.* "The prices," he wrote, "were from ten to thirty percent below prices received by the United States Forest Service for similar timber, similarly situated and sold to the same purchaser. . . [I]f the appraisals of the timber sold during the period of 1950 and 1951 had been increased in accordance with the prices paid on the competitive bids . . . the state would have received almost a million dollars more." *Id.*

131. DNR behavior in eastern Washington—and, historically, throughout the state—parallels United States Forest Service behavior as described by the Sixth Circuit Court of Appeals:

[F]orest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse. Because national forests are located near rural communities, foresters make management decisions to support perceived needs in the communities. . . . The resulting dependency of these communities on timber production causes over-harvesting and destructive harvesting methods. . . . Rural constituencies reliant on timber sale revenues may provoke politicians to place pressure on the Forest Service to sustain that revenue.

*Sierra Club v. Jack Ward Thomas*, 105 F.3d 248, 251 (6th Cir. 1997).

132. ROBERT E. FICKEN, *LUMBER AND POLITICS: THE CAREER OF MARK E. REED* 62 (1979). The problem persisted for decades. "The logged-off land problem, according to state Land Commissioner Clark Savidge, was 'the largest unsettled one that our state has before it

of . . . unrestricted use [of private forest lands was] one of 'cut and get out,' the logged-off lands (having no economic value) being left to revert to the county for unpaid taxes."<sup>133</sup> Around the same time, Clarence Bagley, who had come to Washington in 1864, wrote that "[o]ur boasted heritage of inexhaustible forests is nearly dissipated. Unless the federal government or the state takes over the gigantic task of reforestation, the lumber industry of Washington will ere long become a matter of past history."<sup>134</sup>

As a step toward reforestation, the Washington legislature passed two statutes that enabled the state to buy and manage cutover land and a third statute that enabled it to acquire cutover land from counties, provided that it manage the land in trust for those counties.<sup>135</sup> Collectively, the more than 600,000 acres acquired under these statutes are known as the Forest Board lands. Most of that acreage is explicitly held in trust for the counties, but the legislature established the trust only as a tool for channeling any financial benefits that flowed from land the counties had relinquished. Such financial benefits are merely incidental, because the legislative *intent* was nothing more or less than reforestation.<sup>136</sup>

Counties benefit whenever timber is sold, but the state did not acquire the land in order to generate money for the counties and the legislature could probably reduce or eliminate the counties' income at will.<sup>137</sup> The Forest Board lands clearly are not subject to the common-law duty of "undivided loyalty."

today." *Id.*

133. *State v. Dexter*, 32 Wash. 2d 551, 555, 202 P.2d 906, 907-08 (1949). "Denuded hill-sides . . . made possible the rapid runoff of surface waters, thus increasing the danger from floods and contributing to costly soil erosion." *Id.*

134. CLARENCE BAGLEY, HISTORY OF KING COUNTY WASHINGTON (1929).

135. See 1921 Wash. Laws 169; 1923 Wash. Laws 154; 1927 Wash. Laws 288.

136. WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 10. This is certainly the way Forest Board lands were viewed at the time. The statutes themselves made it clear in their statements of legislative intent. The first was designed to further the "acquirement [sic] and designation of lands . . . to be used for the development and growth of timber." 1921 Wash. Laws 169. The second referred to "the acquiring, seeding, reforestation and administering of lands for state forests." 1923 Wash. Laws 154. The statute that allowed land to be held in trust for the counties employed the same language and referred back to the management requirements established in 1923. There was no hint of undivided loyalty or any requirement to generate any revenue at all. 1927 Wash. Laws 288. Popular understanding confirmed the plain statements of legislative intent and the absence of any legislative requirements to generate money for the trust beneficiaries. "In the last two years, through gifts, purchases and the transfer to the State of tax-forfeited lands, over 200,000 acres are now embraced in State reforestation forests on which the regrowth is being promoted naturally by protection and planting." FRANK H. LAMB, SAGAS OF THE EVERGREENS 331 (1938).

137. Because they are statutory trusts, the legislature is free to change their terms. 1996 Op. Wash. Att'y Gen. No. 11.

C. *The Framers of the Washington Constitution Consciously Rejected the Idea That the Granted Lands Should Produce Maximum Revenue*

The Attorney General has suggested that generating maximum revenue for the beneficiaries over time should be the management goal for granted and Forest Board lands.<sup>138</sup> To support this thesis, the Attorney General cites *Nigh*,<sup>139</sup> which is an Oklahoma case.

The framers of Washington's constitution clearly did not choose maximum revenue as a goal. They received and rejected two petitions asking them to maximize revenue. Tacoma Typographical Union No. 170 and the Knights of Labor both sent petitions to the constitutional convention demanding that the granted lands be retained and managed to maximize revenues.<sup>140</sup> The convention was clearly aware of these petitions, and both were recorded in the convention's journal. In fact, the Tacoma Typographical Union submitted the very first petition that the convention received, and the submission made front-page news in *The Seattle Times*.<sup>141</sup> Both requests to maximize revenues were ignored. In other words, the convention was explicitly asked to manage the lands for maximum revenue, and the convention refused.

The framers were familiar with—and tacitly rejected—language in other constitutions that required maximum revenue. The drafters of Washington's constitution familiarized themselves with the constitutional language that other new states had adopted.<sup>142</sup> The last state admitted to the union before Washington, Colorado, had called for management of granted lands “in such a manner as will secure the maximum possible amount therefor.”<sup>143</sup> Washington's convention could have copied that language. It did not.

The Idaho Constitution, created only one year later by residents of what was at the time still part of Washington, did call for maximum revenue.<sup>144</sup> The framers of the Idaho Constitution obviously recog-

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138. *Id.* at 14.

139. Oklahoma Education Ass'n. Inc. v. Nigh, 642 P.2d 230 (Okla. 1982).

140. See BEVERLY PAULIK ROSENOW, *THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION* 188, 793-949 (1962).

141. SEATTLE TIMES, July 11, 1889, at 1.

142. [T]he Washington convention furnished an excellent example of the tendency of American states to follow and copy one another in constitutional practices. The delegates did not come to their task unprepared or empty-handed. They had models and drafts before them. . . . [T]he Washington constitution-makers acknowledged the merits of a number of other state constitutions by reproducing particular provisions either in substance or verbatim.

ROSENOW, *supra* note 140, at v.

143. COLO. CONST. art. IX, § 10(1) (amended 1996).

144. The original language required the state to reap “the maximum amount possible.” IDAHO CONST. art. IX, § 8 (amended 1982).

nized that Washington's constitutional language did not require maximum revenue, since they felt compelled to require it explicitly.

The Washington convention also ignored arguments that permitting the land to be sold for its appraised value could not possibly produce maximum revenue. *The Seattle Times* editorialized that "it will be impossible for the state to get anything like the full value of these lands if they are sold as is proposed."<sup>145</sup> The convention dismissed this and other warnings that, by selling off the granted lands, Washington would squander its heritage.<sup>146</sup> Some members of the convention may have consciously furthered the interests of mill companies and speculators, others may simply have been fixated on current income. Collectively, they showed no interest in securing maximum long-term revenue for the public schools.

Washington and the United States Congress have recognized more recently that neither the Washington Constitution nor the Enabling Act requires maximum revenue. The 1968 referendum on log exports from state land was not cast as a constitutional amendment or discussed as a constitutional issue, even though an export ban would have greatly reduced income from state lands.<sup>147</sup> Opponents, including the Governor, the Commissioner of Public Lands, and the Superintendent of Public Instruction, talked about losing dollars for school construction and erecting barriers to international trade, not about violating constitutional requirements or fiduciary duties to maximize income.<sup>148</sup> Presumably, they did not believe that such requirements or duties existed.

In addition, Congress' failure to change the Enabling Act when it voted to ban log exports from state land suggests that the Enabling Act does not require maximum income.

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145. *Our Timber Lands*, SEATTLE TIMES, August 1, 1889, at 4. "The mill companies will be the bidders for them, and there will be no competition, for, in this, as in other things, they will combine together and make an amicable division of the spoils."

146. The influence of the ubiquitous land speculator was demonstrated in connection with the article on the sale of the common school lands. Urging permanent state ownership of these lands, Prosser of North Yakima quoted from the reports of Illinois, Wisconsin, and Michigan, which indicated in each case that the school lands had been sold to benefit the purchasers rather than the state. Instead of \$50,000,000 or more in their school funds, as the value of their grants warranted, Michigan had \$3,381,963, and Wisconsin only \$1,165,041. Prosser insisted further that startling cases of mismanagement and robbery in California had resulted in a loss to the school fund of probably \$100,000,000, "one of the most stupendous robberies in the annals of history."

Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* 495 (1945) (unpublished Ph.D. thesis, University of Washington) (on file with the University of Washington Library).

147. A federal export ban actually did after 1991.

148. *Log-Export Measure Aims at Restrictions*, SEATTLE TIMES, November 3, 1968, at C5.

Even a court that has ignored the weight of historical evidence against *any* requirement for maximum revenue has recognized the state does not have to generate maximum *current* revenue. Noting that “the needs and desires of present beneficiaries may conflict with the needs and desires of future beneficiaries,” the court held that “nothing in the law . . . requires the Department [of Natural Resources] to maximize current income.”<sup>149</sup>

*D. Congress and the Framers Had Only One Overriding Concern: They Wanted to Prevent the Land from Being Stolen or Given Away*

The Washington Constitution forbids making a gift of public funds or lending state credit to private individuals or corporations.<sup>150</sup> Just as the framers did not want public money funneled into private pockets, they did not want the granted lands enriching anyone but designated state institutions. Clearly, under any plausible interpretation of the state’s fiduciary duty, neither the legislature nor the Department of Natural Resources may grant financial favors to named third parties. It does not follow, however, that the state must avoid protecting species or habitat. There is no reason to believe that the framers’ concern went beyond corruption. Their concern was well placed, because the framers lived in a time and place in which public resources were routinely misappropriated for private profit. The economy of Washington Territory had been built on the theft of public timber. All around Puget Sound, trees on federal land had been cut and milled without paying the federal treasury a dime.

In the first years of the [forest products] industry, San Francisco-owned milling companies made no acquisitions. . . . [L]aws left timber . . . virtually free for the taking. A federal investigation concluded that by the late 1870s, \$40 million worth of timber had been ‘stolen’ from the public domain on Puget Sound. Efforts to curb thievery were sporadic and easily corrupted.<sup>151</sup>

Mill companies had also acquired many square miles of federal timber land through blatant fraud.<sup>152</sup> In 1889, when the Washington

149. *Okanogan County v. Belcher*, No. 95-2-00867-9, at 8 (Chelan County Supr. Ct. May 30, 1996).

150. “No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm. . . .” WASH. CONST. art. VIII, § 7.

151. ROBERT E. FICKEN & CHARLES P. LEWARNE, *WASHINGTON: A CENTENNIAL HISTORY* 34 (1988).

152. Reformers reasoned that carefully worded legalization would end thievery, and they

State Constitution was written, the pace of land fraud was accelerating.<sup>153</sup>

In other states, lands granted for the benefit of common schools had already been sold at scandalously low prices—as had the lands granted Washington Territory for the benefit of what became the University of Washington, which may also have been sold in violation of federal law.<sup>154</sup>

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therefore endorsed the timber and Stone Act of 1878, which authorized sale to residents of Washington, Oregon, California and Nevada of up to 160 acres of timber or mineral land at \$2.50 per acre. . . . Meant to eliminate corruption, the timber and Stone Act instead allowed the mill companies to acquire sizeable holdings. The 160-acre limitation was easily circumvented by using dummy entrymen. Once these original entrants received patents—companies paid them from \$50 to \$125 for their brief service—title was transferred to the mill firms, often through third parties. . . . The process was conducted so openly that . . . newspapers even reported regular departures of organized groups of entrymen for the Olympia land office. Two hundred thousand acres of Washington timberland passed into private hands by this process in 1882 and 1883 alone. Fraud was so widespread that on two occasions the government temporarily halted entries pending investigation. But, in their own words, mill owners 'fixed' or 'entertained' federal agents assigned to the investigation.

*Id.* at 35.

In 1883, with the Act's political future highly uncertain, the federal government sent an inspector to the Puget Sound region to check on local abuses of it. [Port Blakely Mill Company manager William] Renton saw the handwriting on the wall, but he wanted to delay the inevitable as long as possible. In June 1883, he wrote to the manager [of the Pope and Talbot sawmill] at Port Gamble, Cyrus Walker, that the "Governmental Special Agent for homestead, preemption and timber claims is making an examination of all such entries. The [Interior] Department has suspended the issuing of patents on all timber applications until after the agent reports. He is a confidential friend of [Seattle lawyer] H.C. Struve. Tacoma will give Struve \$100 to have him use his influence to present the matter in as favorable a light as possible to the agent whom [sic] he thinks can be fixed. I am in favor of doing something in order to give us a chance until the next meeting of Congress, when the bill will undoubtedly be repealed, and our day for purchasing cheap land gone forever."

DANIEL JACK CHASAN, *THE WATER LINK: A HISTORY OF PUGET SOUND AS A RESOURCE* 17 (1981).

153. FICKEN, *supra* note 19, at 51.

154. The federal government had reserved land in Washington for the support of a territorial university. Such lands were normally sold only after the achievement of statehood, but a special commission headed by the Reverend Daniel Bagley began selling the land set aside for the University of Washington in 1861. This action, Josiah Keller reported from [the mill at] Port Gamble, represented "a good opportunity for us." Purchasers . . . were apparently permitted to make their own selections from government holdings at a price of \$1.50 an acre. Lumbermen were the principal beneficiaries . . . the Puget Mill Company purchased over 7,000 acres, one-seventh of the total sold. George Meigs, a member of the university board of regents, bought 3,300 acres. . . . To many observers, the close connection between lumbermen and public officials and the heavy sales to the mills indicated the existence of a conspiracy to defraud the government. The university land sales, a Seattle newspaper charged, were "characterized by gross extravagance if not downright fraud." A federal investigation, based on allegations that Bagley had exceeded his authority appeared likely. . . . The political strength of lumbermen, however, was apparently sufficient to prevent invalidation of the transactions. . . . Bagley and the mill owners, the commissioner [of the General Land Office] concluded, had "no doubt acted in good faith." This judgment,

The delegates knew all this. They also knew that most western politicians lost little sleep over conflicts of interest. "[I]n Western affairs, business and government were interdependent and symbiotic. . . . It does not take much exposure to Western political history to lead one to a basic fact: 'conflict of interest' has not always been an issue of political sensitivity."<sup>155</sup>

Events quickly confirmed the delegates' fears. "It was soon clear . . . that the commissioner of public lands, an elected official, was usually more than eager to demonstrate how effectively he could hold down the level of personal taxation by his vigorous disposal of the landed inheritance."<sup>156</sup>

Within a year after Washington achieved statehood, the Commissioner himself observed that "[r]ailroad companies are building their lines . . . over school lands without having secured the right to do so. . . . Much of the valuable timber on school lands is being destroyed or removed by trespassers."<sup>157</sup> Two years later, he observed that county commissioners had been given the task of appraising school lands, and the "temptation is great to favor particular friends by appraising the lands . . . too low. . . . There is also a temptation to strengthen a friend's chances of securing school lands which he has improved . . . simply by appraising his improvements at much above their actual value and the land correspondingly low."<sup>158</sup>

The framers knew their time and place. They knew that natural resources in public hands posed an almost-irresistible temptation to

from the available evidence, seems incorrect. The friendly relations between Bagley and lumbermen, the role of [Port Madison mill owner George] Meigs in determining university policy, the departure from standard practice with regard to territorial sale of public land, and the heavy purchases made by the mills suggest the existence of an agreement to provide funds for the university and timber for the industry.

*Id.* at 41.

155. PATRICIA LIMERICK NELSON, *THE LEGACY OF CONQUEST* 84 (1987). "Petitioned to grant a railroad charter, the first Dakota Assembly members were cautious and reserved—until the railroad agreed to make 'every member of the Assembly a partner!' True to their insight into government as a paying business, 'the assemblymen had not hesitated to use their office to get in on the ground floor of what they considered a very good business deal.'" *Id.*

156. NORMAN H. CLARK, *WASHINGTON: A BICENTENNIAL HISTORY* 102 (1976).

In 1908 . . . only a loud public outcry by the Spokane Spokesman-Review prevented the sale at ten dollars an acre of land in the Okanogan valley belonging to the State College of Washington—land easily worth more than three times that price. And there was impressive evidence that the commissioner had allowed casual herds of opportunists—like the "dummy entrymen" of homestead corruptions—to enter claims, obtain undervalued state lands, then sell the titles to large timber corporations.

*Id.* There was also evidence that state timber cruisers deliberately underestimated the amount of timber on tracts of granted land for the benefit of favored buyers. Hoover, *supra* note 115, at 212-32.

157. COMMISSIONER OF PUB. LANDS, *FIRST BIENNIAL REP.* 10 (1890).

158. COMMISSIONER OF PUB. LANDS, *SECOND BIENNIAL REP.* 38 (1890).

many of their fellow citizens. They wanted to make sure that the financial benefits from the sale or exploitation of granted lands flowed to the schools and other state institutions rather than to corporations and speculators. They did not worry about sacrificing some financial benefits to the broader public interest.

*Lassen* and the other much-quoted rulings about granted lands reflect similar concerns. Those rulings have one common theme: neither the lands nor rights to use the lands nor money earned by selling or leasing the lands can be alienated without compensation. The question has never been land *management*. It has been the use of money from the permanent funds, the relinquishment of contractual rights, and the granting of easements.

In *Lassen*, the Court ruled that the Arizona highway department could not obtain an easement over common school land without paying for it.<sup>159</sup> In *111.2 Acres of Land*, the court ruled that the Federal Bureau of Reclamation Department could not obtain an easement over common school land without paying for it.<sup>160</sup> In *Ervien*, the court ruled that the State of New Mexico could not use money from the common school fund to promote economic development.<sup>161</sup>

*Skamania* fits this general pattern, in that the court ruled against a specific legislative giveaway. The legislature had not engaged in self-dealing, but it had attempted to deal on behalf of identifiable third parties. The court looked beyond the stated rationale (that aiding the logging companies would aid the economy, which would ultimately be good for the public schools) to the statute's real purpose—the financial benefit of a specific industry—and ruled that the legislation violated the state's trust duty of undivided loyalty. Instead of getting top dollar for the beneficiaries, the legislature would be easing the financial burden on a small, identifiable group of constituents.

Not one of these rulings requires state land to be *managed* in any particular way or precludes management that is guided in part by environmental values.

The prevention of self-dealing—or dealing on behalf of identifiable third parties—is the crux of the state's fiduciary responsibility. This is true even if one assumes that the granted lands constitute limited trusts.

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159. *Lassen v. Arizona ex rel. Ariz. Highway Dept.*, 385 U.S. 458, 465 (1967). The crux of *Lassen* was that "[t]he Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." *Id.* at 466.

160. *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968).

161. *Ervien*, 251 U.S. at 41.



Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all self-interest and all considerations of the interests of third persons.<sup>162</sup>

This is a very old concept. The Babylonian Code of Hammurabi said: "If a man hire a man to oversee his farm and . . . if that man steal either the seed grain or the fodder and it be found in his hand, they shall cut off his hand."<sup>163</sup>

In our times, a breach of the duty of loyalty happens most often when "the trustee, while engaged in a business transaction for the trust, attempts at the same time to secure a financial advantage for himself or persons related to him; this is usually forbidden as 'self-dealing.'"<sup>164</sup> But dealing on behalf of other people who are not beneficiaries is considered just as clear a breach. If "the trustee attempts to inject into a trust transaction the interest of a *third person*, . . . [t]he attitude of the court . . . is the same as where the interest is that personal to the trustee."<sup>165</sup>

All the standard rhetoric about a trustee's extraordinary duty of loyalty to the trust beneficiary boils down to the same thing: the trustee cannot put his own or any third party's material interest ahead of the beneficiary's. To illustrate the undivided loyalty a trustee owes a beneficiary, Bogert quotes Benjamin Cardozo: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place."<sup>166</sup>

Cardozo delivered this ringing description of fiduciary duty in *Meinhard v. Salmon*,<sup>167</sup> which involved a managing co-adventurer in a Fifth Avenue hotel lease who did not let his de facto partner in on a lucrative new real estate deal. The issue was self-dealing pure and simple. Cardozo was explaining why the defendant could not line his

162. BOGERT & BOGERT, *supra* note 73, at 217.

163. H.L. MENCKEN, A NEW DICTIONARY OF QUOTATIONS 1220 (1960).

164. BOGERT & BOGERT, *supra* note 73, at 235.

165. *Id.* at 241.

166. *Id.* at 217.

Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exception. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

*Id.*

167. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1929).

own pockets without letting his co-adventurer in on the deal.<sup>168</sup> His words have no bearing on a state's ability to consider environmental values.

*E. Neither Congress nor the Framers Gave Any Guidance About the Management of Granted Lands*

In 1889—and certainly in 1853, when Congress first set two sections in each township aside for common schools in Washington Territory—everyone assumed the land would simply be sold.<sup>169</sup> The only questions were when and how. The constitutional convention considered and rejected arguments and petitions in favor of keeping the land.<sup>170</sup> The framers decided to sell no more than one-half of it before 1905,<sup>171</sup> but they did not address long-term management.

In 1889, when the Washington Constitution was ratified, no one managed American forests. Gifford Pinchot established the nation's first managed forest on private land three years later.<sup>172</sup> Northwestern "tree farms" date from the period of World War II, some 55 years later.<sup>173</sup> Native Americans had long burned underbrush to shape the landscape, but European-Americans did not. In fact, deliberately set blazes were known as "Indian fire." Ignited by these deliberate burns gone awry, careless use of fire by European Americans, sparks from the steam donkeys and locomotives used in logging, and sometimes even natural lightning, vast tracts of Washington forest went up in smoke every summer. "[T]he figures in State Forester [J.R.] Welty's first annual report [for 1905] reveal that prior to 1905 more timber had been destroyed by fire than had been logged."<sup>174</sup> Nevertheless, the timber industry did not even try to control accidental forest fires until the early 20th century.

No one had decided what kinds of policies should govern publicly owned forests. The federal government was on the brink of set-

168. *Id.* at 546.

169. Washington simply followed the pattern set by earlier western states. "[V]arious leasing systems were tried in each of the five states of the old Northwest, and 'in every case it was discarded as a failure.' In 1827, Ohio petitioned Congress for authority to sell rather than lease the lands, and thereafter, school lands were generally sold." Fairfax, et al., *supra* note 5, at 821.

170. ROSENOW, *supra* note 140, at 39, 41, 149.

171. WASH. CONST. art. XVI, § 3.

172. "The first attempt to practice forestry in America was made . . . [i]n 1892[, when] George W. Vanderbilt employed Gifford Pinchot to manage the forest portion of the Biltmore Estate[,] . . . a tract of 7,000 acres in the mountains of western North Carolina." Robert K. Winters, SOCIETY OF AMERICAN FORESTERS, *The First Half Century*, in FIFTY YEARS OF FORESTRY IN THE U.S.A. 4 (1950).

173. FICKEN, *supra* note 19, at 226.

174. FOREST ADVISORY COMM., *supra* note 31, at 16.

ting land aside in the first national forest reserves, which later evolved into the national forests, but the creation of forest reserves did not imply management. It simply meant that the government would hold some trees for long-term public benefit instead of handing them over to the first logger who coveted them. Even after the first forest reserves took shape, exactly how those trees would be used in the future remained unclear.

John Muir<sup>175</sup> thought they should and would be saved as wilderness. Gifford Pinchot thought they should be managed like European forests, as renewable sources of wood. Pinchot's view soon prevailed, but in 1889, even people who expected the federal government to set forests aside could not have known what the government would do with them.<sup>176</sup>

The state lands were not seriously managed—and, arguably, were not manageable—until years after the Department of Natural Resources was created in 1957.

The lands were scattered, ill protected against fire, and not policed against theft. With the exception of some lands obtained after statehood from the federal government in exchange for common school lands that had been included in the national forests, they lay in isolated sections, too small for even the rudimentary management of

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175. John Muir was, of course, the great 19th and early 20th century spokesman for American wilderness. In the late 19th century,

[w]ild country needed a champion, and in . . . John Muir it found one. Starting in the 1870s, Muir made exploring wilderness and extolling its values a way of life. . . . Muir's books were minor best sellers, and the nation's foremost periodicals competed for his essays. The best universities tried to persuade him to join their faculties and, when unsuccessful, settled for this acceptance of honorary degrees. As a publicizer of the American wilderness Muir had no equal. At his death in 1914 he had earned a reputation as "the most magnificent enthusiast about nature in the United States, the most rapt of all prophets of our out-of-door gospel."

RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 122 (rev. ed. 1973).

176. Since the Forest Reserve Act did not specify the function of the reserved areas, John Muir had reason to believe it was intended to preserve undeveloped forests. . . . Indeed, a renewed plea from Muir for a park around Kings Canyon stimulated Secretary of the Interior John W. Noble's determination to push the reserve bill through Congress. . . . [D]isconcerting to conservationists was the lack of any clear definition of the purpose of the reserves. Muir was content simply to protect the forests in their undeveloped condition. But [Assistant Land Commissioner Edward A.] Bowers, Bernhard E. Fernow of the federal Division of Forestry, and a young Yale graduate named Gifford Pinchot had other ideas. . . . The Sargent-Muir faction won a temporary victory on February 22, 1897, when President Grover Cleveland, in the closing days of his administration, established over 21,000,000 acres of forest reserves with no mention of utilitarian objectives. . . . At once the foresters, seconded by lumber, grazing and mining interests, howled in protest. . . . On June 4, 1897, Congress passed the forest Management Act, which left no doubt that the reserves would not be wilderness.

*Id.* at 133-37.

earlier eras.<sup>177</sup> In many cases they were inaccessible. The state did not even have an accurate inventory of its land. In 1942, a Forest Advisory Committee appointed by Governor Arthur B. Langlie reported that "the office of the Commissioner of Public Lands has been, with a few recent exceptions, a land sales office. . . . Before the state can undertake forestry on its own lands, it must know what it has."<sup>178</sup>

Pointing out the tendency of loggers to move to Oregon because Washington stands were becoming depleted, *The Seattle Times* reported under the front-page headline, "Drastic Plan Proposed to Save Timber," the committee's argument that "[i]f the state's timber is to be preserved, it is time for the state to take the initiative in forestry matters and to see that its own lands are properly managed."<sup>179</sup>

On state lands, the group recommended the state enforce proper slash disposal, allow cutting only under forester direction, cooperate with counties in reforesting tax delinquent lands, increase fire protection, exchange timber lands with private owners to form the state's holdings into big blocks instead of isolated stands, expand sustained yield units, build a good road system to state lands, and make loggers leave residual stands to promote regrowth.<sup>180</sup>

The state did not take this advice. It did not even try very hard to keep people from stealing timber. "There is no supervision by the Land Office of the . . . logger who has purchased, and is removing state timber," McBee wrote in 1952. "[F]requently, adjacent timber belonging to the State and not included in the sale is taken."<sup>181</sup> In some "salvage sales," he wrote, "the bids were so high that a true salvage operation could not have been profitably conducted." Obviously, "[t]he salvage sale has been used as a mean of entry upon land for the purpose of unlawfully removing green timber."<sup>182</sup>

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177. People realized that consolidating the state's timber holdings into large blocks, as the 483,000 acres were consolidated, would be advantageous. For example, a 1926 *Seattle Times* article describing the triumphs of Land Commissioner Clark V. Savidge observed if he had not negotiated successfully with the federal government for 483,000 acres, "[t]his timber land . . . would still be locked up in the federal reserves in isolated sections, instead of being held in huge tracts, as it now is." *Land Commissioner Savidge Has Long Record of Good Service to Washington*, SEATTLE TIMES, October 26, 1926. No one bothered blocking up the rest of the granted lands.

178. FOREST ADVISORY COMM., *supra* note 31 at 5.

179. *Drastic Plan Proposed to Save Timber*, SEATTLE TIMES, August 1, 1942, at 1.

180. *Id.*

181. MCBEE, *supra* note 33, at 9.

182. *Id.* at 14.

After the Department of Natural Resources was created, its first big task was taking an inventory of the state's land and forest holdings. The inventory was not completed until 1966.<sup>183</sup>

At that time, most of the state's forest land still could not be reached by road. As late as 1970, 72% of the land had no road access.<sup>184</sup> The process of blocking up state forest land into manageable parcels was very late in coming. After 1980, "[e]fforts were intensified to exchange land with other forest land owners to consolidate and 'block up' isolated parcels into contiguous blocks. . . . Since 1957, 499 exchanges were concluded resulting in new blocked-up areas."<sup>185</sup>

Any real management of the state forests is a recent phenomenon. Management practices should not be bound by a contemporary view of historical expectations, for historically, there were no meaningful expectations. The nineteenth, and even most of the twentieth century, offers little or no guidance. We should be free to manage the forests in ways that make sense at the start of the twenty-first century.

As a manager, rather than a trustee, of both granted and Forest Board lands, the state has a great deal of latitude. There is a critical difference between getting the maximum return when timber or land is sold and getting maximum return on the underlying asset value. The state must strive for the former. It has no obligation to strive for the latter.

The state's performance as either a trustee or manager will be judged under an "abuse of discretion" standard.<sup>186</sup> If the beneficiaries question the state's performance, the courts will ask whether or not the state has acted with the prudence and undivided loyalty expected of a trustee.

A trustee abuses its discretion only when it acts arbitrarily, in bad faith, maliciously or fraudulently. . . . [S]o long as a trustee acts not only in good faith but also within the bounds of reasonable judgment, an abuse of discretion will not be found.<sup>187</sup>

If anyone else questions the state's performance, the courts will ask only if the state has met the procedural standards that any state agency must meet in carrying out its statutory duties.<sup>188</sup>

A discretionary decision of an administrative agency is not set aside absent a clear showing of abuse, which in turn is shown by

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183. CHAMBERS & SUMMERFIELD, *supra* note 117, at 2.

184. WASHINGTON ST. DEP'T OF NAT. RESOURCES, *supra* note 1, at 12.

185. *Id.* at 13.

186. 1996 Op. Wash. Att'y Gen. No. 11.

187. *Id.*

188. *Id.*

demonstrating that the discretion was exercised in a manner that was manifestly unreasonable or exercised on untenable grounds or for untenable reasons.<sup>189</sup>

Clearly, the state has discretion to refrain from selling or cutting timber. In 1938, the Washington Supreme Court ruled that the state could retain timber land in a sustained-yield forest rather than selling it to a logging company.<sup>190</sup> In 1996, the Chelan County Superior Court ruled that the Department of Natural Resources did not have to sell lodgepole pine timber threatened by a bark beetle infestation before it completed an 80-year forest management plan. "[T]he trustee has broad discretion not to act, as long as inaction can be demonstrated to be prudent."<sup>191</sup>

In recent years, citizens' groups have urged the state to use its discretion to manage public forests for broader public benefits.<sup>192</sup> "Department of Natural Resources lands are a commercial forest within which there is a special opportunity to experiment with harvest techniques."<sup>193</sup>

The state has freely acknowledged that a forest is more than standing timber, and that prudent long-term forest management requires protection of an entire living system. "The department recognizes that assets owned by the trusts include the entire ecosystem and manages each site with the entire ecosystem in mind."<sup>194</sup> Under the forest resource plan adopted in 1992, "[t]he department will place

189. *Id.*

190. *State ex rel. Forks Shingle Co. v. Martin*, 196 Wash. 494, 83 P.2d 755 (1938). The court's ruling was potentially broader than that. It said there was nothing wrong with "the declared policy of the legislature to reserve the timber from present sale, for disposal under some other plan." *Id.* at 502.

191. Jon A. Souder & Sally K. Fairfax, *Arbitrary Administrators, Capricious Bureaucrats and Prudent Trustees: Does It Matter in the Review of Timber Salvage Sales?* 18 PUB. LAND & RESOURCES L. REV. 181 (1997). "The court unequivocally rejected the plaintiffs' assertion that managing the Loomis is a no-brainer. . . . [It said,] 'it is apparent to the Court that "managing" a forest of this size and diversity is a very complex and vast undertaking.'" *Id.* at 206.

192. The Tiger Mountain State Forest (TMSF) should be developed as a model sustained-yield forest where innovative management practices compatible with an urban environment are used to produce prudent timber harvest revenues for the trusts. Such harvest should be economically profitable, environmentally sound, and maintain and/or enhance the yield of all other forest resources such as clean water, soil, fish, wildlife and recreation for present and future beneficiaries.

TIGER MOUNTAIN ST. FOREST ADVISORY COMM., TIGER MOUNTAIN STATE FOREST RECOMMENDED MANAGEMENT GUIDELINES ix (1984).

193. COMMISSION ON OLD GROWTH ALTERNATIVES FOR WASHINGTON'S FOREST TRUST LANDS, FINAL REPORT 2 (1989).

194. DEPARTMENT OF NAT. RESOURCES, FOREST RESOURCE PLAN 1 (1992).

more emphasis on protecting ecosystem diversity and providing habitat for endangered and threatened wildlife and plants."<sup>195</sup>

The state must manage its forests in perpetuity. We can be pretty sure that some management strategies will be bad for the forests over the long run. But what management strategies will be good over the coming centuries? What management strategies will produce the surest future return? What management strategies will be *best*? It would be arrogant to presume we knew. Clearly, we should avoid practices that will destroy or diminish the land's ability to grow trees. Clearly, we should keep future options open. The Department of Natural resources

must conserve and enhance natural resources in State forest trust lands to attain the highest long-term net income from these lands. In exercising its duties, the department, as trust manager, must act in a manner that is equitable to all generations, including acting reasonably to avoid foreclosing future options of generating income from the trust assets for future generations.<sup>196</sup>

The very nature of the task of managing forest land demands both flexibility and caution—and a willingness to look beyond what present beneficiaries think their successors will want. Managing its forests *in perpetuity*, the state may legitimately accept a modest rate of return in order to keep long-term options open. A federal court in Colorado has observed that “[t]he choice of the trustee to manage the lands to produce reasonable and consistent income over time is reasonable and prudent given the perpetual nature of the trust.”<sup>197</sup> So far, the Department of Natural Resources has applied this approach cautiously. It can be less cautious without shirking its duty to the beneficiaries.

Our understanding of the Enabling Act and the Washington Constitution has evolved. It would be disingenuous to insist on using the 1889 view of the state's duty toward the beneficiaries, because we have long since abandoned this view. The general perception of what constitutes a “common school” system has changed. If it had not changed, we would currently have no public high schools in Wash-

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195. *Id.* at 14.

196. *Okanogan County v. Belcher*, No. 95-2-00867-9 at 8 (Chelan County Supr. Ct. May 30, 1996). “The department does not know all the ways there are to generate income from state forest lands. The department believes it is prudent to manage these trust assets so that at least reasonably foreseeable future source of income are not foregone by actions taken today.” DEPARTMENT OF NAT. RESOURCES, *supra* note 194, at B-3.

197. *Branson School District RE 82 v. Romer*, 958 F. Supp. 1501, 1520 (D. Colo. 1997). “It is axiomatic, of course, that in any final disposition of trust land, the Board is bound to produce the maximum benefit possible to the public schools.” *Id.*

ington State. Insisting rigidly on the original intent underlying the Enabling Act and the Washington Constitution would lead straight into a legal quagmire.

Although the people who passed the Enabling Act and the state constitution did not foresee management under common-law private trust principles, they clearly did require management of sections 16 and 36 for the exclusive financial benefit of the "common schools." Virtually everyone treats "common schools" as a synonym for "public schools." However, the words originally had different meanings. The convention delegates did not regard "public" and "common" as synonyms. As used in Washington at the time, "common schools" did not include high schools. The constitution makes this perfectly clear. Article IX, section 2 says that "[t]he legislature shall provide for a general and uniform system of public schools," and then explains that "[t]he public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established."<sup>198</sup> It finishes by stating unequivocally that "the entire revenue derived from the common school land . . . shall be exclusively applied to the support of the common schools."<sup>199</sup>

This distinction between schools was thoroughly consistent with the understanding and politics of the time. A lot of taxpayers thought high school was a frill for which the public should not have to pay. Washington Territory did not officially recognize public high schools, nor did the new state.<sup>200</sup> In the first years of statehood, some people thought that using public money to fund high schools was illegal.<sup>201</sup>

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198. WASH. CONST., art. IX, § 2.

199. *Id.*

200. BIBB, *supra* note 6, at 105. "According to official reports there were six high schools at the time Washington became a state, with enrollment of three hundred twenty students. We might say, then, that save a few feeble attempts, high schools were of little importance during the territorial period. They had no legal recognition until 1895." *Id.*

201. As late as 1893,

the legitimacy of the high school within the ambiguous framework of the constitution and laws was only assumed; and [Seattle school board vice-president T.W.] Prosch gained notoriety as an opponent of the high school. . . . [H]e believed that the Board had no legal right to operate the high school as part of the city's common school system. . . . One major newspaper charged that Prosch "has been a member of the board for several years and has always opposed the high school being organized and continued. The common schools he deems sufficient education for the state to provide."

Pouw-Bray, Change in the Common School System of Washington State 1889-1899 33-36 (1973) (unpublished masters thesis University of Washington) (on file with the University of Washington). Members of the school board consulted Judge Thomas Burke. The board president subsequently "reported to the full meeting of the Board that Judge Burke, after consultation with Judge Roger S. Greene and William H. White, the board's attorney, gave the opinion that the board had no legal right to maintain a high school. The board then voted unanimously that the high school in Seattle be abolished." *Id.*



High schools were soon accepted as an integral part of the public schools, however. No one has since insisted on preserving Congress' or the framers' original intent.

As our understanding of the term "common school" has changed, our view of responsible public land management should evolve, too. Common law trust principles—and common sense—require the state to strike a balance between short and long-term benefits and a prudent diversification of assets. Managing some of the granted lands for environmental values would provide a baseline against which to measure other management regimes and, if other regimes were to fail over the long term, a land base with greater economic potential.

In 1996, by a narrow margin, Colorado voters amended their state's 120-year-old constitution to change the management of common school lands. Amendment 16 declared that "the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting the beauty, natural values, open space and wildlife habitat thereof, for this and future generations."<sup>202</sup> When the amendment was challenged as a violation of the trust terms established by Colorado's Enabling Act, the Tenth Circuit Court of Appeals said,

we believe that the "sound stewardship" principle merely announces a new management approach for the land trust. The additional requirement to consider beauty, nature, open space, and wildlife habitat as part of the whole panoply of land management considerations simply indicates a change in the state's chosen mechanism for achieving its continuing obligation to manage the school lands for the support of the common schools. A trustee is expected to use his or her skill and expertise in managing a trust, and it is certainly fairly possible for a trustee to conclude that protecting and enhancing the aesthetic value of a property will increase its long-term economic potential and productivity. The trust obligation, after all, is unlimited in time and a long-range vision of how best to preserve the value and productivity of the trust assets may very well include attention to preserving the beauty and natural values of the property.<sup>203</sup>

A trustee's prudent long-range vision may very well embrace beauty and natural values in Washington, too. Colorado's Enabling Act has not prevented that state from changing its management premises, so Washington's act, which contains similar terms, should like-

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202. COLO. CONST. art. IX, § 10(1).

203. *Branson School District RE-82 v. Romer*, 161 F.3d 619, 638 (10th Cir. 1998).

wise pose no obstacle. Washington has never had Colorado's constitutional requirement for maximum revenue, so Washington could make the change without amending its constitution.

*F. The Granted Lands Are Shielded by a Broad Constitutional Trust, Which Gives Them the Benefit of the Public Trust Doctrine*

Applying the public trust doctrine to Washington's state forests means that the environmental and aesthetic values of the granted lands must be balanced against the state's duty to earn money for the schools; those values must be safeguarded for all the people and preserved for future generations.<sup>204</sup>

The Washington Constitution explicitly recognizes the creation of a public trust. Article XVI says: "All the public lands granted to the state are held in trust for all the people."<sup>205</sup> While the courts have read elaborate trust meaning into the ambiguous language of article IX, they have never given full effect to the unambiguous language of Article XVI. Yet the courts have stated, "[w]e will not construe or interpret a constitutional provision that is plain or unambiguous."<sup>206</sup> Because Article XVI is unambiguous, the courts must apply the public trust doctrine to state granted lands.<sup>207</sup>

All parts of the Washington State Constitution must be given equal weight. "One requirement of the constitution is as mandatory in its nature as another."<sup>208</sup> A constitution must be interpreted in ways that give effect to every article and, if possible, to every word. "We have . . . consistently stated that . . . constitutional provisions should be construed so that no clause, sentence or word shall be superfluous, void, or insignificant."<sup>209</sup> Language in different sections that seems to conflict must be reconciled. One can easily give effect to

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204. "Edmund Burke once said that a great unwritten compact exists between the dead, the living, and the unborn. . . . Such an unwritten compact requires that we leave to the unborn something more than debts and depleted natural resources." *State v. Dexter*, 32 Wash. 2d 551, 556, 202 P.2d 906, 908 (1949).

205. WASH. CONST. art. XVI, § 1.

206. *Washington Econ. Dev. Auth. v. Grimm*, 119 Wash. 2d 738, 748, 837 P.2d 606, 612 (1992).

207. If it does not mean that, the clear language of article XVI is hard to reconcile with the idea that the constitution set up trusts for the exclusive benefit of public schools and other institutions.

Washington entered the Union under the Omnibus Enabling Act which did not establish a trust. Washington's state constitution clearly did so. . . . [I]t states unambiguously that "all lands granted are held in trust for all the people." [I]f the trust is to benefit all the people, it is not clear how undivided loyalty ought to be defined.

*Fairfax et al.*, *supra* note 5, at 846.

208. *State ex rel. Wolfe v. Parmenter* 50 Wash. 175 (1908).

209. *Grimm*, 119 Wash. 2d at 746, 837 P.2d at 610-11.

Article XVI and resolve its apparent conflict with Article IX: one need only recognize that Article XVI creates a public trust that coexists with and underlies the interests of specific beneficiaries in the granted lands.

The public trust doctrine has always existed in Washington.<sup>210</sup> This doctrine, which dates to Roman and old English common law, resembles "a covenant running with the land . . . for the benefit of the public and the land's dependent wildlife."<sup>211</sup> The courts apply it on a case-by-case basis. In each case, the courts must balance the broad public trust interest against a narrower, conflicting interest. This may involve reexamining a decision made years or even decades before.<sup>212</sup>

A public trust interpretation of Washington's management responsibilities is consistent with the events and concerns existing in 1889. At that time, people who worried that public resources would be stolen or given away may have taken some comfort from the idea that an inalienable public interest underlies state ownership of the granted lands. Three years later, in the seminal *Illinois Central Railroad* case, the United States Supreme Court decided that a public trust interest did underlie Illinois' interest in the bed of Lake Michigan. The Court held that the state could not legally sell the lake bed to the Illinois Central Railroad. The case laid the foundation for modern public trust doctrine law in the United States.

Could a case decided in 1892 have influenced Washington State constitutional delegates meeting three years earlier? It could have. The case spent ten years making its way through the courts. While there is no evidence that people in Washington were aware of the legal doctrines involved in the case, there is no reason to doubt it. The constitutional convention and the leadership of the territory were well supplied with lawyers who had been born in the Midwest and may well have retained a personal interest in legal controversies there.<sup>213</sup> Personal connections aside, the Illinois Central was no minor regional railroad.<sup>214</sup> In fact, it was publicly contemplating a line to Puget

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210. *Orion Corporation v. State*, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987).

211. *Id.* (quoting Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J.ENVTL. L. & LITIG., 107, 118 (1986)). "The heart of the public trust doctrine . . . is that it imposes limits and obligations on governments." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 284 (1980).

212. In the seminal "Mono Lake case," the California Supreme Court ruled that "plaintiffs can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin." *National Audubon Soc. v. Superior Ct. of Alpine Cty.*, 658 P.2d 709, 732 (Cal. 1983).

213. ROSENOW, *supra* note 140, at 465-90.

214. It was the railroad for which Abraham Lincoln had worked as a lawyer. It had employed many Civil War generals on both sides of the conflict, including McClellan, Burnside,

Sound.<sup>215</sup> The leadership of Washington Territory would have known all about the Illinois Central and its legal conflicts. At the time, the public trust doctrine applied only to navigable waters. Washington's constitutional language extended it to dry land.

Over the years, the scope of the public trust doctrine has expanded dramatically. Originally, it protected the public rights to navigation and fishing. In more recent American law, it has been expanded to protect environmental quality, wildlife habitat, and aesthetic beauty.<sup>216</sup> Washington courts have already extended the doctrine beyond rights of navigation and commercial fishing to "incidental rights of fishing, boating, swimming, water skiing and other related recreational purposes."<sup>217</sup>

Now, even in the absence of explicit constitutional language, the public trust doctrine could easily encompass environmental and aesthetic values on publicly owned forest land.<sup>218</sup> The Washington

and Beaugard. In 1850, it had received the first federal land grant for railroad construction. In 1889, the year of the convention, it finished building what was then the longest metal bridge in the world. (The bridge spanned the Ohio River at Cairo, Illinois.) It operated the rail route between Chicago and New Orleans. Under the leadership of E.H. Harriman, it was pushing tracks west of the Mississippi <<http://icrrhistorical.org/icrr.history.html>>.

215. In June, word leaked out that a railroad survey crew had left Pierre, South Dakota in search of a route to the Sound and that speculators from Dubuque had already headed west to buy up land along the probable right-of-way. *Illinois Central Scheme*, N.Y. TIMES, June 13, 1889, at 2.

216. "Several courts have recognized environmental quality as a public trust interest." RALPH W. JOHNSON, ET AL., WASHINGTON DEPARTMENT OF ECOLOGY, *THE PUBLIC TRUST DOCTRINE AND COASTAL ZONE MANAGEMENT IN WASHINGTON STATE* 59 (1991). "Even without relying on the expansion of the doctrine to encompass parklands, beaches, and nonnavigable waters, or to protect interests such as recreation, aesthetics, and ecological diversity, there is sufficient precedent and logical justification for including wildlife within the coverage of resources protected by the public trust doctrine." Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 728 (1989). In ruling that certain land near the Missouri River was subject to the public trust doctrine, an Iowa court took "judicial notice of the expanding involvement of Iowans in recreational activities . . . [that] include hiking, camping, biking and picnicking" there. *State v. Sorenson*, 436 N.W.2d 358, 363 (Iowa 1989).

217. *Orion Corp. v. State*, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987).

218. Under Washington law, environmental quality and water quality are probably also protected interests. The public's interest in fishing can only be realized if water quality and quantity are adequate to support fish. Moreover, the Washington Supreme Court indicated in *Orion* that it would look favorably on a claim that protecting the environment is a public interest. . . . [I]n another footnote, the court cited *Marks v. Whitney*, a California case which recognized the public interest not only in ecological values, but also in preserving tidelands in their natural state. Therefore, given the proper case, the Washington Supreme Court may well follow several other states by recognizing water quality and environmental preservation as public trust interests.

JOHNSON, ET AL., *supra* note 216, at 58.

Extension of protected public trust interests to include preservation of aesthetic or scenic beauty is rather unproblematic. Indeed, for the sightseer, the enjoyment of natural beauty is a form of recreation, which the court has already recognized as a

Supreme Court has explicitly left open the door to broader applications, noting that “[r]ecognizing science’s ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects,” and stating that the Supreme Court has not yet had occasion “to decide the total scope of the doctrine.”<sup>219</sup>

The actual use made of Washington’s state forests suggests that they have in fact been regarded and treated as a public trust. Although the state has never acknowledged a public trust interest in the granted lands, in many respects, it has managed those lands as if a public trust existed. It has permitted ranchers in isolated communities to treat the state forests as commons.<sup>220</sup> It has permitted all citizens to use the granted lands for recreation. Citizens have been free to walk there, use human-powered and motorized boats there, ride mountain bikes, ATVs, and snowmobiles there, camp, hunt, fish, and trap there. The Department of Natural Resources’ current policy states that “[t]he department will provide access for multiple uses on state forest lands.”<sup>221</sup> The current recreational uses all correspond to established public trust interests. These uses are not required or even explicitly permitted by the Enabling Act or the Washington Constitution. Not all states permit such a range of uses on granted lands.<sup>222</sup> The fact that Washington does permit them implies that Washington tacitly recognizes a public trust interest in its granted lands.

Public expectations about the management of state forests must be protected by a public trust. The people of Washington seem to agree that a public trust governs the state forests.<sup>223</sup> “A specialist on

protected interest. Several other states have recognized aesthetic beauty as a legitimate public trust interest.

*Id.* at 65. “The principal values plaintiffs seek to protect . . . are recreational and ecological. . . . [I]t is clear that protection of these values is among the purposes of the public trust.” *National Audubon Soc. v. Superior Ct. of Alpine Cty.*, 658 P.2d 709, 719 (Cal. 1983).

219. *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073.

220. See PUBLIC FORESTRY FOUND., *supra* note 126, at 13. “Cattle grazing and fire suppression were the main management activities on the Loomis Forest until 1957.” *Okanogan County v. Belcher*, No. 95-2-00867-9 at 5 (Chelan County Supr. Ct. May 30, 1996).

221. DEPARTMENT OF NAT. RESOURCES, *supra* note 194 at 41.

222. Montana and New Mexico require permits, Colorado requires leases, and three states, Nebraska, Oklahoma and Texas, permit no recreational access at all. Souder, *State Trust Lands* at 272.

223. Actually, the people of many states have reached the same conclusion.

Under growing pressure from environmental interests, the courts and the trustees are beginning to find a place on school trust lands for subsidized recreation and hunting access, and even for aesthetic preservation. Trustees are on notice, we believe, that their [supposed] mandate to maximize returns for the beneficiary does not free them from the growing public demand that profit be obtained by methods that are as aesthetically and environmentally sensitive as possible.

*Id.* at 275.

Washington's state trust lands, Professor Thomas Waggner, has cautioned against the widespread public perception of these grant lands as properties that are publicly owned for 'public use.'"<sup>224</sup> Public expectations are crucial. "The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common. . . . The function of the public trust as a legal doctrine is to protect such public expectations against destabilizing change."<sup>225</sup> One can attribute the attitude of Washington citizens to ignorance, but one can just as well attribute it to an intuitive grasp of the public trust and argue that the public trust doctrine must be applied to protect their legitimate expectations.

A public trust intent can be reconciled with the prevailing legal decisions and interpretations rendered by Washington courts. This interpretation would not deny or abridge the public schools' interest in the granted lands; it would simply recognize another, underlying interest. It would not change the state's obligation to use money generated by the granted lands solely for the benefit of the schools. It would not open the door to self-dealing or to dealing on behalf of specific third parties, the situation with which *Skamania* dealt. It would not foreclose any future management options or any potential long-term benefits to the public schools.<sup>226</sup> Public trust values would have to be balanced against other values on a case by case basis.<sup>227</sup> If the

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224. COMMISSION ON OLD GROWTH ALTERNATIVES, *supra* note 193, at 16.

225. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188, 193 (1980). "The historical lesson of customary law is that the fact of expectations rather than some formality is central. . . . Our task is to identify the trustee's obligation with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destabilization and disruptions." *Id.*

226. It also would not threaten private industry's ability to manage timber on its own acreage. Industry has historically opposed stricter environmental regulation of the granted lands, fearing that new rules would eventually extend to private land. If the public trust doctrine were applied to state forests, industry would have nothing to fear. Unlike a law of general application or even a set of regulations based solely on administrative choice, the public trust doctrine could not spill over onto privately owned land.

227. "As the list of protected public trust uses grows, new questions arise. Conflicts will arise between two or more public trust interests. . . . It is unlikely that courts will or even should set up a rigid hierarchy of public trust uses. Perhaps the best answer is balancing competing uses." Johnson, *et al.*, *supra* note 216, at 66. Some commentators worry that the public trust doctrine does not guarantee an outcome and does not even give any guidance for conducting the balancing process.

[T]he Mono Lake case is inspiring for its recognition of the impact of activities within the Mono Lake basin, but . . . also evidences the shortcomings of the doctrine at its current stage of evolution. [T]he court of appeals . . . did not demand a particular outcome; rather, it dictated that 'some responsible body' should reconsider the allocation of waters of the Mono basin after conducting a public trust analysis. It gave no guidance on how that analysis should be done, nor what the result should be. . . . When public trust resources are at stake, the critical issue centers around resolving

economic value of the timber and the schools' need for revenue increased markedly, the courts could open the door to economic exploitation of those forests at a later date.

### III. CONCLUSION

*Skamania's* view of the granted lands was badly distorted, but it might be futile, at this late date, to argue that the management of those lands was not governed by some form of trust. It might also be undesirable. Trust prohibitions against self-dealing or dealing on behalf of third parties, as well as trust obligations to protect the financial interests of posterity, provide excellent guidelines for managing public resources.

Let us not grudgingly concede, but rather, actively embrace the idea that these lands are held in trust. But let us remember that the "trust" lands do not form the assets of common law trusts, and that they were never meant to produce maximum revenue. Nor have they ever fully financed the state's public school system. Currently, the granted lands provide none of the schools' operating or maintenance funds and only about 25% of school construction costs. This money remains important to local school districts, but the state uses it to reimburse districts for costs incurred years earlier. The timing, amount, and even basic availability of these reimbursement payments has become uncertain. Local taxpayers must still come up with the full cost of new buildings.

The balance of public interests and equities is, therefore, less stark than it seems. The state does not face a choice between protecting habitat and fully funding school construction. It faces a choice between ignoring habitat in order to fund a small percentage of school construction and protecting habitat at the cost of funding a slightly smaller percentage of school construction.

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conflicting uses or activities. . . . For example, should loggers be prohibited from clearcutting forests to protect squirrel habitats? . . . To help resolve such issues . . . Jack Archer and I have proposed a priority of use analysis for ocean and nearshore resource conflicts. . . . First, non-exclusive uses should be presumptively favored over exclusive uses. A second presumption would favor activities that involve reversible versus irreversible commitments of resources. . . . [Finally,] a presumption in favor of decisions that preserve biodiversity should be instituted. In addition . . . we recommend that the resource user . . . should have to prove that her activity will not interfere with other legitimate uses and that the activity will be conducted in an environmentally sound manner.

M. Casey Jarman, *The Use of the Public Trust Doctrine for Resource-Based Area-Wide Management: What Lessons Can We Learn from the Navigable Waters Trust?* 4 ALB. L.J. SCI. & TECH. 13 (1994).

The state could do school districts more good by, for example, eliminating the sales tax on materials and services used in school construction than by wringing every last dollar out of forest land. Under the current system—because money from the Common School Construction Fund reimburses districts for money paid in taxes—the state is, in effect, cutting trees on common school land to subsidize the general fund. Arguably, this violates both the Enabling Act and the Washington State Constitution.

The state does have a continuing duty to help pay school construction costs. But, even if we view that obligation as a trustee's solemn fiduciary duty, let us remember that the granted lands are protected by two overlapping trusts. A broad public trust has always existed. Courts have ignored this trust,<sup>228</sup> but they have not extinguished it. The trust is still there, and because it is, the environmental and aesthetic values of the granted lands must be safeguarded for all people, in all generations to come. The state's obligation to the public trust beneficiaries is every bit as strong as its obligation to the public schools.

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228. The *Skamania* court was not even asked to interpret the meaning of "all the people" or to rule on management for lasting, nonfinancial public benefits.