White Paper on The Department of Natural Resources' Trust Obligations to Counties and Their Taxing Districts

July 7, 2016

Prepared for the Port Angeles Business Association

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I. Duties of the Department of Natural Resources to its Trust Beneficiaries

Among its various duties as trustee and custodian of publicly owned natural resources for our State, the State Legislature has assigned the Department of Natural Resources management duties and fiduciary obligations as for various natural resource trusts.[1]

The Department consists of (1) the Board of Natural Resources, (2) an Administrator, (who is the Commissioner of Public Lands per RCW 43.30.105), and (3) the Supervisor, who is nominated by the Commissioner of Public Lands and confirmed by the Board of Natural Resources.[2] The Board of Natural Resources ("the Board") is the departmental component specifically charged as follows:

> "The Board shall: …
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> "(2) Establish policies to ensure that the acquisition, management, and disposition of all lands and resources within the department's jurisdiction are based on sound principles designed to achieve the maximum effective development and use of such lands and resources consistent with laws applicable thereto; … (Emphasis added);
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> "(6) Adopt and enforce rules as may be deemed necessary and proper for carrying out the powers, duties, and functions imposed upon it by this chapter."[3]

Buttressing the primacy of the Board's fiduciary duties, a separate statute makes the point that "multiple uses", as applied in RCW 79.10.100,[4] and as defined in RCW 79.10.110,[5] may only be

[1] "Of the 18 million acres of commercial timberland in Washington, approximately 10 percent is held by the State of Washington in trust for various beneficiaries. The bulk of this land was granted to the State pursuant to the Washington Enabling Act, 25 Stat. 676 (1889). It is held in trust for the common schools, the University of Washington and others, pursuant to the enabling act and article 16 of the Washington Constitution. These are known as "federally granted" lands. The remaining lands were deeded by various counties to the State after tax foreclosures, pursuant to RCW 76.12.030. That statute provides that these forest board transfer lands are to be "held in trust" by the State, and that proceeds from the management of these lands go to the grantor counties, after deducting administrative expenses. RCW 76.12.030(1), (2)." The County of Skamania, et al, Respondents, v. The State of Washington, et al, Appellants. 102 Wn.2d 127 (1984) 685 P.2d 576.

[2] RCW 43.30.030. The terms "Department" and "Board" are used throughout this paper and are used advisedly within their proper context. The two terms are not interchangeable. While the Board provides much of the policy governance for forest trust lands, the two other main components of the "Department" (Commissioner of Public Lands and the Supervisor) operate and manage the Departmental staff. They prepare and defend the Departmental budget. In doing these activities, they exert significant policy control over financial and other results obtained by the Department.

[3] RCW 43.30.215.

[4] RCW 79.10.100 - Concept to be utilized, when. - The legislature hereby directs that a multiple use concept be utilized by the department in the administration of public lands where such a concept is in the best interests of the state and the general welfare of the citizens thereof, and is consistent with the applicable provisions of the various lands involved. (Emphasis added.)

[5] RCW 79.10.110 - "Multiple use" defined. – "Multiple use" as used in RCW 79.10.070, 79.44.003, and this chapter shall mean the management and administration of state-owned lands under the jurisdiction of the department to provide for several uses simultaneously on a single tract and/or planned rotation of one or more uses on and between specific portions of the total ownership consistent with the provisions of RCW 79.10.100.

accomplished, in addition to the Department's trust management responsibilities, if they do not detract from those fiduciary duties. If they do, the trust(s) must be compensated for any multiple use that diminishes current or future revenue to the trust(s):

> … "If such additional uses are not compatible with the financial obligations in the management of trust land they may be permitted only if there is compensation from such uses satisfying the financial obligations."[6]

Additionally, in explaining the law of our State, the Washington State Supreme Court has clearly stated the duty of the Board:

> A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. ... It may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be. … (Emphasis added).[7]

The Attorney General has similarly laid out the duties of the Board in regards its fiduciary obligations to the various trusts in an Opinion published in 1996.[8] The Board has acknowledged all of these responsibilities in its fundamental policy document – Policy for Sustainable Forests.[9]

For forested trust lands, the Board must establish a sustainable harvest level, and update that calculation every decade.[10] If a shortfall exists in actual versus planned harvest levels, the Board must determine that such an "arrearage" exists, and determine how to eliminate it, on the basis of what provides the best return to the various trust beneficiaries.[11]

There are a plethora of Federal and State environmental statutes that the Department is obliged to follow, and which the Board has taken into account. Among them are the Endangered Species Act,[12] the Federal Clean Water Act as administered through the State Department of Ecology,[13] the State Environmental Policy Act,[14] and the State Forest Practices Act.[15]

The Board's charge is this: to maximize development and use, consistent with laws applicable thereto. So this means, in regards the beneficiaries of the several trusts established in forested areas, that maximizing revenues from its operations in forested areas is of paramount importance. Indeed, the Chelan County Superior Court concluded that the Department has the duty to maximize revenues from the trust lands in perpetuity for the exclusive benefit of beneficiaries. [16] The Board has no statutory duty (discussed in detail later in this paper), as

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[6] RCW 79.10.120.

[7] The County of Skamania, et al, Respondents, v. The State of Washington, et al, Appellants. 102 Wn.2d 127 (1984) 685 P.2d 576 (hereafter, "Skamania").

[8] Attorney General Opinion (AGO) 1996-11. http://www.atg.wa.gov/ago-opinions/states-trust-responsibilities-respect-lands-granted-united-states-or-placed-trust.

[9] http://file.dnr.wa.gov/publications/lm_psf_section1_of_3.pdf pages 14-16.

[10] RCW 79.10.320 - Sustainable harvest program. The department shall manage the state-owned lands under its jurisdiction which are primarily valuable for the purpose of growing forest crops on a sustained yield basis insofar as compatible with other statutory directives. To this end, the department shall periodically adjust the acreages designated for inclusion in the sustained yield management program and calculate a sustainable harvest level.

[11] RCW 79.10.330 - Arrearages—End of decade. If an arrearage exists at the end of any planning decade, the department shall conduct an analysis of alternatives to determine the course of action regarding the arrearage which provides the greatest return to the trusts based upon economic conditions then existing and forecast, as well as impacts on the environment of harvesting the additional timber. The department shall offer for sale the arrearage in addition to the sustainable harvest level adopted by the board of natural resources for the next planning decade if the analysis determined doing so will provide the greatest return to the trusts.

[12] 16 U.S.C. §§ 1531 et seq.

[13] Enunciated at RCW Chap. 90.48.

[14] Codified at RCW Chap. 43.21C.

[15] Codified at RCW Chap. 76.09.

[16] Okanogan Cy. et al. v. Belcher, Chelan Cy. Cause No. 95-2-00867-9 (5-30-96).

manager of the State's natural resources trusts, to achieve a "balance" between its revenue-producing duties, and its environmental responsibilities as it relates to its management of trust lands.

Thus, nothing that is within the discretion of the Board (as contrasted with a separate legal obligation that operates as a constraint on that discretion) supplants or reduces the importance of the Department's fiduciary obligations to its trust beneficiaries.

II. The Department Must Act As A Shareholder-Owned Private Business Does In Regards Its Shareholders

Regarding its obligations to the beneficiaries of the various lands held in trust as laid out in Section I, the Department must act in identically the same fashion as the Board and Officers of a public corporation in regards their shareholders who collectively own the corporation – the common law duties of care and loyalty. In addition, for the assets held in trust by them, the Department must adhere to the duties of trustees.

For the purposes of this paper, the "shareholders" are those beneficiaries of each separate trust – in particular, these are County governments and the various special purpose municipal corporations having authority to levy property taxes (taxing districts) within each County that transferred land to the State in accordance with RCW 79.22.040.[17]

As acknowledged and laid out in the Board's Policy for Sustainable Forests, common law fiduciary duties applicable to any of the separate trusts that the Department manages are these:

> "These include, but are not limited to: administering the trust in accordance with the provisions that created it; maintaining undivided loyalty to each of the trusts and its beneficiaries; managing trust assets prudently; making the trust property productive, while recognizing the perpetual nature of the trusts; dealing impartially with beneficiaries; and reducing the risk of loss to the trusts."[18]

So in sum, the Department is very limited in applying the otherwise broad discretion it has in managing state lands and publicly owned natural resources not held in trust. Again, legal constraints occasioned by the Department's compliance with laws of general application, such as environmental laws mentioned above, do not provide a grant of authority that dilutes the Department's fiduciary duty; such constraints can only limit some land's availability for renewable and non-renewable valuable materials.

III. Legal Constraints on Trust Fiduciary Duties

As explained above, as a trust manager and fiduciary, the Department has an obligation to maximize economic and financial value for present-day and future trust beneficiaries. Compliance with environmental laws have the potential to create constraints on the Department's duty to maximize development of the assets held in trust. The State Environmental Policy Act (SEPA) contains no duty of an Agency to achieve a particularized

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[17] RCW 79.22.040 "Deed of county land to department. - If any land acquired by a county through foreclosure of tax liens, or otherwise, comes within the classification of land described in RCW 79.22.010 and can be used as state forest land and if the department deems such land necessary for the purposes of this chapter, the county shall, upon demand by the department, deed such land to the department and the land shall become a part of the state forest lands.
"Such land shall be held in trust and administered and protected by the department in the same manner as other state forest lands.
"In the event that the department sells logs using the contract harvesting process described in RCW 79.15.500 through 79.15.530, the moneys derived subject to this section are the net proceeds from the contract harvesting sale." (Emphasis added)

[18] http://file.dnr.wa.gov/publications/lm_psf_section1_of_3.pdf p. 15.

outcome.[19] Mandatory for any State agency, when planning for and undertaking a "major action significantly affecting the quality of the environment",[20] SEPA does require a specific, prescribed decision process. The Department must apply scientific understanding of any potential environmental consequences for any prospective course of action, and " … use all practicable means, consistent with other essential considerations of state policy … " to " … (2) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; … ".[21] Rules adopted by the Department's Forest Practices Board[22] are subject to the SEPA decision process. Decisions taken by the Forest Practices Board on each separate forest practices application are not subject to this decision process, unless they fall into a category known as "Class IV".[23] The Department must of course comply with State law and its own rules regarding its forest practices activities and sales on State trust lands.

The Board's decadal sustainable harvest calculation, the Board's decision on any "arrearage" that may exist after the end of a decadal harvest plan, and any significant rule or policy adopted by the Board are subject to the SEPA decision framework. Administrative and operational processes by the Department in excess of the minimum required by State law usually generate operational inefficiencies, entail the expenditure of financial resources in excess of Departmental needs, and in many cases, generate additional, needless, legal risk. The Board has no discretion to approve legal settlements and the Department has no discretion to establish administrative policies and processes that diminish in any way the revenue to Trust beneficiaries. There is a strong argument that, for the Department in regards its trust fiduciary duties, any process in addition to compliance with Forest Practice Rules for anything but Class IV forest practice operations is outside the discretion granted to the Department.

For all trust lands held by the State (including County Trust Lands), production of social and environmental goods take second place to production of a continuous stream of revenue to County governments and other taxing districts, as taught by the Washington State Supreme Court in its "Skamania" decision.[24] State law is quite explicit that recreational, cultural, other social-goods, and a variety of other environmental or non-revenue-producing activities can only be undertaken if they provide current and future economic and revenue benefit to the trustees, equal to that produced by the sale of valuable materials from forested lands. [25]

The Board's and the Department's obligation to comply with general environmental statutes extend only to understanding, and where both practicable and consistent with the primary fiduciary obligations of the Department, mitigating the particularized, predictable deleterious effects on the environment of its activities in accomplishing of its trust and fiduciary obligations. Where science and current knowledge of forested land ecology is uncertain or unknown, the Board and the Department have discretion only in one direction: to take precautions to preserve trust assets as productive of current and future revenue to trust beneficiaries. Indeed, SEPA

[19] SEPA "is essentially a procedural statute", meant only to "ensure that environmental impacts and alternatives are properly considered by [] decision makers," not to "usurp [] decisionmaking or to dictate a particular substantive result." Save Our Rural Env't v. Snohomish County, 99 Wn.2d 363, 371, 662 P.2d 816 (1983).
[20] RCW 43.21C.030(2)(c), and RCW 43.21C.031.
[21] RCW 43.21C.020(2).
[22] RCW 76.09.030.
[23] RCW 43.21C.037(1), and RCW 76.09.050(1) "… (d) Which have a potential for a substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act, chapter 43.21C RCW.".
[24] Skamania, op. cit.
[25] RCW 79.10.120, op. cit: " … If such additional uses are not compatible with the financial obligations in the management of trust land they may be permitted only if there is compensation from such uses satisfying the financial obligations.".

itself identifies its framework as supplementary to – and not supplantive of – the primary legal authorities of the Department.[26]

IV. Assisting the Legislature in Fulfilling Its Paramount Duty to Amply Fund Basic Education

The State Constitution contains specific provisions relating to certain of the lands held in trusts managed by the Department.[27] Lands granted to the State at its inception constitute a permanent source of revenue to common schools as noted above.[28] Thus, the Department plays a big role in assisting the State Legislature in financing basic education statewide. Revenues from State and County trust lands flow to the State for distribution to the statewide education establishment, and to local school districts. Funds go to operations[29] and construction of school facilities.[30] Private timber harvests governed by the Department through the Forest Practices Board are subject to an excise tax, the proceeds of which flow to school districts in two ways: for those districts with approved debt, and to any and all school districts, if any money remains after the distribution to taxing districts with voted debt.[31]

While school revenues from these sources will not fund all common school operations and construction, these funds are substantial and perpetual. They do not require the imposition of general taxes – indeed, they enable a lessened need for taxes on the general public and on business activity in our State.

V. The Recent Arrearage Calculation Shows that Some Counties and Their Taxing Districts Have Borne the Brunt of the Revenue Impacts of The Arrearage

Clallam County has the most "state forest board transfer lands" held in trust by the State, and the highest arrearage. Additionally, the Southwestern Counties in our State have suffered significantly diminished revenues occasioned by environmental set-asides of trust lands from harvest. Moreso than most, Clallam County has lost revenue, according to the Department's calculation of the gross arrearage in timber harvest. The Common School trust has suffered similarly.[32] If the Department has undertaken activities, or taken decisions to set aside acres from harvest, either permanently, semi-permanently, or temporarily, or has taken other actions

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[26] RCW 43.21C.060 Chapter supplementary—Conditioning or denial of governmental action. The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.

[27] Washington State Constitution, Article IX Education, Section 3 - Funds for Support; and Article XVI - School and Granted Lands.

[28] Skamania, op. cit.

[29] RCW 28A.515.300; and RCW 79.64.110,

[30] RCW 28A.515.320.

[31] RCW 84.33.081.

[32] http://file.dnr.wa.gov/publications/em_bc_bnr_arrearage_subcomm_pres.pdf, slide 8. A substantial number of Clallam County trust lands are located within the Olympic Experimental State Forest (OESF).

– whatever they may have been – that result in otherwise-harvestable acres being set aside from harvest, the County or Counties and their taxing districts have an actionable grievance.

Such actions and the resulting arrearage exact an economic and revenue toll on the trusts that has not been redressed. Whether these constraints result from explicit decisions taken by the Department, or by lack of, or misallocation of, resources within the Department that serve to disable efficient operations, is beside the point. Our citizens are being increasingly asked to make up the shortfall in revenue occasioned by the arrearage, through increased local taxation, or by seeing essential activities of government being increasingly constrained by lower-than-necessary levels of revenue. Further, local economies suffer, with forest products businesses seeing a diminished timber supply. In Clallam County, some of those business no longer exist, with predictable results to our County's population, and employment and income levels.

VI. The Board Must Re-establish the Primacy of its Fiduciary Obligations to the Various Trust Beneficiaries

The Department, through its Board and through the Commissioner of Public Lands, must act to eliminate from its policies, rules, or activities any thing, activity, or action that is not absolutely dictated by statutes or common-law obligation that diminishes current and future revenue and economic benefit to the various trusts it manages. The Commissioner must seek legislative relief for any Departmental practice that is unduly hampered by needless process driven by laws of general application. A recent example of how this was made possible by the legislature for another department was when the Department of Transportation was faced with an additional process time and project cost when the SR-520 bridge needed to be significantly redesigned on one end. Complying with State law would have required an additional year of delay while additional review was undertaken, and which also would have increased costs by several tens of millions of dollars. The Legislature provided relief to the Department of Transportation through a change in statute.[33]

Our Common Schools and our Counties deserve similar consideration by the Legislature and by the Department. It is long past time.

[33] Chap. 222, Laws of 2014, § 306(12).