

BAR BULLETIN

KING COUNTY BAR

This is a reprint from the King County Bar Association Bar Bulletin

July 2019

Managing Washington State Forests for ‘All the People’

A Long-Simmering and Environmentally Significant State Constitutional Issue

By Peter Goldman

The U.S. Constitution may be getting most of the attention these days, but did you know that a controversial provision in the Washington State Constitution, article XVI, section 1, controls how the Department of Natural Resources (DNR) and its policy-setting board, the Board of Natural Resources (“Board”), plans and conducts logging on 2 million acres of state-owned forests?

In fact, did you even know that the State is the largest, non-federal forest landowner in Washington? Logging has yielded a rough average of 400 million board feet of lumber annually — about 20,000 log trucks.¹

Article XVI, section 1 applies to what are now mostly state forest lands received by Washington upon statehood in 1889. Section 1 provides in relevant part that these lands are “held in trust for all the people....” This provision may not have the notoriety of its federal brethren, but how courts and the Washington attorney general interpret it matters if you would like to see environmentally sound and long-term sustainable logging on the state forests in these climate-challenged times.

These treasured forests include Tiger

Mountain (King County), Raging River (King), Blanchard Mountain (Skagit, Whatcom), Capitol (Thurston), Loomis (Okanogan), Reiter (Snohomish), Tahoma (Pierce), Olympic Experimental (Clallam), and Tahuya (Kitsap). They, and adjacent federal, state and private forests, are among the reasons many of us choose to live and work in the Pacific Northwest.

The state forests are not just beautiful. They also provide myriad ecosystem and economic “services” in a climate-challenged, Washington forest landscape. These lower-altitude forests store water and carbon, and provide essential large-scale fish and wildlife habitat. The state forests are particularly important biologically because they often serve as older forested buffers lying between relatively older, roadless, intact federal forests and the sea of heavily logged, adjacent private forests.

They also provide diverse recreational opportunities (camping, hiking, bird-watching, mountain biking, off-roading, and equestrian trails), which provide all of us a kind of “second paycheck.” And, of course, state forests deliver important socio-economic benefits by supporting good-paying jobs in rural communities that have built their economies around forestry and by netting nearly \$110–120 million annually for their beneficiaries — primarily the statewide school construction account² and counties’ general funds.

So, how did article XVI, section 1 come about, and why the controversy over its interpretation? Upon Washington’s statehood on November 11, 1889, Section 10 of the federal Enabling Act

gave the State two sections of land (1,280 acres) for every township (36 square miles) of land “for the support of common schools.”³ The federal land grants also placed multiple “manner of sale” conditions on these acres, including that all lands sold be at public auction and for fair market value and that the proceeds from sale or use be “reserved for the purposes for which they have been granted.”⁴ The prevailing policy concern was preventing the states from selling their state lands to private entities based on corrupt relationships, as had been the case elsewhere in the West.⁵

In article XVI, section 1, the founders at Washington’s Constitutional Convention accepted the federally conditioned lands and declared that they would be “held in trust for all the people.” Fasten your seatbelts though because, since 1889, this provision has had a bumpy legal ride.

Most lawyers and judges do not seem to dispute that the sale of or commodity revenue from the state forests are dedicated exclusively to the enumerated beneficiaries, such as K-12 school construction (in the case of the 1.5 million acres of federal school land grants) or the county beneficiaries, in the case of the 600,000 acres of State-managed county forests. And it is well settled that the state forests are subject to legislatively sourced forest management laws and the laws of general application.⁶

But many lawyers and commentators disagree on the nature of the trust and the duties the Constitutional Convention intended and created. One of the

principal disagreements is how the terms “in trust” square with “all the people.” Specifically, exactly what kind of “trust” was created and does “all the people” permit the Board and DNR to manage (plan, road, log or conserve) the state forests for the benefit of *all* the citizens as if they were public-like trusts or, instead, must DNR manage these forests in the exclusive best interest of the beneficiaries, as if they were private trusts?

One might think this is an easily resolvable legal issue. By its own terms, the Washington Constitutional Convention specifies that the state lands are held “in trust for *all the people*” (emphasis added), which suggests the State may manage them in the interest of *all* of us and not “exclusively” to maximize revenue for the enumerated beneficiaries.⁷ Relatedly, article XVI, section 3 allows the sale of timber from state lands “on such terms as may be *prescribed by law*” (emphasis added), again reflecting that our laws, not some amorphous private trust duty, should guide logging on state forests.

The public trust doctrine, saliently, is well established relative to submerged lands.⁸ Legal commentators have made many of these arguments for more than 30 years.⁹ Indeed, the framers of the Washington Constitution specifically rejected two land grant revenue maximization amendments.¹⁰ The framers wanted to ensure that the State would sell its federally sourced school lands at fair market value, in limited amount, at public auction, to the highest bidder, and reinvest the proceeds in the same school accounts.¹¹ The federal government included these constitutional protections to prevent the reckless sale of state land to private entities.¹²

But despite the term “all the people,” the Washington Attorney General’s Office,¹³ the Department of Natural Resources,¹⁴ timber trade associations dependent on state forest logging, and many state and county state forest beneficiaries take the legal and policy position that the federally sourced lands are private trusts and must be managed in the exclusive, best fiduciary interest of the beneficiaries.¹⁵ For this private trust rationale, they rely virtually exclusively on a 1992 Washington Supreme Court case, *County of Skamania v. State* (“*Skamania*”).¹⁶ On this point at least, *Skamania* went too far and deserves to be appropriately re-

considered with apt facts.

Skamania arose out of timber industry lobbying for a financial bailout. Between 1978 and 1980, private timber buyers — as they do every year — entered into contracts with DNR to purchase timber logged on state forest lands. In early 1982, however, the market price for logs crashed, falling from \$300–\$800 per 1,000 board feet to \$175 per 1,000 board feet. If these contracts had been enforced, timber companies would have lost approximately \$100 million. The Legislature came to the rescue with the Forest Products Industry Recovery Act of 1982, which effectively allowed purchasers of state timber to either default on their contractual obligations or to extend or modify the terms of their contracts.

Fearing massive losses, Skamania County sued the State alleging that the Recovery Act was a breach of the State’s fiduciary trust duties to the trust beneficiaries. Importantly, all the parties to the case agreed that the State owed a private fiduciary duty to the County, and only disagreed about whether that duty had been fulfilled. No party presented the alternative view that the trusts were not strictly private.

In a decision that today effectively guides DNR logging policy, the Supreme Court invalidated the Recovery Act, holding that the State violated its fiduciary duty to manage the federal school trusts (and the county trusts, which mimicked them), which, according to the Court, “impose on the state the same fiduciary duties applicable to private trustees.”¹⁷

The Court held that the Legislature had elevated the interests of the timber industry over the interests of trust beneficiaries¹⁸ and that the Recovery Act could not be justified by the fact that it purportedly would advance other “state goals.”¹⁹ Finally, the Court held that the Recovery Act violated the State’s duty to “act prudently” by relieving the timber companies from their contracts at less than market rate.²⁰

Many environmental lawyers and state constitutional experts believe *Skamania*’s characterization of the existence and nature of the federal school trust as private trusts — the so-called “trust mandate” rationale — was wrongly decided because the Court incorrectly relied on cases involving different land grants and state constitutional provisions. There

are not enough column inches available to address this issue here, but the law review articles cited in note 7 set forth those arguments.

Irrespective of whether its private trust rationale was sound, however, *Skamania* should *not* be read as prohibiting DNR from managing the state forests in the best, long-term environmental interests of “all the people” out there, like us. *Skamania* simply said no to giveaways of revenues from state forest products that serve neither the interests of the beneficiaries nor the public at large.

Skamania should not foreclose conservation-oriented forest management if the Board and DNR conclude such management is in the best, long-term interest of the public at large. *Skamania* should also not be interpreted as a limit on the Board’s or DNR’s discretion to protect and restore our state forests consistent with today’s climate-challenged conditions or as preventing DNR from dedicating more of its forests to recover critical forest-dependent fish and wildlife to help create the resiliency forests will require with climate change.

The state forest trust issue is not abstract, but one that plays out virtually every day at DNR and the Board. Interpretation of this provision will determine lofty questions such as how many acres DNR should be legally required to log over the next decade. How much habitat protection can the Board legally offer to the federal wildlife and water-quality agencies considering long-term permits to protect, or recover fish, wildlife, and forest-dependent birds, listed in the Endangered Species Act, that rely on state forests as habitat?

What level of risk to public safety is acceptable when DNR logs on or near potentially dangerous landslide areas? May DNR decide not to log (or to log less) in unique ecological or recreational hot spots? May DNR consider managing its forests in a way that best reduces greenhouse gas emissions and sequesters carbon and water? These are among the key forest issues of our time, made all the more pressing by climate change.

Neither I nor the conservation professionals and clients I work with are anti-logging. All of us work in collaboration with DNR and other stakeholders in support of sustainable and environmentally sound and community-oriented forestry

on state lands. We also recognize that the federal land grants are special dedications of land and we work to help communities and local governments, disproportionately reliant on state-forest income, adjust to smarter and more environmentally responsible logging on state forests.

But we also believe *Skamania* should not destine the state forests to be managed as unsustainable, bottom line-driven, industrial private forests. Nor should the “trust mandate” line be drawn in a place that forces the State to maximize its revenue from the state forests at the expense of the long-term environmental interests of all citizens.

Skamania has unfortunately been weaponized by entrenched economic interests to discourage or prevent forestry that is in the best, long-term interests of the public at large. There are many policies that can help the affected trusts, but logged forests take decades to recover.

One day, the law surrounding article XVI, section 1 may be more vetted and settled. But in the meantime, you “people,” please consider what the term

“all the people” means the next time you visit a state forest near you. ■

Peter Goldman founded the Washington Forest Law Center in Seattle in 1997.

¹ Virtually all the old-growth forest on the state forests has been logged. As of today, only about 6% (88,000 acres) meet the State’s “old growth” criteria.

² The state forests generate about 9.5% of Washington’s annual K-12 statewide school construction budget: <http://www.k12.wa.us/LegisGov/2019documents/2019-21CapitalBudgetSummary.pdf>.

³ Enabling Act, § 10 (25 Stat. ch. 180). See 1996 AGO 11, at 8.

⁴ See 1996 AGO 11, at 8 (citing Enabling Act, § 11). *Papasan v. Allain*, 478 U.S. 265, 268–69, 106 S. Ct. 2932 (1986), includes a thorough summary of the various types of federal school land grants.

⁵ See articles cited in note 7 below.

⁶ See *State ex rel. Forks Shingle v. Martin*, 196 Wash. 494, 501, 83 P. 755 (1938) (affirming constitutionality of statute that imposed a “sustained yield” plan on the state forests); *West Norman Timber, Inc. v. State*, 37 Wn.2d 467, 224 P.2d 635 (1950) (state timber sales subject to ordinary state forest practice regulations).

⁶ 1996 AGO 11, at 6.

⁷ Another issue, beyond the scope of this article, is whether the federal land grants even created a trust at all given that the term “trust” was not in the Washington land grant. The Attorney General’s Office says yes; 1996 AGO 11, at 10–11, but numerous commentators disagree. See Sally K. Fairfax, Jon A. Souder & Gretta Goldenha, “The School Trust Lands: A Fresh Look at Conventional Wisdom,” 22 *Envtl. L.* 797, 818 (1992); accord Daniel Jack Chasan, “A Trust

for All the People: Rethinking the Management of Washington’s State Forests,” 24 *Seattle U. L. Rev.* 1, 15 (2000); Alan V. Hager, “State School Lands: Does the Federal Trust Mandate Prevent Preservation?” 12 *Nat. Resources & Env’t* 39, 40 (Summer 1997) (“The trust concept did not appear in any enabling act until Congress passed the New Mexico-Arizona Enabling Act in 1910.”); 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, 160 (1990).

⁸ *Orion Corp. v. State*, 109 Wn. 2d 621, 639, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 198 (1988).

⁹ See Arum, “Old-Growth Forests on State School Lands,” 65 *Wash. L. Rev.* at 160; Chasan, “A Trust for All the People,” 24 *Seattle U. L. Rev.* at 15.

¹⁰ See Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention*, 793–94 (1962).

¹¹ All four sections of article XVI specify that, in one way or another, the school lands are subject to special conditions.

¹² Arum, “Old-Growth Forests on State School Lands,” 65 *Wash. L. Rev.*, at 162, n.74.

¹³ 1996 AGO 11, at 10.

¹⁴ https://www.dnr.wa.gov/publications/em_bnr_process_march_pres.pdf?j33p5o8ncdi (last visited June 6, 2019)

¹⁵ The State’s historic legal position on this issue was well summarized in the Arum law review article (note 7). Not much appears to have changed since. See 1996 A.G.O. 11, at 11.

¹⁶ 102 Wn. 2d 127, 132–33, 685 P. 2d 576 (1984).

¹⁷ *Id.* at 132.

¹⁸ *Id.* at 136.

¹⁹ *Id.* at 135–36.

²⁰ *Id.* at 138.