

I. Trust Lands Management in Washington

Washington holds approximately 2.9 million surface acres of trust lands.¹ Some agricultural lands are held in a checkerboard pattern in eastern Washington, but the state also owns a series of large, contiguous forested parcels throughout eastern, central, and western Washington, where the Department of Natural Resources has worked to consolidate its landholdings to improve management.² Timber sales are the primary source of revenue from Washington's trust lands.

1. Washington's Land Grant

At statehood, Washington received sections sixteen and thirty-six in every township "for the support of common schools."³ In addition to the common school grant, Washington also received specific grants for a variety of other public institutions, including: 90,000 acres for agricultural colleges; 100,000 acres for a scientific school; 100,000 acres for a state normal school; 100,000 acres plus 50 sections for public buildings; 72 sections for University purposes; and 200,000 acres for charitable, educational, penal, and reformatory institutions.⁴ The common schools are the largest single beneficiary, with approximately 1.7 million acres, or 63 percent of the total trust land holdings. Washington currently retains ownership of more than 90 percent of its original land grant of more than 3 million acres.

In addition to and separate from the federal land grants, the State of Washington administers a legislatively created trust consisting of acquired lands deemed suitable for state forests and reforestation, and lands acquired by counties through foreclosure of tax liens that were suitable for inclusion as state forests, and transferred to the state.⁵ This trust is managed in conjunction with other forested state lands.

2. Enabling Act and Constitutional Requirements

In the late 1800's, after several unsuccessful attempts at statehood that were frustrated by concerns over maintaining the balance of power between Democrats and Republicans in Congress, Washington was finally admitted as a state. Washington was admitted under the Omnibus Enabling Act of 1889, along with Montana, North Dakota, and South Dakota.⁶ Generally, Washington's Enabling Act permits the state to "dispose of" lands for a minimum price only at an advertised public sale; exchange lands where the lands have equal value and are of as nearly as possible equal area; lease lands for a term of years; and grant easements or other rights.⁷ Proceeds from the sales of lands are required to be deposited in a permanent fund, with the interest expended in support of the beneficiaries of those lands. Section eleven of Washington's Enabling Act has been amended by Congress in 1921, 1932, 1938, 1948, 1952, 1962, 1967, and 1970 to allow for the grant of easements, longer-term leases for mineral lands and hydroelectric purposes, public sales of agricultural and grazing lands, land exchanges, and to create a Common School Construction Fund for support of the construction of school facilities.

Washington's Constitution states that the granted lands are to be held in trust for "all the people."⁸ The Constitution also requires that school lands cannot be sold for less than fair market

¹ WASHINGTON DEPARTMENT OF NATURAL RESOURCES ANNUAL REPORT, FISCAL YEAR 2003 (Draft 2004) (hereafter, "DRAFT 2003 ANNUAL REPORT") (Washington had not released a final annual report for 2003 or a report for FY 2004 at the time of publication; the agency indicates that the reports will be published together in the spring of 2005.) However, of these nearly 625,000 acres are derived from tax foreclosures on forest lands; Washington's granted trust lands comprise only around 2.3 million acres of the state's current holdings.

² The state also manages 2.4 million acres of state-owned aquatic lands received at statehood (e.g. tidelands, bedlands of Puget Sound, navigable rivers, lakes, and other waters) for a variety of aquaculture cultivation activities. However, these lands are not "school trust" lands and therefore are not addressed in this report. WASH. REV. CODE § 79.90.450.

³ Omnibus Enabling Act, 25 Stat 676 § 10 (February 22, 1889).

⁴ *Id.* at §§ 12, 14, 16, 17; see also 7 U.S.C. § 301-308 et seq.

⁵ WASH. REV. CODE §§ 79.22.020, 79.22.040.

⁶ Omnibus Enabling Act, 25 Stat. 676 (1889).

⁷ *Id.* at § 17.

⁸ WASH. CONST. Art. IX § 1.

value, at public auction, to the highest bidder,⁹ with a restriction that no more than ¼ of the lands granted for education could be sold before January 1, 1895, and no more than half before January 1, 1905.¹⁰

3. Washington's Trust Responsibility

As noted in section IV(A), the courts have held that Washington's Enabling Act and Constitution operate to create a binding trust responsibility. Based on this trust responsibility, the courts have held that:

- The state could implement a sustained yield plan with respect to timber production on lands granted for common schools.¹¹
- The state was prohibited from enacting legislation to allow timber companies holding timber contracts on state lands to escape from their contract obligations where this would benefit the timber industry and the state's economy at the expense of trust beneficiaries.¹²
- The state was prohibited from granting trust lands to the United States for an irrigation project.¹³

4. Governance of Trust Lands in Washington

To more effectively and efficiently manage state land and forest resources, in 1957 Washington consolidated a number of agency activities from the state Division of Forestry, the Board of State Land Commissioners, the state Forest Board, and several other committees and commissions, into a Department of Natural Resources (DNR).¹⁴ The DNR consists of a Board of Natural Resources (BNR), an administrator, and a supervisor.¹⁵ The Commissioner of Public Lands, a constitutionally established statewide elected official, is the administrator of the DNR.¹⁶

The BNR is made up of representatives from the various beneficiary groups and consists of the Governor or the Governor's designee, the Superintendent of Public Instruction, the Commissioner of Public Lands, the Dean of the College of Forest Resources at the University of Washington, the Dean of the College of Agriculture, Human, and Natural Resource Sciences at Washington State University, and a representative of those counties that contain state forest lands¹⁷ acquired or transferred for reforestation purposes.¹⁸ The BNR establishes policies for state trust land management,¹⁹ and adopts and enforces rules deemed necessary for carrying out the duties of the Board.²⁰

The Commissioner²¹ appoints DNR's Supervisor, who serves at the pleasure of the Commissioner, with the advice and consent of the BNR.²² The Commissioner and Supervisor direct DNR, although they must conform to the policies established by the BNR.²³

DNR is divided into a number of different divisions that engage in resource protection and land management activities: Aquatic Resources, Asset Management and Protection, Engineering and

⁹ *Id.* at Art. IX § 1 and 2.

¹⁰ *Id.* at Art. XVI § 3.

¹¹ *State ex rel. Forks Shingle Co. v. Martin*, 83 P.2d 755 (Wash. 1938).

¹² *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984).

¹³ *United States v. 111.2 Acres of Land in Ferry County*, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (9th Cir. 1970).

¹⁴ WASH. REV. CODE § 43.30.010.

¹⁵ *Id.* at § 43.30.030.

¹⁶ *Id.* at § 43.30.105.

¹⁷ *Id.* at §§ 79.22.010, 79.22.040, and 79.22.020.

¹⁸ *Id.* at § 43.30.205.

¹⁹ *Id.* at § 43.30.215(2).

²⁰ *Id.* at § 43.30.215(5).

²¹ WASH. CONST. Art. III § 1.

²² WASH. REV. CODE § 43.30.155.

²³ *Id.* at §§ 43.40.421, 43.40.430.

General Services, Financial Management, Forest Practices, Geology and Earth Resources, Human Resources, Information Technology, Land Management, Office of Budget and Economics, Office of the Commissioner of Lands, Product Sales and Leasing, and Resource Protection. The responsibilities of the department are administered by several geographic divisions – the Northeast Region, Northwest Region, Olympic Region, Pacific Cascade Region, Southeast Region, and South Puget Sound Region.

The agency receives funding for the administration and management of federally granted trust lands from a Resource Management Cost Account (RCMA),²⁴ which receives a percentage of the funds derived from the various trusts. Charges for the RMCA are made against most trust transactions, and state statute allows up to 25 percent of the revenue earned to be placed in the account.²⁵ The funds in the account are appropriated by the legislature and may only be used to defray the costs and expenses necessary for the management of the trust lands.

5. Trust Land Management in Washington

The Department of Natural Resources' mission is to provide professional, forward-looking stewardship of state lands, natural resources, and environment, as well as leadership in creating a sustainable future for the Trusts and all citizens.²⁶ The agency relies on principles of stewardship, respect for creativity, and inclusiveness to achieve its mission.²⁷

DNR's trust management activities are subject to Washington's State Environmental Policy Act (SEPA), which requires all state agencies, including DNR, to prepare an environmental impact statement for all management decisions that are likely to have a "significant impact" on the environment. Under state law, trust lands are also subject to local land use planning and zoning.

Washington's trust land management activities can be roughly divided into four general categories: surface uses, subsurface uses, land sales and other uses, and multiple uses. Surface uses (primarily timber production) currently contribute the bulk of the revenues earned by the trust.

a. Surface Uses

In Washington, lands may be leased for agriculture, grazing, commercial, industrial, residential, recreation, or any other lawful purposes.²⁸ Lease terms generally may not exceed ten years with the following exceptions: agricultural leases may not exceed twenty-five years; tree fruit or grape production leases may not exceed fifty-five years; commercial, industrial, business, or recreational leases may not exceed fifty-five years; leases to public school, college, or universities may not exceed seventy-five years; and residential leases may not exceed ninety-nine years.²⁹

Leases are administered through a competitive bidding process with only two exceptions: first, the United States is specifically allowed to lease state lands for national defense purposes at the fair rental value for a period of five years or less without competitive bidding;³⁰ and second, public school districts are granted priority in the leasing of common school lands when the district clearly demonstrates an actual or reasonably foreseeable need for the lease.³¹

Agricultural leases, which include leases for dryland farming, irrigated farming, orchards, vineyards, and grazing, cover approximately 1.2 million acres³² and generated around \$16 million in

²⁴ *Id.* at § 79.64.020.

²⁵ *Id.* at § 79.64.020.

²⁶ See Washington Department of Natural Resources, available at: <http://www.dnr.wa.gov/base/aboutdnr/html>.

²⁷ *Id.*

²⁸ WASH. REV. CODE §§ 79.13.010(1); 79.13.010(3).

²⁹ *Id.* at § 79.13.060(1).

³⁰ *Id.* at § 79.13.090.

³¹ WASH. ADMIN. CODE § 332-100-020.

³² DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 5.

revenue in fiscal year 2003.³³ Grazing, considered a lower priority use than irrigated agriculture, generated only \$1 million in revenue statewide.³⁴ Grazing leases are based upon a grazing capacity which permits the maximum forage utilization and seeks to maintain the condition of the range or improve it to “good” condition.

There are several types of grazing permits – special use, temporary, operational, and preference. Temporary permits are limited to five years and are generally issued for specific grazing needs.³⁵ Preference permits are allocated to an eligible applicant who owns “base ranch” property for grazing on state range allotments.³⁶ These permits are valid until they are revoked, but may be passed from one generation to another through inheritance, gift, or sale.³⁷ The state may encourage improvements of grazing ranges by extending grazing permit periods to a maximum of ten years, reducing grazing fees where the permittee contributes to the improvement of the range,³⁸ and by developing coordinated resource management plans with lessees, agencies, and private landowners to protect fish and other wildlife habitat.³⁹

Leases for commercial, industrial, or residential uses are authorized by statute and these agreements may be entered into at public auction or through negotiations at the option of DNR.⁴⁰ Where public auctions occur, leases are awarded to the highest bidder for not less than the appraised value,⁴¹ although DNR is permitted to reject any or all bids in the best interests of the state.⁴² Commercial real estate leasing generated over \$6.8 million for the school trust in Washington in 2003,⁴³ resulting in more trust revenue than any source other than timber sales and land transfers. The role of real estate in Washington’s trust management program is detailed in the “Transition Lands Policy Plan” adopted by the BNR in June 1988.

Sales of valuable materials from state trust lands (primarily timber) are the largest single source of revenue for the trust. Sales are required to take place at public auction or by sealed bid and are awarded to the highest bidder, subject to the approval of the Board. (For materials valued at less than \$20,000, the department may sell the materials directly).⁴⁴ For timber damaged by fire, wind, or floods, the legislature has provided an expedited sale process in order to minimize lost value from rot and disease.⁴⁵ Timber on state lands may not be sold for less than the appraised value.⁴⁶

Approximately 2.1 million acres of the state’s 3 million surface acres of trust lands are managed for timber use,⁴⁷ and timber sales and related activities accounted for more than \$62 million in revenue on trust lands in 2003.⁴⁸ Timber resources are managed under the state’s “sustained yield” plan, which provides for “harvesting on a continuing basis without a major prolonged curtailment or cessation of harvest.”⁴⁹

Once timber has been removed from state lands, DNR may classify the lands and may reserve portions of the land from any future sale in order to promote reforestation.⁵⁰ Lands so reserved are

³³ *Id.* at 22.

³⁴ WASH. REV. CODE § 79.11.310.

³⁵ *Id.* at § 79.11.310.

³⁶ *Id.* at § 332-20-180. (Base ranch property is defined as “a place on which to hold and feed the permitted units of livestock prior to and after the grazing season,” *Id.* at §332-20-030(13)). If the base ranch property ownership does not change, there is no opportunity for the lessee of the state land to change, thereby evading the public auction process.

³⁷ *Id.* at § 332-20-180.

³⁸ WASH. REV. CODE § 79.13.410.

³⁹ *Id.* at § 79.13.610.

⁴⁰ *Id.* at §§ 79.13.010 and 79.13.110(2).

⁴¹ *Id.* at § 79.13.140(1).

⁴² *Id.* at § 79.13.140(5).

⁴³ DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 19.

⁴⁴ WASH. REV. CODE § 79.15.050.

⁴⁵ *Id.* at § 79.15.210. *Id.* at § 79.10.450. DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 37.

⁴⁶ *Id.* at § 79.10.450.

⁴⁷ DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 37.

⁴⁸ *Id.* at 14.

⁴⁹ WASH. REV. CODE § 79.10.310.

⁵⁰ *Id.* at § 79.10.080.

not subject to sale or lease,⁵¹ and reserved lands must be protected from fire and reforested by the DNR.⁵² This section of law was enacted in 1895 to prevent the sell off of forestland after timber was removed and to protect the future income potential of the lands.

b. Subsurface Uses

The state of Washington grants leases for the extraction of oil and gas, minerals (including prospecting), geothermal resources, as well as for rock, sand, and gravel (though these leases are treated as surface uses). Subsurface leases are awarded on a competitive basis to any applicant,⁵³ though for coal mining, current lessees are generally afforded a preferential right to re-lease over any new applicant.⁵⁴ Combined, mineral and hydrocarbon revenues totaled \$1,181,000 in fiscal year 2003, or less than 1 percent of the total revenues generated on trust lands.⁵⁵

The allowable acreage for an oil and gas lease is capped at 640 acres unless on a riverbed, lakebed, or on tide and submerged lands; in these cases the lease is limited to 1,920 acres.⁵⁶ Initial terms may be from five to ten years in duration and can be extended for as long thereafter as the lessee diligently prosecutes development of the resource.⁵⁷ If lands are known to be within an oil or gas producing geologic structure, DNR may lease any or all unleased lands within such geologic structure, in areas not exceeding 640 acres, at public auction⁵⁸ to the bidder offering the greatest cash bonus.⁵⁹ A DNR lessee can also enter into cooperative or unit agreements to facilitate the conservation of the natural resource in the oil or gas pool or field when doing so is in the public interest and DNR consents to the plan.⁶⁰

Initial rental rates for oil and gas leases are set at a minimum rental of \$1.25 per acre plus bonus bids. Annual rental rates are then set by the BNR but can never be less than \$1.25 per acre, and are paid until such time as oil, gas, or other hydrocarbons are actually produced. At that time the lessee begins paying royalties.⁶¹ If the lessee is pursuing drilling operations with due diligence at the end of the lease term and has not encountered oil, gas, or other hydrocarbons, the lease term may be extended.⁶² As set by statute, the minimum royalty paid on oil and gas leases is 12.5 percent of the gross production and 25 percent for mining royalties.⁶³

Coal leases may not exceed twenty years,⁶⁴ and are subject to per-ton royalties. The royalty may be graduated so that the lessee pays a lower minimum royalty at the beginning of the lease to encourage development of coal extraction.⁶⁵

For mineral and prospecting leases, the acreage cap is set at six hundred forty acres.⁶⁶ For placer mining contracts for gold, the leases may only be offered at public auction;⁶⁷ otherwise, the DNR may issue permits and leases for mineral prospecting.⁶⁸ If a prospecting lessee wishes to convert the prospecting lease to a mining contract, the prospector has a preferential right to do so if an application is made at least one hundred eighty days prior to the expiration of the lease, and the

⁵¹ *Id.*

⁵² *Id.*

⁵³ WASH. ADMIN. CODE § 332-12-230.

⁵⁴ WASH. REV. CODE § 79.14.570.

⁵⁵ DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 14.

⁵⁶ WASH. REV. CODE at § 79.14.020.

⁵⁷ *Id.*

⁵⁸ *Id.* at § 79.14.080.

⁵⁹ *Id.*

⁶⁰ *Id.* at § 79.14.100.

⁶¹ *Id.* at § 79.14.030.

⁶² *Id.* at § 79.14.050.

⁶³ *Id.* at § 79.14.070.

⁶⁴ *Id.* at § 79.14.510.

⁶⁵ *Id.*

⁶⁶ *Id.* at § 79.14.300.

⁶⁷ *Id.* at § 79.14.310.

⁶⁸ *Id.* at § 79.14.315.

applicant furnishes an acceptable mining plan.⁶⁹ Mining contracts are issued for a term of twenty-five years.⁷⁰

Rock, gravel, sand, and silt leases – treated as surface uses – are sold at public auction for terms of up to thirty years, and for not less than the appraised value of the material,⁷¹ with payments made on a royalty basis.⁷² Road material may additionally be sold to any county, city, or town at not less than the fair market value.⁷³

Leases to explore for and develop geothermal resources are also limited to six hundred forty acres,⁷⁴ and are issued for terms of up to fifty-five years, subject to re-approval every five years.⁷⁵ Production royalty payments are required, and shall be not less than the cumulative amount of 10 percent of the gross proceeds received from the sale of the resources, and 10 percent of the fair market value of products utilized but not sold, and 10 percent of the gross proceeds for all by-products derived from the leasehold estate.⁷⁶

c. Land Sales and Other

Washington has an established transaction program for land sales, purchases, and exchanges. Land sales take place at public auction, with the minimum bid no less than the appraised value of the property.⁷⁷ DNR is authorized to purchase forested, agricultural, or commercial properties to replace acres sold. The Legislature appropriates funds from various sources to DNR to pay for the acquisition of new trust properties.

DNR may also exchange lands for any land of equal value, subject to Board approval, in order to facilitate the marketing of forest products from state lands, to maintain or increase lands determined by DNR to be in the best interest of the trust, to consolidate or block up lands, to acquire urban property with higher income generating potential, or to acquire lands having commercial recreational leasing potential.⁷⁸

Prior to a land sale, DNR is required to have the lands inspected for the following: topography; development potential; forestry, agricultural, and grazing qualities; coal, mineral, stone, gravel, or other valuable materials; the distance from any city or town, railroad, river, irrigation canal, ditch, or other waterway; and location of utilities.⁷⁹ When lands are expected to convert to commercial, industrial, or residential uses within ten years, the DNR is required to identify and designate these trust lands as “urban lands.” When determining the fair market value of these properties, local land use planning and zoning requirements are applied.⁸⁰

To facilitate better management, state trust lands that were isolated or could not be effectively managed have been exchanged or sold over time. Proceeds from certain land sales can be used to acquire replacement trust lands with higher long-term income potential. Washington’s Land Bank program allows the purchase of up to fifteen hundred acres at fair market value to be held in a “land bank.”⁸¹ The land purchased should add to the value of state lands based on the natural resource or income production potential of the property.⁸² This property may be sold or exchanged for

⁶⁹ *Id.* at § 79.14.360.

⁷⁰ *Id.*

⁷¹ *Id.* at §§ 79.15.300(2), 79.01.032(4).

⁷² *Id.* at § 79.15.300(2).

⁷³ *Id.* at § 79.15.320.

⁷⁴ WASH. ADMIN. CODE § 332-22-170.

⁷⁵ *Id.* at § 332-22-190.

⁷⁶ *Id.* at § 332-22-210.

⁷⁷ WASH. REV. CODE § 79.11.090.

⁷⁸ *Id.* at § 79.17.010(1).

⁷⁹ *Id.* at § 79.11.080.

⁸⁰ *Id.*

⁸¹ *Id.* at § 79.19.020.

⁸² *Id.*

any other public or private lands of equal value, including lands held in trust.⁸³ Lands held in the land bank for potential commercial, industrial, or residential use are subject to the payment of an “in-lieu of real property tax” to the county where the land is located.⁸⁴

There are also several established programs in Washington that are targeted at protecting conservation and recreation uses on state lands, including trust lands; of these, the most significant are the Natural Areas Preserve system, and the Natural Resource Conservation Area program. The Natural Area Preserves system,⁸⁵ established in 1972, permanently protects private or public lands or waters which have retained their natural character, or which are important in preserving rare or vanishing flora, fauna, geological, natural historical, or similar features of scientific or educational value.⁸⁶ The DNR is authorized to purchase, lease, set aside, or exchange any public land or state-owned trust lands which are deemed to be natural areas.⁸⁷ The trust must receive fair market value for any interests disposed of and the transactions must be approved by the BNR.⁸⁸ Proceeds from this transfer must be used to acquire new, replacement trust lands in order to meet the DNR’s fiduciary obligations and to maintain the productive land base of the various trusts.⁸⁹

The Natural Resources Conservation Areas (NRCAs) program, created in 1987, protects lands with a high priority for conservation, critical wildlife habitat, prime natural features, examples of native ecological communities, and environmentally significant sites threatened with conversion to other uses. The state may acquire property by all means except eminent domain for the purposes of creating natural resources conservation areas.⁹⁰ Conservation purposes include enhancing sites for primitive recreational purposes and outdoor environmental education.⁹¹ However, the conservation use must be consistent with the financial management obligations of the trustee.⁹²

d. Multiple Use

DNR is directed to manage trust lands for “multiple uses.” This can involve several land uses simultaneously on a single tract or the rotation of uses between specific portions of the parcel.⁹³ In addition to resource extraction, “multiple uses” include recreation for vehicular and non-vehicular uses, special education or scientific uses, experimental programs by public agencies, special events, hunting and fishing or other sports activities, non-consumptive wildlife activities, and public rights-of-way.⁹⁴ Such uses must be compatible with the financial obligations in the management of the trust, and financial compensation must be provided.⁹⁵ In planning for multiple uses, the DNR is required to consider various ecological conditions, values, public use potential, accessibility, economic uses, recreational potentials, and local and regional land use plans or zones, local, regional, state, and federal comprehensive land use plans.⁹⁶

⁸³ *Id.* at § 79.19.030.

⁸⁴ *Id.*

⁸⁵ WASH. REV. CODE § 79.70.010.

⁸⁶ *Id.* at § 79.70.020(2).

⁸⁷ *Id.* at § 79.70.060.

⁸⁸ *Id.*

⁸⁹ *Id.* at § 79.71.050.

⁹⁰ *Id.* at § 79.71.040.

⁹¹ *Id.* at § 79.71.030.

⁹² *Id.* at § 79.10.120.

⁹³ *Id.* at § 79.10.110.

⁹⁴ *Id.* at § 79.10.120.

⁹⁵ *Id.*

⁹⁶ *Id.* at § 79.10.200.

Table V(I): FY 2003 Revenues – Washington Department of Natural Resources

Source	% of Revenue	Receipts
Surface Uses		
Agriculture	6.0%	\$7,054,743
Grazing	0.5%	\$601,583
Timber sales	53.4%	\$62,854,200
Commercial leases	5.8%	\$6,829,449
Rights of Way	0.9%	\$1,056,568
Total Surface	66.6%	\$78,396,543
Subsurface Uses		
Minerals and Hydrocarbons	0.9%	\$1,079,225
Total Subsurface	0.9%	\$1,079,225
Sales and Other		
Land Sales*	5.4%	\$6,346,480
Trust land transfers	21.6%	\$25,425,999
Other**	5.5%	\$6,421,431
Total Sales and Other	32.5%	\$38,193,910
Grand Total	100.0%	\$117,669,678
Agency Expenditures***		\$24,234,259

*Includes land bank sales

**Includes asset transfer/loan repayment

*** This figure reflects operational expenditures from the Resource Management Cost Account for all state grant land management activities, minus line item expenditures for “aquatic resources” (a non-trust related activity).

Source: Washington Department of Natural Resources FY 2003 Annual Report, at 19.

6. Trust Revenue Distribution in Washington

Washington administers separate trusts for the following beneficiaries: the Common Schools; Agricultural School Trusts and Scientific School (Washington State University); Capitol Building Trust; University Original and University Transfer (University of Washington); charitable, educational, penal, and reformatory institutions; and Normal Schools (The Evergreen State College and Western, Central, and Eastern Washington Universities). Funds generated from the sale of timber on common school trust lands are distributed to the Common School Construction Fund, proceeds from the sale of land (except land bank and trust land transfers), minerals, oil and gas are distributed to the Common School Permanent Fund. A portion of the revenues generated goes to the Resource Management Cost Account which is used to pay expenses in the management of trust lands. Revenue generated on other trust lands is distributed to the appropriate fund as established by law for the support of the specific trust. Except for lands granted under the Morrill Act of 1862, up to 25 percent of the revenues generated from the lands may be deposited into the Resource Management Cost Account⁹⁷ which is utilized to pay the costs of managing trust lands.⁹⁸

The Washington Constitution describes the common school fund as “permanent and irreducible.”⁹⁹ The fund consists of the principal existing on June 30, 1965 and any additions

⁹⁷ DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 19.

⁹⁸ *Id.* at 13.

⁹⁹ WASH. CONST. Art. IX § 3.

thereafter from appropriations and donations to the fund, donations to the state for the common schools, the proceeds of lands and property, the proceeds from the sale of stone, minerals, or property other than timber and crops from school and state lands, all money recovered from those trespassing on school and state lands, 5 percent of the proceeds from the federal sale of public lands within the state, and the principal of all proceeds from the sale of lands and other property granted for the support of the common schools.¹⁰⁰ The legislature may provide for the enlargement of the fund.¹⁰¹

The Permanent Fund accounts are managed by the Washington State Investment Board which invests in a mix of public and private equities, fixed income, and real estate. The permanent funds may be invested in state, county, municipal, or school district bonds, but may not be loaned to a private person or corporation.¹⁰² The fund balance for the Common Schools Permanent Fund is currently \$171,923,819, with all six of the trust permanent funds totaling approximately \$728 million.¹⁰³ The interest from each fund is distributed to the appropriate beneficiary. Any loss to the Permanent Fund becomes state debt.¹⁰⁴ Washington's current policy of depositing the revenues derived from current land sales into the land bank fund means that these permanent funds are not likely to see substantial growth from new deposits in the near future.¹⁰⁵

The Common School Construction Fund (the common schools' current fund), originally created to accommodate rapid post-World War II growth, is utilized for the exclusive purpose of financing facility construction for common schools.¹⁰⁶ The sources of this fund are:

- 1) Proceeds from the sale or appropriation of timber and other crops from school or unspecified state lands after June 30, 1965;
- 2) Interest accruing on the Permanent School Fund after July 1, 1957, and all rentals and other revenues from the Permanent Fund and school lands; and
- 3) Other sources as the legislature may direct.¹⁰⁷

The portion of the Common School Construction Fund derived from interest on the Permanent Common School Fund may be used to retire bonds for financing facility construction for the common schools.¹⁰⁸ Historically, the Common School Construction Fund was the only source of funds from the state for school building construction;¹⁰⁹ however, the Fund currently supports only about 50 percent of school construction.¹¹⁰ Funds in the Common School Construction Fund in excess of the needed amount are deposited into the Permanent Common School Fund, or can be distributed directly for use by the common schools.¹¹¹

Of the \$131 million generated by state trust lands in fiscal year 2003 (including aquatic lands proceeds), approximately \$89 million was distributed to beneficiaries and \$9.1 million was placed in permanent funds; the remaining \$33.7 million was deposited into the Resource Management Cost Account. The Common School Construction Fund received approximately 60.3 percent of the total revenues generated by the trust.¹¹²

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at Art. XVI § 5 (amended 1894).

¹⁰³ Washington State Investment Board, Permanent Fund Performance Report, available at: <http://www.sib.wa.gov/financial/pdfs/permanentperformance.pdf>.

¹⁰⁴ WASH. CONST. Art. IX § 5.

¹⁰⁵ SOUDER & FAIRFAX, *supra* note 4, at 55.

¹⁰⁶ WASH. CONST. Art. IX § 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ SOUDER & FAIRFAX, *supra* note 4, at 61.

¹¹⁰ *Id.* at 158.

¹¹¹ WASH. CONST. Art. IX § 3.

¹¹² DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 19, 21.

7. Recent Developments and Emerging Issues in Washington

a. Sustainable Forestry Plan

As part of a ten-year sustainable forestry planning process, in September 2004 the Board adopted a forest management policy intended both to protect and increase old growth forest habitat, and to generate 1.5 billion dollars for trust beneficiaries over the next decade.¹¹³ The Washington State Board of Natural Resources set the sustainable harvest level for forested trust lands in Western Washington at 597 million board feet (mbf) per year, a 23 percent increase from the previous level of 460 mbf.¹¹⁴

The Commissioner stated that the approved alternative¹¹⁵ takes an “active stewardship” approach to begin to increase the amount of fully functioning forests (i.e. old growth), thereby improving forest and stream health, improving habitat for salmon and other fish, generating hundreds of millions of dollars for construction of public schools and universities, and increasing the amount of timber available to future generations.¹¹⁶

However, the proposal is not without controversy. Shortly after the plan was adopted a group of Washington environmental groups filed a legal challenge asserting that the increased logging levels will harm salmon, wildlife habitat, and clean water. According to an October 5, 2004 press release:

Commissioner Sutherland and the BNR failed to properly consider the consequences of dramatically increasing clearcut logging in sensitive forests near streams, across landslide-prone slopes, and within wildlife habitat areas. Decisionmakers also failed to consider an approach that would have met Forest Stewardship Council (FSC) standards and allowed certification of state forest as well managed. Widespread problems with logging roads that dump tons of sediment into Washington waterways also were not sufficiently addressed by Commissioner Sutherland’s logging plan. Nor does the plan commit to protecting the State’s swindling old-growth forests. The suit calls for a return to the status quo logging plan, pending proper consideration of environmental impacts and FSC certification.¹¹⁷

b. Recreation on State Trust Lands

Recent budgets have offered no General Fund support for recreation on state trust lands. Without these funds the department is having difficulty managing the lands and controlling invasive weeds, lawlessness, and overuse. In 2002, the Commissioner proposed the “Legacy Trust for Recreation and Conservation” (Legacy Trust) to fund the recreational management of trust lands. These lands are under increasing pressure for recreation and, unfortunately, are increasingly regarded as preferred sites for multi-acre methamphetamine labs. The Legacy Trust proposes to acquire and hold lands (and other assets) to generate revenue for the support of recreational use, access, maintenance and enforcement. Funding for this acquisition would come from bonds, private donations, and federal grants.¹¹⁸

¹¹³ News Release, *Commissioner of Public Lands Doug Sutherland proposes policy preventing clear-cuts of old-growth stand in Western Washington state trust forest*, Washington Department of Natural Resources (January 21, 2004).

¹¹⁴ News Release 04-078, Washington Department of Natural Resources (September 7, 2004), available at: http://www.dnr.wa.gov/htdocs/adm/comm/nr04_078.htm.

¹¹⁵ Washington Department of Natural Resources, available at: <http://www.dnr.wa.gov/htdocs/fr/sales/sustainharvest/sustainharvest.html>.

¹¹⁶ *Id.*

¹¹⁷ *Latest News*, Northwest Ecosystem Alliance, available at: http://www.ecosystem.org/statelands/press_release_10_04.html.

¹¹⁸ News Release, *Recreation on state lands threatened by Governor’s budget*, Washington Department of Natural Resources (December 18, 2002).

c. Ecoregional Assessments

Washington's Department of Fish and Wildlife, DNR, and the Nature Conservancy have signed a Memorandum of Understanding to create a series of eco-regional assessments embracing state and private lands using the best available science and human expertise. The assessments are not regulatory, but are intended to guide conservation across eco-regions (large geographic areas that share similar climate, landforms, and native species). This holistic approach will better inform the agencies making management and policy decisions affecting the ecological and economic well being of the trust lands.¹¹⁹

d. Upland Trust Review Committee

The Commissioner of Public Lands recently appointed an advisory committee of individuals with expertise in private or public sector finance and organizational management "to evaluate the agency's effectiveness and efficiency concerning trust land costs and benefits, and to make recommendations for positive change." The review committee is charged with looking for less costly more efficient ways for the Board of Natural Resources to carry out its objectives in light of DNR's economic prediction that management fund balances are likely to fall.

The committee began meeting in early October 2004 and reported its findings in December 2004. It recommended:

- An increase in management funds by an amount equal to about 5 percent or 8 percent of annual gross trust land revenues, depending on the fund.
- DNR should more actively market all trust land products and services including specialty timber products, wind power, telecommunication sites, and mitigation banking and carbon sequestration opportunities.
- DNR should pursue benchmarking its costs to similar private and public sector organizations to discover opportunities for further savings.
- DNR should more aggressively reposition high-value trust lands not currently returning significant trust revenues.¹²⁰

e. Lake Whatcom Landscape Management Plan

After four years of effort, the DNR has finally adopted the Lake Whatcom Landscape Plan, prepared in cooperation with local tribes and the community. The plan, which resulted from legislation requiring DNR to seek a new approach for the state trust lands it manages in the Lake Whatcom watershed, appears to have widespread support.

The plan includes riparian management zones on all streams, careful regulation and planning of harvest and road construction on potentially unstable slopes, use of a sustained yield model specific to the Lake Whatcom watershed, as well as incorporating community and scientific information in management decisions. It will create a five-member inter-jurisdictional committee made up of those with technical expertise that will be appointed by the Commissioner of Public Lands from nominees submitted by the local government jurisdictions and public members nominated by DNR's Northwest Region manager. The committee will evaluate any planned activities against the strategies contained within the Lake Whatcom Landscape Plan, and make appropriate recommendations to the Department.

¹¹⁹ News Release, *New agreement to usher in comprehensive approach to conservation*, Washington Department of Natural Resources (June 24, 2004).

¹²⁰ News Release, *Business and legislative experts report on financial health of DNR state trust land management: Independent Review Committee offers ideas to Commissioner of Public Lands*, Washington Department of Natural Resources (December 14, 2004).

A lawsuit has been filed by Skagit County and several beneficiaries challenging the constitutionality of the Lake Whatcom management plan. The lawsuit alleges the legislature and DNR have breached their fiduciary duties to the trust beneficiaries and have adopted unconstitutional legislation to facilitate the project.