



*Source: WA STATE DNR*

## Chapter 2

### Trust Land Restrictions

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State trust lands are subject to specific statutes, regulations, policies, and management practices that are unique to state-owned lands and which are different from privately held lands in similar use. Collectively, these restrictions result in different and lower net revenues from the land, which result in a lower trust land value.

## INTRODUCTION

The management of trust lands is the result of five levels of direction and oversight: 1) federal law and applicable regulations, 2) state statutes, 3) state regulations, 4) policies of the Board of Natural Resources and the Department of Natural Resources (“Trust Manager”), and 5) management practices implemented by the Trust Manager. These five levels of direction and oversight are also influenced by the Enabling Act (federal) that gave rise to the trust land portfolio, as well as the provisions of the Washington State Constitution.

Collectively, we can describe these as the “restrictions” that direct and/or influence how the trust land portfolio is managed and administered. While some of these restrictions also apply to the operation of similar, privately owned lands, many are unique to state trust lands. The

purpose of this discussion is to call attention to those restrictions that we believe have a material effect on the value of the trust land portfolio, its net incomes, and, thereby, returns, and which are different from those restrictions that affect the use and management of similar, private-owned lands.

We need to emphasize that this chapter is not intended to be any form of detailed portfolio of statutes, regulations, policies, and practices that are specific to the trust land portfolio, nor is it intended to be an analysis of the appropriateness or suitability of any of the statutes, regulations, policies, and practices that direct or influence the management of trust lands. Rather, it is intended to be a commonsense discussion of how the use and management of trust lands is different from similar privately-owned land. Our focus here is on those restrictions that have the greatest impact on trust land value and net operating income.

Recognizing these differences in allowable operations and management of privately owned lands and trust lands is particularly appropriate, because, as a general statement, it is the operations and management of similar-use, privately owned lands that are the basis for the evaluation of the operational effectiveness of the Trust Manager, and that the values, net incomes, and returns of privately owned peers are the basis for evaluating the asset management effectiveness of the Trust Manager. Therefore, if we are going to compare the performance of the trust land portfolio with privately owned peers, we need to understand some of the differences between the two types of lands.

Because the sales of privately owned lands are reported in the marketplace and set an expectation of the price and value of land, we anticipate that readers of this trust land performance assessment (TLPA) have private market information about the value and net incomes associated with the various classes or types of trust lands under review (timber lands, agricultural lands, mineral lands, etc.). With our discussion here about the restrictions that direct or influence the management of trust lands, we hope to explain, in part, some of the underlying reasons for the difference between the market value of privately-owned lands and the Trust Value that we estimate in this TLPA.

In order to present this discussion, we have completed a high-level overview of the statutes, regulations, policies, and practices that direct or influence the management of the trust land portfolio. The objective of this review is to identify those restrictions that have the most significant impact on the value and/or net income of the trust lands and to evaluate their impact on value or net income. Further, the objective is to establish a basis on which the reader can begin to understand how and why the conclusions of Trust Value of this TLPA are or may be different from unit prices or values reported in the marketplace by a variety of reporters.

### **RESTRICTIONS DO AFFECT PRIVATELY OWNED LANDS**

Similar-use, privately owned lands are also subject to statutes and regulations of the jurisdictions in which they are located. For example, privately owned forest lands are subject to federal, state, and local statutes and regulations. These include, for example, laws such as federal environmental protection under the Endangered Species Act and Clean Water Act; state statutes on the environmental impact of logging, mining, and agricultural activities; local ordinances involving permissible land use (zoning and land use entitlement); and other statutes and

regulations further restricting or defining activities on the land and improvements to the land, as well as buildings on the land. In fact, all land prices and values are affected by the restrictions on land use, and the resulting impact on the nature and intensity of that use.

In this discussion, our emphasis and interest are on those provisions of statute, regulation, policy, and management practice that are specific to the trust land portfolio and which do not affect similarly used, privately held lands. For example, privately held lands are not subject to the policy mandates of the Board of Natural Resources (to which only trust lands are subject). Therefore, as we evaluate the policy decisions of the Board of Natural Resources, we can say that they are i) unique to state-owned trust lands (and other state lands) and ii) may or may not have a material impact on the Trust Value of those trust lands.

### **RESTRICTIONS MATERIALLY AFFECTING TRUST LANDS**

Based on our review and investigation, we have concluded that the following restrictions likely do have a material, differential impact on trust lands, and that the Trust Value of the trust lands is materially impacted or influenced by these restrictions:

#### Environmental Laws and Regulations

Both privately owned lands and state trust lands are subject to statutes and regulations involving environmental protection and environmental impact mitigation, and the protection and mitigation of adverse conditions under these statutes is similar for both. However, there are differences in how these laws are implemented that may result in a material, differential impact on value or net operating income.

For example, management activities on both private and state trust lands may be subject to the Forest Practices Act and/or State Environmental Policy Act (SEPA), but because the Trust Manager is a public agency, SEPA places a greater burden on the Trust Manager to consider and disclose potential impacts as compared to private land managers. SEPA states that “all branches of government of this state, including state agencies, municipal and public corporations, and counties” must “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making...” and “identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations...” (RCW 43.21C.0301). On both private and public land, state and local permit decisions require SEPA review. In addition, most management decisions made by the Trust Manager involving state trust lands are agency actions that require SEPA review; SEPA does not apply to private land management decisions. For example, per RCW 43.21C.037, RCW 76.09.050, and WAC 222-16-050(1) and (2), a Class IV forest practice application for either a private or public timber sale requires SEPA review. But, as a public agency, the Trust Manager is also required to conduct a SEPA review to disclose potential impacts for all timber sales to the public and consider public comments, regardless of the forest practices application classification. Complying with this requirement increases public scrutiny of timber sales and may result in delays, changes to, or in some cases, cancellation of sales. Thus, the impact of the Trust Manager’s obligations under SEPA may include higher costs associated with timber sales, as well as longer sale preparation periods. Both differences may affect net income from timber sales.

#### Reservations of Land From the Available Trust Land Portfolio

In Chapter 5, Timber Asset Class, we describe the timberlands valued in this TLPA and report that, in total, some 40 percent (816,000 acres) of the available land portfolio in the timber asset class is either not or only partially harvestable. Some areas have been deferred from harvest per Board of Natural Resources policies, such as the policy on old growth forests. Per the forest practices rules, some areas can be harvested only with surveys, consultation with tribes or federal partners, or other steps, which can effectively limit or restrict harvest. Further, thousands of acres are being managed as habitat mitigation for threatened and endangered species under the Trust Manager’s 1997 State Trust Lands Habitat Conservation Plan (HCP).

The Trust Manager decided to pursue an HCP when the northern spotted owl was listed on the federal Endangered Species List as threatened in 1990. In addition to northern spotted owls, the HCP describes how the Trust Manager will meet Endangered Species Act requirements for other iconic, listed species as well, including bull trout and seven species of anadromous salmon, marbled murrelets, bald eagles, peregrine falcons, gray wolf, and grizzly bears, and other species of concern that have habitat in the forested environment. (Note, bald eagles and peregrine falcons have since been delisted.)

Unlike most private lands, which tended to be dominated by younger forests, the forest asset managed by the Trust Manager in the 1990s contained a large percentage of older forest: approximately 41 percent of the 1.6 million acres of lands managed by the Trust Manager and covered by the HCP were between 51 and 151 years old or older (Table 3.4.1, Merged Final Environmental Impact Statement for the Habitat Conservation Plan). Because many of these

older forests were either functioning as habitat or had the potential to become habitat for listed species, they were subject to requirements for “survey and manage,” meaning they had to be surveyed for threatened and endangered species prior to timber sales.

Adopting an HCP was a means for the Trust Manager to meet the requirements of the Endangered Species Act without doing survey and manage, while providing management certainty (including a no-surprise clause) to its beneficiaries over the long term (to 2067). The proportion of the land base (40 percent) that today is either not or partially available for harvest nonetheless reduces the harvestable land base and, thus, represents a material financial impact to the income-generating capability of the portfolio for trust beneficiaries. This condition has a material effect upon net operating income and the value of the harvestable land base.

#### Sustained Yield

The state trust lands, both those granted at statehood and those created by statute, are perpetual in nature. Because these are perpetual trusts, the beneficiaries are represented by both today’s generation as well as future generations. In discharging its duty as a trust manager, the department is required to manage state trust lands to provide “intergenerational equity” in perpetuity to its beneficiaries. Intergenerational equity means not favoring one generation of beneficiaries over another. Specific to forested state trust lands, the Trust Manager is required to manage on a sustained yield basis, which is defined as “management of the forest to provide harvesting on a continuing basis without major prolonged curtailment or cessation of harvest” (RCW 79.10.310).

The Trust Manager meets the sustained yield requirement by calculating a sustainable harvest level each decade for 20 sustainable harvest units. The sustainable harvest level

is defined in RCW 79.10.300(5) as “the volume of timber scheduled for sale from state-owned lands during a planning decade as calculated by the Trust Manager and approved by the board.” To ensure sustained yield, the mean annual timber volume for any decade cannot vary up or down more than 25 percent from the level of the preceding decade for any sustainable harvest unit.

If the Trust Manager cannot meet its sustainable harvest level in a given decade, an arrearage is created. Arrearage volume is the difference between the planned sustainable harvest level and the actual harvest level in a planning decade. If an arrearage exists, the Trust Manager is required by RCW 79.10.330 to conduct an economic and environmental analysis of any arrearage volume resulting from the previous planning decade and determine the best course of action for addressing it, for example, harvesting the arrearage in the next planning decade.

Sustained yield acts as a restraint on net operating income. Unlike a private land manager, the Trust Manager cannot harvest heavily in the current decade and then divest or exchange its holdings in the future. Instead, it must plan its harvest carefully over years and decades to ensure intergenerational equity, under the assumption that the land base will remain essentially intact and productive. The result is a harvest volume that may be lower than what a private land manager could achieve without these obligations.

***In the 1990s, the Trust Manager had two options for managing the forest asset to comply with the Endangered Species Act, given that state trust lands covered by the HCP (1.6 million acres within the range of the northern spotted owl) contained significant tracts of mature stands. The first option was to survey for threatened and endangered species prior to each timber harvest. These surveys were time consuming and costly, and many timber sales were delayed due to concerns about habitat. Given the size and complexity of its land base, this option was impractical for the Trust Manager and the trust beneficiaries.***

***The Trust Manager chose the second option, which was to negotiate a HCP with the Federal Services (National Oceanic and Atmospheric Administration and U.S. Fish and Wildlife Service) to obtain an incidental take permit. In four major conservation strategies, the HCP describes how the Trust Manager will minimize and mitigate incidental take (harm) of listed species while conducting lawful activities, such as timber harvests. The Trust Manager minimizes and mitigates take primarily by limiting or restricting management activities in habitat areas. Outside of these areas, the Trust Manager has the flexibility to manage primarily for revenue production without needing to survey for threatened and endangered species. As such, the HCP provides the Trust Manager and its trust beneficiaries with a higher level of certainty in both habitat conservation and revenue production. The HCP is one of the largest in the United States and one of the few to contain “no surprises” provisions, which mean that if a new species becomes threatened or endangered while the HCP is in place, the Trust Manager will not have to increase the protections already in place to cover that new species.***

### **The Delayed Conversion of Transitional Forest and Agricultural Land into Commercial Land**

Reportedly, approximately 9,000 acres of land are currently classified as timberland that is believed to be suitable for commercial and/or other suburban or urban land uses. These are lands that are located near or in towns and cities across western Washington. These lands may have a market value in an alternative use that is materially greater than their value in continuing timberland use. For example, with an average Trust Value in the vicinity of \$1,500 per acre as timberland, it is likely that the value of transitional lands could easily be 10 times higher if the land were developed for other uses. The delay in converting these lands to other uses is, therefore, seen as a restriction that affects the total value of the portfolio.

Admittedly, because the transitional lands portfolio is small, at 9,000 acres, the effects of a 10-fold increase in transitional lands is also small. Were a 10-fold increase possible in this subset of timberlands, it appears it would represent a material increase in the value of all timberlands.

We have discussed five financially material restrictions that we believe can explain, in part, why and how the Trust Value conclusions of this TLPA may vary significantly from the market value indications of privately-owned lands of similar use. These restrictions include i) restrictions upon sale, ii) additional environmental impact assessment obligations, iii) the reduction in the available harvestable portfolio of timberland, iv) the effect of sustained yield on net operating income, and v) the delay in conversion of transitional lands within the timberland portfolio to other land uses.

We cannot provide a quantifiable dollar amount of impact from these restrictions, either at the asset class or the portfolio level. We are reasonably confident, however, that the sum of these restrictions is financially material in the context of the Trust Value conclusions, and represent, in part, explanations for the variance between our conclusions of Trust Value and the market values of similarly used, privately owned lands in Washington state.