Natural Community Conservation Planning: A Targeted Approach to Endangered Species Conservation

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Is State Trust Land Timber Management "Better" Than Federal Timber Management? A Best Case Analysis

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1. Introduction

The nation is replaying a familiar public lands drama that has come to be known as a Sagebrush Rebellion. The mid-1990s version of this "hearty perennial" begins, as they all do, with western states' dismay at federal land holdings. The current debate is, however, unusual in important respects. The

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1. A good place to start on all of this is Nelson, Private Rights and Public Lands (1995). For a starting point on the enormous literature on Sagebrush Rebellions past and current, see also Limeric, A History of the Public Lands Debate, a paper presented at the conference "Challenging Federal Ownership and Management," Natural Resources Law Center, University of Colorado (Oct. 11-13, 1995); Brubaker, Rethinking the Federal Lands (1984); Fairfax, Riding into a Different Sunset, 79 J. Forestry 516 (1979); Cawley, Federal Land, Western Anger: The Sagebrush Rebellion and Environmental Politics (1993).
most significant distinction between the present and all previous versions is the ubiquitous, serious discussion of community participation in decision-making about local and regional resources, particularly watersheds.2

This emphasis has led, in turn, to an unusual attempt to take seriously the possibility that states could, in fact, play a role in the management of what we have come to discuss as "federal"3 lands. The issue of whether the states could "do better" is on the front burner, a frequent topic of professional panels, public debate, and scholarly and popular articles.4

State trust lands have emerged from the shadows of the public lands debate and have attracted unusual attention as part of this discussion about state potential.5 Unbeknownst to many, twenty-two western states manage approximately 135 million acres of trust lands for the benefit of schools and other public institutions.6 These lands were granted by Congress to newly-joining states during the accession process in order to support public institutions such as common schools.7 Having labored to analyze state trust lands for many years without much company, we were pleased to observe

2. See, e.g., DEMMIS, COMMUNITY AND THE POLITICS OF PLACE (1990); see also RICE, Federal Lands and Watershed Based Management Approaches, a paper presented at the conference "Challenging Federal Ownership and Management," Natural Resources Law Center, U. of Colo. (Oct. 11-13, 1995); NORTHERN LIGHTS, various volumes, especially Vol. 9, No. 4 (Winter 1994); Chronicle of Community, A Publication of Northern Lights Institute, Vol. 1, No. 1, et seq. (starting Fall 1996). Given the focus of this piece, we accentuate the community aspects of the debate. Others, particular students of, and participants in, the Wise Use movement, would assert that what is unique about the present undertaking is the presence of a "broadly based anti-environmental movement." See BRICK, DETERMINED OPPOSITION: THE WISE USE MOVEMENT CHALLENGES ENVIRONMENTALISM, 37 ENV'T 17 (Oct. 1995). To the extent that Wise Use is connected with opposition to the Federal government, the two are not, of course, unrelated.

3. Nomenclature matters: referring to the "former public domain" as either "public lands" or "federal lands" evinces a bit of side-taking in a century-long debate.

4. There have been dozens of meetings, most widely advertised, perhaps, "Challenging Federal Ownership and Management," Natural Resources Law Center, U. of Colo. (Oct. 11-13, 1995); but other include, for example, "Public Lands Symposium: Public Lands in Nevada—New Concepts for the 21st Century," Reno, NV (Sept. 16-17, 1996).


6. Note that the number goes to about 155 million acres when the subsurface estate is included. Discussed in STATE TRUST LANDS, supra note 5, at 47-53.

7. Discussed in STATE TRUST LANDS, supra note 5, at ch. 1.
that the topic is now so "chic" as to attract the attention of the General Accounting Office (GAO). 8

We recognize that GAO reports constitute a special kind of attention. 9 Nevertheless, we welcome the discussion. For far too long, public and professional debate about public resources has proceeded as if the federal multiple use model was the only available or viable approach. The GAO analysis makes many important observations. It also misses or muddies a number of important points regarding trust lands. For both of those reasons, it is very much worth discussing.

The purpose of this paper is to debate with and embellish the GAO Report by juxtaposing it with work we were privileged to undertake for the State of Washington. 10 The GAO's conclusions provide a good starting point for in-depth understanding of how state trust timberland management programs work. It is appropriate to focus on Washington for comparative analysis in the timber context because it is by far the largest, most complex and most successful state level forest planning and management program in the nation.

Elsewhere we have argued that the "Washington Department of Natural Resources (DNR) is widely regarded as the premier state land management agency in the western U.S. . . . Its programs and practices set the standard for public land management at both the state and federal level." 11 The GAO Report presents four reasons why the Pacific Northwest state programs look good, indeed better than their federal counterparts. 12 We have much to learn by exploring their results.


9. The General Accounting Office responds, it frequently appears, to loaded questions from elected representatives seeking data to support a previously defined position. And, it generally appears, that knowing whence cometh the butter for their bread, the GAO provides it. The world, accordingly, little noted and will probably not long remember a recent GAO response to questions from Hon. Don Young, Republican Congressman from Alaska and Chair of the House of Representatives Committee on Resources. At present it appears that the GAO is more likely to service Republican legislators while the Democrats draw necessary research from the Congressional Budget Office, but this partisan alignment is not stable. Personal Communication from Mark Rey, Professional Staff, Committee on Energy and Natural Resources, United States Senate, 1996.

10. See Wash. State Bd. of Natural Resource Indep. Review Comm., Report to the Washington State Board of Natural Resources from the Independent Review Committee (June 22, 1995) (on file with the authors) [hereinafter Board Report]. Our discussion will focus on the timber management issues contained in this report.

11. GAO Report, supra note 8, at 1.

12. Id.
The paper will proceed in three main parts. The first will introduce and discuss the GAO's findings. The second focuses on state trusts, in general, and in Washington State in particular. The third delves more deeply into the Washington timber program, discussing the evolution of timber planning in Washington, and two disputes that have recently engulfed the state's program.

The GAO Report, discussed in Part II, concludes that although federal and state timberlands in Washington and Oregon are often adjacent and appear to have similar characteristics, "significant differences" arise in three principal areas: (1) the states' "legislative and regulatory guidance" is clear and simple; (2) the states' timberlands are primarily roaded, second growth, hence they are "less controversial" to manage; and (3) the states' timber sales programs rely on receipts for their funding, thus providing them with an incentive to control costs and increase revenues, while the federal agencies rely on annual appropriations and thus make no connection between receipts and expenditures. These three factors are manifest in a fourth area of important difference, a state planning process that is shorter, less complex and less likely to invite appeals than the federal system. Moreover, the states sell their timber differently than do the federal agencies. Unlike the United States Forest Service, the states do not have annual timber sale targets. This allows the states to offer timber sales so as to take advantage of changes in timber prices. The rest of Part II will engage the GAO Report, challenging, amending and supplementing its findings.

Part III will provide background on the trust lands in general and the Washington trust in particular. Both of those topics are treated in more depth elsewhere. We will focus on general principles of trust land management: clarity, undivided loyalty, accountability, enforceability, perpetuity and prudence. We will use a standard Washington case brought by Skamania County to explore the facial difference between federal multiple use and trust notions of undivided loyalty and prudence. We will also draw attention to the constitutional status of the trust mandate. Unlike the federal multiple use lands, the trust mandate is typically enshrined in the state constitution. Hence, the issue is not merely legislative and regulatory guidance, as the GAO Report indicates, but indeed legislative violations of the trust are unconstitutional. Part III will end with an exploration of the GAO's assertions about the sources of funding for

13. See id. at 1-2.
14. See id. at 6.
Washington management programs. We will also note that the GAO paid inadequate attention to how the money that the DNR produces on trust lands is allocated to beneficiaries.

Part IV will delve deeper into the details of the Washington timber management program. First, we will explore the evolution and current status of the state's timber program planning. Our goal is to demonstrate that the planning processes on federal and state lands are in fact quite similar. We must look elsewhere for differences in outcomes from federal and state timber programs. Then we will trace the long and complex evolution of the process in two disputes. The first dispute traces the notion of prudence in recent litigation concerning the DNR's alleged over attention to lynx habitat on the Loomis state forest which is presently experiencing a mountain pine beetle epidemic. The second dispute begins with a discussion of sustained yield and then focuses on the complex controversy over "arrearages" that engulfed the DNR in the mid-1990s.

The two cases point in opposite directions. The Loomis case underscores differences between federal and state management regimes, with particular emphasis on expectations and culture. We will underscore that although the case is deeply contested, there is no disagreement as to expectations and goals. The issue is what constitutes prudence.

The discussion of the arrearages dispute starts with the observation that the sustained yield and marketing strategies of the Washington state program are not, upon close inspection, as different from the federal programs as the GAO Report suggests. Both agencies have taken to their bosom the forestry profession's highly questionable dogma concerning sustained yield. Both the Forest Service, where it is statutory, direction, and the Washington DNR, where it is Board policy, strive to achieve an "even flow" of timber from their lands. We will argue that this ought not be the case; the even flow approach to sustained yield is a per se trust violation. As implemented, it gives the timber purchaser enormous advantages over the trust in speculating in a changing timber market. Further, timber sale procedures embedded in the arrearages dispute allow the buyer but not the trust to take advantage of changes in the market. We conclude again that the program


18. Id.

is a per se violation of the trust. We will leave the obvious companion question—if it makes no sense for the trust, does it make any sense at all for the federal government—to the myriad of our colleagues who have tried for decades to point to the absurdities of the policy on federal lands.20

The state, however, undeniably sells more timber more efficiently than the federal government. This is, of course, not the only basis for evaluating renewable resource management programs. But focusing on that will allow us to identify real distinctions rather than the superficial ones discussed in the GAO Report.

In Part IV we will return to the question that the GAO began with: why is it that the states are so much more effective in putting timber on the market in a speedy and efficient fashion? We reach a tentative conclusion that the distinctions the GAO observed are more likely to arise from the constitutional status of the mandate and a culture that emphasizes benefit for the beneficiary than they are to emerge from legislative guidance and funding mechanisms. We are not as impressed with the DNR’s planning as the GAO—it seems to us to be similar in all its diverticulae and inefficiencies to the much lamented federal program. We observe, however, that when all parties share a basic set of expectations, in this case the idea that the goal of management is to make money for the beneficiary, the process is less likely to flounder fatally. But we recognize that when groups fight over increasingly scarce resources, no system works very well. The advantages in simplicity are, however, obvious.

II. The GAO Report

The basic conclusion of the GAO analysis reflects the interests of Representative Young who requested the report.21 The GAO found that the state trust land managers were able to offer timber sales in a far shorter time frame, with fewer appeals and at significantly less cost than their federal counterparts.22 With these basic conclusions, we have relatively few quibbles. When the GAO asked why this is so, the report, in our opinion, stumbled. The GAO attributed this overall difference to the four factors, summarized above, which merit some elaboration.

Three of the GAO’s points are fairly straightforward. The GAO asserts that the states’ “legislative and regulatory guidance” is clear and simple, directing managers to maximize revenues over the long term to benefit the schools and counties within the states. This simplicity, and the connection between timber sales and returns to the beneficiaries, leads counties to

22. See GAO Report, supra note 8, at 1-2.
pressure the state to sell more timber. The state's clear, profit maximizing mandate contrasts, according to the GAO, with the Forest Service situation: the multiple use framework "requires that the national forest lands be managed to produce the greatest 'net public benefit,' and to develop detailed management plans for the national forests; regulate timber harvests to ensure the protection of other resources; and allow the public to participate in the development, review, and revision of forest plans." The Report notes that "many Forest Service officials believe that this framework provides little guidance on how to balance the forests' competing users or to ensure their sustainability." In addition, the GAO concludes that federal decision making has become increasingly difficult because of the need to "consider other statutory requirements, such as the Endangered Species Act" (ESA).

The GAO Report is similarly unalloyed regarding funding mechanisms, stating at several points that the states' timber sales programs are funded from receipts, and thus the trustee has an incentive to control costs and increase revenues. This compares, according to the GAO, with the federal agencies' reliance on annual appropriations, and their corresponding failure to make decisions based on connections between receipts and expenditures. The state's funding source encourages state officials to "actively market timber to increase revenues and to reduce timber-related expenditures to control costs." The Report compares this situation unfavorably with the Forest Service situation wherein the agency "is not required to cover the costs of their timber sale programs with the associated receipts." The federal agencies, in contrast to the states:

rely on annual appropriations. Because no clear linkage exists between the receipts from timber sales and funding associated with the programs, there is little incentive to control costs or increase revenues. In addition, the performance measures for the federal agencies are based on the volume of timber offered for sale, not the actual amounts sold.

Third, the GAO Report simply asserts that differences in the timberlands that the agencies manage account for important programmatic differences. State lands do not, for the most part, contain old growth forests

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23. See id.
27. Id. at 7.
28. Id.
because they have already been harvested. The state lands tend to be second growth and are generally accessible due to extensive road systems. The federal lands are unlike these state lands: they contain old growth, designated wilderness areas and other special use areas, recreation areas, and similar features. And, the Report asserts, because the federal old growth forests provide habitat for endangered species, the federal agency “must take additional steps to protect these remaining old-growth forest areas.”

All of those differences are, according to the GAO, reflected in the differences between federal and state planning processes. “While the states have developed shorter planning processes that satisfy their legal requirements and get the job done quickly, the federal planning processes are more lengthy and expensive.” The federal government is, according to the GAO, required to consider and develop management alternatives, while the states merely come up with a plan. Furthermore, because the federal government manages for many resources while the states are only trying to produce timber, it is “difficult to get consensus” on federal lands. In addition, to comply with the National Environmental Policy Act (NEPA) and the ESA, the Forest Service must spend more time and money on long- and short-term planning. In spite of all that effort, the Forest Service’s decisions are still more likely to be challenged than those of the state trustee.

A major concern of the GAO is that the state planning process is shorter than the Forest Service Process. The GAO concludes that this is not because the state does not seek public input in planning. The states, however, have long-range plans that remain in effect until major changes occur, and they are used as a basis for planning individual timber sales. Similarly, states prepare wildlife surveys well in advance of individual sale planning. As a result, they can prepare an individual timber sale in about eighteen to twenty-four months.

This contrasts, according to the GAO, with Forest Service planning, which for an individual sale can take three to eight years. In contrast to the states, the Forest Service includes a wildlife assessment in each timber sale process. Also, because the federal agencies are to manage for multiple uses, “it is difficult to get a consensus on how to best manage forest lands and individual sales to achieve a net public benefit.” Complying with numerous other laws and regulations further complicates the federal planning process.

29. Id.
30. Id. at 8.
31. See id.
32. See id. at 9.
34. GAO Report, supra note 8, at 8-9.
35. See id.
The GAO also notes that the states get through their process with far smaller timber staff. The Report includes fiscal 1995 data on the number of state and federal employees involved in timber management in the Pacific Northwest. The GAO compares 2,552 federal employees in the two states with 322 state staff in Washington and 219 state employees in Oregon,36 for a state total of 541. At first blush, the impact is as likely intended. Reality, however, is both better and worse than stated. In Table I below we have displayed the GAO’s report data on number of personnel with its data on number of acres managed by the states and the federal agencies37 and the amount of timber sold by state and federal agencies in those two states.38 Although the GAO did not report its data in a format to facilitate this juxtaposition, we have been able to compare the number of timber management personnel per acre on federal timber lands in the region with the same category of personnel per acre on state timber lands.39

### Table I

<table>
<thead>
<tr>
<th>Agency</th>
<th>No. of Personnel</th>
<th>Timber Sold</th>
<th>Timber Sold per Employee</th>
<th>Forest Acres Managed</th>
<th>Forest Acres per Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Forest Service (WA and OR)</td>
<td>2,330</td>
<td>401 BBF</td>
<td>0.172 BBF</td>
<td>FS and BLM WA and OR Combined</td>
<td>15,826,000</td>
</tr>
<tr>
<td>U.S. Bureau of Land Management (OR)</td>
<td>222</td>
<td>124 BBF</td>
<td>0.559 BBF</td>
<td>WA and OR Combined</td>
<td>6,201</td>
</tr>
<tr>
<td>Washington Department of Natural Resources</td>
<td>322*</td>
<td>607 BBF</td>
<td>1.885 BBF</td>
<td>2,255,000</td>
<td>7,003</td>
</tr>
<tr>
<td>Oregon State Forestry Division</td>
<td>219</td>
<td>118 BBF</td>
<td>0.539 BBF</td>
<td>875,000</td>
<td>3,995</td>
</tr>
</tbody>
</table>

* The WDNR reports that this number includes only their timber sales staff only, and not any administrative support, reforestation or silvicultural management staff.

Source: Based on data assembled from the GAO Report, at 3, 4. Data is for 1995.

BBF: Billion Board Feet

Because they manage so much more land than the BLM or the states, the Forest Service data looks considerably less ridiculous when expressed as a per person per acre comparison. Conversely, the agency looks even worse than the GAO’s original presentation suggests, when expressing the same personnel data in relation to the amount of timber sold. Washington State sells more than ten times as much timber per employee than does the

36. See id. at 29. There are 2,330 in the Forest Service and 222 in BLM in Oregon. The BLM in Oregon manages the O & C lands, without question their most valuable timber resource, which is, because of the O & C’s history as a revested railroad grant, admixed in checker-board style with Forest Service lands in Western Oregon. For a brief and excellent introduction see BUREAU OF GOVT RESEARCH AND SERV., SCH. OF COMMUNITY SERV. AND PUB. AFFAIRS, U. OF OR., THE O & C LANDS (1981).

37. GAO Report, supra note 8, at 3.

38. Id. at 4.

39. These numbers should be used with some caution since the number of employees may be counted differently among different agencies.
Forest Service in the Pacific Northwest. It is important to note, however, that
the BLM sells slightly more timber per employee than the trust managers in
the State of Oregon. This suggests that the trust is not the sine qua non of
enhanced performance. We shall return to this discussion in Part IV, having
noted for now that the GAO’s analysis is too simple to fully explore the
comparisons between federal and state trust land timber management.

III. The Trust in General and in Washington in Particular

A. What Is a Trust?

The first step in locating apparent causes for the wildly disparate results in
timber management is, we concur with the GAO, to begin with the mandate. The
trust mandate is radically different from the multiple use mandate. This section
will underscore those differences, focusing on Washington.

The General Land Ordinance of 1785 is probably most familiar as the
origin of the township and range system that divided the nation into little
postage stamps of 640 acres each in order to sell them. But that same statute
also established a program of granting land to support common schools. At or
near the time of statehood, Congress granted sections in each township—first
one section (Section 16) and ultimately four sections—to new states. In 1803,
Ohio became the first beneficiary of such a Congressional grant. The program
evolved for over a century-and-a-half and played an integral role in the westward
expansion and state making process until it ended, practically, in 1912 when
Arizona and New Mexico joined the union, and actually when Alaska joined in
1959. Hence the grants are among our nation’s oldest public policies, and are
certainly the core of our oldest public resource policy.

Of the almost 322 million acres originally granted to the states for
school and other public institutions, approximately 135 million acres of
surface and 152 million acres of mineral rights continue to be held in state
ownership. The state school lands are not managed subject to the same

UPPER MISSISSIPPI COUNTY (1976).

41. For a full story on the original grant to Ohio, see Mansfield, Educational Land Policy
of the United States: Land Grants for Educational Purposes Within the State of Ohio, XXVIII BARNARD AM.
J. OF EDUC. 59 (1878).

42. For a fuller treatment see STATE TRUST LANDS, supra note 5, at ch. 1.

43. The best general source on grants to states is ORFIELD, LAND GRANTS TO THE STATES
WITH SPECIAL REFERENCE TO MINNESOTA (1915). See also GATES, HISTORY OF PUBLIC LAND LAW
DEVELOPMENT (1968).

44. Regarding data on the original grants, see Gates, supra note 43, at 805-06. Current
accreage data are based on the twenty-two states that contain the vast majority of the remaining
school and institutional trust lands. See WESTERN STATES LAND COMM’RS ASS’N, DIRECTORY (Annual).
multiple use standard that currently directs federal resource management. That standard generally exhorts federal land managers to achieve, on the public lands, "the combination of uses that best meets the needs of the American people." \(^4\)

The school land and related grants are emphatically not multiple use lands. They are held "in trust" by the states. With the exception of Arizona and New Mexico, wherein the trust was clearly established by Congress in the states' enabling act, the trusts are established in state constitutions. We will return repeatedly to this single, crucial observation. Contrary to the suggestion of the GAO Report, the core of the trust does not turn on "legislative and regulatory guidance." Although the state legislatures are clearly authorized to make rules regarding the administration of the trust, the basic commitment to trust principles is constitutional "guidance," which cannot be altered by legislative action.

A trust is a fiduciary relationship, which means that the trustee holds and manages property for the exclusive benefit of beneficiaries identified by the settlor, or person who set up the trust. \(^5\) The best way to think about state trust land is to keep in mind the kind of trust that a grandmother (settlor) might establish to assure that her grandchildren (beneficiaries) will have funds to go to college: A banker (trustee) is authorized to manage and dispense the funds to the student, who is not free to blow it on a Harley (breach of fiduciary relationship by the trustee). \(^6\)

The key characteristic of a trust mandate, and one which readily distinguishes state trust lands from federal lands, is clarity of the goal: Manage the trust resources for the benefit of the beneficiary. The trustee must exercise skill and diligence in making the trust productive for the specified beneficiary. \(^7\) Thus, the primary duty of the trustee is to act with undivided loyalty to the specified beneficiary. \(^8\) This is generally taken to

For those who would dismiss the state holdings as inconsequential, please recall the National Park Service is responsible for about 85 million acres, the U.S. Fish and Wildlife Service for about 100 million acres and the U.S. Forest Service for about 180 million acres.


\(^47\) It is frequently observed, in fact, that a trust is established precisely when the settlor of grantor does not trust the beneficiary to manage prudently.


\(^49\) Although the existence of a trust can be implied in the absence of a specific statement or document, the normal route to establishing a trust involves a trust "instrument." The instrument identifies the trustee and the beneficiary, and allows the settlor to specify terms and conditions for implementation of the trust.
mean that "any derived benefit from the school trust lands must be used in support of schools and may not be used to support or subsidize other public purposes. Any arrangement not ensuring full fair market value for the use and/or sale of the school trust lands violates the trust obligation . . . ." 50 The very purpose of the grants was to "enable states to produce a fund with which the states could support the public school system." 51

Some have argued that "without exception, the principal goal, the overriding purpose, of the trust administrative agencies is to secure the highest monetary return." 52 Reality, as usual, is a bit more complex. While it is true that the trustee is required to make the trust productive for the benefit of the specified beneficiary, that is not the trustee's only responsibility, thus the "highest" monetary return need not always be secured. In fact, the trustee can tolerate uncompensated use if it does not impose costs on the beneficiary. 53

Other trust duties are elaborated in ancient common law principles, state statutes and case law. These additional principles can be summarized under the headings of accountability, enforceability, perpetuity and prudence.

1. Accountability

Clarity of goals facilitates accountability. The trustee must hold trust property separate from other property owned or managed by the trustee, and must also deal with the beneficiary with fairness, openness and honesty. 54 In order to meet that standard, the trustee is specifically and comprehensively accountable to the beneficiary. The trustee must keep property records, accounts of receipts and disbursements, and must furnish this information to the beneficiary. 55 It is difficult to overestimate the importance of this approach to record keeping, in contrast, to that practiced by federal land management agencies.

51. Id. at 211. Undivided loyalty does not mean that an investment of activity is disallowed if it coincidentally benefits someone other than the beneficiary, but it does bar programs that impose costs or reduce benefits in order to achieve a collateral or general benefit. See, e.g., Oklahoma Educ. Assoc. v. Nigh, 642 P. 2d 230 (Okla. 1982); County of Skamania v. State, 685 P.2d 576 (Wash. 1984); Ervien v. United States, 251 U.S. 41 (1919).
53. Personal Communication from Richard Pederson, consultant to the state land board of Colorado, notes that managers of private trusts routinely make charitable donations when they have reason to believe that the status of the trust will be enhanced by the good community relations that putatively accrue to such donations. Meeting of the Western State Land Commissioners' Association, St. George, Utah (Winter 1992).
54. Id.; see also Fairfax, et al., Conventional Wisdom, supra note 46, at 853-55.
2. **Enforceability**

Trust doctrine allows the beneficiary[6] to sue to enforce the terms of the trust. Trust obligations are fully elaborated in common law, statutes and many centuries of judicial experience in enforcing the trust doctrine. While a manager, a judge, a local banker, or even a citizen might debate or be confused by the circumlocutions or technicalities of a contemporary discussion of ecosystem management, they are far less likely to be thrown off course by clear trust principles.

3. **Perpetuity**

Preserving the productive capacity of the corpus of, or resources belonging to, the trust is one of any trustee's fundamental obligations. Ordinarily, beneficial trusts are not necessarily perpetual: A trust might be liquidated, for example, at the instruction of the settlor, when a beneficiary reaches a certain age or when the purposes for which the trust was established are achieved. The school land trusts' peculiar emphasis on perpetuity derives from the existence of the permanent school fund which,

56. Or others with an identifiable interest. RESTATEMENT (SECOND) OF TRUSTS §§ 172. One of the major distinctions observable in trust land litigation is the issue of standing. Most states freely grant citizens the right to sue to protect the trust. The Arizona and New Mexico enabling act states that "Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act." New Mexico-Arizona Enabling act § 28, as amended, ch. 310, 36 Stat. 557 (June 20, 1910), cited in Lassen v. Arizona Highway Dept, 385 U.S. 458, 472 app. to opinion (1967), m'g State of Ariz. ex. rel Ariz. Highway Dept v. Lassen, 407 P.2d 747 (1965). Other states are spread out on a scale from less to more restrictive. See Fairfax, et al., Conventional Wisdom, supra note 46, at n. 194 and accompanying text. More recently, see Selkirk-Priest Basin Assoc. v. Idaho (1st Dist Idaho Bonner County) (No. CV-92-0037 (Oct. 9, 1992)), Plaintiff's Brief in Opp'n. to Mot. for Summ. J. at 26-47.

57. Whereas rules of administrative review favor the administrator, through presumptions of deference to agency expertise and similar, rules for review of the trustee do not favor the trustee. See Fairfax, et al., Conventional Wisdom, supra note 46, at 847-50 for a discussion of the difference between judicial review of administrator's discretion and judicial review of the trustee's exercise of discretion. The case of a government trustee is made complex by the fact that the agency frequently acts as both administrator and as trustee.

58. "If by the terms of the trust, the trust is to continue only until the expiration of a certain period or until the happening of a certain event, the trust will be terminated upon the expiration of the period of the happening of the event." RESTATEMENT (SECOND) OF TRUSTS § 334 (1999). The trust purposes can also be changed or the trust terminated if the purpose for which the trust was established is no longer reasonable. Change in trust purposes can be sought under the cy pres doctrine of charitable trusts. See Fairfax, et al., Conventional Wisdom, supra note 46, at 875-77 and references therein.
starting around 1850, became a ubiquitous feature of all new and revised state constitutions. Language regarding the funds is frequently draconian, noting that the "principle can never be diminished" or the legislature "shall make good all losses." What this means is that undivided loyalty and financial productivity are forever balanced against the need to protect the productivity of the trust, and in this case, to do so in perpetuity.

4. Prudence

The trustee is supposed to manifest "prudence" in managing trust resources to balance undivided loyalty and perpetuity. The trustee makes many choices about the nature, intensity, timing and location of development. The trustee is allowed to withhold resources from development while planning, to hold resources off the market awaiting higher prices, and to act to protect the trust's reputation in the community and the political climate necessary to profitable operations. An ordinary person serving at the request of friends of family as a trustee for a minor child will be held, by the courts, to a less onerous standard of care than a professional funds manager or forester who has made claims of expertise in areas relevant to the trust. Interpreting the trust principle of prudence is complicated by the land trusts' emphatic commitment to perpetuity.

These five themes of (1) clarity and undivided loyalty, (2) accountability, (3) enforceability, (4) perpetuity and (5) prudence, form the core of the trust mandate. They are constitutional rather than statutory requirements. Each state has defined the trust a little differently, and Washington has some particularly interesting peculiarities to which we now turn.

B. State Trust Lands in the State of Washington

1. The Trust in Washington

Washington joined the Union when Congress was granting two sections in each township for the support of common schools. The standard pattern was followed: First Congress reserved and then granted the "school sections." Congress reserved lands for the support of common school in the 1848 Organic Act creating the Oregon Territory and in the 1853 Organic Act creating the Washington Territory. The 1889 "Omnibus" Enabling Act by

59. Both Oregon and Washington territories are relevant. Section 20 provided: "when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common school in said Territory." For a discussion of dates of reservation that ultimately wound up in which state,
which Washington, Montana, North Dakota and South Dakota joined the
union, granted the reserved sections 16 and 36 to the new states. As it had
in all new states, the Enabling Act promised five percent of the proceeds of
the sales of Federal public lands within the states, but specified that the
money go to a "permanent fund" the interest on which would be used to
help support the common schools. In addition, Congress granted to the
new state of Washington fifty sections of land "for the purpose of erecting
public buildings at the capitol of said States for legislative, executive, and
judicial purposes," and reaffirmed previous acts granting lands for
"purposes of a university." It also granted 90,000 acres for "the use and
support of agricultural colleges," 100,000 acres for "the establishment and
maintenance" of a scientific school; 100,000 acres for state normal schools;
another 100,000 acre-grant for public buildings at the state capitol; and

see Soderstrom & Fairfax, Federal Reserved Water Rights for State Trust Lands? (on file with
authors).

60. 25 Stat. 681, § 10 (Feb. 22, 1889).

61. Except California, which is peculiar in this as in most other things. See Gates, supra note 43, at 301-04.

62. Supra, note 60, at § 13. Congress has amended the 1889 Enabling Act eight times at
the request of the four states to clarify, alter or expand upon its intentions with respect to lands
granted for educational purposes. The 1932 amendments allowed the sale of lands principally
valuable for grazing purposes for a $5 per acre as an exception to the general requirement that
such lands sell for at least $10 per acre. The amendments specifically authorized the exchange of
such lands for others "of equal value and as near as may be of equal area ...." They authorized
leasing of the lands for mineral development for up to 20 years and for hydroelectric power for up
to 50 years. They also authorized the states to use lease rentals and other income not derived
from permanent sales of the lands for direct maintenance and support of school and institutions
instead of going into the permanent fund. In 1938, the term for agricultural and grazing leases was
extended to ten years. In 1948, the state legislatures were broadly authorized to set the terms and
conditions for mineral leases. The 1952 amendments authorized each of the states to pool its
revenues earned from mineral leasing and apportion the funds among the school and
institutions based on the original granted acreage. An amendment in 1962 specifically authorized
the State of Washington to use funds from the sale of the lands granted for charitable,
educational, penal, and reformatory institutions for the construction of such institutions. In 1967,
Congress authorized the states to use rentals on leased lands, proceeds from the sale of timber
and other crops, and other forms of income for the acquisition and construction of facilities as
well as for their maintenance and support.

63. Supra note 60, § 12.

64. Supra note 60, § 14. See also Thomas R. Waggener, The Federal Land Grant
Endowments: A Problem in Forest Resource Management, unpublished Ph.D. dissertation, U. of
Wash. 72-77 (1966) hereinafter Waggenerl.

65. Supra note 60, § 16.
200,000 acres for state charitable, educational, penal and reformatory institutions.\textsuperscript{66}

In return for these grants, the State of Washington, again like all new joining states, waived all right and title to the remaining unappropriated public lands lying within the boundaries of the state; and the state of Washington agreed never to tax the federally owned lands within its jurisdiction. This was done in the traditional "compact irrevocable without the consent of the United States and the people" of the state, in Article XXVI of the Washington State Constitution. These quid pro quo underscore that the compact was a bargain.\textsuperscript{67}

Other provisions in the State Constitution\textsuperscript{68} provide "guidance" for the state in locating, disposing of and managing the grants. Article XVI of the State Constitution provides that:

\begin{quote}
|a|ll the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state.
\end{quote}

By the time Washington joined the Union, a familiar pattern for dealing with land grants had emerged. Nevertheless, there is idiosyncratic language in every accession.\textsuperscript{70} A most important Washington peculiarity is the phrase "for all the people." The relationship between the goal of the grants and the establishment of a trust "for all the people" continues to be debated. It may have been to resolve the question of whether the proceeds from the permanent school fund were to be distributed just to the benefit of the schools within the county in which the lands were sold, or were to be available statewide. Others have argued that it gives standing to sue to vindicate trust principles to all the citizens of the state.\textsuperscript{71} Still others have suggested that the "all the people" phrase permits management of the trust

\textsuperscript{66} Supra note 60 § 17. This section specifically empowers the state legislature to determine the manner in which these lands are to be "held, appropriated, and disposed of" consistent with the purposes for which they were granted.

\textsuperscript{67} See Fairfax, et al., Conventional Wisdom, supra note 46 § II.

\textsuperscript{68} For a brief review of the proceedings at the constitutional convention as they relate to school lands see Wilfred I. Airey, A History of the Constitution and Government of Washington Territory, unpublished Ph.D. dissertation, U. of Wash. (1945).

\textsuperscript{69} WASH. CONST. art XVI, § I.

\textsuperscript{70} See Fairfax, et al., Conventional Wisdom, supra note 46, at 818.

\textsuperscript{71} See JAMES R. JOHNSTON, THE LEGAL FRAMEWORK FOR THE MANAGEMENT OF WASHINGTON'S FORESTED TRUST LANDS: LIMITS AND IMPERATIVES. See also Bogle and Gates, supra note 14, at 5 n. 4; Fairfax, et al., Conventional Wisdom, supra note 46, at 850 n. 194.
resources for a broader range of beneficiaries than the schools and other institutions. This question will reemerge in the context of specific disputes in Section III, below.

The Washington Constitution also provides details on the management and disposition of the lands. Disposition of lands granted for educational purposes must be at public auction to the highest bidder. The value of the land is to be appraised by a board of appraisers, and the sale price must be at least equal to the appraised value. Each sale of land can include no more than 160 acres; lands within an incorporated city, within two miles of an incorporated city, and with an appraised value of more than $100 per acre must be platted into lots and blocks with not more than five acres in a block and not more than one block may be sold as a parcel in each sale. Article III of the Constitution, creating the executive department, establishes the position of Commissioner of Public Lands. The duties of the Commissioner are to be established by the legislature, and the Commissioner is to be elected to a four-year term of office.

2. The Trust Lands in Washington

The Washington DNR manages five million acres of public lands in Washington. Of those, over 2.2 million acres originated as statehood grants. That is, approximately 74 percent of the original grants remain in state ownership. Another important Washington peculiarity is the Forest Board

72. Discussed in Fairfax, et al., Conventional Wisdom, supra note 46, at 873-77.
73. See Wash. Const. art. XVI, § 2.
74. See id. art. XVI, § 4.
75. Id. art. III, § 23.
76. Administrative arrangements for the 22 western states managing trust lands is discussed in State Trust Lands, supra note 5, at ch. 2. The elected commissioner is not a Washington peculiarity, but it is unusual. Only Texas, Washington, South Dakota, New Mexico, and Arkansas elect their land commissioners.
77. Of this total, 2.1 million acres are aquatic lands and are not considered in this discussion. The DNR actually has a number of important functions beyond managing trust lands. The DNR manages tidelands, shorelands, harbor areas, and the beds of navigable water, referred to as the aquatic lands. The DNR implements the Forest Practices Act regulating timber harvesting and other forest practices on private and state lands. The DNR has responsibility for forest fire protection on both state and private lands. Finally, DNR manages certain state lands set aside as protected areas. See State Trust Lands, supra note 5, at 42-43 for a discussion of the difference between free standing and integrated trust land management.
78. State Trust Lands, supra note 5, at 48. For a discussion of the shift in policy disposing of the land to retaining it, see id. at 30-31, 90-99.
79. Which it shares with Oregon. See id. at 150-58.
lands. The DNR manages 622,000 acres of forest lands obtained by the state either by transfer or purchase, primarily from the counties. These lands are generally presumed, with some meaningful inaccuracy, to be held in trust.

There are actually two categories of Forest Board lands. Forest Board Purchase lands were acquired, beginning in the 1920s, by purchase, gift or transfer from the counties. The state purchased cut over lands "chiefly valuable for the purpose of developing and growing timber." The second category is called Forest Board Transfer lands. The state legislature authorized the State to take over lands held by the counties because of tax foreclosures that could be "used as state forest land." Both categories of Forest Board lands are held in trust by the DNR, but they should be distinguished from the federal granted lands because of the difference in their origins and the differences in the purposes for which they are managed.

Forest Board lands are held, by statute, to "promote generally the interests of reforestation." The Forest Board lands cannot be sold, although timber and other products may be sold and the lands may be leased. Although the proceeds from Forest Board land transactions are distributed to the counties in which the lands are located, the Board lands are not intended to produce income for beneficiaries and the state is not under any trust-like obligation to make them productive. Note also that the trustee’s obligations regarding the Board lands are defined in statute and thus can be changed by the legislature. The trust surrounding the granted lands is, as noted above, defined in the Washington Constitution.

3. Trust Administration in Washington

As was typical, the Enabling Act and the Constitution left enormous details about the management of the granted lands to the state legislature. Washington, like most other states, has gone through a number of different institutional arrangements reflecting a number of different management philosophies and priorities during the last century. The modern era began in Washington in 1957, when the state made a number of crucial decisions about trust land management and institutions.

81. See id. § 76.12.030.
82. Id. § 76.12.020.
83. See id. § 76.12.120.
84. Proceeds from these transactions are to be used for their management (up to 25 percent for transfer lands and 50 percent for land purchase lands) with the balance paid to the county in which they are located for distribution in the same manner as property taxes. See supra note 83.
The DNR was created to consolidate a number of functions related to management of state lands and resources. The new DNR, in its first Biennial Report announced a decision to "retain and manage state lands wherever economically feasible, instead of selling them."\(^8\) Also the DNR was finally granted authority to exchange granted lands.\(^9\) The remodeled DNR consists of a board of natural resources, an administrator, and a supervisor.\(^8\) The elected Commissioner of Public Lands called for in the Washington Constitution is the administrator of the DNR.\(^9\)

These changes and decisions concluded a long period of conflict and debate about forested lands in the state.\(^9\) They also coincided closely with the emergence of trust principles as controlling on granted lands in the western United States. As we have discussed elsewhere,\(^9\) prior to the 1950s, most states had approached the trust lands in ways strikingly similar to the federal management of federal public lands. By that we mean that the lessees dominated the policies, and for the most part, the beneficiaries were a secondary consideration.

A series of lawsuits, beginning in 1957 in Nebraska,\(^9\) and peaking in 1966 with the Supreme Court's decision in Lassen v. Arizona,\(^9\) clearly reiterated the trust notion as controlling on granted lands. Thereafter, a series of institutional and cultural changes began in most western states that gradually altered the expectations and priorities surrounding management of the granted lands. For example, the Washington legislature directed the Board of Natural Resources to establish policies to achieve "maximum effective development and use" of trust lands and resources.\(^9\) In another statutory provision, the legislature stated that the maximization of economic return is "the prime objective" of trust land management.\(^9\)

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86. WASH. DEPT. OF NATURAL RESOURCES FIRST BIENNIAL REPORT 34 (1956-58).
87. The Enabling Act had been amended by Congress in 1932, authorizing exchanges of granted lands, but the Washington legislature had not acted on this change until 1957. This authority has been the backbone of the State's effort to reposition its holding away from environmentally sensitive lands and consolidate its holdings on highly productive timber sites.
88. See WASH. REV. CODE § 43.30.030.
89. WASH. CONST. art III, §§ 1, 23.
90. See Jones, supra note 85, passim.
91. STATE TRUST LANDS, supra note 5, at 33-36.
94. See WASH. REV. CODE § 43.30.150.
95. See WASH. REV. CODE § 79.01.095 (calling for periodic economic analysis of state trust lands "where the nature of the trust makes maximization of the economic return to the beneficiaries of income from state lands the prime objective").
In keeping with the subsequent environmental era, however, the Washington legislature has also directed that a "multiple use concept" be utilized in the management of all state-owned 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 trust provisions of the various lands involved." The Washington Supreme Court has, in several important cases, including *Skamania v. Washington*, underscored that the trust commitments are "real." Nevertheless, when combined with the "for all the people" language of the Washington Constitution, the trustee's obligation to maintain the long-term productive capacity of the trust, balancing these obligations requires, as noted above, that the trustee evince considerable "prudence."

Questions about the mandate came to a head in the early 1980s in a dispute over whether the legislature could divert trust resources to provide for the timber industry. Before turning to the issue of funding sources for management that so enthralled the GAO, let us look at the resulting dominant case in Washington trust law. The *Skamania* case will introduce the crucial concept of prudence in the context of the trustee's diverse obligations and clarify the importance of the constitutional status of the mandate. The dispute also illustrates the standard method of enforcing the trust principles, highlighted the importance of financial returns in trust management, and made unmistakable comparisons between federal and state management of public resources.

As we shall see in the next section when we discuss the emergence of forest planning in Washington, the 1970s were a defining period in management of forested trust lands. In the *Skamania* case, the most important facts had to do with a sharp rise and then a plunge in timber prices.

The close of the decade was accompanied by a rapid increase in timber prices. Timber purchasers bid up sales from both federal and state lands, basing their bids on the presumption that timber prices would continue to increase. Shortly thereafter, the inevitable occurred. During 1981 and 1982 the market price for lumber dropped sharply. Timber purchasers were faced with "working contracts" for which they had paid $300 to $800 per thousand board feet (MBF) while the market value of the timber had fallen to about $175 per MBF. The purchasers appealed both to the state legislature and to Congress, requesting that they be released from their contracts without penalty. At the federal level, there is no interest group that has an identifiable identifier.

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96. See WASH. REV. CODE § 79.68.010, discussed in Fairfax, et al., Conventional Wisdom, supra note 46, at 904-07.


98. See infra, Section IV.3, where we will juxtapose the older *Skamania* case, emphasizing maximum returns, with the more recent *Okanogan* case involving management of the Loomis Forest in part for lynx habitat.

99. See supra note 97.

100. See id.

stake in protecting timber receipts to the Federal treasury, and no established expectation that the federal sales program will make a profit. Thus, Congress complied, and the federal purchasers were allowed to default on their contractual obligations at a small fraction of the normal penalty.\textsuperscript{102}

The story unfolded quite differently regarding Washington's trust lands. First, the trustee, the DNR, which manages the trust lands, objected strenuously to passage of the relief bill. Their opposition was unsuccessful, but the interests of the trust were defended heartily by the trustee. The timber purchasers argued it was in the long-term interests of the trust to protect its market—effectively saying that if all the purchasers went bankrupt, there would be no one to purchase their timber. The legislature enacted the Forest Products Recovery Act in 1982,\textsuperscript{103} which authorized defaults and provided means for extending the contracts under modified terms.

Thus far, the federal and state stories are quite similar. Washington took a sharply different path, however, when one of the trust beneficiaries, Skamania County, filed suit, arguing that the act violated the state's duty of undivided loyalty to the trust beneficiaries. The Washington Supreme Court agreed, ruling that the state as trustee has a duty of undivided loyalty and a duty to act prudently, which duties were violated by placing the interests of the timber industry with respect to its contracts over those of the trust beneficiaries.\textsuperscript{104} DNR negotiations with the 82 defaulting companies concluded in 1989 with settlements returning nearly 75 percent of the original contract value.\textsuperscript{105}

For present purposes there are three key elements of the Skamania decision. The first is the bald comparison between the outcome on federal land, where there is no group or interest which attaches particular importance to the financial returns on a sale, as opposed to the state, where there are beneficiaries who care, sometimes enormously, about returns. The second major element is the trust's constitutional status, manifest in the court's discussion of the legislature's authority relative to trust lands. As we have noted, the Washington Constitution left the legislature enormous discretion to make rules and set standards regarding the management of the trust. Nevertheless, the court distinguished the general authority of the legislature to act in the state interest from its more limited authority to act with respect to trust lands.

Where the statute deals with state trust lands, however, the permissible goals of the legislation are more limited. The federal land grant trusts were created specifically to benefit certain named beneficiaries . . . . Every court that has considered the issue has


\textsuperscript{103} WASH. REV. CODE §§ 79.01.1331-.1339.

\textsuperscript{104} See supra note 97.

\textsuperscript{105} WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES ANNUAL REPORT 9 (1989).
concluded that these are real, enforceable trusts that impose upon
the state the same fiduciary duties applicable to private trustees.106

The court made it clear that the state cannot use trust assets to pursue
other state goals. This duty requires the state to obtain full value for trust
assets that are transferred, and it prohibits the state from actions respecting
the trust assets that provide benefits to others (here the timber purchasers)
at the expense of the trust beneficiaries,107 no matter how laudable may be
the reasons for providing other benefits.

The third key element of the decision is the duty to manage trust assets
prudently.108 In this narrow discussion of prudence, the court held that it means
diligently pursuing contract claims. According to the court, releasing contract
claims unilaterally, without clear benefit for the trust beneficiaries, is not
prudent.109 The court noted that the timber industry argument was based on a
single report with limited data from a single economist. Relying on such skimpy
information to make a decision that would cost the trust approximately $90
million was not prudent.110 We will return in Section IV to a more detailed
discussion of prudence as it is discussed in the Loomis case.

4. Funds and Funding from the Trust Lands.

The GAO paid relatively little attention to either the notion of
prudence, or the enforceability of the mandate in the courts. It focused
instead on the economist's theory that the best way to direct administrative
behavior is to tie management activities to program income. A brief
overview will put the GAO's conclusions into perspective.

a. Where the Money Comes From

In Fiscal Year 1996, total income generated from the state trust lands
was $311 million, about 55 percent coming from the Federal granted lands.

106. Skamania, supra note 97, at 579-80 (citations omitted).
107. See Skamania supra note 97, at 580 (finding that the statute creating the Forest
Board transfer lands “imposes upon the state similar fiduciary duties in theirl management
and administration”).
108. See id. at 582-83.
109. Quite apart from the trust obligation, the Washington Constitution requires that
the state also receive fair market value for all state property sold. See supra Skamania note 97,
at 582-83.
110. See Skamania, supra note 97, at 588; STATE TRUST LANDS, supra note 5, at 160, and
accompanying notes. We noted there and we reiterate that we hope some day that
someone will take the time to approximate what the “timber buy out bill” cost the federal
government.
and 45 percent from the Forest Board lands. Expenditures for management of these lands totaled $60.6 million. The vast majority of receipts are from timber sales, 82 percent the case of the grant lands and 99 percent for the Forest Board lands.

b. Where the Money Goes

An important, yet often overlooked, aspect of management is the process for disbursement to the beneficiaries. The standard pattern is that rents and receipts from sale of renewable natural resources are distributed directly to the beneficiary. Royalties on non-renewable resources and receipts from land sales are typically deposited in a permanent fund, the interest from which is disbursed to the beneficiaries. Washington's approach is complicated both by the presence of the Forest Board lands, and by the creation, in 1967, of the School Construction Fund.

Since 1967, Washington has not deposited timber or most lease revenues in the permanent school fund. Instead, the receipts are distributed directly for the construction and renovation of school facilities. This shift was made because the interest from the permanent school fund was considerably less than the annual revenues earned from the sale of timber. Note that because this change in state policy was in fact a change in the Enabling Act, the shift required the approval of Congress.

It is also important to note that there are many more beneficiaries of trust land management than the GAO deals with. Recall also that the trustee is obligated to keep separate accounts for each trust. So, whereas common school beneficiaries are not affected by shifts in the regional allocation of management effort or policies in a particular area—they are averaged out over the state—each beneficiary only draws from the funds which its own lands produce. Therefore, their cash flow may in fact be affected in the same way that the Forest Board counties are by a shifting geographic focus of harvest or harvest calculations. Moreover, different beneficiaries may have

111. Person Communication from Bill Koss, Wash. Dept of Natural Resources (June 1, 1995).
113. See id. at 17, 28.
114. Elsewhere we have spoken at considerable length about the relationship between earnings in the permanent fund and management decisions for renewable and non-renewable resources. See STATE TRUST LANDS, supra note 5, at chs. 3, 6-7.
115. For the relationship between Constitution and the Enabling Act provisions, see STATE TRUST LANDS, supra note 5, at 26-33.
different preferences regarding the flow of returns. Some have need for a steady, predictable income over time. Others might prefer that the state "play the market" and get higher returns when the market allows, recognizing that there will be periods of reduced income as well. This preference depends in large part on how the beneficiary derives the remainder—typically the vast majority—of their funds. If the state legislature views the trust income as a drop in the funding buck and provides the remaining needed funds irrespective of what the trust earns in a year, then the beneficiary is, again, indifferent to fluctuations in trust income. If shifts in the trust income are not offset by legislative appropriations, however, the beneficiary cares very much about the periodicity of the returns.

Regarding the Forest Board lands, there never has been a permanent fund involved. After the state deducts a percentage for management costs, including reforestation, the remainder is disbursed to the county in which the land is located for distribution in the same manner as used in the distribution of real property taxes.

The fact that the receipts return to the counties for timber harvested within that county means that counties pay considerable attention to the timing of harvests in their jurisdiction and the geographic basis for which harvests are planned. School land distributions are not, in contrast, tied to the area of origin, which means that school officials are indifferent to where harvests are located. Hence, it makes sense that the counties should be pressing for intensified management, but only on the lands in their county. What happens in other jurisdictions affects beneficiaries of the federal grants but not recipients of Forest Board land disbursements.

c. Funding for Management

The GAO's main point regarding trust funds concerns the relationship between receipts and expenditures as a way of encouraging the agency to control costs and emphasize returns. We share their conclusion. We also note, however, that the facts are not as simple as the GAO Report suggests.

116. Up to 25 percent for Forest Board transfer lands and up to 50 percent for Forest Board purchase lands are placed in the Forest Development Account (FDA). Similar the RCMA, the FDA monies are appropriated by the Legislature. WASH. DEPT OF NATURAL RESOURCES, ANNUAL REPORT 27-79 (1996).

117. See id. In 1968 the Washington Attorney General issued an Opinion pointing out that the counties, when they originally acquired the lands through tax sale, held title in trust for state, county and other taxing districts entitled to tax revenues from the land. 1968 Ops. Wash. Att'y Gen. 10.

118. See infra notes 175-186, and text accompanying, for a discussion of this in the sustained yield context.
For Forest Board lands, the funding situation is fairly straightforward: The state created a Forest Development Fund for Forest Board lands in 1923.

For the granted lands, the situation is slightly more complex. In 1961, the state legislature established the Resource Management Cost Account (RMCA) as a dedicated fund for the management of the granted lands. The RMCA dedicated a percentage of the gross receipts from the granted lands (originally a maximum of 20 percent and increased to 25 percent in 1972) to be used for "defraying the costs and expenses necessarily incurred in managing and administering all of the trust lands." The availability of this fund gives DNR somewhat greater independence in establishing long-range management programs for the lands since the legislature is not being asked to authorize a DNR budget out of general state revenues. The legislature, however, still must appropriate funds from these accounts biennially.

By Board policy, when the RMCA fund balance holds more than twelve months of anticipated operating expenses, the Board may disburse the excess. This has occurred every year since 1977, resulting in more than $165 million of "excess" or unused management funds being passed to the trust beneficiaries in the past seventeen years.

5. Summary

The GAO Report tells a simple story about why the states are more efficient at managing timber. It focuses on alleged differences in legislative guidance, funding mechanisms, timber type and planning requirements. We have tried to point out that the trust mandate is more variegated in its contributions to differences than the GAO observed, and have done so by emphasizing the constitutional status of the trust and the notion of prudence, as well as the role of the beneficiary in defending the trust. We have also tried to intensify somewhat their discussion of sources of funding. We now have sufficient background to pursue these issues in a detailed examination of timber management on Washington State trust lands.

119. See Wash. Rev. Code § 79.64.010.
120. Id.
121. See Wash. Admin. Code § 332.100.040. Since 1978 the balance has been distributed in one of two ways. From 1978 to 1988 DNR would suspend accepting funds into the RMCA until the balance reached the desired level. This occurred from 1978 through 1983 and early in 1988. From late 1988 to present, whenever the RMCA accumulated surplus funds, the Board would disburse the funds to the appropriate fund or beneficiary.
122. Interview with and comments by Bill Koss, Wash. Dep't of Natural Resources (May-June 1995). The Forest Board lands receive no portion of the RMCA distribution as their management fees enter the Forest Development Account. The FDA has not had a surplus income situation similar to the federally granted lands.
IV. The Timber Management Program in Washington

The burden of the present section is twofold. First, we want to disagree rather sharply with the GAO's conclusions about the state and federal planning processes. The GAO has suggested, wrongly in our assessment, that whereas the federal land planning is distorted and slowed by NEPA, ESA and other multiple use considerations, state land use planning is not similarly affected. It is easier to obtain consensus on state lands, the GAO concludes, because they are only planning for the production of timber.\textsuperscript{123} We will trace the evolution of forest planning in Washington into a current dispute involving the Loomis forest to demonstrate that these lands are not noticeably less controversial, nor is the process less complex. We conclude that we will have to look elsewhere for an explanation of why the state program runs so much better.

The other task of this section is to look closely at two key disputes surrounding Washington DNR's management program. At a gross level, the disputes should challenge the GAO's assertion that DNR timber programs are not controversial, or challenged politically or in the courts. We shall look first at timber salvage issues on the Loomis State Forest. Ironically, the GAO singled out the State's management of the Loomis situation as exemplary, especially when compared to the federal agencies' conflicted salvage operations.\textsuperscript{124} Subsequent events have put the GAO's glib sustained yield and timber sales arrangements discussion to rest.\textsuperscript{125} The case also provides a much fuller look at the issues of prudence and perpetuity that are necessary for understanding trust management generally, and particularly where it actually differs from federal management. Second, we will look at a technical but intense dispute about arrearages that engulfed the Land Commissioner in the early to mid-1990s. This will enable us to explore areas where the federal and state management programs are similar—in their embrace of sustained yield definitions and marketing mechanisms that are, we argue, per se violations of the trust. This section will enable us to ask, in effect, "Well, if the states are not more efficient for the reasons the GAO cited, where should we look for meaningful differences?"

A. Evolution of the Forest Management Planning Process

If the GAO is correct in asserting that state lands are inherently less controversial than federal lands, then we are home free. We understand why the trust mandate appears to work more quickly and efficiently than the

\textsuperscript{123} See GAO Report, supra note 8, at 8-9.

\textsuperscript{124} Id. at 8.

federal programs. If, however, the same conflicts exist and the state handles them better, we need to pursue the question of why that is so. An introduction to the forest management planning process in Washington should accomplish two things. First, it should challenge the GAO's assertion that the State's planning process is simple and abbreviated because it is not afflicted by the controversial elements that badger the federal agencies, for example, NEPA requirements, ESA controversies, old growth conflicts, alternative generation and multiple products, each of which leads to litigation and appeals on federal lands. The GAO implies that these problems do not afflict the state. The evolution of the planning process will demonstrate, to the contrary, that precisely the same issues arise on state lands that shape federal management. This should come as no surprise. It is the GAO's suggestion that is counter-intuitive. The same interests that challenge the federal programs are just as active and alert in challenging the state program.

Second, the discussion should give a further flavor to the importance of two trust notions: prudence and clarity of mandate. Our discussion of the planning process will first underscore the basic point that the same controversies exist. Second, we will focus on clarity and prudence, two notions that inhere in the trust and which, in the context of the constitutional status of the mandate discussed above, we believe contribute to the observed differences between federal and state planning and management. It is not that the issues and conflicts do not occur, but that the state is authorized and required to handle them better.

Forest management planning became a "process" and a major preoccupation for state managers at about the same time and in response to approximately the same issues as occurred on federal lands. This new era of state trust land planning had its genesis in a dispute over harvesting timber without an adequate environmental impact statement. The Washington Legislature enacted a State Environmental Policy Act (SEPA) in 1971. The DNR believed that state trust land timber sales were exempt from SEPA. In fact, the DNR had been granted an exemption from the assessment requirements of the state's "little NEPA." The issue was addressed and resolved in litigation surrounding the "Classic U" timber sale from state lands on Whidbey Island. The sale of timber included clear cutting a 255 acre tract in July 1977, and proceeded without environmental review under SEPA. The DNR's exemption to SEPA was challenged by environmental organizations and overturned in Noel v. Cole.


127. WASH. REV. CODE ANN. §§ 43.21C.010 et seq. (West 1998); WASH. ADMIN. CODE §§ 197-11-400 et seq.

128. See id.

129. Supra note 126.
All timber sales were thus halted by the dispute until the DNR completed an environmental analysis. The agency responded, in 1979, with the first of a series of forest planning processes, the Forest Land Management Program (FLMP), which yielded the first Forest Land Management Plan, accompanied by a programmatic environmental impact statement as required by SEPA. In October 1979, environmentalists again filed suit, claiming the environmental analysis was inadequate. This set of events set the DNR on the course of planning, planning documents, reports, and replanning and revised documents summarized in Table 2.

Table 2

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>1979</td>
<td>Forest Land Management Program (FMP)</td>
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<tr>
<td>1983</td>
<td>Final Forest Land Management Program, 1984-1993 (FLMP)</td>
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<tr>
<td>1986</td>
<td>Timber, Fish and Wildlife Agreement</td>
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<tr>
<td>1987</td>
<td>State Forest Board Lands: Report to the Counties</td>
</tr>
<tr>
<td>1988</td>
<td>Strategic Plan for Forest Resource Management</td>
</tr>
<tr>
<td>1989</td>
<td>Commission on Old Growth Alternatives for Washington’s Forested Trust Lands</td>
</tr>
<tr>
<td>1996</td>
<td>Habitat Conservation Plan (FLMP)</td>
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</tbody>
</table>

This familiar scenario figured prominently in the next election of a state land commissioner. The new Commissioner, Brian Boyle, was elected in 1980. He promptly resolved the issues in the original “Classic U” suit, agreeing to reduce the timber harvest by half, and settled the challenge to the adequacy of the environmental analysis by undertaking a new round of planning.

The new and improved 1983 FLMP defined forest management guidance for a ten-year planning period. The document set broad policy, concluding, “in managing the Federal land grant trust the Department is to be primarily concerned with generating income for trust beneficiaries but must manage by following prudent practices and by taking precautions to preserve the trust assets for future beneficiaries.” Three broad management goals for state forest lands were described: (1) conserve and enhance the natural resources of state forest land; (2) provide financial support that balances the level and flow of revenue to the trusts; and (3) provide social and economic benefits. In 1986, Commissioner Boyle precipitated the Timber, Fish and Wildlife (TFW) process

132. See id. at xii.
133. Id.
that resulted in an agreement to revise forest practice regulations for greater environmental protection.

The GAO also asserted that one of the reasons that state lands were less controversial to manage is because the state does not encounter controversies regarding old growth. This is in part correct. The State of Washington does not, in fact, manage an enormous amount of old growth. Of the nearly two million forested acres managed by the DNR, less than 5 percent, or about 65,000 acres, are old growth defined as more than 160 years old.135 These older stands are located primarily throughout the western Olympic Peninsula and are intermixed with the Olympic National Forest. But to say that they are not controversial is absurd. What is important to note, however, is the way in which the state responded to the disputes that inevitably arose.

In 1988, Commissioner Boyle established the Commission on Old Growth Alternatives for Washington’s Forest Trust Lands. Old growth concerns had been raised as part of the Timber, Fish and Wildlife discussion but, rather than becoming a part of the 1986 agreement, Commissioner Boyle agreed to address old growth issues separately.136 In 1989, this thirty-three-member commission produced a consensus report recommending the creation of an experimental forest on Olympic Peninsula trust lands with the goal of producing acceptable timber harvests while retaining the ecological values of old growth forests, deferring harvest for fifteen years on 15,000 acres of old growth forest to allow research into ways to extract timber while preserving wildlife habitat, and purchasing up to 3,000 acres of trust lands with unique natural features warranting permanent protection.137 Although a management plan was developed by a citizens committee in 1990, DNR never officially adopted the plan. DNR then began its own planning process, which is not yet complete.138 One of the six goals of the program is to maintain harvest levels. This goal has not been met as a result of the subsequent listing of the spotted owl and marbled murrelet as endangered species under the ESA.139


136. This decision was made because most of the old growth was on state trust lands whereas the wildlife issues arose on intermixed state and private lands. Telephone Interview with Art Stearns, Assistant Manager for the Community and Landowner Assistance Section, Resource Protection Division, Washington State DNR (May 24, 1995).


139. Interview with Jill Mackie, Pacific Lumber & Shipping Co.; Chair, Dept. of Natural Resources Timber Purchasers Committee; and member, Olympic Experimental State Forest Advisory Committee (April 1995); Telephone Interview with Art Stearns (May 24, 1995).
Several other major policy documents emerged in the late 1980s. In January 1988, the DNR produced a “Strategic Plan for Forest Resource Management,” described as a business plan for trust forest resources. The described “central” goal of the strategic plan is to “conserve and enhance the natural resources of state forest lands while attaining the highest long-term net income from these lands.” These documents led to the adoption of the second major ten-year plan for Washington’s forests.

In 1992, the Board adopted the Forest Resource Plan (“Plan”) governing management of state forest land for the ten-year period 1992-2002. The major changes in the 1992 plan were a “landscape” planning approach, and an improved wildlife habitat policy. Also, there was a change in process followed during the development of the FLMP that not only included broader participation within the DNR, but also earlier public involvement.

The Plan’s stated primary goal is to “conserve and enhance the natural resources of state forest land while producing long-term, stable income from these lands.” Among the “major” policy changes identified in the plan is placing “more emphasis on protecting ecosystem diversity and providing habitat for endangered and threatened wildlife and plants” and making “additional efforts to analyze the effect of its activities of aquatic systems, including watersheds, riparian areas and wetlands, and it will modify its activities when necessary to protect these resources.”

The Plan outlines several general management policies governing its trust assets. In deciding whether to sell, exchange, or acquire granted lands, the “Department will balance current economic returns and trust benefits with future economic returns and trust benefits.” Exchanges of Forest Board lands will be based on whether timber harvesting is impractical and whether the lands can be replaced with productive forest lands. Lands unavailable for harvest are to be designated as “off-base” and are not to be used in
calculating the sustainable harvest. State forest lands are to produce a sustainable, even-flow harvest of timber, "subject to economic, environmental and regulatory considerations." Because of regulatory uncertainties about the amount of timber that can be harvested, the Department did not calculate a sustainable harvest level for the period 1992-2002.

The tone and direction of planning, its origins in a series of disputes and law suits, and the repetitive and cycling nature of the process are all familiar. It is noteworthy that the state can get it done more or less on time. But the state planning process is not the wildly different process that the GAO suggests exists on state lands. It was born in the same disputes that have shaped federal planning and it responds to the same problems: old growth preservation, wildlife habitat, watershed quality and environmental protection. This becomes even clearer when the issue of endangered species, which the GAO suggests does not exist on state lands, is added to the mix.

B. Forest Management Planning and the Endangered Species Act

Even before the spotted owl was listed as a threatened species in 1990, the DNR had been involved in efforts to improve state lands management to address environmental concerns. As discussed above, Commissioner Boyle addressed both wildlife and old growth concerns in special public involvement oriented planning programs in the mid-1980s. In 1990, the U.S. Fish and Wildlife Service (FWS) listed the Northern Spotted Owl as an endangered species.

Under section 9 of the ESA, listing of a species commences a prohibition on the "taking" of the species. Taking has been interpreted by the FWS regulations and by the Supreme Court to include harm to the species' habitat resulting in death or injury. All lands, regardless of ownership, are subject to the provisions of the Act. The FWS developed guidelines for establishing protected owl sites on certain lands. Since first developed, some of these guidelines have been withdrawn by the FWS, or modified as a result of miscalculation of owl "circles." In addition to the federal requirements, the listing triggered regulation under SEPA, the State Environmental Policy Act. The SEPA requirements affect both state and private lands within the state. A SEPA analysis is required on lands comprising the most suitable 500 acres for nesting, breeding, and foraging habitat surrounding a documented owl activity center. The DNR

147. See id.
148. Id. at 17.
151. See Okanogan, supra note 138, Belcher briefing document at 32, Owl briefing documents; see also WASH. ADMIN. CODE § 223-08-260; Crown Pac., Ltd. v. DNR, FPAB No. 94-
responded to the listing in several ways, as summarized in Table 3, infra. First, the DNR established interim guidelines. DNR's Forest Practices Division established procedures for the protection of the owl based on regulating activities within a 2.2-mile radius of an identified nest site or activity center on the Olympic Peninsula or a 1.8-mile radius in the rest of the state (the Cascades). FWS guidelines required that at least 40 percent of the suitable habitat for owls within these circles must be protected.\textsuperscript{152}

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1990</td>
<td>Northern spotted owl listed as threatened species by the U.S. Fish &amp; Wildlife Service (FWS).</td>
</tr>
<tr>
<td>1990</td>
<td>FWS announces initial &quot;take&quot; and survey guidelines.</td>
</tr>
<tr>
<td>1991</td>
<td>DNR develops initial 1-year surveys for northern spotted owls.</td>
</tr>
<tr>
<td>1991</td>
<td>DNR established &quot;take&quot; risk criteria.</td>
</tr>
<tr>
<td>1991</td>
<td>DNR staff first considers Habitat Conservation Plan (HCP) idea.</td>
</tr>
<tr>
<td>1992</td>
<td>FWS revises survey guidelines, requiring 2-year surveys; DNR goes to 2-year survey.</td>
</tr>
<tr>
<td>1992</td>
<td>DNR revises definition of potential owl habitat, adding additional acreage to risk analysis.</td>
</tr>
<tr>
<td>1992</td>
<td>DNR again investigates idea of HCP as additional species listings become likely.</td>
</tr>
<tr>
<td>1993</td>
<td>Commissioner initiates development of HCP.</td>
</tr>
<tr>
<td>1996</td>
<td>HCP finalized and approved by Board of Land Commissioners.</td>
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</tbody>
</table>

The Board approved a staff-developed risk assessment approach that first categorized three types of habitat: Type A (old growth), Type B (mature forest), and Type C (younger stands with some old growth/mature components). It then created five risk categories: 1 (within an owl circle), 2 (Type A or B habitat less than five miles from any known center but not in a circle), 3 (Type A or B habitat greater than five miles from any known center or Type C less than five miles from any known center), 4 (Type C habitat greater than five miles from any known center), and 5 (non-habitat). Risk category 1 sales proceed only if an owl survey has been completed and an evaluation shows more than 40 percent potential habitat remains within the circle. Risk category 2 and 3 sales proceed only if no owls are found during a survey. Risk category 4 and 5 sales can proceed without survey.

Since 1991, the DNR has postponed, halted or repurchased timber sales because of the projected risk of taking.\textsuperscript{153} Within one year, about $20 million of sold timber under contract had been repurchased by the DNR because of spotted owl problems and the inability of purchasers to log.\textsuperscript{154} Since the listing of the owl, the DNR has worked with the FWS to ensure that

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\textsuperscript{152} See John R. Edwards, Impact of Spotted Owls and the Department’s Timber Sale Program, Briefing for the Board of Natural Resources (Oct. 1, 1991).

\textsuperscript{153} See Okanogan, supra note 138, Belcher briefing document at 32-33. The U.S. Fish and Wildlife Service has modified its rules defining prohibited “taking” since the species was initially listed.

\textsuperscript{154} See Board of Natural Resources, Minutes (Sept. 3, 1991).
developed standards and procedures are consistent with federal guidelines for avoiding a "take" of the species. Standards for identifying protected "circles," or setting radii surrounding known owl sites, were developed. Guidelines for surveying owl habitat and for suspending operations were also developed by the DNR.

Spotted owl survey protocols were changed as "take" guidelines were reviewed and revised by the FWS. In March 1992 the FWS issued revised survey guidelines. One of the changes required the DNR to shift from one-year surveys to two-year surveys, and made inadequate the existing one-year surveys on most of the sales scheduled from March through September. This decision to shift to a two-year survey for future and pending sales was made to avoid possible exposure to liability as a result of the changed survey protocols. The shift caused a significant drop in timber sales that year. In addition, the definition of potential owl habitat was also modified, resulting in the need to conduct surveys in areas previously not within the definition.

Finally, in 1993, the marbled murrelet was listed, prompting additional surveys to avoid takings of this species. The combined consequence was that many sales that had been prepared for sale were delayed while DNR risk analysis procedures were completed. From 1991 to 1994, sales figures continued to reflect the impact of these procedures initiated in 1992. DNR's response is an example of a decision for the long-term interest of the trust over the short-term revenue production although, because timber prices rose during this same period, revenue was not dramatically affected. The harvest and sales levels in 1995 appear to be on the rise over the previous four years.

Most recently, the DNR initiated a Habitat Conservation Plan (HCP) process under section 10 of the ESA as another response to the owl listing. The DNR began reviewing this option in 1991. Staff reports were developed and the DNR decided against the approach at that time. As the impact of the listing on state timber lands became more apparent, the potential risk of "taking" was increased and the DNR began spending more funds on surveys and other risk assessment analyses. In 1992, the DNR staff again looked at the HCP process when it was revealed that additional species would likely be listed. In 1993, the Commissioner created a new section within DNR to develop an HCP for 1.6 million acres of state trust lands affected by the listing of the spotted owl.

This new DNR initiative was reported to the Board at its inception, and the Board has been kept apprised of the planning process. The scope of the planning process includes all state forest lands within the range of owl habitat. Department of Natural Resources staff have developed strategies for the plan and have, since August 1993, regularly reported to the Board on the

155. Conversations with DNR staff members (May-June 1995).
156. Interview with Jack Hulsey, Chief, Forest Resources Division, WDNR (Mar. 22, 1995).
progress of the plan. In the spring of 1995, the DNR presented a range of conservation recommendations or alternatives to the Board.157

Perhaps enough has been said to suggest that the GAO's assertions are erroneous, and that the Washington timber management planning must in fact respond to the same endangered species, old growth, and related environmental issues as the federal planners. What is unique about the state's planning process has, in fact, also already been suggested. It has less to do with the particulars of the process, the opportunities for appeals, or the requirements for this or that procedure than the GAO infers. At bottom, the difference is that the trust managers know what they are planning to achieve. Goals are not likely to be debated on state trust lands in the same way that they are on federal lands. The Skamania case discussed supra has illustrated the importance of the trust mandate in the face of an effort to divert trust resources to the timber industry. More recent disputes allow us to explore differences and similarities in timber management to locate meaningful differences in the timber programs.

C. Two Disputes—The Okanogan and "Arrearages"

I. The Okanogan case158

The emerging shape the trust mandates with respect to timber management is particularly fruitful for highlighting the key notion of prudence that was only partially visible in the Skamania case. The structure of the Okanogan case is significantly different from that in the previously discussed Skamania litigation.159 In the current dispute, plaintiffs are challenging not acts of the legislature but decisions of the trustee. Hence, issues of constitutionality, presumptions that acts of a legislature are constitutional, the role of the legislature, and the clarity of the trust mandate, although important at some level, are not the focus of the case. The dispute deals squarely with the central notion of prudence. That leads very quickly, as we shall see, to issues of perpetuity.

In July 1995, Okanogan County and fourteen school districts sued the DNR regarding planning and management on the Loomis State Forest, located in North Central Washington and entirely made up of lands with the Common Schools as beneficiaries. Basically they charge that the trustee has violated its duty of undivided loyalty to the beneficiary, putting

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157. Interview with John Calhoon, Habitat Conservation Planning Director, Wash. Dept of Natural Resources (Mar. 20, 1995); Interview with Bill Koss (May 30, 1995).

158. This case is discussed from the perspective of the trustee's requirement to be prudent in Souder & Fairfax, Arbitrary Administrators, supra note 125 at 200 et seq.

159. See supra notes 99-110 and accompanying text.
environmental interests ahead of the beneficiaries in managing the forest.\textsuperscript{160} The DNR has done this in the midst of a pine beetle epidemic that petitioners charge is destroying the standing timber on the Loomis, and creating an emergency that could lead to a catastrophic fire. This they do, again according to petitioners, to over-comply with environmental restrictions, most particularly the protection of endangered species such as the lynx. The lynx is not in fact a listed species. However, environmental groups are concerned that roading for timber sales will impact lynx habitat.

The Loomis State Forest is unique in the Washington DNR’s portfolio of trust timber lands. First, it is the largest state forest, which at 134,000 acres comprises about 5 percent of all lands managed by the DNR. Second, its timber resources—principally lodgepole pine—have traditionally had so little value that timber harvests had not been conducted. This situation changed with the rise in timber prices in the early 1990s, which caused the DNR to first start scheduling timber harvests there. Both environmental groups and the Washington Department of Fish and Wildlife objected to these sales. Then newly-elected Commissioner Boyle withdrew these sales pending the recommendations of a citizen’s review group for the goals and objectives for the management of the Loomis State Forest.\textsuperscript{161} The citizen’s group recommendations provided the framework for the draft Loomis State Forest Landscape Plan and its accompanying EIS, released in March 1994. About a week after the court reached its first opinion in the Okanogan case in June 1996, the DNR published the final plan.\textsuperscript{162}

The plaintiffs described the DNR’s planning process as a tactic that simply demonstrates “that the DNR has chosen to favor the interests of its environmental constituents over its legally mandated trust responsibilities.”\textsuperscript{163} It therefore asked the court to:

require the DNR to undertake a commercially reasonable and prudent program of harvest and salvage that will . . . (1) preserve the trust asset from further damage due to mountain pine beetle, (2)

\textsuperscript{160} See Okanogan, supra note 138, Memorandum in Support of Petitioners’ Request for Mandatory and Injunctive Relief at 9.

\textsuperscript{161} See Okanogan, supra note 138, Declaration of Roy Henderson, Northeast Region Assistant Manager, Washington State Department of Natural Resources at 4.

\textsuperscript{162} See WASH. DEP’T OF NATURAL RESOURCES, Natural Resources Board Adopts Long-Term Plan for Managing Loomis State Forest (Press Release June 4, 1996).

\textsuperscript{163} Okanogan, supra note 138, Memorandum in Support of Petitioners’ Request for Mandatory and Injunctive Relief at 23-24. Petitioners asked for a mandatory injunction, a writ of mandamus and a permanent injunction. The discussion focused not on the legal requirements defining those forms of relief in Washington, which were obviously much debated, but on the gist of the complaint focusing on prudence.
recover as much value as possible for the trust beneficiaries, and (3) reduce the risk of catastrophic fire in the Loomis Forest.\textsuperscript{164}

Specifically, the petitioners requested a writ of mandamus ordering the Department to comply with a state law that directs them to "determine if the sale of the damaged timber is in the best interests of the trust for which the land is held."\textsuperscript{165} The statute requires such determination be made within seven months of the Department having identified the damage, and plaintiffs charged that such determination was being arbitrarily and capriciously withheld.\textsuperscript{166} Finally, plaintiffs request that the DNR be required to implement a plan for the forest that had been devised by their expert witness.\textsuperscript{167} Plaintiffs argue, in sum, that the Loomis is in crisis and that the state has no options: certain clearly identifiable measures, all of which turn on intensified harvesting, constitute the only available path to prevent catastrophe and meet the trustee's obligation of undivided loyalty to the beneficiaries.

This is a very difficult argument to sustain. The plaintiff's case turns, at bottom, on the assertion that managing the Loomis is a "no-brainer." The natural processes on the forest proceed in uncomplicated and predictable stages, and the only thing that the trustee can do, for the beneficiary and the long-term productivity of the forest, is to harvest, harvest, and intensify the harvest.

The DNR responded to that textureless assertion with a discourse on prudence.\textsuperscript{168} That, rather than the legal or empirical merits of the charges and counter charges, is the focus of this analysis. Needless to say, the DNR did not argue that they were not obligated to act with undivided loyalty to the school trusts. The state's brief and accompanying declarations focus on prudence as the necessary response to complexity: complexity in the forest ecosystem and in achieving forest health; complexity in present and future economic opportunities, and the trustee's obligation to set priorities in a cost-constrained management environment; complexity in the constantly shifting social and legal environment that could further constrain management options; and complexity doubled and redoubled in balancing the needs and demands of today's beneficiaries against the obligation to evince loyalty as well to future generations of beneficiaries.

Prudence is most obviously manifest in the judgment of experienced experts dealing with a complex biophysical system. Whereas the plaintiffs described the Loomis ecosystem as a simple cycle of inevitable stages, the DNR argued that neither the problems nor the solutions were clearly defined.

\textsuperscript{164} Okanogan, supra note 138, Decision at 9 (citing WASH. REV. CODE § 79.01.795).
\textsuperscript{165} Id.
\textsuperscript{166} See Okanogan, supra note 138, Decision at 8-9.
\textsuperscript{167} See Okanogan, supra note 138, Memorandum in Support of Request for Mandatory and Injunctive Relief at 2-3. They also asked, of course, for attorney's fees.
\textsuperscript{168} See infra notes 170, 171, 173, 174, 176-182, and text accompanying.
Responding to an intervenor's assertion that "the timber trust lands are nothing more than tree farms," the state emphasized the diverse fish, water, wildlife, vegetation and historic and cultural resources that make up a healthy forest. And they challenged the plaintiff's specific assertions regarding pest outbreaks and fire hazards. One expert with thirty years experience in dealing with pests and fires in the region analyzed the Loomis, the "risk of ignition, current fuel conditions, and . . . data available" and concluded that "in its current condition, the Loomis is not likely to experience a catastrophic fire."

The state presented similar data concerning the control of pine beetle infestations, eroding the plaintiff's unalloyed assertions that there was "only one way out" of the dilemma. Finally, the state challenged the assumptions of the petitioners' management plan, such as their assumption that annual per acre growth is reasonably predicted to be 200 board feet per acre. "The derivation of this amount is not explained," declared Walt Obermeyer, manager of the Forest Inventory section. "A conservative way to measure the productivity of the forest . . . produces a growth [prediction] of only 84 board feet per acre per year."

Because the plaintiffs were alleging that the trustee had abandoned the beneficiary in favor of environmental priorities, one element of the DNR's discussion of biological factors was to establish a prudential justification for considering all the resources of the forests, not just the timber. Petitioner, intervenor timber counties, stated the issue squarely:

So long as the laws are obeyed and no nuisance is created, it is no concern of the Trustee whether . . . their management preserves biodiversity or achieves other environmental goals. For example, if long-term maximization of timber revenues consistent with the general laws result in the total destruction of lynx habitat in the Loomis Forest, then the lynx must go. They are not trust beneficiaries.

169. Okanogan, supra note 138, Trial Brief of the Timber Counties at 10.
170. Okanogan, supra note 138, Declaration of George Flanigan, Assistant Manager for the Community and Landowner Assistance Section, Resource Protection Division, Washington State DNR at 4-7. The declarant opined, moreover, that "improved access which accompanies timber harvest due to road construction will exacerbate the risk." He concluded, however, that the same improved access would also "assist suppression efforts and result in an overall reduction of catastrophic fire risk in the Loomis."
171. Okanogan, supra note 138, Declaration of Walt Obermeyer at 2 (emphasis in original).
172. Okanogan, supra note 138, Trial Brief of the Timber Counties at 10 (embracing language in Skamania that suggests that the Forest Board lands are identical to the school and other granted lands). Nevertheless, they are clearly not identical, because, as noted above, the DNR is under no obligation to make the lands productive for the benefit of the counties, only to share with the counties a percentage of whatever receipts are produced. See id. at 5.
The state could not and, of course, did not argue that it had an obligation to the lynx or to achieve any other biodiversity goal. The state did, however, tie overall health of the forest ecosystem to long-term trust productivity. Citing the Forest Resource Plan, they noted:

(|I|t is important not to foreclose reasonably foreseeable future options for support. One way DNR does this is by attempting to retain the capacity of the forest to sustain its components and biological relationships. The trustee's duty to make the trust property productive is, in the case of land assets, related to biological productivity. Because forest productivity has long been, and is still, the subject of professional debate, it is prudent to protect the full range of resources on state trust lands . . . . DNR has concluded that it is sometimes necessary to forego maximum potential current income in order to ensure the ability to produce income over the long term, DNR strives to generate substantial revenue for the trusts by prudently managing the trust assets in a manner that will preserve their ability to support the trusts in perpetuity."

Thus, the state argued, it is not necessary for the lynx to be a beneficiary. Protecting the lynx, water quality, and fish habitat are each essential elements of maintaining forest health for two reasons. First, the trustee would be imprudent to foreclose the possibility that water, fish and wildlife would some day become marketable and valuable trust resources."

173. Okanogan, supra note 138, State Respondent's Brief in Opposition to Request for Mandamus Writ at 23 (citing FOREST RESOURCE PLAN (FRP), Appendix A at 10-12, 16-19); see also Okanogan, supra note 138, Declaration of Art Steams at 12. This conclusion is supported by a recent Attorney General's Opinion (AGO) on the precise subject. 1996 Ops. Wash. Att'y Gen. 11. "Though providing economic support to the beneficiaries remains the primary purpose of the Department's responsibilities with regard to the federal grant lands, this purpose does not exclude all other considerations so long as such considerations are consistent with protecting the economic value and productivity of the federal grant land trusts." Id. at 49. The AGO also cites with approval the recent findings of the Utah Supreme Court: "To the extent that preservation of non-economic values does not constitute a diversion of trust assets or resources, such an activity may be prudently undertaken. To the extent that the protection of non-economic values is necessary for maximizing the economic value of the property, such protection may be prudently undertaken. When such preservation or protection results in a diversion of assets or loss of economic opportunity, a breach of duty is indicated." Id. at 48 (citing National Parks and Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 916 (Utah 1993)).

174. "For example, conifer boughs sales, pole sales, mushroom harvesting leases, and small diameter timber sales serve as examples of current revenue sources which did not appear feasible in the past. DNR previously recognized the value of native genetic material and set aside 2,147 acres of gene pool reserves to ensure that native genetic material, well
Second, forest health is essential to sustainable growth of trees, which comprise the trust's corpus. Long-term productivity is not, as we have discussed elsewhere, necessarily an element of trust management. A trust established to help a grandchild pay for college may, for example, terminate after the beneficiary graduates. The school lands trusts are peculiarly tied not simply to long-term considerations but to perpetual productivity. This arises because of the school grant's close relationship to the permanent school fund—both the lands and the funds are a part of the trust. Hence, the productive capacity of the trust must be perpetuated. This means that the trustee is not allowed to prefer present beneficiaries over future beneficiaries, heightening the emphasis on the trustee's obligations both to prevent wasting of the resource and to not run it into the ground. This shifts the focus on current income considerably. It also justifies extremely conservative management: there are no effective guides to social, economic or biological conditions of the future, nor do we have anything like a clear understanding of what the long-term consequences of intense harvesting or alteration of forest systems might be. Therefore, the trustee's efforts to protect and maintain a functioning forest ecosystem system in the face of the long-term commitments of the trust is arguably prudent. 176

A second element of the state's arguments concerning prudence centers on economic factors. The trustee must evaluate the total portfolio of each adapted to local conditions will be available to the trusts in the future. DNR attempts to maintain the production capacity of trust assets: Okanogan, supra note 138, State Respondent's Brief in Opposition at 29 (citing FRP, supra note 173, Appendix A at 18-19).


176. The plaintiff's argument is at best a hard one to make: the assertion that there is "only one way" or a "sole solution" requires unanimity among experts from a variety of disciplines which is not even present in the testimony of DNR witnesses. On matters biological, it is extremely difficult to support an assertion that the natural world works in easily predicted ways and that we are sufficiently knowledgeable to respond with equally obvious programs that will unquestionably have the desired result. See Fairfax & Huntsinger, The New Western History: An Essay From the Woods (and Rangelands), 54 ARIZ. Q. 191 (1997); Rogers, Adaptation of Environmental Law to the Ecologists' Discovery of Disequilibria, 69 CHI.-KENT L. REV. 887 (1994); Fairfax, Dynamic Equilibrium and Judicial Review of Agency Decisions, in PROCEEDINGS OF THE SIXTH BIENNIAL WATERSHED MANAGEMENT CONFERENCE 147 (Oct. 23-25, 1996). "The biology of forest ecosystems is not a perfect science," asserted declarant Stearns. "There are potential risks to the trusts in being more aggressive in the harvesting of timber to maximize value. There are potential risks to the trusts in being more protective of wildlife habitat and other public resources. The anticipated Loomis Plan is intended to strike a balance of risks at this point in time while creating and maintaining a flexibility as more reliable biological information is available in the future." Okanogan, supra note 138, Stearns Declaration at 9-10.
trust and determine where and when to make investments that will meet the trustee's obligation to make money. Art Sterns, a manager in the DNR for 26 years, noted that constraints and opportunities confronting the trust are diverse: some are "quantifiable and time-certain, but many of them are based on judgments considering historical events and possible future economic, policy, and social scenarios." As the Loomis State Forest "contains much of the least productive trust forest land in the state in terms of timber growth potential and return on investments," Stearns pointed out, "the Loomis Forest historically has not been a high priority for investment of limited trust management funds." Thus, Stearns argued, "opportunity costs must be considered. Funds invested for low-return or net-cost salvage operations in the Loomis are funds that cannot be invested elsewhere for perhaps greater returns. Given the economic and biologic uncertainties discussed earlier, there is no 'right' answer for the best level of salvage in the Loomis."

None of this is particularly surprising. Economic factors obviously require the trustee to balance risk and opportunity—to exercise prudence. The state also made other arguments where the background principles are easily recognized but the outcomes are more controversial. Their discussions of the planning for the Loomis clearly evince a commitment to what might be called "political prudence." The trustee is obligated, the state claimed, to proceed in a way that will allow them to continue to operate. The state presented three kinds of data to make this argument. First, they argued that political conditions could, and in fact did, threaten the productivity of the trust.

Since the late 1980s, forest management in the Loomis State Forest has been intensely scrutinized. Planned sales were protested by other state agencies and interested parties. The threat of litigation was constant. In general, operations in the forest were grinding down and frustrating everyone involved. This was greatly hampering the DNR's ability to manage the forest for the benefit of the trust with any predictability or degree of success.

Second, they argued that conservative management, careful planning, and trust building among interested parties, any one of whom could toss a "monkey wrench" into the works in the form of a protest or a lawsuit, was in the best interests of the trust. The state argued that the reason their interim sales program, that is, sales offered prior to the completion of the landscape plan, was successful was due, "in no small part to the trust levels patiently
built and nurtured over the past couple of years. I think many of our critics are being convinced that we are doing things methodically and professionally.  

Third, they argued that their trust building was working—that the Loomis sales, although challenged and delayed by intense planning and public involvement, was moving forward at slightly more than the level proposed in plaintiffs’ plan.  

The state’s assertions of “political prudence” are confused by a question of whether the state can make laws that reduce income to the trust and, if so, is the trust bound by them. Plaintiffs appear confused by the Skamania decision in this regard. The “real lesson of Skamania” timber counties assert, is that the State as a sovereign may not enact laws that conflict with its fiduciary duties as trustee of the timber trust lands. To the extent of the conflict, any such law is invalid. That includes not only the law struck down in Skamania but also laws governing management of public lands if and to the extent those laws would cause the Trustee to manage the timber trust lands for any purpose other than the sole and exclusive benefit of schools and counties.

This is simply incorrect. There is absolutely no basis for quibbling: the trustee is required to do business in compliance with laws of general applicability as is any other entity doing business in the state. Washington counties have been particularly aggressive in asserting that both federal and state laws that restrict the profitability of the trust are inapplicable to the trust. And they lose every time. Noel v. Cole discussed supra, is particularly relevant. Plaintiffs’ complaint about the extent and duration of the state’s planning for the Loomis, and its request that the court simply impose a preferred plan on the Department is based, as the court noted, on the assumption that the DNR does not have to comply with the planning and public involvement requirements of SEPA.
The basic rule is that the trust must, as any other business entity, comply with all state laws of general applicability. Federal rules that both discriminate against the trust and undercut the trust’s ability to serve the beneficiary are also allowed when there is an overriding federal interest—as in the case of the timber export ban.\textsuperscript{187} State rules that specifically direct the trust to utilize trust resources to benefit interests other than the trust are not allowed. That was the issue in \textit{Skamania}, and the Washington Supreme Court was emphatic.\textsuperscript{188}

But the DNR is making, in addition, a slightly different point. How far can the trustee go in complying with external requirements? Must they merely meet the minimum standard? Can they over comply, doing more than is required to protect watersheds, endangered species, or cultural resources? Can they hold off or pull sales, as Commissioner Boyle did, in an effort to forestall criticism and more draconian regulation? At a minimum, the DNR’s actions are vulnerable to challenge if they do not comply with their own Departmental procedures and regulations. The resource plan adopted in 1992 said that the DNR would do landscape plans that would comply with SEPA, and weigh all the resources at risk, including water quality and state listed species.\textsuperscript{189} You would be vulnerable to challenge, Deputy Stearns suggested, if you have not addressed those issues because “you haven’t done a landscape plan as the policy of the Board of Natural Resources says you must do.”\textsuperscript{190}

The DNR went further and argued that it was prudent in some cases to exceed minimum standards, even though it imposed short-term costs on trust. This was justified with two arguments: protecting resources and investments, and maintaining future sources of income:

Riparian protection in excess of minimum standards provides additional protection for trust resources such as soil and capital improvements such as culverts and roads. Consistent with the duty of a trust manager, DNR believes it is prudent to manage state forest lands and forest resources so future sources of income are not foregone by actions taken today.\textsuperscript{191}

\textsuperscript{187} See \textit{Okanogan}, \textit{supra} note 138, State Respondent’s Brief at 7.

\textsuperscript{188} \textit{County of Skamania}, \textit{supra} note 97; see also \textit{STATE TRUST LANDS}, \textit{supra} note 5, at 160-62.\textsuperscript{189}

\textsuperscript{189} \textit{1992 Policy Plan}, \textit{supra} note 135.

\textsuperscript{190} \textit{Okanogan}, \textit{supra} note 138, State Respondents Brief in Opposition to Request for Mandamus Writ at 7 (citing Stearns Declaration at 131).

\textsuperscript{191} \textit{Okanogan}, \textit{supra} note 138, State Resp’s Brief in Opposition to Request for Mandamus Writ at 28.
Finally, DNR asserted that it will undertake some actions that do not produce profit for the trust simply to maintain working relations in the community. "Strong emphasis was put on involvement of other state agencies and interested parties in order to develop a level of trust that would allow timber sale operations to successfully advance to more appropriate levels." 192

One might ask, given all the flexibility that the notion of prudence potentially introduces into trust management, given the DNR's emphasis on public involvement, and SEPA's NEPA-like demands for plans, papers, and a reviewable record, what becomes of the mandate to achieve maximum returns for the beneficiary? How, given all this prudence, does the trust mandate finally differ from the multiple use mandate of which the GAO complained? The answer is simple. There is no getting around the need for flexibility and judgment, whether it is called discretion or prudence, in managing complex ecosystems. Multiple use and trust land managers alike must consider complex political and biophysical systems. It is important to note that only the trust land manager is obligated to consider opportunity costs, and that the DNR, and not the federal government, operates in a cost-constrained investment environment.

The major point, however, is that there are clear benchmarks for evaluating the trustee's prudence. The clarity of the goal does not indemnify the trust manager from public debate. At bottom, expectations are clear and all contenders understand that the major goal is to produce returns for the beneficiaries.

2. The Arrearages Dispute: Settling and Achieving Harvest Lands

The same issues that led to the evolution of the DNR's planning process have been pivotal in the emergence of another difficult issue, a hot conflict over arrearages. The term arises from sharp reductions in the cut on state lands that occurred during the early 1990s. Historically, Washington timber mills have received on average about 1.2 billion board feet (BBF) per year from the federal government and 700 MBF from the state. With problems in federal sales resulting from the National Forest Management Act and the ESA court suits, federal timber sales have practically disappeared from the market (about one year's worth of volume over six years in the early 1990s). This caused the industry to focus more on state sales (plus the fact that stumpage prices for domestic and export have equalized; see below). When the state sold only 370 million board feet (MMBF) in 1994, the timber industry was shocked. 193

193. Telephone interview with Jill Mackay (April 1995). Ms. Mackay's analysis is that the beneficiaries were not aware of the downfall in sales because stumpage prices had doubled.
The core of this dispute is to be found in sustained yield. Sustained yield’s historic origins derived from concern that forests were being harvested faster than they were growing which would ultimately result in a “timber famine.” At its simplest, sustained yield harvests annually an amount equal to the stand’s annual physical growth (called its “increment”). For example, if tree or stand maturity is determined (by specific criterion or criteria) to be eighty years, then each year one-eightieth of the stand (forest) would be harvested. This system is most easily envisaged with even-aged management regimes, where specific areas can be harvested (i.e., for an 800 acre unit with a rotation age of 80 years, 10 acres could be harvested each year under this strategy). For uneven-aged (selective) forest management strategies, the determination of harvest ages and amounts is more difficult. Here, typically individual trees (or small groups) are harvested when they are mature (economically, physically, grade, or some combination), but the difficulty is to maintain adequate growing stock of young trees within the stands so that an equal volume of trees are available in the future.

Sustained yield systems in the United States were first established on federal forest lands. The emphasis was twofold: protecting the biological and physical integrity (by not harvesting at too rapid a rate) and by providing flows of resources with the idea to stabilize traditionally “boom and bust,” “cut and run” industries and their associated communities. Economists have never liked the concept of even harvest levels, and have roundly criticized the Forest Service for its policies. Economists want the market to signal the demand for timber supplies. If timber sales are made on an even basis, then the seller is restricted from placing stumpage on the market when prices are high, and conversely continues to sell stumpage when prices are low.

While “sustained yield units” had been established previously for portions of the state forest lands, in the process of establishing the DNR, the policy became official. In 1971, the legislature adopted the sustained yield approach and defined it as “management of the forest to provide harvesting on a continuing basis without major prolonged curtailment or cessation of harvest.”

DNR practices in reaching sustainable harvest levels and annual cuts have shifted during the past twenty-five years. Sustainable harvest is described in the FLMP as a “compromise between an economic schedule and a biological schedule.” The policy was restated in the 1992 plan: “the [D]epartment will manage state forest lands to produce a sustainable, even-flow harvest of timber, subject to economic, environmental and regulatory constraints.”

194. WASH. REV. CODE § 79.68.030.
195. FLMP supra note 141, at 42.
196. 1992 POLICY PLAN, supra note 135, at Policy No. 4.
The overall planning period for sustainable harvests is 200 years, broken down into targets for each decade. Ten-year harvest levels prior to 1970 were referred to as the "allowable cut." This term was replaced with "sustainable harvest" to more accurately portray the way in which timber is sold. Although not required by the statute, the DNR has for several years followed a policy of approximate even-flow timber sales from year to year. Prior to 1983, Board policy was to allow fluctuations of up to 50 percent from year to year. Now there is a 25 percent ceiling on annual harvest level fluctuations. Purchasers of the timber sales in general cut the timber in years subsequent to the actual sale.197

The DNR calculates the amount of harvestable timber for three principal time periods. Sustainable yield calculations cover a planning period of twenty decades, with the decade as the basic planning period. This is a longer term assessment of the "carrying capacity" based upon the level the lands can biologically sustain. Within this overall assessment, fluctuations in timber sales from decade to decade are acceptable absent a prolonged cessation or curtailment.198 Calculations of sustainable yields factor in the necessary resource management activities to support the harvest level, including planting, pre-commercial thinning, and fertilization.199

The long-term sustained yield affects the decadal levels and the annual sales. Harvest levels are established for each planning decade. These are defined as the volume of timber scheduled for sale from state-owned lands as calculated by the DNR and approved by the Board.200 Within these decadal plans, annual timber sale levels are determined, considering market changes. As discussed above, changes in annual sales levels are now limited to 25 percent of the average annual sale.201 The annual timber sale level is set about a year in advance. The Board reviews the DNR's calculations and approves the annual sale level.

197. See FLMP, supra note 141, at 42; DNR Study Group, A Report on Management of Forest Trust Lands in the State of Washington, Part A: General Report Section I (Dec. 1977). The DNR's policy on sustained yield control groups has also shifted over the years. In 1967, sustainable harvest calculations were based on one group, or all state lands combined. Taking all state forest lands as a whole, the oldest timber was cut first. This practice was questioned when, in 1967, sales were concentrated on grant lands where the oldest stands existed. On other trust lands, particularly in the western part of the state, sales were significantly lower. This caused a dramatic shift in revenues to the various trust accounts associated with western Washington state trust lands, and prompted a change in the DNR's practice.

198. See WASH. REV. CODE § 79.68.030.

199. See FLMP, supra note 141, at 42.

200. See WASH. REV. CODE § 79.68.035.

201. The annual fluctuations were changed from "up to 50 percent" to "up to 25 percent." See FLMP, supra note 141.
Other factors may affect the average annual sales level. For example, the average annual sales level for the period 1991-2001 was estimated by the DNR to be 840 MMBF. This figure was subsequently adjusted downward to reflect northern spotted owl and other harvest restrictions. An annual sales level for this decade was never formally calculated by DNR nor adopted by the Board due to an uncertain and unstable regulatory environment, including the listing of the spotted owl, the Olympic Experimental Forest harvest calculations, and anticipated changes to the Forest Practices Act.

With that brief discussion of sustained yield calculations behind us, it is possible to understand the core of the timber industry’s “shock” and the arrearages dispute. The pattern in DNR sales since 1980 is shown in Figure 1. Sales levels dropped below sustained yield in the early 1980s as a result of economic factors, and in the early 1990s as a result of environmental factors. The amount of variation in both cases since 1992 exceed the policy limits established in 1983 of plus or minus 25 percent discussed previously. And while the DNR has offered timber for sale above sustained yield levels (1986 to 1990) in an effort to make up past deficits, the percentage sold above sustained yield levels has never matched the percentage deficits cause by either economic or environmental factors.

202. See 1992 POLICY PLAN, supra note 135, at 18. See also WASH. REV. CODE § 43.30.390 (if decisions by entities other than the DNR cause a decrease in the sustainable harvest identified in the 1983 FLMP, the DNR should offer additional timber sales from other state-managed lands).
203. Telephone Interview with Art Stearns (May 22, 1995).
204. The 25 percent policy was adopted in 1983, figures were within this policy until 1992.
Based on the 1992 Forest Resource Policy Plan, the DNR projected sales of 550 MMBF in 1992, 650 MMBF in 1993, and 675 MMBF annually during the period 1994 to 1996. Had the 1992 plan been followed, the DNR's sales level would have ranged from 30 percent below ('92) to 14 percent below ('94-'96) their previously determined sustained yield level. Because of uncertainties in potential harvest activities and ongoing inventories, however, the 1992 Plan specifically stated that the DNR could not determine sustainable harvest levels at that time, but expected that they would be calculated in early 1993.

What happens when the annual cuts do not, at the end of a planning decade, meet the ten-year model? A 1987 statute requires the DNR to develop a plan to deal with existing and projected future arrearages. The DNR has not developed a plan since this law was adopted, although it did prepare a 1986 report on how to deal with arrearages.

To understand the stumpage sales and arrearage issue requires recognizing that purchasers are essentially speculating in the timber product futures market. While the state calculates its sales at a sustained yield level 777 MMBF, purchasers are buying stumpage based on expectations of future demand, alternative supply sources, and timber product prices.

What is the DNR's practice for a typical timber sale? Initially, the DNR, very much like the Forest Service, will conduct a general examination of the potential for a sale in an area and examine access, environmental and other conditions associated with the particular area. A decision is made on whether to proceed in light of these conditions. This is the preliminary risk assessment. The area is then cruised, and run through the requirements of the Forest Practices Act and SEPA. SEPA serves as a vehicle for public review and input. The DNR then, with assistance from the attorney general's office, develops a proposed contract. An internal policy check is conducted by DNR staff and taken to the Commissioner. If it passes the internal check, the proposed sale and appraisal, and possibly additional documentation, it is taken to the Board for approval. State agencies such as Fish and Wildlife may also get involved in making presentations to the Board if other resource issues are raised by the proposed sale. Once the Board approves the timber sale, it is taken to public auction.

How are timber prices established for each sale? Appraisals are conducted by the DNR for each sale. Prior to 1990, the residual appraisal value (value at mill less costs) was followed, a method roughly equivalent to that used by the Forest Service. After evaluation by the DNR in 1990, transaction evidence became the principal appraisal method. The DNR now

205. Assuming the sustained yield level is 785 MMBF per year. See FLMP, supra note 141: 1992 POLICY PLAN, supra note 135.
206. See WASH. REV. CODE § 79.68.045.
207. See FLMP, supra note 141, at 44.
looks at full market value which includes transaction evidence, prior sales, grade, volume, and other factors, and uses a sealed bid auction process. A 1989 study by Guss & Associates recommended a lump-sum sales approach (in contrast to a "scale" sales approach) to achieve closer to market value. This approach was implemented by the DNR following Board approval.

The way sales contracts are written, a purchaser generally has three years before being required to harvest a particular sale. As a result, purchasers, especially in today's supply-constricted market, will attempt to buy contracts and maintain a backlog of purchased sales so that they will be guaranteed the availability of stumpage to meet market demands. Figure 2, infra, shows the relationships for the past 35 years.

When the timber product market price goes below the price paid for a specific sale, the purchaser will delay harvesting that particular sale until either market conditions improve or the contract expires and harvest is required. That does not mean, however, that the company is no longer actively seeking stumpage to buy. The company is still seeking contracts, but searches for stumpage that can be purchased, and economically harvested and processed, at prevailing market rates (or if it has its own lands it may harvest them). At any given time, a purchaser will have a portfolio of sales with each sale having a different stumpage price, different logging costs, and a different species and grade mix. Presumably, the company makes harvest decisions optimally accounting for these considerations.

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209. Board of Natural Resources, Minutes at 26 (August 4, 1981). The expectation of increasing prices for lumber in the late 1970s and early 1980s led one representative of a timber association to state, that it is "significant to keep in mind that the purchaser of the timber sales currently bids higher than he can actually afford to pay for the timber; expecting a higher return when the timber is actually cut and sold." Statement of Carl Newport, Mason, Bruce & Girard, Inc., representing the Western Forest Industries Association to the Board of Natural Resources at their August 1981 meeting.
Because the stumpage market works this way, purchasers would like the DNR to annually supply stumpage on a relatively consistent basis (called even-flow in the federal context). This provides the timber company with a mix of higher- and lower-priced stumpage for their cutting portfolio, as well as relatively consistent expectations of available supplies. Current Washington law\(^ {210} \) requires the Board establish a sustained yield level (by policy calculated on a decadal basis from the "on base" suitable timberlands); and, if within any given decade this amount of timber is not sold,\(^ {211} \) then the DNR is required to conduct an analysis to determine how to sell this timber in a way that "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."\(^ {212} \)

For the reasons given above, however, just because the DNR sells a relatively constant amount of timber annually does not mean that purchasers harvest the same amount each year (see Figure 2). So two factors are present: first, the "arrearage" in stumpage offered for sale by the DNR; and second, the "arrearage" in harvesting by purchasers with existing contracts that have not yet been cut. One way to look at this relationship is

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210. See WASH. REV. CODE § 79.68.040.

211. This is the "arrearage" defined in the WASH. REV. CODE § 79.68.035(1).

212. WASH. REV. CODE § 79.68.045. See also WASH. DEPT OF NATURAL RESOURCES, REPORT TO LEGISLATURE: TIMBER SALE ARREARAGE (1986) as an example of an equivalent analysis.
to analyze past DNR sales and harvesting, starting with the run-up in stumpage prices in the late 1970s through 1983. Events during this period resulted in "arrearage" problems that culminated in the 1987 legislation requiring reconciliation of sustained yield calculations and stumpage sales.\textsuperscript{213}

The arrearages controversy arises from the fact that two interpretations of the timber sale arrearage issue are possible: industry's and statutory construction. Industry contends that the DNR has roughly a 2 billion board foot arrearage. However, based on the state statute, a different interpretation can be offered.\textsuperscript{214} The statute defines the relevant terms as:

"Deficit" means the summation of the difference between the department's annual planned sales program volume and the actual timber volume sold.

"Default" means the volume of timber remaining when a contractor fails to meet the terms of the sales contract on the completion date of the contract or any extension thereof and timber returned to the state under WASH. REV. CODE 79.01.1335.

"Arrearage" means the summation of the annual sustainable harvest timber volume since July 1, 1979, less the sum of state timber sales contract default volume and the state timber sales volume deficit since July 1, 1979 (emphasis added).\textsuperscript{215}

The difference in interpretation depends upon whether the default sales volume is added to the deficit. Thus, depending upon one's interpretation, the calculation of arrearage becomes either:

A. Arrearage = \( \bullet (\text{Sustained Yield} - \text{Annual Sales} + \text{Default}) \) for all years since FY '80.

B. Arrearage = \( \bullet (\text{Sustained Yield} - \text{Annual Sales} - \text{Default}) \) for all years since FY '80.

Figure 3 (A and B) shows the results of these two differences, with the industry perspective (A) in the top portion of the figure and an interpretation of the statutory construction (B) in the bottom portion.

\textsuperscript{213} See WASH. REV. CODE § 79.68.045, enacted in Laws 1987, ch. 159, § 4.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
The legislature dealt with the arrearage issues subsequent to Skamania when it passed Chapter 159 Section 2, Laws 1987. This statute defines the terms above and, if an arrearage exists at the end of a planned decade, requires the DNR to conduct an analysis of alternatives to provide the greatest return to the trusts while minimizing the impact on the environment.\footnote{216}{See \textit{Wash. Rev. Code} § 79.68.045.}

While language in the legislative findings appears to allow the DNR to sell the 1.1 billion board feet of timber defaulted above the sustained yield level between 1984 and 1993, and the DNR prepared a report on how they planned to do so, the DNR is not expressly required to sell this timber,
especially if environmental impacts cannot be mitigated.\textsuperscript{217} The DNR, however, is required to prepare an analysis if arrearage exists in any given planning decade. Without the default sales volume, and without a sustained yield harvest level set for 1993 and subsequent years, the aggregate decadal deficit (1984-1992) is calculated to be only 1 MMBF. Adding the deficit for 1993, assuming a 785 MMBF sustained yield level (which is not assumed by the 1992 Forest Plan) gives a decadal arrearage of 251 MMBF, roughly one-tenth of what the timber industry contends exists.

Two different reasons caused arrearage. First, timber purchasers defaulted on their contracts over the period from 1981 to 1986 in the aggregate amount of 1.235 billion board feet. These defaults occurred at the same time that DNR sales levels dropped 670 million board feet ('81-'85) due to lack of purchasers, which combined resulted in a cumulative sales deficit of 1.938 billion board feet under sustained yield levels. Even while defaulting on existing high-price contracts, however, purchasers (in aggregate) were buying replacement stumpage. This can be seen by the pattern of defaults in relation to DNR sales arrearage. The DNR's sale arrearage existed basically for only three years, from 1981 to 1983. In 1984, in fact, the DNR sold slightly above the sustained yield level, dipping slightly below the next year. In contrast, defaults on existing sold stumpage began slowly in 1981 and 1982, reached their peak in 1983 (583 MMBF), remained high for 1984, and did not disappear until 1987, two years after the Skamania suit put an end to contract buyouts.

Until 1990, the DNR attempted to reconcile the previous arrearage by selling above the sustained yield level. From 1985 to 1990 the DNR sold at or above the sustained yield level, a cumulative makeup of 428 MMBF. This met about half of the stumpage previously unsold due to lack of sales in 1981 to 1983, but did nothing to settle the defaulted sales' deficit. In contrast, the sale arrearage situation in the 1990s resulted primarily from deferring stumpage sales to reconcile environmental protection. In the early period, 1991 to 1993, the level of sale was approximately 500 to 600 MMBF instead of 770 MMBF. This temporarily changed in 1994 when only about 350 MMBF was sold.

3. Timber Supply from State Trust Lands

The supply of timber from state trust lands will be considered in light of the following topics: long-term sustained yield (LTSY), desires of purchasers for an even-flow of logs from trust lands, and past recommendations to the DNR and Board regarding timber sale levels. These topics will be considered in the general context of when, and how, to sell stumpage.\textsuperscript{218}

\textsuperscript{217} See id.

\textsuperscript{218} This analysis will use the Waggener dissertation, \textit{supra} note 59, and WALTER MEAD, COMPETITION AND OLIGOPSONY IN THE DOUGLAS FIR TIMBER PRODUCT INDUSTRY (1966) as starting points. Sale levels, particularly deficits from long-term sustained yield, were covered.
A useful starting point in analyzing these issues is to distinguish between (a) the concept of sustained yield in the long-term, and (b) the even-flow of timber sales (or harvests) volume on an annual basis. As Figure 1 and the accompanying discussion demonstrated, economic and environmental constraints commonly lead to considerable variation from the DNR's calculated sustained yield sales level. The question of whether an even-flow timber sales strategy is the best policy for the beneficiaries was discussed in the 1992 Forest Resources Plan, and its ramifications were looked at in greater detail in the 1989 "Guss Report." The Forest Resources Plan explicitly states the DNR has adopted an even-flow policy. The Guss Report set out an alternative strategy that identified procedures that would allow the DNR to utilize market signals to determine when to sell stumpage.

Price-responsive harvesting, compared to rigid sustained yield harvesting, produced considerably higher income, not only from stumpage sales, but from interest compounded on the higher income. Net present worth is thus greatly increased. . . . Timber volume cut under sustained yield for old growth forests could be less than under flexible price responsive forestry, if and as over-mature timber that would otherwise be cut is set aside to wait its turn.

![Graph showing relationship between average price received by DNR and stumpage sales.](image)

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in the DNR's REPORT TO THE LEGISLATURE: TIMBER SALE ARREARAGE, supra note 201, as required by H.C.R. 29. From a portfolio management perspective, the Guss Report to the DNR provides recommendations respecting the efficacy of sustained yield strategies in light of trust responsibilities. Supra note 208. Similarly, ZINKHAN, ET. AL., TIMBERLAND INVESTMENTS: A PORTFOLIO PERSPECTIVE (1992) provides supporting analysis.

221. Guss Report, supra note 208, at 68.
Figure 4 shows, in simple terms, the relationship between the average price received for DNR stumpage (the dark black line), and the amount of stumpage sold (not including contract defaults). The market for DNR stumpage in the early 1980s demonstrates the relationship between demand and price. As prices dropped, DNR stumpage demand dropped. However, the situation in the mid-1980s shows that the DNR placed large volumes of stumpage on the market prior to price recovery beginning in 1988. Then once prices continued to increase, the DNR's sales levels initially stabilized, then precipitously dropped beginning in 1991 as prices remained firm and then increased. It goes without saying that outside concerns, specifically the northern spotted owl listing, resulted in much of the early 1990s drop in sale volumes during a strong market; the change in owl survey protocols caused the precipitous drop in 1994.

Recall again that stumpage purchasers are essentially working in the futures market. Given that, they require a portfolio of potential harvest areas under contract, which at times has been as substantial as three to four times the annual sales as shown in Figure 4, supra. The strategy purchasers use is based on the expectation that prices (nominal and real) for both stumpage and timber product will rise in the future. Within any one contract is a time constraint, and possibly environmental and physical access constraints as well. Purchasers take these factors into account when making harvest decisions; but the primary consideration is to cover costs (i.e., the price paid for the stumpage plus harvest, transport and milling expenses) and make a profit. Necessarily, companies will first harvest stumpage giving the highest spread between the price paid at auction and the current market price for stumpage. This strategy works well when prices are generally increasing, whether real prices or nominal prices. This is because the contracts bought today will be worth more in the future (albeit a premium may be paid due to this expectation), and the contracts bought two years previously are now worth quite a bit more. This situation is illustrated graphically in Figure 5.

The distance between the zero line and the top of the dark-shaded column in Figure 5 represents the average real price difference between timber harvested for a specific year and the average real price for stumpage sold that year. Similarly, the distance between the light-shaded column and the zero line represents the difference between the average real value of stumpage under contract compared to the average real price of stumpage sold that year. When the lines are above zero, constricts either harvested or remaining in purchasers' portfolios obtain a speculative profit (realized or potential) due to the futures nature of stumpage sales. And the fact that purchasers typically harvest their least expensive contracts within their aggregate portfolio is seen by the fact that the "Contract Premium" line is almost always below the "Harvest Premium." This means that there are greater profits realized from the units harvested than from the ones remaining (which include a mixture of older and newer contracts).
This strategic phenomenon has, in fact, been the pattern for most recent periods in DNR sales, as can be seen in Figure 5. Specifically, it is the reason that purchasers prefer to maintain large volumes under contract (as well as having certainty of supply) that leads to the situation shown in Figure 2 where these volumes are large relative to annual stumpage sales. Alternative strategies, however, are called for when prices are expected to decline in the future. In this case, the company would harvest its most expensive (assuming costs could be covered) contracts first, essentially to limit exposure to future price decreases, then subsequently harvest the less expensive contracts.

There would seem to be no question that the DNR, and the trust beneficiaries, would be better off if the speculative nature of the timber sale process could be reduced. It must be realized, however, that the DNR’s even-flow policy makes a major contribution to encouraging such behaviour on the part of purchasers. The “Guss Report” identifies significant gains from pursuing a price-responsive stumpage marketing strategy as opposed to an even-flow policy:

There seems to be considerable revenue potential if the Department can reduce below mean sales, selling more timber at times when higher prices can be commanded . . . . Timber sales need not be withheld for long periods. Studies suggest that as little as a two year range over what was planned on a sustained yield basis would gain much of the available incremental revenue, while plus or minus five years would gain substantially all.222

222. Id. at 70.
Clearly, the decision was made subsequent to the Guss Report explicitly not to use a price-responsive marketing strategy. The 1992 Forest Resources Plan makes it plain that the DNR is committed to a large even-flow regime, both from the federal grant lands as well as from the Forest Board lands.

The decision to use an even-flow policy for the trust lands was subject to considerable debate before, and after, the practice was adopted. The Economics Panel in the 1977 review of DNR and Board policy noted "concern about adoption of the 'even-flow' interpretation of sustained yield management by the Department, principally because the Department sustainable harvest model does not adequately incorporate economic factors." The Economics Panel went on to say "that it has seen no evidence that sustained yield/even-flow leads to acceptable management of a forest as a capital asset." There were two points to this argument: first, even-flow reduces near-term harvests during conversion of old growth to second growth; and secondly, even-flow constrains response to market demands (both higher and lower) for stumpage. Regarding the second point, the 1977 Department Study Group's Timber Harvest Panel suggested that "DNR have 200-300 million board feet of timber prepared for sale in order to be able to respond quickly to high market demand and accompanying higher prices; this implies that the limits of annual fluctuation of harvest within a decade be widened."

Given the volatile timber market in the mid- to late-1970s (see Figure), the Board (with Bert Cole as Commissioner and Chair) was requested at its November 7, 1978 meeting to expand the limits of annual sale fluctuations to plus or minus 50 percent, and for decadal sales to plus or minus 10 percent of the decade's sustained yield harvest. The Board generally agreed to allow this. DNR policies to reduce timber placed on the market during 1981 engendered a response from representatives of the Western Forest Industries Association (WFIA) at the August 1981 Board meeting. The DNR proposed reducing sales by 50 percent in the first half of the decade, then increasing

224. Id. at 10. Note, however, in this context even-flow limited near-term harvest, rather than pressured to maintain harvests at higher levels as in present context. Nevertheless, on purely economic grounds even-flow has little to recommend it. Also, in the 1977 report, the Timber Panel recommend continuance of DNR's sustained yield/even-flow policy even while the Economics Panel was recommending against it. Id. at 10, 14-15.
225. Id. at 11. "Even within the 'sustained yield requirement, the panel views the DNR 'even flow' as unnecessarily restrictive to effective management . . . ." Id. at 14.
226. Id. at 19.
227. See Board of Natural Resources, Minutes 48 (Nov. 7, 1978).
228. We were unable to confirm the final approval date of this action, although the change was virtually assured at the above-mentioned Nov. 1978 Board meeting.
them 50 percent during the second half (this was called Strategy #1 in the Department Staff Report to the Board). The representative for WFIA raised concerns not only about the availability of funding for trust beneficiaries, but also about effects on small, dependent firms and the number of future bidders DNR sales. The 1983 FLMP established the present sustained-yield even-flow timber sale constraints. These constraints are that annual sales be within plus or minus 25 percent of the long-term sustained yield, and that the decadal sustained yield amounts be harvested, or that according to statute, the DNR must devise a plan to do so.

Ultimately, the question regarding the DNR's sustained yield even-flow policy comes down to factors outside economic considerations. Clearly, from a strictly financial standpoint, even-flow has a difficult challenge to overcome. Past discussion in the Board, particularly during Brian Boyle's tenure as Commissioner and Chair, tended to offset the financial losses from even-flow by justifying it during poor market conditions to protect both the DNR's and the timber industry's ability to effectively (and competitively) sell and purchase timber during the good periods. Also related, but not easily determinable from the data, is whether the DNR was in fact constrained by even-flow policies from offering higher levels of sales during good market periods.

There is perhaps justification based on trust land origins for at least some even-flow of timber during poor market conditions. If the purpose of the Forest Board lands is to reforest land and provide a table supply of timber to the locality, then, at least for the Forest Board lands, an even-flow, rather than a revenue-maximizing or price-responsive, timber sale policy could be justified. The Board, in fact, spent a lot of time during the 1980s considering the effects of its sales levels on local communities and

230. See id.

231. See id. Note that this was the identical rationale for the contract buyouts litigated in Skamania, supra note 97.

232. See Board of Natural Resources, Minutes 10 (Jan. 5, 1988).

Responding to Vandenberg's comment, Boyle said there was a conscious decision made by this Board in the low period of the economy that they were going to keep a sales program going. In the FLMP they decided that they were going to change the policy of varying the sales level by 50 percent, plus or minus, and changed it to 25 percent, plus or minus. They realized and discussed with the Board that there needed to be a certain level of sales policy in order to keep employment levels going. He was not talking about employing people as a trust responsibility, but that they needed to keep a bid pool going because the market would eventually turn around and that our people needed to be equipped to sell timber and there needed to be a market for the timber at the time that the market turned around. It didn't make sense from a trust standpoint to stop the sales program.

Id.


dependent industries, as well as on beneficiary requirements. There was little concurrence among Board members on how to proceed. Some members, principally the Dean of College of Forest Resources, wanted to continue to offer timber for sale even when it appeared very likely that the bottom had fallen out of the market and many previous sales would be defaulted.235 Others, including representatives of the Superintendent of Public Instruction, wanted to scale back sales in order to preserve the trusts, in this case the Common Schools' capital in the form of old growth.236

V. Conclusion

The GAO Report missed or muddied important similarities, such as the even-flow sustained yield constraint and the timber sales contracts, between state and federal management and also adequately explored major differences between the two systems. It is not adequate to say that because the goals are simpler, state planning is less controversial, or because the state relies on receipts for funding, their management is going to be more efficient. We have seen in the arrearage dispute that in the fundamental intellectual structure of the timber program, the state's commitment to sustained yield/even-flow is every bit as inefficient as the federal program. And we have observed that the state's timber sale contracts allow the purchaser all the speculative advantages of the market, with very clear disadvantages to the trust.

But we have also seen that the states are able to sell more timber more efficiently than the federal government. We attribute this not to an absence of controversy but to mechanisms for containing it. By far the most important is the constitutional status of the mandate—as long as there is a

235. See Board of Natural Resources, Minutes 26 (Aug. 4, 1981), supra note 209.
236. See id. at 24. See also Board of Natural Resources, Minutes 14 (Jan. 5, 1988).

Bill Daley, Administrative Assistant to Superintendent of Public Instruction, Frank Brouillet, said Commissioner Boyle knew very well that the major holdings of the school trust were part of that last decade of sales in a depressed market and much of it was old growth. We were dealing here with the remnants of that. The original environmental plan was developed by Boyle's predecessor and had been thoroughly consistently implemented over the last few years. It had been a plan that cut all of that old growth at a time when we faced a baby boom in the 1980s and 1990s. It also cut everything in a depressed market. We urged at that time that not be done. We sought legislation to prevent it from being done, but it was done anyway . . . . As matter of fact there was correspondence consistently to that effect in this past year urging that the adoption of the policies related to old growth held in the common school trust, we would approach the legislature for a different long-term solution to the way to build schools in the short-term and save those resources for when we would need them and when they were likely to be more valuable to us.

Id. at 14.
beneficiary or other public spirited citizen to sue to enforce the trust, the legislature is limited in the extent to which it can divert trust resources to subsidize other public purposes. We have seen, however, that when there is no litigant to challenge such patent nonsense as the state's timber sale and even-flow policies, the trust is not vindicated. We have also observed the importance of the notion of prudence in evaluating the trustee's decisions.

Although prudence appears, in many respects, to resemble the chaos of discretion inherent in the multiple use standard, the resemblance does not recreate on state lands the problems the GAO observed with federal management. Although it is utter nonsense to assert that the trust lands are uncontroversial, the Loomis and arrearage disputes demonstrate the contrary quite emphatically, the expectations surrounding the lands are much clearer. In the Loomis case, we see disagreement as to what the goal means, but we do not see disagreement about the goal. And in the arrearages case, we find that all the arguments are made in the context of shared assumptions about the priorities. This culture of acceptance of the mandate, and its underlying notion of prudence, seems to us to be the place to start when trying to explain the differences in the outcomes between the two ownerships.