A Legal Analysis of Oregon's Trust Obligations in Managing the Elliott State Forest

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Executive Summary

When Oregon became a state in 1859, the federal government granted nearly 3.4 million acres to Oregon to hold in trust to fund the public schools. The Elliott State Forest comprises a large portion of Oregon's trust lands, but because the Elliott State Forest also provides habitat for species listed under the Endangered Species Act (ESA), logging on the Elliott State Forest, a significant source of income to the trust fund, has all but ceased.

The State Land Board (the "Board") serves as trustee of these lands, and with that designation, has fiduciary obligations to the beneficiaries. The trustee must exercise reasonable care and skill in managing the trust and make trust property productive, must preserve trust property and defend actions that may result in loss to the trust, and must act with absolute loyalty to the beneficiaries. Failure to carry out these duties is a breach of the trustee's fiduciary duties. Under the management of the Board, the Elliott State Forest lost three million dollars in 2013. This paper explores the following breaches:

1. The Board is not prudently managing the trust land assets. Although a trustee is not charged with 20/20 hindsight, the trustee must be able to explain the reasoning behind an investment strategy. Only recently has the State Land Board attempted to understand the value of the Elliott State Forest. Further, the Board has ignored recommendations to divest all trust land holdings. Other assets in the trust have consistently earned strong returns, while the Elliott State Forest declined in value.

2. The Board should have known that doing nothing was imprudent. The Board, by its inaction, has breached its duty by failing to dispose of the Elliott State Forest when the opportunity presented itself, and by waiting too long, has left the trust with devalued property. The Elliott State

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Forest is no different from a stock whose value may fluctuate, but failing to take any action with respect to the asset is a breach of a trustee's duty of prudent management.

3. The Board must protect the trust from loss, including insuring trust property against loss and when facing litigation or other claims implicating the trust. A trustee is also obligated to defend the trust against claims, to avoid claims of liens and other losses, and to pay taxes. Here, the Board failed to fulfill its duties by not negotiating a Habitat Conservation Plan ("HCP"), which would have alleviated the impact of the ESA on the Elliott State Forest. As trustee, the Board is obligated to remove legal impediments from causing a decrease in value of a trust asset. The Board ceased negotiations regarding the HCP prematurely. Negotiating an HCP is within the Board's authority and, since it is in the best interest of the trust to preserve trust assets, the Board was obligated to pursue such negotiations.

4. The appointment of the State Land Board as trustee in Oregon's constitution, which comprises the Governor, the State Treasurer, and the Secretary of State—the three most political positions in the State of Oregon—likely violated trust principles from the trust's beginning. A trustee has a duty to act honestly and with undivided loyalty to the interests of the trust and its beneficiaries. By virtue of the Board members' political roles, the Board members cannot offer undivided loyalty to the beneficiaries because they are beholden to so many competing interests. In this fashion, the composition of the State Land Board and its role in overseeing the trust is improper and a breach of the duty of undivided loyalty.

I. Introduction

Providing for school funding has been a recognized concern for states since the country's founding. To address this need, the federal government granted lands to states upon statehood to fund common schools. This grant of lands designated to benefit schools created a trust, imposing fiduciary obligations on trustees, who in this case are the members of the State Land Board ("Board"). In Oregon, the Elliott State Forest comprises a large portion of the state's trust lands. The Elliott State Forest also provides habitat for fish and bird species listed under the Endangered Species Act (ESA). The ESA, as a federal law of general application, applies to trust lands and subjects the lands to its restrictions. Under the ESA, logging on the Elliott State Forest, a significant source of income to the trust fund, has all but ceased.

By virtue of its status as trust land, the Elliott State Forest must be managed by the trustee to comply with certain fiduciary obligations. The trustee, among its numerous duties, must exercise reasonable care and skill in managing the trust and make trust property productive, must preserve trust property and defend actions that may result in loss to the trust, and must act with absolute loyalty to the beneficiaries. Failure to carry out these duties is a breach of the trustee's fiduciary duties. Under the management of the State Land Board, the Elliott State Forest lost three million dollars in 2013. To put this into context, the Elliott State Forest has been valued at $600 million or more, and the Board has been advised multiple times by Department of State Lands staff, paid consultants, and outside groups such as Cascade to sell off the forest and put the money into stocks and bonds, over a 20-year period as timber receipts were steadily dwindling. This evinces a breach of the Board's fiduciary obligations to preserve the corpus of the trust, to manage trust assets prudently, to remove claims against the trust, and to act with undivided loyalty. Moving forward, the State Land Board must comply with its obligations.

II. Overview of School Trust Lands and the Elliott State Forest

Oregon achieved statehood in 1859. At Oregon's inception, the federal government granted certain acreage, nearly 3.4 million acres, to Oregon to be held in trust for the Common School Fund via the Oregon Admission Act. The purpose of these granted lands was to provide income to fund the public schools. The Act provided:

> The following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, that sections numbered sixteen and thirty-six in every township of public lands in said state, and

> where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools.[1]

Thus, the federal government allowed Oregon to accept or reject the conditional grant, but upon acceptance required both entities to manage the lands for the "use of schools."

The Oregon State Constitution formally adopted the terms and conditions of the Admission Act's land grant. In its original language, the Constitution provided:

> The proceeds of all the lands which have been or hereafter may be granted to the State for educational purposes . . . shall be set apart as a separate and irreducible fund, to be called the common school fund, the interest of which, together with all other revenues derived from the school land mentioned in this section, shall be exclusively applied to the support and maintenance of common schools in each school district . . . .[2]

Oregon's Constitution further provided that the State Land Board, comprising the three highest-ranking state officials (the governor, the Secretary of State, and the State Treasurer), would be responsible for the management of the trust lands.[3] Under current Constitution verbiage, as amended in 1968, the State Land Board "shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."[4] By agreement, the Oregon Department of Forestry manages the Common School Forest Lands.[5]

The Elliott State Forest, the first of six state forests created in 1930, became a part of the trust lands through a series of land transfers and exchanges to consolidate land holdings.[6] The Elliott State Forest comprises 93,000 acres and is located in south coastal Oregon.[7] Oregon's school trust land holding is not unique. Numerous other states also received land grants upon statehood. Of these, many states, including Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, Ohio, and Wisconsin, have sold off the entirety

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[1] Act of February 14, 1859, § 4,11 Stat. 383 (1859)(Oregon Admission Act).

[2] OR. CONST. art. VIII, § 2 (1859).

[3] OR. CONST. art. VIII, § 5.

[4] OR. CONST. art. VIII, § 5 (1968).

[5] Oregon Department of Forestry, History and Legal Mandates of Oregon State Forests, http://www.oregon.gov/odf/pages/state_forests/history.aspx (last visited Aug. 18, 2014).

[6] OREGON DEPARTMENT OF STATE LANDS & OREGON DEPARTMENT OF FORESTRY, ELLIOTT STATE FOREST MANAGEMENT PLAN, ES-3 (2011) *available at:* http://www.oregon.gov/odf/state_forests/docs/esf/elliott_fmp_2011/elliottsf_2011_fmp_final.pdf.

[7] *Id.* at ES-2.

of their trust lands.[8] In many western states, however, these trust lands remain held and managed by a state entity.[9] In several instances, the passage of the ESA has decimated the value of these lands for logging and grazing because of conflicts with protecting inhabiting endangered species.

III. Overview of the Endangered Species Act and Implications for the Elliott State Forest

The Endangered Species Act (ESA or Act)[10] has complicated things for the school trust lands. The Act protects endangered and threatened species by requiring the listing of identified species, based on the best scientific and commercial data available, either by the U.S. Fish and Wildlife Service (USFWS) or by the National Marine Fisheries Service (NMFS).[11] The Services are then responsible for designating critical habitat for listed species, defined as:

> (1) the specific area within the geographical area occupied by the species, at the time it is listed … on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection, and
> (2) specific areas outside the geographical areas occupied by the species at the time it is listed … upon a determination by the Secretary that such areas are essential for the conservation of the species.[12]

In designating critical habitat, the Secretary must base that designation "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[13]

Once a species is listed as endangered or threatened, Section 9 of the Act prohibits any "take" of that species.[14] "Take" is defined as "to harass, harm, pursue, hunt, shout, wound, kill, trap, capture, or to attempt to engage in any such conduct," a species.[15] To be unlawful (and in the case of the ESA, criminal) a take need not be the intended result of any action. In 1975, the USFWS issued regulations that further defined the meaning of "harm" in the statutory definition of "take" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral

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[8]State Trust Lands, State Trust Lands Today, http://www.statetrustlands.org/about-state-trust-lands/state-trust-lands-today.html (last visited Aug. 18, 2014).
[9]*Id.*
[10]16 U.S.C. §§ 1531 to 1544 (1973).
[11]16 U.S.C. § 1532(15).
[12]16 U.S.C. § 1532(5)(A).
[13]16 U.S.C. § 1533(b)(2).
[14]16 U.S.C. § 1538(a)(1).
[15]16 U.S.C. § 1532(19).

patterns, including breeding, feeding, or sheltering."[16] The effect of the definition of "harm" in the regulations is that anyone engaging in an activity in designated critical habitat is at risk of violating the ESA, which includes criminal penalties.[17] This matters because the individuals comprising the State Land Board are potentially liable as individuals for take under the ESA.[18] Whether or not such fear is justified, the fact remains that the fear exists and state actors proceed with extreme caution.

Because the ESA recognizes that some otherwise lawful activities will result in take, Section 10 of the Act permits the Secretary to issue permits for take that is incidental and not the purpose of the otherwise lawful activity.[19] As part of the process of obtaining an incidental take permit, the applicant must prepare a habitat conservation plan (HCP), which is a planning document that describes the anticipated effects of any incidental taking of a protected species, how those effects will be mitigated, and how the permit applicant will finance the HCP.[20] This is a technical and complicated process. However, as long as an HCP has been approved, the USFWS will not prosecute the HCP holder for any incidental take of species. The USFWS regulations require HCPs to include the following:

- An assessment of the impacts that are likely to result from the proposed incidental take;
- Measures the applicant will take to monitor, minimize, and mitigate such impacts, the funding available to fund such measures, and how the applicant will respond to unforeseen or extraordinary circumstances;
- The alternative actions to a take that the applicant has analyzed and why such alternatives were not practicable; and
- Additional protective measures.[21]

The USFWS has also implemented a "Five Points Policy" that further requires the following before it will approve an HCP:

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[16] 50 C.F.R. § 17.3 (1994).

[17] 16 U.S.C. § 1540(b) (authorizing imprisonment up to one year and fines up to $50,000).

[18] For further discussion see PERKINS COIE LLP, LIABILITY OF STATE AGENCIES AND LOCAL GOVERNMENTS UNDER THE ENDANGERED SPECIES ACT (2002), *available at*:http://www.crab.wa.gov/LibraryData/RESEARCH_and_REFERENCE_MATERIAL/Environmental/020829ESAWhitePaperPerkinsCoie.pdf

[19] 16 U.S.C. § 1539(a)(1)(B).

[20] 16 U.S.C. § 1539(a)(2)(A).

[21] 50 CFR § 17.22(b)(1). For more information, see U.S. Fish and Wildlife Service, Endangered Species: Habitat Conservation Plans Overview, http://www.fws.gov/endangered/what-we-do/hcp-overview.html (last visited August 18, 2014).

1. Biological goals and objectives that define the expected biological outcome for the protected species covered by the HCP.
2. Adaptive management that includes methods for addressing uncertainty and monitoring and feedback to biological goals and objectives.
3. Monitoring for compliance, effectiveness, and effects.
4. Permit duration determined by the time-span of the project and designed to provide the time needed to achieve biological goals and address biological uncertainty.
5. Public participation.[22]

The HCP is only one part of an incidental take permit application. An applicant must also complete a standard application form, sign an Implementation Agreement, if applicable, pay the application fee, and draft an analysis under the National Environmental Policy Act (NEPA).[23] The NEPA analysis considers whether the proposed action will be categorically excluded from further analysis because it will have no adverse environmental impacts[24] or only previously identified, minor environmental impacts, or whether it will require an environmental assessment (when the impacts are expected to be minor but require an assessment to confirm this) or an environmental impact statement (when the effects of the action are unknown and potentially significant).[25] This, like the HCP, is an extensive and costly process.

Federal grant lands, including the Elliott State Forest, are subject to federal laws of general application. In *National Parks and Conservation Association v. Board of State Lands*, the Utah Supreme Court observed that trustees clearly have a duty to act according to applicable law, noting "general laws enacted pursuant to the police power are not likely to violate the terms of the trust."[26] State laws of general applicability, for instance county zoning laws, can apply to state trust lands.[27] Therefore, the restrictions of both the federal ESA and state versions will apply to state trust lands.

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[22]U.S. Fish and Wildlife Service, The HCP Handbook Addendum or "Five Point Policy," (2000), *available at*: http://www.fws.gov/caribbean/es/PDF/Library%20Items/HCPAddendum.pdf.

[23]U.S. Fish and Wildlife Service, Endangered Species: HCPs Frequently Asked Questions, http://www.fws.gov/midwest/endangered/permits/hcp/hcp_faqs.html (last visited August 18, 2014).

[24]Note that, in this case, the environmental impacts go beyond consideration of the impact to protected species to include anything affecting the quality of the human environment.

[25]National Environmental Policy Act (NEPA), Basic Information, http://www.epa.gov/compliance/basics/nepa.html (last visited August 18, 2014).

[26]869 P.2d 909, 921 n.9 (Utah 1993); see also Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1147 (Utah 1995) (the Court cited with apparent approval the statement that in exercising trust duties, the state must maximize revenue in a manner that best serves the beneficiaries within the provisions of applicable law).

[27]Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Board, 809 P.2d 974, 982 (Colo. 1991).

The Elliott State Forest contains designated critical habitat for three listed species, the Northern Spotted Owl, the Marbled Murrelet, and the Coho Salmon, and therefore falls within the reach of the ESA. USFWS first designated critical habitat for the Northern Spotted Owl in 1992.[28] After several legal challenges, USFWS published a final rule establishing a revised critical habitat for the owl in 2012.[29] The final critical habitat increased the size of critical habitat on state lands by 272,026 acres.[30] Within state lands designated as critical habitat for the Northern Spotted Owl, the ESF constitutes 33%.[31] USFWS designated critical habitat for the Marbled Murrelet in 1996.[32] On January 13, 2003, it settled with plaintiffs who had challenged the designation as too extensive[33] by agreeing to review the designation. In 2011, it published a final rule that reduced the size of the critical habitat to exclude certain areas farther inland.[34] The rule states that it covers all state forests subject to an HCP.[35]

In response to the designation of critical habitat for these bird species, the Oregon Department of Forestry, which manages the Elliott State Forest for the State Land Board, developed an HCP in 2008 to which USFWS and NMFS gave their approval. On December 31, 2011, however, the Oregon Department of Forestry terminated the HCP for the Elliott State Forest when the State and the NMFS could not agree on what the HCP would encompass to protect Coho Salmon. As a consequence of the HCP's termination, there is no incidental take permit for bird species in the Elliott State Forest. Any person, possibly including the members of the State Land Board, who engages in any activity in the Elliott State Forest that results in a take of either a species or results in significant degradation of habitat essential to the species survival is subject to civil and criminal penalties. Moreover, the ESA includes a citizen suit provision that allows any person to commence a civil suit in federal court to enjoin any person, including the United States and any state subject to the limitations of the Eleventh Amendment of the Constitution, who is alleged to be in violation of any provision in the ESA.[36] The court may award, where appropriate, the prevailing

[28] 57 Fed. Reg. 1796 (Jan. 15, 1992).
[29] 77 Fed. Reg. 71876 (Dec. 4, 2012).
[30] *Id.*
[31] *Id.*
[32] 61 Fed. Reg. 26256 (May 24, 1996).
[33] Western Council of Industrial Workers v. Sec. of the Interior, Civ. No. 02–6100–AA (D. Or).
[34] 76 Fed. Reg. 61599 (October 5, 2011).
[35] *Id.*
[36] 16 U.S.C. § 1540(g)(1)(A).

party's attorney's fees and costs.[37] The lack of an incidental take permit for logging in the ESF has left the State of Oregon vulnerable to lawsuits, and trapped between compliance with the ESA and achieving their obligations to school beneficiaries as trustee.

IV. Overview of Trust Law and Its Application to the Elliott State Forest

Oregon law recognizes that "[a] trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence."[38] Under Oregon law, a trust forms when a grantor grants to a beneficiary certain property, which is then managed by a trustee. The creation of a trust requires three things: manifestation of intent by the settlor to create a trust, property held by the trustee, and a specified beneficiary.[39] The creation of a trust "may arise out of conduct alone, that is, where there is no expression of intent and the inferences leading to the conclusion that a trust was or would have been intended by the grantor if he had thought about it, are drawn entirely from circumstantial evidence."[40] In determining a settlor's intent to create an express trust, courts will infer from surrounding circumstances, the conduct and relationships of the parties, and the purpose of the transaction.[41] However, essential to finding the existence of a trust is that the trustee receives property under conditions that impose a fiduciary duty, not merely a contractual obligation, to the grantor or a third person.[42]

A. The Creation of a Trust and Applying Trust Law to the Elliott State Forest

In the case of school trust lands, the federal government granted to the state certain lands "for the use of schools."[43] The federal government declared its intent to grant the lands and the state agreed by accepting the terms of the grant into its Constitution. Further, the Oregon Constitution appoints the State Land Board as trustee. The Oregon Attorney General, Charles S. Crookham, in a 1992 opinion, discussed the import of these legislative enactments at length.

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[37] Id. at § 1540(g)(4).
[38] Templeton v. Bockler, 73 Or. 494, 506 (1914).
[39] RESTATEMENT (SECOND) OF TRUSTS§74 (1980).
[40] Belton v. Buesing, 402 P.2d 98, 101–02 (Or. 1965).
[41] Lozano v. Summit Prairie Cattlemens Ass'n, 963 P.2d 92, 95–96 (Or. App. 1998).
[42] *Id.*
[43] Oregon Admission Act § 4 (1859).

The Attorney General concluded that the grant of Admission Act lands to Oregon imposed legal restrictions on the use of those lands.[44] He reached this conclusion by reviewing the nature and history of the grant to Oregon as well as similar grants in other states. In particular, the Attorney General noted the requirement to set aside sections 16 and 36 in Oregon Territory for the support of schools, Oregon's ability to accept or reject this condition in the Admission Act, and that Oregon accepted the conditions in that Act.[45] He characterized this offer and acceptance as a "solemn agreement" or "compact" between the United States and Oregon, which imposed a binding obligation on Oregon.[46] He further noted that Congress would not have imposed the requirement that lands the State selected in lieu of already occupied grant lands "be forever inviolably set apart for the benefit of the common schools," if it had intended that there be no restrictions on use of the lands.[47] Although this language was used with respect to lands granted to the Oregon Territory, the Attorney General concluded that Congress "would have intended to continue the same restrictions upon Oregon's admission into statehood a few years later."[48]

While the opinion does not unequivocally state that the Common School Fund is a trust, the Attorney General concluded, that, regardless of whether an express trust was created by the state constitution and various federal and state statutes, the fund must be treated as if it were a trust in the following regard:

1) The lands dedicated to the Common School Fund must be "for the use of schools;"

2) The State has an obligation to conserve the corpus of the trust (in this case, the lands);

3) The lands must be managed in "such a way as to derive the greatest net profit for the people of this state;" and

4) The lands can be used for other purposes that benefit the people of Oregon as long as such use is consistent with maximizing their value in support of schools.[49]

Thus, the State has clear obligations in its management responsibility of the trust lands.

In addition to the Attorney General Opinion, there is a little Oregon case law to support the conclusion that the Common School Fund is a trust, and that the Elliott State Forest is a trust asset

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[44] Opinion No. 8223, 46 Op. Att'y Gen. 468 (1992).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

that must be conserved and managed for the benefit of that trust.For example, in *Grand Prize Hydraulic Mines v. Boswell*, the Oregon Supreme Court stated:

> [T]he school lands granted to the State of Oregon are a trust for the benefit for public education. It is the duty of the state to dispose of them for as near their full value as may be, and to create thereby a continuing fund for the maintenance of public schools.[50]

The Supreme Court of Oregon has also distinguished between the proceeds of certain submerged and submersible lands and trust lands. The proceeds from submerged and submersible lands are dedicated to support public education, but the Court held that only the proceeds from designated trust lands are held in trust for that purpose.[51] In another case, the Supreme Court of Oregon analyzed Article VIII of the Oregon Constitution, and noted that in establishing the Common School Fund, the Article impressed that fund with a trust "of the highest nature."[52]

Perhaps the strongest support for the creation of a trust is the case law from other western states holding that Admission Act lands are held in trust. For example, in *Lassen v. Arizona ex rel. Arizona Highway Department*,[53] the United States Supreme Court held that Admission Lands were a trust and required compensation by the Highway Department when it imposed an easement for a highway through the trust lands.[54] The Court required compensation even though the State argued that the highway would actually increase the value of the school lands.[55] The Court held that any such increase in value was speculative and that the requirement in Arizona's enabling act (the congressional act by which it was admitted as a state to the Union) that any sale or disposition of trust lands be made for their true value did not permit any reduction in present value based on speculation as to further value.[56] Therefore, the Court held that the law required the Highway Department to pay into the school fund the present value of the land it appropriated through its easement.[57]

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[50]Grand Prize Hydraulic Mines v. Boswell, 162 P. 1063, 1064 (Or. 1917).

[51]Johnson v. Dep't of Revenue, 639 P.2d 128, 133 (Or. 1982) ("Submerged and submersible lands are not within any of the listed categories in that section, since they were not "granted" to this state, but rather vested in the state of Oregon on her admission to the Union as a result of the equal footing doctrine and are statutorily dedicated to the common school fund . . . .").

[52]Eagle Pt. Irr. Dist. v. Cowden, 137 Or. 121, 124 (1931).

[53]Lassen v. Arizona ex rel. Arizona Highway Dep't, 385 U.S. 458 (1967).

[54]*Id.* at 469–70.

[55]*Id.* at 468.

[56]*Id.* at 469.

[57]*Id.* at 470.

While *Lassen* is dispositive of school trust lands in Arizona and New Mexico, it is less clear that it applies to Admission Act lands in Oregon because the New Mexico-Arizona Enabling Act specifies that the lands granted under it were to be held "*in trust*, . . . and the natural products and money proceeds of any said lands shall be subject to the same trusts as the lands producing the same."[58] Regardless, *Lassen* has been frequently and positively cited in many lower federal courts and state courts to support a finding that Admission Act lands are held in trust. Of these, *County of Skamania v. Washington*[59] is perhaps most relevant to Oregon because Admission Act lands in Washington were derived from the same Oregon Territory as those in Oregon and were thus initially controlled by the 1853 law granting land to Oregon Territory for schools.[60]

The plaintiffs in *Skamania* challenged the constitutionality of a Washington State law that, in response to falling lumber prices, released logging companies from contracts they had entered into with the state for harvesting timber on Admission Act lands.[61] The court noted that although the Washington Enabling Act did not specifically impose a trust on Admission Act lands, a previous federal court[62] had held that school lands in Washington were subject to the principle enunciated in *Lassen—i.e.*, that the state could not diminish their value to the common school fund without compensation.[63] Thus, the court held that the state had violated fiduciary principles in enacting the legislation by failing to give undivided loyalty to trust beneficiaries (i.e., the schools) and by not acting prudently with respect to the trust.[64]

One significant difference between Oregon and Washington law that may distinguish *Skamania* and make it inapplicable to Oregon is that although the Washington Enabling Act, like the Oregon Enabling Act, does not specifically refer to Admission Act lands as being held in trust, the

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[58]Act of June 20, 1910, Pub. L. 219 (ch. 310), 36 Stat. 557 (1910) (New Mexico-Arizona Enabling Act) (emphasis added).

[59]County of Skamania v. Washington, 685 P.2d 576 (Wash. 1984).

[60]*Id.* at 579–80.

[61]*Id.* at 579. Because of falling lumber prices, the companies contracting with the state faced losses of approximately $100 million. Contracts were released upon the payment of $2500 and forfeiture of their 10 percent deposits. It also allowed these companies to more easily extend or modify their contracts, which would permit them to log once lumber prices rose. The effect of the state law was to forfeit approximately $10 million that would otherwise have gone to the common schools fund.

[62]United States v. 111.2 Acres of Land, 293 F.Supp. 1042, 1048–50 (1968) ("The United States will be required to pay the full market value of the easement it has condemned.").

[63]*Id.* at 580.

[64]*Id.* at 581–83.

Washington Constitution does.[65] This language is considerably more restrictive than the language in the Oregon Constitution, which merely identifies the sources of the Common School Fund and requires the funds to be managed to provide the greatest benefit for the people of Oregon.[66] In fact, *Skamania* cites a number of other cases in which courts have held that Admission Act lands in states other than Oregon are held in trust, but in each of these cases trust language appeared in the state constitutions.[67] Similarly, in *National Parks & Conservation Ass'n v. Board Of State Lands*,[68] a dissenting opinion questioned reliance on *Lassen* where the Utah Enabling Act did not contain trust provisions similar to those in Arizona.[69] Even the United States Supreme Court, although not required to decide whether school lands in Mississippi were held in trust, made the following observation in *Papasan v. Allain*: "To begin with, it is not at all clear that the school lands grants to Mississippi created a binding trust. The respondents, in fact, contend that the school lands were given to the State in fee simple absolute and that no binding federal obligation was imposed."[70]

Of particular importance to the issue with respect to Oregon's Common School Fund, is the fact that the Wyoming Supreme Court considered the difference between Wyoming's Constitution and that in other states, such as Colorado, Oklahoma, Idaho, and Washington.[71] The former, although requiring that the permanent funds from the sale of school lands be held in trust, did not expressly declare that the lands themselves were held in trust, unlike the four latter states.[72] Nevertheless, the Wyoming court held that state lands were held in trust pursuant to Wyoming statutes, and because the legislature had also repeatedly referred to these lands as "trust lands," they

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[65] OR. CONST. art. XVI, §1 ("All 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; nor shall any lands which the state holds by grant from the United States in any case in which the manner of disposal and minimum price are so prescribed, be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.").

[66] OR. CONST. art. VIII.

[67] *See, e.g.*, State ex re. Ebke v. Bd. Of Educational Lands and Funds, 47 N.W.2d 520, 522 (Neb. 1951) ("By constitutional provision the lands set aside for the support of schools by the federal government are held in trust by the state."); Alaska v. Univ. of Alaska, 624 P.2d 807, 812, 818 (Alaska 1981) (finding that although language in the original Enabling Act referring to proceeds from the sale of land being held in trust had been repealed, the legislative history of the repeal made it "abundantly clear . . . that Congress was willing to repeal . . . [that language] because it was satisfied that Alaska had adequate procedures in its own statutory law. . ." and concluding that "the inclusion of university lands in Chugach State Park by statute, without compensation to the university, was a breach of the federal trust.").

[68] 869 P.2d 909 (Utah 1993).

[69] *Id.* at 993.

[70] 478 U.S. 265, 279 (1986).

[71] Riedel v. Anderson, 70 P.3d 223, 231–32 (Wyo. 2003).

[72] *Id.* at 232 ("Although Wyoming's Constitution contains a declaration of trust as to the proceeds from the sale of the lands, there is no similar declaration as to the land itself as in the states listed above.").

were in fact held in trust.[73] Moreover, a recent review of existing case law by the Lincoln Institute of Land Policy found:

> [V]irtually all of the Western states whose courts have considered the issue [of whether federally-granted lands are held in trust] have found that trust relationships were created by their individual enabling act grants. Attorneys general in states whose courts have not directly addressed the issue have reached the same conclusions. Today, only two Western states—California and Wyoming—have found that neither their Enabling Acts nor their Constitutions impose any trust responsibilities on the state, and only California has found that their state land managers are not subject to any form of trust responsibility whatsoever.[74]

Despite the existence of case law suggesting that Admission Act lands, apart from those in Arizona, New Mexico, and possibly Alaska, are not subject to a binding federal trust, the State of Oregon might be reluctant to argue that its own Admission Act lands are not held in trust with the public schools as the beneficiary of that trust. Although his 1992 opinion falls short of declaring the common school fund to be a trust, the Oregon Attorney General does use the term "trust" with respect to the fund multiple times in his opinion, and his analysis and opinion consider use of the Admission Act lands from a trust perspective. As previously noted, the Oregon Attorney General has opined that the lands must be managed along trust principles. An earlier Oregon Attorney General opinion also refers to the State Land Board's expenditure of the "constitutionally dedicated moneys in the [Common School Fund as being] governed and limited by trust principles" and to the State Land Board as a "trustee of these moneys."[75] Moreover, the state's Asset Management Plan for Common School Fund property continually refers to the property as "trust property."[76] Even *Papasan*, which cast doubt on whether land grants prior to those to Arizona and New Mexico created express trusts, included the following, somewhat ambiguous footnote: "It could be that the earlier grants did give the grantee States absolute fee interests, while the later grants created actual enforceable trusts. On the other hand, it may be that the petitioners are correct in asserting that the

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[73] *Id.* at 233.

[74] CULP, PETER W. ET AL., TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW AND POLICY ASSESSMENT, *available at*: Lincoln Institute of Land Policy, http://www.lincolninst.edu/subcenters/managing-state-trust-lands/publications/trustlands-doctrine.pdf.The authors include a long list of citations for this statement, which are not reproduced here, but include cases from Alaska, Arizona, Idaho, Montana, Nebraska, Oklahoma, South Dakota, Utah, and Washington, as well as opinions of the attorneys general of North Dakota, Oregon, and California.

[75] Opinion of Hardy Myers, Attorney General, Opinion No. 8279, n.8 (2003).

[76] OREGON DEPARTMENT OF STATE LANDS, REAL ESTATE ASSET MANAGEMENT PLAN (2012), *available at*: http://www.oregon.gov/dsl/LW/docs/reamp_2012_plan.pdf.

substance of all of these grants is the same."[77] Thus, although there exists some criticism that imposition of a trust requires interpretation of a state's individual documents, there is a strong argument that Oregon's granted lands are in trust.[78]

B. Duties Ascribed to the Trustee

A trustee, by virtue of its role with respect to trust property, is charged with numerous fiduciary duties to trust beneficiaries. Once a trustee has accepted appointment, it is in a fiduciary relation to the beneficiaries of the trust, and courts will liberally interpret the trustee's common law fiduciary duties.[79] The numerous duties imposed on a trustee include:

- A duty to administer the trust;
- A duty of undivided loyalty;
- A duty to delegate trustee duties only when reasonable;
- A duty to keep and render accounts and to furnish information to beneficiaries;
- A duty to exercise reasonable care and skill in managing the trust;
- A duty to take and keep control of trust property;
- A duty to preserve trust property;
- A duty to enforce claims held by the trust;
- A duty to defend actions that may result in loss to the trust;
- A duty to keep trust property separate from other property;
- A duty to use reasonable care regarding bank deposits;
- A duty to make the trust property productive;
- A duty to pay income to the beneficiaries;

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[77] 478 U.S. 265, 292 n.18 (1986).

[78] In a 1997 article in the American Bar Association's Natural Resources & Environment journal, the author, Alan Hager, a deputy attorney general for the State of California at the time the article was published, Hager, Alan V., *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 NAT. RES. & ENV'T1 39–43, 80 (1997) argued that *Lassen* was not dispositive of the trust issue in states that do not have specific language in their enabling acts or state constitutions creating a trust for common school lands. He also cited an opinion of the California Attorney General that the school lands grant in that state "does not create a binding trust relationship between the state and the federal government [but instead] imposes an honorary obligation on the state to use its school lands in a manner that will promote public education." 41 Ops. Cal. Atty. Gen. 202 (1963).) *See also* Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 847 (1992) (citing the decision in 111.2 Acres that relied on Lassen, Skamania "invisibly incorporated Arizona's statehood bargain into Washington's"); Tacy Bowlin, Comment, *Rethinking the ABCs of Utah's School Trust Lands*, 1994 UTAH L. REV. 923, 926 (1994) (noting the significance of the variation in the legal documents establishing the school land grants has been overlooked in the state and federal jurisprudence interpreting the obligations of the western states, as trustees, in managing and disposing of school land grants).

[79] RESTATEMENT (SECOND) OF TRUSTS§ 2 (1980).

- A duty to deal impartially with beneficiaries;
- A duty to use reasonable care to prevent breach of the trust by co-trustees; and
- A duty to follow the direction of persons given control over the trustee.[80]

Where a State actor serves as the trustee, the entity is bound by both common law and statutory trust principles, and must achieve the duties enumerated above.[81] The State, as trustee, may only consider factors consistent with ensuring productivity of the trust lands and all of the State's actions will be tested by fiduciary principles. While state legislative authority is presumed constitutional, and although the state must comply with common law duties in administering the trust lands, the State's discretionary decisions regarding the trust lands will be measured against an abuse of discretion standard.

V. Trustee's Breach of Fiduciary Duties

As noted above, the obligations of a trustee are numerous. In the instance of the mismanagement of the Elliott State Forest, the trustees have arguably breached several of their duties, discussed in the following sections. The potentially breached duties include a duty to exercise reasonable care and skill in managing the trust and to make trust property productive, a duty to preserve trust property[82] and defend actions that may result in loss to the trust, and a duty of undivided loyalty. Moving forward, it is critical that the State Land Board act in a considered manner to avoid future breaches of its duties.

A court analyzes the breach of a duty under either an abuse of discretion or an excess of authority standard. As long as the trustee meets its duties of loyalty, prudence, and impartiality, the trustee's conduct "is subject to supervision by a court only to prevent abuse of discretion."[83] The challenge with a state trustee is that the beneficiaries will need to demonstrate that the State Land Board acted outside the limits of its authority, that its action demonstrated a clear error of judgment,

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[80]RESTATEMENT (SECOND) OF TRUSTS§§ 169-185 (1980); RESTATEMENT (THIRD) OF TRUSTS §§ 170-171, 181, 183-185.

[81]White v. PERB, 268 P.3d 600, 607 (2011) ("The parties do not disagree, in the main, about the trust law principles that apply to PERB in its administration of PERS and the fund. They agree that PERB is obligated to comply with the statutes that establish PERS and with generally applicable trust standards mentioned above, such as the UTPA and the common law of trusts. They agree that PERB had (and has) a fiduciary duty to PERS members (including retired and active members), and that it was (and is) obligated to act for the benefit of PERS members.").

[82]To clarify, this duty does not require the preservation of specific trust property, but allows for trust property to be preserved through sale with the proceeds going into an income-producing trust fund.

[83]RESTATEMENT (SECOND) OF TRUSTS§ 87.

or that it failed to follow required administrative procedures. Case law in which a governmental body, such as the State Land Board, has been challenged in court simply for failing to obtain the maximum potential value from the property with which it has been entrusted is nonexistent. This is likely due in part because many decisions taken with respect to the management of property, such as Admission Act lands, are within the state's discretion.

Most of the litigation involving state trustees concerns such specific actions that were not discretionary because they violated a statutory or constitutional mandate imposed on those whose decisions have been challenged. As discussed previously, the County of Skamania successfully sued the State of Washington when it believed that a statute enacted by that state's legislature was inconsistent with what was required of the state under the trust covering its common school lands. That suit, however, challenged the constitutionality of the legislation, a specific act, as opposed to a general suit alleging mismanagement of the trust.[84] In *Lassen*, the Arizona Highway Department sued the Land Commissioner over his action in preserving the trust from encroachment.[85] In *State of Alaska v. University of Alaska*, the University sued the State when it was about to appropriate trust lands for a state park.[86] In *United States v. 111.2 Acres of Land*, the State sought payment of the full market value of trust land appropriated by the U.S. Bureau of Reclamation.[87] Even in the Nebraskan case, *Ebke*, the plaintiff sought review of state laws relating to the appraisal and leasing of state school lands.[88]

Thus, the challenge in successfully alleging a breach will be to show that the management decisions were outside the State's discretion. The following outlines the context of possible breaches at play and summarizes some existing case law to examine the scope of each duty.

A. Breach of the duty to exercise reasonable care and skill in managing the trust and to make trust property productive

It is basic trust law that a trustee must prudently manage trust property and ensure that funds are managed in a way that will benefit all trust beneficiaries.[89] The standard of care, diligence, and skill required of a trustee in the administration of a trust is that of "an ordinarily prudent person

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[84]County of Skamania v. Washington, 655 P.2d 578 (Wash. 1984).
[85]Lassen v. Arizon ex rel. Arizona Highway Dep't, 385 U.S. 458 (1967).
[86]State of Alaska v. University of Alaska, 624 P.2d 807 (1981).
[87]United States v. 111.2 Acres of Land, 293 F.Supp. 1042 (E.D. Wash. 1958).
[88]State ex rel. Ebke v. Bd. Of Educational Lands & Funds, 47 N.W. 2d 520 (Neb. 1951).
[89]RESTATEMENT (SECOND) OF TRUSTS§§ 76, 79, 176 (1980).

in the conduct of his or her private affairs under similar circumstances, and with a similar object in view."[90] Prudence requires reasonable skill, asset diversification, considered investments, and continual reassessment.[91] A trustee must consider both short and long-term viability of the trust, and ensure that the trust can satisfy both the present and future needs of trust beneficiaries. In balancing these requirements, a trustee will be judged by its conduct and not by its performance.[92]

Oregon has codified the idea of the prudent investor by adopting the Uniform Prudent Investor Act. The Rule requires that "[a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust . . . [and] shall exercise reasonable care, skill and caution."[93] A trustee's actions investment and management decisions "are not evaluated in isolation, but in the context of the trust portfolio as a whole and as a part of the overall investment strategy having risk and return objectives reasonably suited to the trust" and are judged "in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."[94] The Rule identifies factors a trustee should consider in making investment decisions including general economic conditions; the possible effect of inflation or deflation; the expected tax consequences of investment decisions or strategies; the role that each investment or course of action plays within an overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; the expected total return from income and the appreciation of capital; other resources of the beneficiaries; needs for liquidity, regularity of income, and preservation or appreciation of capital; and an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.[95] A trustee is also obligated to diversify assets unless it otherwise determines that the trust is better served without diversification.[96] The prudent investor rule, though codified, draws on the common law. Thus, although the statutes

[90] *Id.* §§ 174. 227(a).
[91] O.R.S. § 130.665.
[92] Estate of Cooper, 81 Wn. App. 79, 82–83 (1996) (noting that the proper standard "focuses on the performance of the trustee, not the results of the trust").
[93] O.R.S. § 130.755(1).
[94] Id. § (2); O.R.S. § 130.770.
[95] O.R.S. § 130.755(3).
[96] O.R.S. § 130.760.

specifically exempt state actors,[97] the statutory guidance provides a comparison for State Land Board compliance.

A breach of this duty to exercise reasonable care and skill in the management of trust property can take many forms. The following explores some general observations regarding imprudent management, breach through inaction, and breach through failure to consider the needs of beneficiaries.

1. Failure to manage prudently

Imprudent management can take many forms—primarily in failing to consider the purposes, terms, distribution requirements, and other circumstances of the trust.[98] In assessing whether a trustee has acted as a prudent investor, the trustee is not evaluated with 20/20 hindsight or required to always invest optimally.[99] The trustee must act with gross negligence before being found in breach of his or her duties.[100] One aspect of the prudent investor rule is the requirement that a trustee be able to articulate the reasoning behind an investment strategy and why that strategy was prudent under existing circumstances. In other words, a trustee must be able to explain the actions that it takes.[101] Here, only recently, has the State Land Board attempted to understand the value of the Elliott State Forest through a limited auction. Without knowing what the Elliott State Forest is worth (timber and land sales), the State Land Board cannot assess whether banking the property is a wise investment because it cannot compare it to other investment options. Moreover, net proceeds from timber harvesting have been on a steady decline since 1986, resulting in a recommendation in the 1995 draft Department of State Lands Asset Management Plan to sell all trust holdings. This proposal was ultimately rejected, but it shows knowledge of decreasing value of trust assets. In this way, the State Land Board is likely in breach of its duty to invest prudently.

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[97] O.R.S. § 130.005(2)(e). ("This chapter does not apply to . . . [f]unds maintained by a public body . . . or other governmental entities.").

[98] O.R.S. § 130.655.

[99] In re Scheidmantel, 868 A.2d 464, 487 (Pa. Super. Ct. 2005); In re JP Morgan Chase Bank, N.A., 2013 NY Slip Op 51946, * 13 (N.Y. Sur. Ct. November 26, 2013) ("The case law warns against using hindsight, but due to the Trustee's documented pattern of negligence and inaction, the Court in this case must only hold the Trustee to its own determined standard. In determining whether to impose a surcharge a court must look at the facts as they exist at the time of their occurrence, not aided or enlightened by those which subsequently take place.").

[100] In re Scheidmantel, 868 A.2d at 487; *see also* Hatcher v. U.S. Nat'l Bank of Oregon, 643 P.2d 359, 364 (Or. App. 1982).

[101] *Hatcher*, 643 P.2d at 364.

Prudent management further requires that each investment be in the best interests of the trust beneficiaries. Significantly, the Restatement provides that the prudent investor standard should be "applied to investments not in isolation but in the context of the trust portfolio" and that caution and the preservation of the trust corpus should be addressed in every investment.[102] This has the practical effect of requiring a trustee to make conservative investment decisions, but also allows a trustee to create a balanced portfolio of diversified investments. Even so, simply because the trustee manages some trust property profitably, that does not insulate the trustee from liability for mismanaging other trust assets. Each investment must be "prudent" when viewed in the context of the strategy for the overall portfolio and the balancing of risks and returns. Furthermore, turning a profit does not guarantee that the trustee is not in breach of its duty to manage with reasonable skill and care. As applicable to the Elliott State Forest, by achieving a modest profit, the State Land Board has not necessarily achieved its obligations to the school beneficiaries. By recognizing that other assets in the trust were consistently earning strong returns, while the Elliott State Forest declined in value, the Board should have known in real-time (not hindsight) that doing nothing was imprudent.

In Oregon, the courts have held that a trustee did not act prudently when it failed to ascertain the fair market value of a trust's asset.[103] The court stated:

> We conclude that the acceptance of the corporation's offer, without any effort to determine if there were other potential buyers, without appraising the real estate and without taking into account important factors such as the controlling interest to be sold and value of the goodwill, was imprudent. Defendant breached its trust by failing to obtain fair market value for the sale of the sole trust asset, to the loss of plaintiff, the only beneficiary who did not approve or consent to the sale.[104]

Thus, a prudent manager must know the value of trust assets and strive to obtain full value for the assets under its management. Oregon courts have also found a trustee in breach when the trustee failed to diversify the assets of a trust, and retained investments solely in its own investment funds.[105]

In other courts, trustees are often found in breach of this duty for failing to respond to a volatile stock market, where the sale of assets may be necessary to retain the value of the trust or to pay taxes on the trust. Conversely, a trustee's wholesale liquidation of the trust portfolio within a week of remainderman taking interest that resulted in a significant loss in the value of the trust

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[102] RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).
[103] Hatcher, 643 P.2d at 366–67.
[104] *Id.*
[105] Stephan v. Equitable Sav. & Loan Ass'n, 522 P.2d 478 (Or. 1974).

principal was also a breach.[106] In Washington, a court found that a trustee had violated the prudent investor rule when the "trustee had improperly weighed trust assets in favor of himself, the income beneficiary."[107] Importantly, the court required that the trustee reimburse the trust corpus for the loss caused by that investment strategy.[108] Thus, a trustee must be proactive in managing the trust to accommodate fluctuations in investments, but also with care toward external considerations, and failure to meet these obligations may leave the trustee liable in the amount of the loss to the trust.

Here, the loss of three million dollars does not evince the results of a prudent and diligent trustee. The question of whether the State Land Board has violated the concept of the prudent investor is a fact intensive one. Courts are likely to give broad discretion to the trustee, but will also look for comparison in the management of other assets to determine whether or not the Board has breached its duties. One such benchmark may be that a sustainable harvest is calculated to be in the neighborhood of 40 MMbf per year,[109] but the Board has approved only a small percentage for harvest. This is clearly imprudent action.

It is worth noting here the idea that has frequently been mentioned that the State Land Board somehow divest the trust of the Elliott State Forest to avoid putting students in opposition to endangered species. A trustee is vested with the authority to change the holdings of a trust, and in this way the State Land Board can convert its real property holding to cash for investment. However, it is contrary to basic trust law to have a beneficiary fund its own trust to facilitate a change in funds assets. Some taxpayers are beneficiaries of the trust and, therefore, the State Land Board cannot decouple the Elliott State Forest from the trust with taxpayer funds. This would be a clear violation of its duties.

2. Failure to act

A trustee can also be liable for failing to dispose of property when the opportunity presents itself, and by waiting too long, leaves the trust with devalued property.[110] To constitute a breach, inaction must rise to the level of negligence. It is commonly seen where a trustee holds stock

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[106]Matter of Wood, 177 A.D.2d 161, 167 (N.Y. Sup. Ct. 1992) ("When sales by a trustee result in losses, the issue is whether a prudent person, dealing with his own property, would have given the order to liquidate to preserve capital. In this case, the answer is obviously not.").

[107]Estate of Cooper, 81 Wn. App. 79, 82–83 (1996).

[108]*Id.* at 83.

[109]Letter from Robert E. Ragon, Douglas Timber Operators to Department of State Lands (August 14, 2014).

[110]LINCOLN INSTITUTE OF LAND POLICY, TRUST AND TRUST RESPONSIBILITIES, https://www.lincolninst.edu/subcenters/managing-state-trust-lands/publications/trustlands-responsibility.pdf.

inappropriately long or fails to diversify. Several cases exemplify the mismanagement of a trust occurring as a result of a trustee's inaction. The cases explored below, although not Oregon case law, are applicable because they are based on the Restatement and the analysis employed by these courts is comparable to the analysis likely to be utilized by Oregon courts.

In *Shear v. Gabovitch*, the beneficiaries alleged that the trustee was in breach for failing to act on two accounts.[111] First, the trustee failed to take action to stop a massive waste of hospital assets.[112] Thus, the trustee's inaction resulted in the trusts earning no income from their primary investment.[113] Second, the trustee sold the trusts' hospital shares for less than fair value.[114] While the court ultimately decided that the facts did not weigh in favor of finding breach, it made clear that this inaction under different circumstances with proper facts could be construed as a breach.[115]

Similarly, in *In re Estate of Rowe*[116] and in *In re Estate of Saxton*[117] the court found trustees liable for failure to act with respect to trust assets and failure to diversify. In each case, trusts were established on the death of the grantor placing IBM stock into trust for charity and family support. In both cases, the corpus of the trust remained in IBM stock, even as such stock was decreasing in value. In both instances, beneficiaries of the trust brought suit against the trustee for failure to act and to diversify the holdings of the trust, and the court found the trustee liable for inaction and for failure to diversify the trust holdings. In *In re Estate of Rowe*, applying the prudent person rule, the court held that the trustee had violated its duties to the trust and had violated its own policy manual in its administration of the trust.[118] In so holding, the court considered the "extreme volatility and over-all downward trend of IBM stock during this period and the fact that IBM itself was undergoing an 'extremely stressful time' [which] made it unsuitable for fulfilling the trust's investment goals"[119] In *In re Estate of Saxton*, the court found "not a scintilla of evidence indicates that [the trustee] fully apprized [the beneficiaries] of the effects that their execution of the [investment direction agreement] would have on their legal rights or how their direction to hold the entirety of the trust's corpus in IBM stock would fall far short of what would have been required of

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[111] Shear v. Gabovitch, 685 N.E.2d 1168, 1172, 1195 (Mass. App. 1997).
[112] *Id.* at 1172.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 1188.
[116] 274 A.D.2d 87 (N.Y. Sup. Ct. 2000).
[117] 274 A.D.2d 110 (N.Y. Sup. Ct. 2000).
[118] 274 A.D.2d at 92.
[119] *Id.*

a prudent corporate trustee."[120] The court awarded damages, recognizing that a "beneficiary is simply entitled to be put in the position he or she would have occupied had no breach occurred."[121]

However, courts will not find a breach where there is no evidence of gross negligence or bad faith. In *Nelson v. First National Bank and Trust Company of Williston*, trust beneficiaries argued "that First National acted in bad faith because it did not even consider selling the Medtronic stock immediately after Leonard Nelson's death."[122] The court disagreed with the assertion, holding that "[a] failure to act, like an act, may be in good faith or bad faith, just as it may be negligent or prudent[, but t]here is no evidence that First National proceeded dishonestly or with corrupt or selfish motives in respect to this particular inaction."[123] A court will also not find a breach where the beneficiaries consented to certain actions.[124]

In this case, the State of Oregon has simply retained the Elliott State Forest. It has not attempted to sell or otherwise derive income from it as a trust asset until just recently. This is comparable to the trustee in *Shear*, who was alleged to have failed to prevent waste of hospital assets. The Elliott State Forest is no different from a stock whose value may fluctuate, but failing to take any action with respect to the asset is a breach of a trustee's duty of prudent management. The State's inaction directly resulted in an unrecoverable loss of three million dollars, which may be construed as a breach of its duties.

3. Failure to consider beneficiary needs

The trustee must also take care to understand the needs of the beneficiaries to ensure trust management comports with these needs. In *In re Estate of Lieberman*, the court found that the trustee's actions were not prudent because the trustee "knew that the beneficiaries did not need substantial sums of money to address their current needs, and, instead of investing that money in a property that would have yielded a higher return, it decided to invest the money in a property yielding a 1% return . . . [and that a] trier of fact could find that the investment of such a large amount in short-term funds was not reasonable or prudent and could constitute a breach of fiduciary duty."[125] In some cases, this duty requires the trustee to accommodate beneficiaries with

[120] 274 A.D.2d at 119.
[121] *Id.* at 121.
[122] 543 F.3d 432, 436 (2008).
[123] *Id.*
[124] *See, e.g.*, Hatfield v. First Nat. Bank of Danville, 46 N.E.2d 94, 99–100 (Ill. App. 1943).
[125] In re Estate of Lieberman, 909 N.E.2d 915, 923 (Ill. App. Ct. 2009).

conflicting interests. Such was the case in *SunTrust v. Merritt*, where the beneficiaries were at odds—some benefitted from an aggressive management strategy that maximized payout and others benefitted from a sustainable, long-term plan to preserve the corpus of the trust.[126] The court emphasized the importance of looking to trust documents, especially when there are multiple beneficiaries, and held that the trustees had met their obligations because "the corpus of the trust was not encroached upon and actually increased in value . . . [and] the corpus was invested in a manner consistent with the intent of the trust's settlor, which was to provide income to the lifetime beneficiary."[127]

This enunciation of this aspect of the duty is worth noting here because the State Land Board must manage the trust for current income to schools and to preserve the corpus of the trust for future income. This issue appeared in *White v. Public Employees Retirement Board*, where the beneficiaries of the Public Employees Retirement System ("PERS"), a trust fund managed by the State, sued the State alleging that certain of its actions violated its fiduciary duties.[128] In *White*, the court held that PERB acted within its authority when it settled a pending lawsuit, but may have exceeded its authority when it transferred money from its contingency reserve, which was not required under the settlement.[129] In reaching that conclusion, the court stated that "common-law trust principles recognize that a trustee must consider not only the amount of income or the near-term benefits for trust beneficiaries, but also the need to protect and preserve the corpus of the trust itself."[130] It further recognized that "PERB owes duties of loyalty, prudence, and competence to PERS members—and the fact that PERS retirees receive the dollar amount of benefits to which they are contractually entitled does not necessarily mean that PERB has met those fiduciary obligations."[131] Rather, the court reiterated that PERB "has a duty to protect the corpus of the fund and to manage the fund for the benefit of all PERS beneficiaries."[132] Thus, the State Land Board is further limited in its actions because it must consider short-term and long-term beneficiaries in furtherance of its duties.

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[126] 612 S.E.2d 818, 821 (2005) ("In trusts like the present one with successive beneficiaries, that is income to a beneficiary for life and the principal later to other beneficiaries, the interests of the two beneficiaries are to a certain extent antagonistic, and the trustee is under a duty so to administer the trust as to preserve a fair balance between them.").

[127] *Id.* at 822–23.

[128] *Id.* at 608.

[129] *Id.* at 623.

[130] *Id.* at 608.

[131] *Id.* at 609.

[132] *Id.* at 610.

B. Breach of the duty to preserve trust property and defend actions that may result in loss to the trust

A trustee has certain obligations to preserve trust property, including when facing litigation or other claims. The trustee must protect the trust from loss as a result of actions implicating the trust and the trustee must defend actions against the trust.[133] The trustee is also responsible for insuring trust property against loss or control and to pay any taxes or liens imposed on trust assets to prevent foreclosure.[134] A trustee's obligation with respect to claims involving the trust is not a simple balancing of the out-of-pocket cost of litigation against the amount that might be recovered (discounted, presumably, by the possibility of not prevailing).[135] When making decisions involving claims and litigation, a trustee must consider the "risks and benefits"—as it must when making other decisions involving the trust—but the test itself is whether the decision is a reasonable course of action in terms of the trust's interests.[136] If no statutes or trust provisions apply, the standard is whether or not the trustee acted reasonably.

A trustee is obligated to defend the trust against claims, to avoid claims of liens and other losses, and to pay taxes. Most case law presumes the trustee's authority and appropriateness of retaining counsel to assist a trustee in trust administration and resolution of claims, and focuses on payment of attorney fees—whether they are properly attributed to the trust or the trustee. In an Oregon case, the trustee hired attorneys to facilitate a premature termination of the trust and to resolve a malpractice suit.[137] The court approved use of trust moneys to pay attorney fees under some circumstances and placed the burden on the trustee in others.[138] From the court's partial approval of attorney fees, it can be inferred that the trustee acted properly in defending the trust and seeking legal advice. This echoes throughout the case law. In an Illinois case, the court awarded attorney fees, finding litigation necessary to resolve conflict between the trustees and that expenses incident to the preservation of a trust are properly charged to the trust.[139] In Michigan, a trustee

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[133] RESTATEMENT (SECOND) OF TRUSTS§178 (1980); O.R.S. § 130.700.

[134] O.R.S. § 130.725(11), (15); see Murray v. Wiley, 180 Or 257, 269–270 (1947).

[135] White v. PERB, 268 P.3d 600, 607 (2011).

[136] *Id.* at 611.

[137] Masters v. Bissett, 790 P.2d 16, 23–27 (Or. App. 1977).

[138] *Id.*

[139] Northern Trust Co. v. Continental Illinois National Bank and Trust Co., 356 N.E.2d 1049, 1072 (Ill. App. 1976), Aff'd in part and rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company 369 N.E.2d 1262 (Ill. 1977).

incurred legal fees to prevent its removal as trustee (which would have inhibited the trustee from administering the trust), and the court found these fees properly attributable to the trust.[140] Similarly, California courts note that "[i]f litigation is necessary for the preservation of the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust; however, if the litigation is specifically for the benefit of the trustee, the trustee must bear his or her own costs incurred, and is not entitled to reimbursement from the trust."[141]

In one California case, a trustee was found specifically to have the authority to obtain counsel and that such action was "necessary to the continued performance" of her duties as trustee.[142] In another unpublished California case, the court found that the trustee breached her fiduciary duties by failing to take reasonable steps to defend actions resulting in loss to the trust.[143] Although the trustee attempted to settle a lawsuit involving trust property and a contractor, she negotiated a settlement of the lawsuit in her name only, leaving the trust exposed to liability.[144]

Also included in this duty, a trustee must not waste property. As defined by the Restatement, "[w]asting property consists of such interests as terminate or necessarily depreciate in the course of time either because of the nature of the interest or because of the character of the subject matter of the interest."[145] A court has suggested that a trustee's abuse of trust assets constitutes a wasting of trust assets.[146] In that case, the trust was established to care for a special needs child, and the father "regularly remunerated himself out of Trust fund assets for what he perceived to be his due in caring for his son . . . [and his wife used] fund assets to pay the rent on the duplex apartment that she and her other two children occupy and to pay for half of the family's grocery expenses."[147]

The beneficiaries of the common school trust likely have a cause of action against the State Land Board for the breach of its duties in failing to remove certain governmental hindrances, namely by negotiating an HCP to alleviate the impact of the ESA on the Elliott State Forest. As trustee, they are obligated to remove legal impediments from causing a decrease in price of a trust. As discussed above, the development of an HCP would insulate the State Land Board and permit

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[140]Matter of McCarty's Trust, 323 N.W.2d 567, 573 (Mich. App. 1982).

[141]Terry v. Conlan, 33 Cal.Rptr.3d 603, 615 (Cal. App. 2005).

[142]Rutter Hobbs & Davidoff Incorporated v. Bessemer Trust Company of California, N.A., B209835 (Cal. App. 11/24/2009) (Cal. App., 2009).

[143]Crookshanks v. Crookshanks, Case No. B231580, at 8 (Cal. App., Mar. 26, 2012).

[144]*Id.*

[145]RESTATEMENT (SECOND) OF TRUSTS § 239 cmt a (1959); see Dennis v. Rhode Island Hosp. Trust Nat. Bank, 571 F.Supp. 623, 632 (D.C.R.I. 1983).

[146]In re Matthew W.T. Goodness Trust, C.A. No. PM/08-7349, *11–12 (R.I. Super 5/14/2009) (R.I. Super, 2009).

[147]*Id.*

incidental take. The State ceased negotiations regarding the HCP prematurely. The HCP discussions disintegrated after NMFS required six additional conditions, the two major sticking points of which included inadequate stream temperature limitations and inadequate protection for in stream wood delivery.[148]

Not only would such a plan protect the trust asset, such an action is likely expressly authorized. For example, Washington, which has successfully instituted an HCP on its trust lands, has found the HCP and other management plans appropriate if they do not abdicate the fiduciary duties of the trustee:

> The Department of Natural Resources has the authority to enter into a long-term agreement regarding management of the federal grant lands and forest board transfer lands as a means of complying with the Endangered Species Act, so long as such an agreement does not violate the Department's common law fiduciary duties and is consistent with state statutes directing the manner in which these lands are to be administered. The plan need not benefit the trusts equally. However, to include a trust in the plan, the Department, acting consistently with its fiduciary duties and in the exercise of reasonable judgment, must determine that on balance, the plan is in the economic interests of the trust.[149]

Therefore, negotiating an HCP is within the State Land Board's authority and, since it is in the best interest of the trust to preserve trust assets, the State Land Board was obligated to pursue such negotiations.

C. Breach of the Duty of Loyalty

It is possible that the appointment of the State Land Board by the Oregon legislature as trustee violated trust principles from the beginning. A trustee has a duty to administer a trust "solely in the interest of the beneficiaries," and to act honestly and with undivided loyalty to the interests of the trust and its beneficiaries.[150] The trustee's fiduciary duties prohibit self-dealing—the trustee

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[148]Letter from Kim W. Kratz, National Marine Fisheries Service to Jim Young, Coos District Forester (July 21, 2009) *available at*: http://pacificrivers.org/files/elliott/NMFS%20elliott%20letter.pdf.

[149]Att'y Gen. Op. No. 11 (1996) *available at*: http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=9168#.UynMHa1dUYI

[150]RESTATEMENT (SECOND) OF TRUSTS § 170 (1987); *see also* O.R.S. § 130.655; Grandy et al. v. Robinson, 180 Or. 315, 324 (1946) ("The utmost good faith is required of a trustee in the administration of his trust, and he is held to undivided loyalty to the interests of the beneficiary.").

cannot use trust property for the trustee's own purposes.[151] Additionally, a trustee cannot place the interests of third parties ahead of the interests of the trust.[152]

Common breaches of this duty occur when a trustee attempts to secure a material advantage for the trustee or to a third party in a transaction on behalf of the trust. A court has found a breach when a trustee leased land to himself,[153] and a trustee cannot purchase from his own sale.[154] Similarly, a trustee has been found in breach by failing to test the market and "without attempting to negotiate a rental more favorable to all the beneficiaries or even to consider that option."[155] A trustee was found in breach where the trustee assumed dual roles as trustee and developer of real property held by the trust.[156] A court found self-dealing where a trustee encouraged trading in speculative and risky investments that generated income at the expense of the trust.[157]

The duty requires the avoidance not only of self-dealing, but also of a conflict of interest. To give an example, under New York law, "the rule of undivided loyalty mandates that a trustee must neither deal with trust property for the benefit of himself nor place himself in a position inconsistent with the interests of the trust."[158] It is further described as "a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty."[159] In one case, *In re Hanes*, the trustee invested trust assets in certain companies in which he had an interest, and following bankruptcy, the other beneficiaries brought suit.[160] The trustee was a chairman of the board and held an interest in certain companies, in which the Family Investment Limited Partnership also invested. As the court noted, the trustee "invested not only his personal capital in [the companies], but also his personal pride, making it difficult to remain loyal to the trust." The court thereby concluded that the trustee engaged in self-dealing and had a potential conflict of

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[151]RESTATEMENT (SECOND) OF TRUSTS § 170, cmt. 1 (1987); *see also* O.R.S. § 130.655.

[152]RESTATEMENT (SECOND) OF TRUSTS§ 170.

[153]Wilkins v. Lasater, 46 Wn. App. 766, 733 P.2d 221 (Wn. App. 1987) (finding a breach where a trustee leased farm land to himself, in an individual capacity, which was deemed to violate the principle that the trustee cannot deal with the trust property for his own profit or claim any direct or indirect advantage by reason of his relationship to it). *See also* In re Eisenberg, 43 Wn. App. 761, 719 P.2d 187 (Wn. App. 1986).

[154]Marquam v. Ross, 47 Or. 374, 404 (1906).

[155]Jarrett v. U.S. National Bank of Oregon, 725 P.2d 384, 387–88 (Or. App. 1986) ("We do not think that the trustee fulfilled its duty in this case but, instead, took the easiest course by permitting the lessee to renew the lease, which locked up the property at the below market rental possibly for another 20 years.").

[156]Edwards v. Edwards, 842 P.2d 299, 305–06 (Idaho App. 1992).

[157]Pierce v. Lyman, 3 Cal. Rptr. 2d 236, 240–43 (Cal. App. 1991).

[158]In re Hanes, 214 B.R. 786, 814 (Bankr. Va. 1997).

[159]Birnbaum v. Birnbaum, 541 N.Y.S.2d 746, 748 (1989).

[160]214 B.R. 786.

interest. However, the court later found that the trustee was relieved of the duty of loyalty by the express terms of the trust. Also relieving him from liability for the conflict was the fact that he did not act to benefit himself, but rather because he genuinely believed it was in the best interest of the trust.

In the context of Washington trust lands, in *Skamania*, the State of Washington was found in violation of its duty of loyalty because of its passage of the Forest Products Industry Recovery Act of 1982.[161] Washington passed the Act in response to falling timber prices and allowed certain entities out of their timber contracts, resulting in a substantial loss to the trust.[162] The court enunciated the duty as follows:

> A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. In the context of this case this means that when the state transfers trust assets such as contract rights it must seek full value for the assets. It may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be.[163]

The court held that the State violated its duty of undivided loyalty to the trust beneficiaries and its duty to act prudently by enacting a law aimed at benefitting the timber industry and the state economy in general at the expense of the trust beneficiaries.[164] Thus, a state actor can be found in breach of the duty of loyalty for considering other interests.

The State Land Board, provided for by Oregon's constitution, comprises the Governor, the State Treasurer, and the Secretary of State—the three most political positions in the State of Oregon. By virtue of these political roles, the Board members cannot offer undivided loyalty to the beneficiaries because they are beholden to so many competing interests. In this fashion, the composition of the State Land Board and its role in overseeing the trust is improper and a breach of the duty of undivided loyalty. In fact, to avoid such a scenario, other states have gone so far as to create an independent agency to oversee management of state trust lands.[165]

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[161]County of Skamania v. Washington, 685 P.2d 576, 583 (Wash. 1984).

[162]*Id.* at 578–79.

[163]*Id.* at 580–81.

[164]*Id.* at 581–83 ("In short, the Act released over $90 million in contract rights (including $8 million secured by performance bonds), and the state received very little in return. The Act prevented the [Department of Natural Resources]from attempting to enforce the contracts, or to renegotiate the contracts on an individual basis. Renegotiation would have allowed the [Department of Natural Resources]to provide relief to the companies that needed it most, without resorting to the wholesale sacrifice of the trusts' contract rights. We think the Act falls far short of the state's constitutionally imposed duty to seek 'full value' for trust assets.").

[165]Jon Souder and Sally Fairfax, The State Trust Lands, http://www.ti.org/statetrusts.html#RTFToC9 (last visited August 18, 2014).

D. Breach of additional duties

The previous sections have highlighted the primary breaches likely committed by the State Land Board's management of the Elliott State Forest. The following briefly highlights additional possible breaches. First, Oregon statutes prohibit private trustees from incurring unreasonable costs.[166] While the statute does not apply to state entities, the statute represents a codification of the common law, which would apply. Generally, a trustee must prove that expenses were reasonable and were made for trust purposes.[167] The management of the Elliott State Forest incurred net costs of three million dollars in 2013. This would likely be deemed unreasonable, and the State Land Board bears the burden of showing its reasonableness.

Second, it is worth noting that under other state regimes, substantial case law focuses on breaches as a result of diversion of trust income to pay certain management costs. Although the Oregon Constitution permits the use of income to pay for the management of the trust,[168] these cases bear mentioning as examples of how rigorously protective courts are of trusts—particularly public trusts funding schools. In *Rumery v. Baier*, the Arizona Supreme Court held that the Arizona legislature could not divert funds to manage trust lands from the proceeds of trust lands.[169] The court was not persuaded that expenditure benefitted the beneficiaries, that framers intent included management costs, or that university's permanent fund had been used for timber sale expenses.[170] Idaho law similarly disallows diversion of trust funds to pay for trust management costs.[171]

XI. Possible Outcomes and Remedies

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[166]ORS 130.670

[167]Gorger v. Gorger, 555 P.2d 1, 15 (Or. 1976) ("A trustee is entitled to reimbursement from the trust for reasonable and necessary expenses . . . [but] 'before he is entitled to be credited for such expenditures, he has the duty as trustee to identify them specifically and prove that they were made for trust purposes.'").

[168]Article VIII (2) ("The State Land Board may expend moneys in the Common School Fund to carry out its powers and duties . . . .").

[169]294 P.3d 113, 118 (2013).

[170]*Id.* at 117.

[171]Moon v. Investment Board, 560 P.2d 871, 872 (1977) ("The sole issue presented by plaintiff's petition is whether or not the legislature may constitutionally appropriate and authorize a portion of the earnings from the investment of the public school funds to be transferred to and used by the Investment Board Expense Fund to defray the expenses incurred by the Investment Board in the investment of the public school fund. It is our opinion that the legislation authorizing this practice, and the practice itself, is in violation of [the Idaho Constitution].").

When a trustee breaches its fiduciary duties, a beneficiary may seek recourse to protect its interests in the trust.[172] Courts, however, will carefully scrutinize the standing of beneficiaries. In *Associated Students of the University of Oregon v. Oregon Investment Council*,[173] students sought a declaration that the Oregon Higher Education endowment funds could not be invested in the common stock of corporations doing business in South Africa, Zimbabwe and Namibia.[174] The court held that the students failed to allege a legally recognized injury in that there was "no diversion of funds and no financial injury to themselves or to Oregon's colleges and universities . . . [and] that they or any potential recipient of endowment funds has ever refused, or will refuse, to accept a scholarship or loan from [the fund]."[175] Thus, the beneficiaries of the Common School Fund will need to be carefully selected to ensure that they will survive a standing challenge.

Importantly, the Oregon Supreme Court has established that Oregon counties can sue the state. In 1986, twelve Oregon counties sued the state over plans to exchange certain forestry lands the counties had conveyed to the state for other land that would be used as a state park.[176] The proposed state park would not generate any revenue for the county in which it was located. The counties made two claims in court. First, they claimed that their conveyance of tax-foreclosed lands to the state created a contract or trust relationship between the parties and the state could not unilaterally transfer such lands to a third party in exchange for non-revenue producing lands without breaching the contract or trust. Second, they claimed that, in the future, the state could not unilaterally change the formula for dividing the revenue from the lands they had conveyed.[177] With respect to the first claim, the Oregon Supreme Court held that the particular land transfer at issue in the case violated the county's legal rights under state law; however, it deemed it unnecessary to describe the arrangement between the county and the state in contract or trust terms.[178] It did not decide the issue of whether the legislature could unilaterally change the distribution formula, noting that challenges to future legislative amendments are not justiciable.[179]

In *Tillamook*, the state had asserted that the counties were mere instrumentalities of the state and could not sue the state because the counties and the state were one and the same entity. The

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[172]See Cloud v. U.S. National Bank, 280 Or 83, 92–93, 570 P2d 350 (1977).
[173]728 P.2d 30 (1986).
[174]*Id.* at 31.
[175]*Id.* at 33.
[176]Tillamook County v. Oregon 302 Or. 406 (1986).
[177]*Id.* at 411.
[178]*Id.* at 416.
[179]*Id.* at 412.

court, however, rejected this position. It noted that counties are distinct entities that can sue and be sued, that can purchase and hold land within their limits, that can make all necessary contracts, and that can do all other necessary acts in relation to the property and concerns of the country. Thus, they possess interests that can be asserted against the state.[180] Similarly, inasmuch as the Common School Funds are divided among the counties, those counties might be able to sue the state if they could prove the state was taking actions that depleted their share. It is important to note, however, that the court decided *Tillamook* under the law of contracts, not trusts.

Assuming a beneficiary with standing pursues its claims against the trustee, the remedy for a trustee's breach of duties can be computed numerous ways. The general principle is that "the beneficiary is simply entitled to be put in the position he or she would have occupied had no breach occurred."[181] If a trustee commits a breach of trust by neglecting, within a reasonable time, to invest money comprising a portion of the trust estate, he is chargeable with the amount of income that would normally accrue from proper trust investments, the lost capital.[182] When a trustee fails to ascertain and subsequently obtain the fair market value for a trust asset, the beneficiary receives the difference between the fair value of plaintiff's share of the trust corpus and her share of the amount obtained by the trustee.[183] Thus, the beneficiaries could be entitled to a reimbursement to the fund of its lost income or lost profits. Unfortunately, the reality is that this reimbursement comes from the taxpayers and not the individuals comprising the State Land Board serving as trustee.

XII. Conclusion

The State Land Board is in an unfortunate and unenviable position, but the reality remains that the Board has certain obligations to the beneficiaries of the trust. To date, the Board's actions as trustee potentially render it in violation of its fiduciary duties. Even if minimal timber sales allow the Board to turn a modest profit, the value of the Elliott State Forest as a trust asset remains wildly under-realized and the Board will continue in breach of its obligations to the school beneficiaries.

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[180] *Id.* at 415-16.

[181] In re Estate of Saxton, 274 A.D.2d 110, 121(N.Y. Sup. Ct. 2000).

[182] RESTATEMENT (SECOND) OF TRUSTS § 181; Jarrett v. U.S. Nat. Bank of Oregon, 725 P.2d 384, 81 Or.App. 242 (Or. App., 1986) ("The trustee breached its fiduciary duty by failing to demand payment on the note after September, 1977, and is liable to the beneficiaries for the lost income to the trust.").

[183] Hatcher v. U.S. Nat'l Bank of Oregon, 643 P.2d 359, 364 (Or. App. 1982); Matter of Janes (Janes III), 90 NY2d 41 (1997).

As the Board moves forward in analyzing various options, it should do so carefully to avoid further detriment to the beneficiaries and to comply with its duties as trustee. Specifically, the Board should consider, at the very least, the following actions.

1. Given that the State Land Board cannot, by virtue of its political positions, offer undivided loyalty to the beneficiaries of the trust lands, it should craft legislation creating a new, independent board to manage the trust assets.

2. The State Land Board is obligated to preserve trust assets, and with the overlay of the ESA, it must reopen negotiations for a Habitat Conservation Plan that would allow for incidental take and prevent further losses to trust assets.

3. To ensure prudent management of the Elliott State Forest as a trust asset, the Board must articulate and justify the reasons for its actions with respect to the asset, whether the Board decides to hold, sell, or harvest the asset.