Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust

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OLD-GROWTH FORESTS ON STATE SCHOOL LANDS—DEDICATED TO OBLIVION?—PRIVATE TRUST THEORY AND THE PUBLIC TRUST

Abstract: The application of private trust principles to management of state forest lands granted to Washington by Congress in the Enabling Act conflicts with the public trust established in the state constitution and hampers efforts to preserve ecological values on these lands. This Comment explores alternative common law doctrines which courts employ to construe restrictive land grants. Principles applying to dedications of land for public use better suit the task of harmonizing the language of the Enabling Act and the state constitution to allow for protection of ecological values on state forest lands.

In recent years, scientists and the general public have recognized the value of the Pacific Northwest's old-growth forests. At the same time, timber companies are logging these forests at an increasing rate. So far, this conflict has centered on federal lands where the bulk of uncut forests remain. But in Washington, attention has turned to the few significant tracts of virgin forest still standing on state lands.

Congress granted these timber lands to the state one hundred years ago in the Washington Enabling Act to support public education.1 Mistaken assumptions about the requirements of the Washington Enabling Act and the state constitution hamper discussion of substantive issues involved in managing the state's old-growth forests. The state's position is that the Washington Enabling Act and the state constitution create an express trust on behalf of educational institutions.2 The "trust" requires that the land be managed primarily to generate income for these "trust beneficiaries."3 Consideration of any other management objectives, however laudable, is precluded by the Enabling Act and the constitution.4

The state's position is fundamentally flawed. The Enabling Act and the constitution do not create an express trust, but merely dedicate public lands for the purpose of supporting public education. The state should use principles normally applied to dedications of land for public purposes to harmonize Congress' intent to provide a land base to

1. Wash. Enabling Act, §§ 11-17, 25 Stat. 676 (1889) (found in 0 WASH. REV. CODE at 19-25 (1989)).
3. Id.
support public education with the public’s interest in protecting ecological resources for future generations.

I. THE WASHINGTON ENABLING ACT AND THE LAW OF RESTRICTIVE GRANTS

Washington State owns approximately 2.1 million acres of forest lands which are managed by the Washington State Department of Natural Resources (DNR). Washington acquired most of these lands at statehood through federal land grants to support public education.

A. The Constitutional and Statutory Framework Governing Management of Granted Lands

1. The Washington Enabling Act

Congress granted most of the land in two sections of the Washington Enabling Act. Section 10 of the Washington Enabling Act granted almost 2.5 million acres to support common schools. Congress left ultimate management and disposition of section 10 land to the state legislature, while imposing certain limits on its discretion. Section 17 of the Washington Enabling Act granted additional blocks of 100,000 acres each to establish a scientific school, state colleges, and public buildings at the state capital. In addition, section 17 granted a block of 200,000 acres for state charitable, educational, penal and reformatory institutions. Congress required the use and disposition of section 17 lands to be “exclusively” for those prescribed purposes.

5. Forest Management Program, supra note 2, at iii.
6. See Wash. Enabling Act §§ 10, 17. From the beginning of our nation’s history, the federal government has granted land to new states as they entered the union to support education and other public purposes. These grants were made out of the idealistic motive of supporting public education and the pragmatic goal of making Western settlement more attractive. See M. Orfield, Federal Land Grants to the States with Special Reference to Minnesota 36-125 (1915); F. Swift, A History of Public Permanent Common School Funds in the United States 48 (1911).
8. The Washington Enabling Act § 11 provides: (1) that lands granted for educational purposes may be disposed of only at public sale with the proceeds of the sale to constitute a permanent school fund; and (2) that land may only be leased for periods of less than five years with restrictions on the amount of land any one individual may lease. Congress has amended section 11 several times, among other things, liberalizing the restrictions on leasing. See Wash. Rev. Code at 21-23 (1989).
9. Wash. Enabling Act § 17. These grants were “in lieu of” land grants made by previous acts of Congress to other states, including grants made for internal improvements, saline land grants and swamp land grants. Id. Other sections of the Act made much smaller dedications of federal land for other public purposes. See id. §§ 12, 14, 15.
10. Id. § 17. To ensure that these limits were respected, Congress conditioned Washington’s admission to the Union on the adoption of a state constitution in compliance with the provisions
2. The State Constitution and Subsequent Enactments

Article XVI of the state constitution provides that "[a]ll the public
lands granted to the state are held in trust for all the people."11 Article XVI also sets forth restrictions and procedures for the sale and
disposition of granted lands substantially similar to the restrictions
and procedures mandated by the Enabling Act.12

The state legislature has enacted a number of provisions relating
directly to the protection of natural areas on granted lands.13 Withdrawals of state lands for recreational purposes are permitted within
the constraints established by the constitution and the Enabling Act.14 More significantly, state land managers may withdraw lands for the
observation, study, and enjoyment of natural ecological systems,15 provided that the land trusts are compensated in full for any interests
disposed of.16 The legislature did not intend these statutes to modify
the purported obligation of state land managers to manage the land in
the best interests of the "beneficiaries" of granted lands.17

B. Limits to State Officials' Discretion in Managing Public Lands

Washington courts have applied private trust principles when for-
mulating rules for management of educational land grants.18 Other
legal principles also may be relevant to management and disposition of
state lands. Among these, the most important are (1) the public trust
doctrine and (2) the principles applying to private and public land
dedications.

of the Enabling Act. Id. § 8. Unlike later Enabling Acts, Congress made no provision enforcing
the Act's restrictions after Washington was admitted to the Union and title to the land passed to
the state. See, e.g., Ariz. Enabling Act, § 28, 36 Stat. 575 (1910) (stating that non-compliance
with the terms of the Act constitutes a "breach of trust," and empowering the United States
Attorney General to seek judicial remedies).
11. WASH. CONST. art. XVI, § 1.
12. See id. § 1 (lands and assets from the lands may not be disposed of for less than full
market value) and § 2 (requiring sale at public auction).
13. See infra note 55 (application of Forest Practices Act and State Environmental Policy Act
to management of granted lands).
15. Id. § 79.68.060.
16. Id. § 79.70.040.
17. Id. § 79.68.060.
Bogert, TRUSTS AND TRUSTEES § 543, at 197-98 (2d ed. 1978).
1. *The Private Trust*

A private trust strictly limits the trustee's discretion to modify the use of land or other trust property. A trust relationship requires the trustee to act in strict conformity with fiduciary principles in managing trust assets. An express trust is created, however, only if there is a clear manifestation by the grantor (the settlor) and the recipient (the trustee) to create a trust. The standard of proof for intent to create a trust is exacting, requiring more than a mere preponderance of the evidence.

2. *The Public Trust*

Although state agencies have broad discretion in managing public lands, the public trust doctrine limits agency discretion. In its traditional form, the public trust doctrine prohibits the state from surrendering state control over public resources. A more modern and expansive conception of the public trust doctrine imposes upon public

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19. A trust is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another." *Restatement of Trusts* § 2 (1959).

20. The trustee's most fundamental fiduciary duty is the duty of loyalty, which requires the trustee to administer the trust solely in the interests of the beneficiaries. *In re Estate of Johnson*, 187 Wash. 552, 554, 60 P.2d 271, 271-72 (1936). The trustee also has a duty to prudently manage trust property. *In re Park's Trust*, 39 Wash. 2d 763, 767-68, 238 P.2d 1205, 1208 (1951); see *Wash. Rev. Code* § 11.100.020 (1989).

In certain limited circumstances, the restrictiveness of the relationship can be tempered somewhat through judicial intervention. Under the doctrine of *cy pres*, a court may reform the purposes of a charitable trust, but only where the settlor has manifested a general charitable intent and accomplishing the settlor's original purpose is impossible, impractical, or illegal. See, e.g., Puget Sound Nat'l Bank of Tacoma v. Easterday, 56 Wash. 2d 937, 949-50, 350 P.2d 444, 450 (1960) (applying *cy pres* where testator's will created charitable trust for unwed mothers discharged from a home and the home was subsequently discontinued). The courts have traditionally hesitated to apply *cy pres* to achieve charitable efficiency in situations lacking impossibility or nonfulfillment of purpose. See *Comment, Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 Va. L. Rev. 635, 648-49 (1988).

21. *Hoffman v. Tieton View Community Methodist Episcopal Church*, 33 Wash. 2d 716, 207 P.2d 699, 704-05 (1949) (99-year lease to a church for nominal rental payments for church, charitable, literary, or community purposes held to be a simple lease not a trust).

22. See, e.g., *In re Madsen's Estate*, 48 Wash. 2d 675, 296 P.2d 518, 519 (1956) (applying a beyond reasonable doubt standard); *Hoffman*, 33 Wash. 2d at 726, 207 P.2d at 705 (applying a clear and convincing evidence standard).


agencies an affirmative and continuing obligation to consider and pro-
tect public trust values when allocating public trust resources. In
modern times, courts almost always find these public values to include
enjoyment and study of intact natural systems.

The Washington Supreme Court has adopted the public trust doc-
trine as part of Washington’s common law governing submerged
lands, but has not yet extended it to other public lands. However,
the Washington constitution provides that public lands granted to the
state are “held in trust for all the people.” Moreover, the State Envi-
ronmental Policy Act (SEPA), does apply to upland areas. SEPA
requires state agencies to adopt policies to “[f]ulfill the responsibilities
each generation as trustee of the environment for succeeding
generations.”

3. Dedications of Land for Public Purposes

Dedications fall into two categories: private and public. Dedications
of land for public use usually impose fewer restrictions on use than a
private trust but more restrictions than the public trust.

A private dedication occurs when a landowner declares an intent to
devote land to a public use. A public body must accept the terms of
a dedication explicitly, or implicitly by assuming control over the
land. A private dedication of land for a specified public purpose
does not create a trust relationship unless the grantor explicitly

25. See, e.g., National Audubon Soc’y v. Superior Court of Alpine County, 33 Cal. 3d 419,
658 P.2d 709, 728, 189 Cal. Rptr. 346, 364 (state has “affirmative duty to take the public trust
into account . . . and to protect public trust uses whenever feasible”), cert. denied, 464 U.S. 977
(1983); see also W. Rodgers, Environmental Law 180-81 (1977) (suggesting a principle of
maximum mitigation or best available technology).

(“the public trust doctrine resembles a covenant running with the land . . . for the benefit of the

27. Id. at 639, 747 P.2d at 1076.

28. See Note, The Public Trust Doctrine: Accommodating the Public Need Within


Environmental Policy Act, 60 Wash. L. Rev. 33, 58-63 n.169 (1984) (citing the Department of
Natural Resources’ (DNR) “top dollar” timber management policies as an example of a policy
insufficiently attentive to the substantive provisions of SEPA).


33. Id. at 503, 206 P.2d at 282 (acceptance may arise by implication from public use for the
purposes for which the property was dedicated).
imposes the equitable duties of a trustee upon the public agency accepting the grant.\textsuperscript{34}

In general, the use of land dedicated for a particular public purpose must conform to the dedicator’s intent.\textsuperscript{35} However, the terms of a dedication imposing land use restrictions are construed strictly against the dedicator and liberally in favor of public use.\textsuperscript{36} To violate the dedicator’s intent, the land use must be inconsistent or substantially interfere with the purpose of the dedication.\textsuperscript{37} For example, when a dedication does not state the land is to be used exclusively for the dedicated purpose, courts have held that other uses are permissible.\textsuperscript{38}

Courts apply a rebuttable presumption that the dedicator contemplated that the state may adjust the land’s dedicated use as circumstances change.\textsuperscript{39} Applying this rebuttable presumption eases the burden imposed on the public by restrictive dedications. The presumption may be rebutted only by a showing that the change in the use would defeat or frustrate the grantor’s basic intent.\textsuperscript{40} Thus, when the language of the grant or dedication permits, courts must balance the private interest in forever restricting land to a favored use against

\textsuperscript{34} See City of Hermosa Beach v. Superior Court, 231 Cal. App. 2d 295, 41 Cal. Rptr. 796, 798-99 (1964) (dedication of land to city as a “public pleasure ground” did not create charitable trust (citing 1 G. BOGERT, TRUSTS & TRUSTEES, § 34)).

\textsuperscript{35} Donald v. City of Vancouver, 43 Wash. App. 880, 886, 719 P.2d 966, 969 (1986).

\textsuperscript{36} Rainier Ave. Corp. v. City of Seattle, 80 Wash. 2d 362, 367, 494 P.2d 996, 999 (where dedicator’s intent is ambiguous, the language of the deed is construed to favor public’s interest in open space), cert. denied, 409 U.S. 983 (1972). Restrictions on the use of land granted in fee are not favored in Washington. Jones v. Williams, 56 Wash. 588, 592, 106 P. 166, 168 (1910).


\textsuperscript{38} See, e.g., King County v. Hanson Inv. Co., 34 Wash. 2d 112, 118, 208 P.2d 113, 117 (1949) (excess land granted for a road could be used for a public park where deed did not say “for road purposes only”).

\textsuperscript{39} Angel, 288 A.2d at 501; see Albee v. Town of Yarrow Point, 74 Wash. 2d 453, 457, 460, 445 P.2d 340, 343-44 (1968) (presuming dedicator intended to extend road dedicated to public use across land submerged at time of dedication to provide access to lake where level of lake subsequently lowered, and permitting land dedicated for public access to lake navigation to be used for recreation access when passenger ferry discontinued); 23 AM. JUR. 2D Dedication § 68 (1983).

\textsuperscript{40} Angel, 288 A.2d at 501 (lease of a small part of dedicated park to non-profit group for indoor recreation facility for retarded children, but open to the public, would not frustrate or defeat the dedicator’s intent).
society's interest in allocating land, a finite resource, to uses which are most beneficial to society.

In public dedications, where land is dedicated to a public use by a public body, the legislature has broad discretion to change the land's use. The rule applies whether the state acquired the land by purchase, condemnation, or grant from the federal government. State agencies have more limited discretion to change the use of dedicated land absent explicit legislative authorization. However, courts will likely uphold an agency's change in the use of publically dedicated land without legislative authorization if the land remains under the control of a public body and the amount of land diverted is minor compared with the original area.

The federal government may dedicate land by act of Congress. Courts often apply dedication principles in construing the terms of federal land grants to state or local governments. However, courts interpret the terms of federal land grants to state and local governments less strictly than private dedications.

C. Applying Private Trust Principles to State Administration of Educational Land Grants—County of Skamania v. State

In County of Skamania v. State, the Washington Supreme Court held that the state holds granted lands in trust for the beneficiaries named in the Enabling Act. The Skamania court applied trust principles to strike down a statute authorizing purchasers of timber from educational grant lands to default on timber sales contracts. The statute allowed the purchasers to renegotiate the contracts with the

41. Seattle Land & Improvement Co. v. City of Seattle, 37 Wash. 274, 277, 79 P. 780, 781 (1905).
42. See Carson v. State, 240 Iowa 1178, 38 N.W.2d 168, 175 (1949).
44. See id.
46. See, e.g., Idaho v. Hodel, 814 F.2d 1288 (9th Cir.) (permitting the leasing of home sites in land granted to the state to be "held, used and maintained solely as a public park"), cert. denied, 108 S. Ct. 159 (1987). Notably, the Hodel court rejected the rule enunciated in United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957), and argued for in the dissenting opinion, Hodel, 814 F.2d at 1300, that federal land grants should be interpreted in favor of the federal government, where, as in this case, the grantee was a public body.
47. See, e.g., Choctaw and Chickasaw Nations v. Board of County Comm'rs of Love County, 361 F.2d 932, 935 (10th Cir. 1966) (permitting extraction of oil and gas from land granted by the United States to the county "in trust for cemetery purposes only").
49. Id. at 130, 139, 685 P.2d at 578, 583.
The court struck down the statute because it violated (1) the state's fiduciary duty of undivided loyalty to the beneficiaries designated in the Enabling Act, and (2) the state's duty to act prudently when managing trust assets. The court held that this breach of trust violated the constitutional requirement that the state seek full market value when disposing of trust assets.

Courts in other states have applied private trust principles to invalidate diversions of state school lands to private parties. Cases involving proposed changes in use of granted land for a legitimate public purpose, especially for the purpose of protecting the environment, are relatively rare. Environmental regulations generally have been held to apply to granted lands even when these laws may potentially reduce the flow of income to educational institutions. On the other hand, the Alaska Supreme Court held that the diversion of state university lands to the state park system was a breach of the state's trust duties. Even so, the court refused to invalidate the legislation. Instead, the court required the state to compensate the university trust fund either in cash or land of equal value.

50. Id. at 136, 685 P.2d at 582.
51. Id. at 138-39, 685 P.2d at 582-83.
52. Id. at 139, 685 P.2d at 583 (citing WASH. CONST. art XVI, § 1). The court also relied on Lassen v. Arizona ex rel. Ariz. Highway Dep't, 385 U.S. 458, 469 (1967) (requiring full compensation to school trust fund for transfer of highway easements across educational grant lands to state highway department). Skamania, 102 Wash. 2d at 132, 685 P.2d at 580.
53. See, e.g., State v. Board of Educ. Lands and Funds, 154 Neb. 244, 47 N.W.2d 520 (1951); Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230 (Okla. 1982) (invalidating preference leasing systems which did not require payment of full market rental value); but see Frolander v. Ilsley, 72 Wyo. 342, 264 P.2d 790 (1953) (upholding statutory leasing scheme giving lease renewal preference to state residents).
54. See, e.g, Kanaly v. South Dakota, 368 N.W.2d 819, 824 (S.D. 1985) (transfer of state university lands granted under the same terms as Washington Enabling Act § 17, to the state prison system without compensation to the university trust fund violated the South Dakota Enabling Act and constitution).
55. For example, Forest Practices Act requirements apply to timber sales on granted land. West Norman Timber v. State, 37 Wash. 2d 467, 224 P.2d 635 (1950) (rejecting a timber company's challenge to an administrative order, made pursuant to the Forest Practices Act, that the company must leave 27 acres of timber standing as seed areas). Likewise, SEPA, WASH REV. CODE § 43.21C.020 (1989), requires the DNR to prepare an environmental impact statement for any timber sale which may significantly affect environmental quality. Noel v. Cole, 98 Wash. 2d 375, 380 n.2, 655 P.2d 245, 249 n.2 (1982) (DNR cannot conclusively presume that timber sales on granted lands will have no significant environmental impact and thus avoid SEPA requirements).
57. University of Alaska, 624 P.2d at 816.
Old-Growth Forests

II. HARMONIZING THE ENABLING ACT AND THE CONSTITUTION—USING DEDICATION PRINCIPLES TO PRESERVE BIOTIC DIVERSITY

Western Washington's old-growth douglas fir forests are unique. The old growth forest ecosystem is vitally important to the state's fish and wildlife. Since the time of the Washington Enabling Act, intensive logging has severely depleted the old-growth forests on state and federal lands and threatens their dependent ecosystems. These impacts can only be mitigated if the state takes steps soon to preserve the state's remaining old-growth forests and to retain or re-create the ecological attributes of old-growth forests on cut-over lands.

The private trust theory adopted in Skamania can only hamper efforts to protect ecological values on state forest lands. State land


59. Large downed logs in streams stabilize stream banks and prevent erosion by dissipating the kinetic energy of falling water. Ecological Characteristics, supra note 58 at 37-40. Sedimentation of streams can be devastating to fish habitat.

60. Old-growth and mature forests provide primary habitat for 118 species of vertebrates, over one-third of which (40 species) cannot survive outside this forest type. See L. Harris, supra note 58, at 68.

61. At the turn of the century, about 85% of the forest land in Western Washington was old-growth forest, with the rest second-growth. L. Harris, supra note 58, at 29-30. Today the proportions are approximately reversed. As little as 10% of forest land remains in mature or old-growth forest. Id. at 34. Over the past 30 years, the annual loss and removal of Douglas-fir from Western Washington and Oregon has averaged three times annual growth. Id. at 27. Only 28,000 acres of forest more than 200 years old and about 120,000 acres of forest older than 100 years old remain on state lands. Telephone interview with Jerry Kamminga of DNR (Jan. 17, 1989).

Logging in Western Washington has had a severe impact on natural ecosystems. For example, the U.S. Fish and Wildlife Service proposes listing the northern spotted owl, a species indicating the health of the old-growth ecosystem, as threatened under the Endangered Species Act (ESA), 16 U.S.C.A. §§ 1531-43 (West 1982 & Supp. 1987). 54 Fed. Reg. 26666 (June 23, 1989).

The ESA prohibits the taking of threatened species. § 1538(1)(b). Taking includes destruction of critical habitat. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184-85 n.30 (1978). Further, the ESA preempts less protective state regulation. § 1535(f). However, exemptions from the ESA are available to states and private parties who formulate an approved Habitat Conservation Plan or apply to the cabinet-level Endangered Species Committee for a special exemption. §§ 1536(e-o), 1539(a). The complexities of the ESA are beyond the scope of this Comment.
managers and the courts should consider other theories, particularly the principles applying to land dedications, in order to harmonize the Enabling Act and the constitution and to avoid an unfortunate conflict between two laudable goals: providing funds for education and protecting the environment.

A. Skamania's Use of Private Trust Theory Was Inappropriate

The Skamania court's application of private trust principles to the management of granted lands was inappropriate. First, neither Congress nor the framers of the constitution manifest an intent to create a land trust on behalf of a class of beneficiaries smaller than the public at large. Second, strict application of private trust principles to management of granted lands clashes with public trust interests in the land and its dependent wildlife as protected by the constitution and SEPA. Ironically, the court could have reached the same result, without resorting to trust law, based on the plain language of the constitution's public trust provisions.

1. Intent to Impose Equitable Duties

The Enabling Act does not manifest an intent to impose the equitable duties of a trustee on the state. Section 10 of the Enabling Act provides that the 2.5 million acres of lands granted the state under that section is for the support of common schools. But the Enabling Act does not impose affirmative duties upon the state regarding how it is to manage the Section 10 land.

Although the proceeds of a sale of Section 10 lands must be deposited in "a permanent school fund," the Enabling Act does not require that the land or its resources be sold at a particular rate or that they be sold at all. Thus, although Congress may have imposed a minimal duty of care upon the state when disposing of granted lands, it did not impose a duty of loyalty requiring the state to manage granted lands solely in the economic interests of "trust beneficiaries."

62. See supra note 21 and accompanying text (discussing elements of a trust).
64. The Enabling Act does impose duties upon the state regarding the disposition of the land. See id. § 11 (requiring a public sale at a price not less than ten dollars an acre). The provisions of the Enabling Act relating to disposition of section 10 land do not affect the management of land prior to its disposition. See McCormack, Land Use Planning and Management of State School Lands, 3 UTAH L. REV. 525 (1982).
66. See supra note 8 (discussing requirements of Wash. Enabling Act § 11).
2. **Intent to Assume the Duties of a Trustee**

The state constitution does not manifest an intent to assume a trustee's duty to manage granted land solely in the interests of "trust beneficiaries." While the constitution provides that the state holds lands granted by Congress in trust, the trust is on behalf of "all the people" of the state, not a smaller class of favored beneficiaries. The constitution's terms are more reminiscent of the public trust than of a strict private trust. Thus, the constitution does not clearly and convincingly manifest an intent to manage assets solely in the interests of specific beneficiaries—a prerequisite to creating a trust. The Skamania court's application of private trust principles, including the duty of loyalty, is therefore out of step with the intent of the framers of the state constitution.

3. **Applying Private Trust Principles Clashes with the Public Trust Established in the Constitution**

The guiding principle of Article XVI of the constitution is that granted lands in Washington are held "in trust" for all the people of the state. The constitution provides partial guidance concerning how the state is to honor this trust, imposing a basic duty not to give away public lands. The constitution reflects the nineteenth century conception of the public trust, which served to protect the public from
the reckless and sometimes fraudulent disposition of valuable public lands to private interests.\footnote{74}{See, e.g., Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (striking down the Illinois legislature's disposition of the Chicago harbor to a private railroad company).}

The constitution provides little guidance to the state concerning management of granted land prior to its disposition. To give the public trust meaning in an era of land management rather than disposition, courts should read the constitution in light of modern public trust conceptions, which protect public values in the context of resource management.\footnote{75}{See Orion Corp. v. State, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073, cert. denied, 108 S. Ct. 1996 (1988); see also supra notes 25-26 and accompanying text (discussing the application of the public trust to natural resource management).} The modern public trust requires that state agencies, at the very least, consider public trust values, such as fish and wildlife, when managing or allocating public trust resources. SEPA reflects the modern public trust doctrine, by requiring state agencies to act as environmental trustees for future generations of Washingtonians.\footnote{76}{WASH. REV. CODE § 43.21C.020 (1989); see also supra note 30 and accompanying text (discussing the public trust embedded in SEPA).}

In the context of state forest lands, applying private trust principles announced in \textit{Skamania} will lead to an irreconcilable conflict between private trust principles and contemporary conceptions of the public trust.\footnote{77}{Under the private trust principles set forth in \textit{Skamania}, the duty of loyalty requires the state as trustee to manage trust lands and assets solely in the interests of a designated class of beneficiaries. County of Skamania v. State, 102 Wash. 2d 127, 134, 685 P.2d 576, 580 (1984). The public trust, on the other hand, requires that land managers consider the broader public interest when planning management strategies. See supra notes 25-26 and accompanying text.} For example, the state has designed timber management plans under \textit{Skamania} trust principles to maximize commodity production in order to generate more revenues for educational beneficiaries.\footnote{78}{FOREST LAND MANAGEMENT PROGRAM, supra note 2, at xiii.} These objectives clash with the broader public trust, which protects the public's interest in the land and its dependent wildlife,\footnote{79}{Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1073, cert denied, 108 S. Ct. 1996 (1988).} and mandates that commodity production be tempered where it has an impact on ecological values. Strict adherence to \textit{Skamania} private trust principles makes harmonization of these legitimate and important governmental objectives an unnecessarily difficult task.\footnote{80}{The doctrine of \textit{cy pres} is of only limited utility in resolving the conflict. See supra note 20 (discussing the principle of \textit{cy pres}). First, it would be difficult to demonstrate that the Enabling Act manifest a general charitable intent broad enough to encompass the protection of biological resources. Second, it would be difficult to argue that compliance with the terms of the "trust" would be impossible or even impractical. Finally, the application of \textit{cy pres} would place critical...}
4. The Skamania Court's Discourse on the Law of Trusts Was Unnecessary

Ironically, the Skamania court's holding that the legislature breached its "fiduciary duty" means nothing more than that the legislature violated the constitutional proscription against giving away public trust assets when it allowed timber contract relief. Indeed, the court acknowledged that in this case the duty of undivided loyalty means that when the state transfers trust assets it must seek the assets' full value. The state violated its duty to act prudently by failing "to satisfy the constitutional requirement that it seek full market value" when disposing of its interest in granted land. Arguably then, the Skamania court's discussion of private trust principles is dicta while the holding of the case vindicates the public trust.

B. Principles Applying to Dedications Are More Appropriate Than Skamania Principles

Principles applying to land dedications are more appropriate than the private trust principles set forth in Skamania in governing management of granted lands. First, dedication principles better reflect the intent of the framers of the Enabling Act and the constitution. Second, dedication principles permit public land managers sufficient flexibility to balance Congressional intent with the public trust.

management decisions in the hands of a court unlikely to have any special expertise in forest management.

81. Skamania, 102 Wash. 2d at 139, 685 P.2d at 583.
82. Id. at 134, 685 P.2d at 580.
83. Id. at 138, 685 P.2d at 583.
84. Skamania's reliance on the constitution as the source for the state's alleged fiduciary duty is especially ironic given that the constitutional provision relied on, art. XVI, § 1, provides that granted lands are "held in trust for all the people."

Besides looking to the constitution as a source of private trust principles, the Skamania court relied on the United States Supreme Court's holding in Lassen v. Arizona ex rel. Ariz. Highway Dep't, 385 U.S. 458 (1967). Such reliance was misplaced given the differences between the Arizona Enabling Act and the Washington Act. See supra note 67 (comparing the Washington and Arizona Enabling Acts).

The other cases relied on by the Skamania court, State ex rel. Ebke v. Board of Educ. Lands and Funds, 154 Neb. 244, 47 N.W.2d 520 (1951) and Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230 (Okla. 1982) (invaliding the granting of preference lease renewals) involved legislation which unconstitutionally gave away public assets to private parties for less than full value. These cases are as equally consistent with public trust doctrine as with private trust principles.

85. The use of dedication principles to construe federal land grants to states is not unprecedented. See supra note 46 (discussing Idaho v. Hodel, 814 F.2d 1288 (9th Cir.), cert. denied, 108 S. Ct. 159 (1987)).
1. Dedication Principles are More Consistent with the Intent of the Framers

Although the Enabling Act and the constitution do not clearly and convincingly manifest an intent to create a trust, they are sufficient to effect a valid dedication of land for a particular public purpose. A dedication, unlike an express trust, does not require a reciprocal manifestation of intent. The Enabling Act clearly expresses an intent to grant land to the state for specific public purposes. The Act transfers title to federal lands to the state, and specifies the purposes for which the state should use the land. Although the constitution does not manifest a clear intent to accept all the terms of the Enabling Act, under dedication principles, this defect is not fatal. On the contrary, the dedication is effective because the state assumed control of the land. The dedication concept, therefore, is more consistent with the terms of the Enabling Act and the constitution, than the private trust theory postulated in Skamania.

2. Dedication Principles Allow Harmonization of the Enabling Act and Constitution

Like trust principles, dedication principles require the state to adhere to Congress' intent that granted lands be used to support educational and other public institutions. Unlike trust principles, dedication law allows the state discretion to fulfill its constitutional public trust obligations. Two aspects of dedication law permit flexibility: First, the rule of construction that ambiguous terms of a dedication must be read against the dedicator and in favor of free public use; and second, the rebuttable presumption that the grantor intended the use of the land to change as circumstances change.

a. A Rule of Construction Favoring Free Public Use

Under dedication principles, ambiguous terms of a dedication must be read against the dedicator. Section 10 of the Washington Enabling

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86. See supra notes 32-33 and accompanying text (describing elements of a dedication).
88. See Thompson v. Savidge, 110 Wash. 486, 506, 118 P. 397, 403 (1920) (title technically did not pass until the lands were surveyed).
89. Wash. Enabling Act §§ 10, 17.
90. For example, the constitution does not state that lands granted under § 17 of the Washington Enabling Act are to be held "exclusively" for the purposes designated in the Act.
91. See supra note 33 and accompanying text (discussing elements of a dedication).
92. See supra note 36 and accompanying text (discussing rules of construction for dedications).
93. See supra notes 36, 39-40 and accompanying text.
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Act, when construed in light of section 17, is ambiguous regarding state discretion in land management.

Section 10 and section 17 of the Enabling Act are strikingly dissimilar. First, section 17 limits the purposes for which the land can be held and appropriated and regulates the means of its disposal. By contrast, section 10 contains no limitations on how land may be held or appropriated. Second, section 17 expressly restricts the lands’ permissible uses to those “exclusively” designated in the Act. But section 10, although stating that the lands were granted to the state for school support, does not state that the lands were granted only for that purpose. Lands granted under section 10 are subject only to the Act’s general restrictions on disposal. Congress restricted the use of granted land to an exclusive purpose in section 17. It chose not to do so in section 10. If Congress intended to restrict the use of section 10 land to school support purposes only, such an intent is not apparent on the face of the Act. Under dedication principles, ambiguous grants, like section 10, are read against the dedicator and in favor of free public use. This rule of construction allows state land managers the flexibility to consider the constitutional public trust when managing section 10 lands. Thus, unlike the Skamania principles, the rule of construction applicable to dedications allows harmonization of the Enabling Act and the constitution.

b. A Rebuttable Presumption Allowing Changes in Use

The Enabling Act and the constitution also may be harmonized by way of the rebuttable presumption that Congress, as grantor, intended the use of the land to change as circumstances change. This presumption would allow the state to protect public trust values, such as fish and wildlife, on granted lands as they become more scarce and valuable to the state as a whole. The presumption would be rebutted only by a showing that a state program to protect these values would frustrate or defeat Congress’ intent. Unlike Skamania principles,

94. See supra note 8 (discussing Wash. Enabling Act § 11).
95. See supra note 36 and accompanying text (rules of construction for dedications).
96. Under dedication principles, the state’s interest in protecting these values could be pursued on section 10 lands as long as the state does not substantially interfere with Congress’s intent that the lands be used primarily to support education. See supra note 37 and accompanying text.
97. See supra notes 39-40 and accompanying text (presumptions applying to dedications).
98. See supra note 40 and accompanying text. A useful guide for land managers and courts to use in evaluating whether affirmative steps to protect public trust values on land granted under section 10 would frustrate or defeat congressional intent may be borrowed from the test set forth in Paepcke v. Public Bldg. Comm’n of Chicago, 46 Ill. 2d 330, 263 N.E.2d 11, 19 (1970). Under
which favor rigid adherence to past preferences, this presumption allows the flexibility needed to vindicate public rights within the context of the restrictions imposed by the Enabling Act.

C. Protecting Biotic Diversity Using Dedication Principles

Some foresters have proposed innovative strategies to preserve the rich biotic diversity characteristic of old-growth Douglas fir forests, even where such forests largely are devoted to commodity production. Under dedication principles, the DNR could implement these strategies on state-owned lands within the constraints established in the Enabling Act and the state constitution.

1. Preserving Biotic Diversity in a Fragmented Forest

In The Fragmented Forest, Professor Harris develops a strategy for preserving biotic diversity in managed Pacific Northwest forests. He bases his strategy on the principles of island biogeography. Island biogeography suggests that preservation and restoration of "long-rotation islands" can be effective in preserving biotic diversity if the islands are strategically located. Long-rotation islands, existing within a sea of intensively managed forest, could be effective in preserving wildlife habitat if the islands are linked by travel corridors preserved along watercourses and highways.

A complimentary strategy for promoting biotic diversity on forest tracts managed primarily for commodity production is to retain selected old-growth attributes, such as snags or downed logs, on land

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the Paepcke test, a diversion of granted land does not frustrate Congressional intent if it is small in relation to the total area of the grant and if the benefits to the public in protecting public trust values are outweighed by the detriment caused by the loss of the land for school support purposes. See supra notes 43-44 and accompanying text.

99. L. Harris, supra note 58, at 127-144.

100. See id. at 71-92.

101. Id. at 90-92. Professor Harris cautions against permanent set-asides of old-growth islands because these islands will inevitably fall victim to fire or disease. Rather, he suggests a system of "long-rotation islands," where a core of old-growth is surrounded by a buffer core of forest managed on a 320-year rotation. Once the long-rotation buffer is well established, the old-growth core could be harvested. Id. at 128-30.

102. For example, a biogeographic strategy might work in the important Hoh-Clearwater area adjacent to Olympic National Park. This area has most of the remaining old-growth and mature forest on state lands, although it is fragmented by prior logging. The area is currently the focus of an intensive review by the Commission on Old-Growth Alternatives for Washington's Forest Trust Lands, an advisory panel appointed by the Governor. See Seattle Post-Intelligencer, May 10, 1989, at A17, col. 1.
that is logged. Management for selected old-growth attributes might preserve valuable wildlife habitat even on land devoted to intensive timber management. Strategic preservation of long-rotation islands, implemented in combination with a strategy to preserve selected old-growth attributes on tracts devoted to commodity production would go far in protecting public trust values on state lands.

2. The Legal Framework for Preserving Biotic Diversity

Dedication principles would allow the state to implement the strategy sketched above consistent with the Enabling Act and the constitution. First, DNR could establish a system of long-rotation islands on section 10 school lands. Second, on section 10 lands not devoted to long-rotation management and on section 17 lands, the state could regulate commodity production to require the cost-effective retention of selected old-growth attributes.

Under the rule of construction applying to dedications, the state would have substantial discretion to pursue alternative management objectives on Section 10 school lands so long as they do not substantially interfere with Congress's overriding intent that these lands be used to support public education. Under dedication principles, long rotation islands could be established on Section 10 lands so long as (1) they would not involve the permanent disposition of any land, (2) the amount of land devoted to protecting biotic diversity would remain small compared to the total land area, and (3) the benefit to the public in preserving public trust values would outweigh the cost to

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103. See Ecological Characteristics, supra note 58, at 43. Although this is not the best strategy for preserving biotic diversity, it has the advantage of optimizing biotic diversity while managing a forest for maximum economic return. Id.

104. J. Calhoun (Olympic Area Manager, Department of Natural Resources), Hoh-Clearwater: A Forest Managed for Commodities and Ecological Functions, Report from Work Group on Forest Research Program/Facility to Members of the Commission on Old Growth Alternatives for Washington's Forest Trust Lands, March 10, 1989 (copy on file with Washington Law Review) [hereinafter Hoh-Clearwater]. This form of management does not affect the overall harvest level. However, increased costs produce about a 10% loss in timber sale revenues. J. Calhoun, Oral Presentation to Commission on Old-Growth Alternatives, March 10, 1989 (notes on file with Washington Law Review).

105. See supra notes 35-37 and accompanying text (rules of construction for dedications).

106. The state need not compensate the permanent school fund so long as the reservation of land does not result in the permanent disposition of granted land. Cf. Wash. Rev. Code § 79.70.040 (1989).

107. The total grant under section 10 was 2.5 million acres. See supra note 7 and accompanying text. Approximately 120,000 acres of old-growth or mature forest remain on state lands. See supra note 61.
the state educational system.\textsuperscript{108} While remaining within the Enabling Act's constraints, such balancing also would address constitutional and statutory public trust concerns.

Public trust values can be optimized even on lands granted under section 17 of the Enabling Act exclusively to benefit certain public institutions.\textsuperscript{109} State regulation to prevent unnecessary harm to public trust values would not frustrate even the terms of this restrictive grant. New regulations promulgated under existing state law\textsuperscript{110} prohibiting logging practices from causing unnecessary harm to public trust values should be presumptively valid if they do not significantly reduce the flow of revenues derived from trust lands.\textsuperscript{111} These regulations could be tailored toward retaining old-growth attributes on land devoted to commodity production, such as section 17 land, or to the protection of travel corridors for wildlife.

The adoption of these two strategies—long-rotation islands and managing for old-growth attributes on land which is logged—would effectively accommodate the respective demands of the constitution and the Enabling Act. Most important, such strategies would ensure the perpetuation of biotic diversity on state lands for future generations.

III. CONCLUSION

The Washington Supreme Court's application of private trust principles in \textit{County of Skamania v. State} was unnecessary and unwise. The Washington Enabling Act and the state constitution do not create a trust because the requisite manifestations of intent are lacking.

\textsuperscript{108} State v. University of Alaska, 624 P.2d 807 (Alaska 1981) is not to the contrary. First, \textit{University of Alaska} involved land granted to Alaska for the "exclusive use and benefit" of the university. 624 P.2d at 812-13. Second, the challenged diversion placed a large amount of the land into a state park where commodity production to generate revenues would be permanently barred. Id. at 813. The diversion struck down in \textit{University of Alaska}, thus clearly frustrated Congress' intent and would have been invalid even if the court had applied dedication principles.

Likewise in Kanaly v. South Dakota, 368 N.W.2d 819 (S.D. 1985), where land granted to South Dakota "exclusively" for a state university was diverted for use as a minimum security prison, the diversion was facially inconsistent with, or even repugnant to, the intent of Congress as grantor.

\textsuperscript{109} See supra note 8 and accompanying text (discussing Wash. Enabling Act § 11).

\textsuperscript{110} The Forest Practices Act, WASH. REV. CODE §§ 76.09.010-935 (1989) and SEPA, §§ 43.21C.010-914 which already apply to granted lands, reflect earlier efforts to prevent such harm through environmental regulation. See supra note 55 and accompanying text.

\textsuperscript{111} Regulations could require maintenance of riparian corridors, leaving certain numbers of standing trees or snags, leaving cull logs and other logging debris, and using logging techniques which minimize impacts on soil, residual trees and other plants. See J. Calhoun, Hoh-Clearwater, supra note 104.
Moreover, private trust theory does not provide sufficient flexibility to allow actualization of the public trust established in the constitution. The rules of law applicable to dedications of land to public use are more appropriate for management of granted lands. The terms of the Enabling Act and the constitution suffice to effect a valid dedication of land for public purposes. More important, dedication principles allow the intent of Congress expressed in the Enabling Act and the public trust established in the state constitution to be harmonized. The law of dedications provides the flexibility needed to implement innovative strategies to protect biological diversity in a working forest.

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