



March 20, 2017

To: Interested Parties

From: Josh Laughlin, Executive Director

Re: State Land Board Constitutional and Trust Obligations Regarding the Elliott State Forest

Following the State Land Board Meeting on February 14, 2017, it became clear that there were significant misconceptions concerning the fiduciary responsibilities of the Board. It has been claimed that the State Land Board has a Constitutional mandate to maximize revenue from the Elliott State Forest for the Common School Fund, and therefore is compelled to sell the forest since timber sale receipts from logging on the forest have declined in recent years. This position is incorrect as outlined below.

CONSTITUTIONAL MANDATE

It has been repeatedly claimed that there is a “constitutional mandate to maximize revenue” from Common School Fund lands. However, the Oregon Constitution contains no such “maximization” provision, current Oregon law stresses the contrary, and any older authority describing maximization has been fundamentally altered by public referendum that amended the Constitutional provisions in 1968. Article VIII, section 5 of the Oregon Constitution states:

(1) The Governor, Secretary of State and State Treasurer shall constitute a State Land Board for the disposition and management of [Common School Fund] lands. Their powers and duties shall be prescribed by law. (2) The 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.

Far from simply requiring the State Land Board “maximize revenue,” the Constitution actually requires the State Land Board to manage Common School Fund lands to obtain the “greatest benefit for the people of the state.” Such management is constitutionally limited to that which is “consistent with the conservation of this resource under sound management techniques.”

As an initial matter, permanently disposing of Common School Fund land is not “consistent with conservation of this resource.” The phrase “this resource” in Article VIII, section 5 refers to the “lands” managed under the State Land Board’s jurisdiction. The State cannot conserve this land for the greatest benefit of the people if the land itself is permanently divested from public ownership and transferred in fee simple to a private entity. The sale of the Elliott State Forest is thus inconsistent with Article VIII, section 5.

The confusion about the Constitutional mandate stems largely from the prior version of Article VIII. Before 1968, the Constitution strictly required the State Land Board to raise money for

schools, and included ‘exclusive’ and ‘irreducible’ clauses that mandated that all funds from the Constitutionally dedicated lands be used only for the maintenance of schools. The 1968 voter-approved amendments to Article VIII, however, explicitly eliminated the “strict cash income objective.” In *Johnson v. Dept. of Rev.*, 292 Or 373, 379, 639 P2d 128 (1982), the Oregon Supreme Court analyzed both the original and current versions of Article VIII, and explained that the original Constitution “dedicated certain lands to the common school fund and narrowly restricted the use of proceeds and interest derived from such lands. The words ‘exclusive’ and ‘irreducible’ mandated that all funds from the constitutionally dedicated lands be used only for the maintenance of schools. Any other use would clearly be unconstitutional.” *Johnson v. Dept. of Rev.*, 292 Or 373, 379, 639 P2d 128 (1982). The Court then explained that “the 1968 amendments to the Oregon Constitution *radically changed the operation of sections 2 and 5*” through the elimination of the “exclusive” and “irreducible” clauses. *Id.* at 380 (emphasis added).

In fact, the preamble to the 1968 Constitutional amendment specifically addresses the need to stop selling off state lands to fund schools. It states:

Whereas the framers of the Oregon Constitution more than a century ago contemplated the ultimate sale of nearly all lands owned by this state, and the retention of the sale proceeds in the Common School Fund; and

Whereas vast areas of such lands have not been sold, *and conditions prevailing in this century may require the State of Oregon to retain some or all of these lands for an indefinite period*; and

Whereas it is essential that the State of Oregon, through the State Land Board, manage such retained lands with the object of obtaining the highest returns for the people of this state, *consistent with the conservation of this resource* under sound techniques of land management developed from time to time; and

Whereas it is essential that the State of Oregon use and invest the assets of the Common School Fund with the object of conferring maximum aid to education in this state, consistent with prudent investment practices prevailing from time to time; and

See Johnson, 292 Or at 381 (quoting preamble to the 1968 amendments) (emphasis added).

It is thus clear from the preamble that the intent of the 1968 amendments was to, among other things, (1) introduce for the first time a policy of conservation to the management of Common School Fund lands, and (2) change the State’s policy from one of disposal of state lands for quick profit to one of retention of state lands for the benefit of the people. Ultimately, there was no longer a requirement that proceeds of Common School Fund lands be used “exclusively” for educational purposes.

Further, the amendments to Article VIII, section 5 of the Constitution clearly delineate that the powers and duties of the Land Board are prescribed by law, and as such, determinations on the proper use of Common School Fun assets is a legislative determination:

Section 5, as amended, calls for the formation of the State Land Board to dispose of and manage lands described in section 2, and also lands owned by the state placed under the

State Land Board's jurisdiction by law. *The powers and duties of the Land Board were and are to be prescribed by law.* Section 5(2) contains the requirement that such lands be managed with the object of obtaining the greatest benefit for the people of Oregon. *Reading this provision according to its most plain and practical meaning, and consistently with the legislative history, the determination of the proper use of common school funds is a legislative one,* subject to the overall requirement that the use have as its goal the greater public benefit.

Johnson, 292 Or at 382 (emphasis added).

The Oregon Legislature has made numerous determinations, regulations and restrictions on the use of Common School Fund assets. Notably here, the Legislature has expressly prohibited the sale of the Elliott State Forest. ORS 530.450. Additionally, the legislature interferes with and has restricted logging on the Elliott State Forest, ensuring compliance with the Oregon Forest Practices Act, ORS 527.610 to 527.770 and ORS 530.450 to 530.520, which restricts logging near streams and rivers, limits the acreage of clearcutting units, requires the state to spend money on reforestation, and “results in a high probability of maintaining and restoring properly functioning aquatic habitats for salmonids, and other native fish and aquatic life; (b) Protects, maintains, and enhances native wildlife habitats; (c) Protects soil, air, and water; and (d) Provides outdoor recreation opportunities.” OAR 629-035-0020(2). Finally, the legislature has also expressed its interest in having the Elliott State Forest managed for, among other things, recreation, fish and wildlife protection, carbon sequestration, and land conservation. ORS 530.500(3), (4), (7), and (8).

In summary, the 1968 amendments to the Oregon Constitution have given the Land Board greater freedom and discretion to manage Common School Fund assets including the Elliott State Forest. The “maximization of revenue” obligation does not exist anywhere in Oregon law or valid caselaw following the amendment. This discretion is bound by Legislative restrictions, but these are few and far between. In addition to the restrictions imposed by the Oregon Forest Practices Act, ORS 530.450 forbids the sale of approximately 69,000 acres of Common School Fund land in the interest of conserving this resource. The Common School Fund land base originally totaled nearly 3.4-million acres. Therefore, ORS 530.450 applies to approximately two percent of all Common School Fund lands. The state has already been free to dispose of millions of acres of land, and it currently holds another 700,000 acres of Common School Fund land that are not withdrawn from sale under ORS 530.450.

TRUST OBLIGATION

It has also been argued that the Land Board’s unique trust obligation compels the sale of the forest. It is arguable that the Constitutional amendments have not altered the fundamental trust obligations upon the Board in relation to Common School Fund assets. Regardless of likely disagreements on what those trust obligations entail and what is of the “greatest permanent value” to Oregonians, it is undisputed that when certain lands are of no good economic use, the Board’s discretion and flexibility regarding management and disposition of these lands is dramatically increased. *See Crookham Attorney General Opinion No. 8223, July 24, 1992.*

“The Board may have good trust reasons for conserving resources that have little or no commercial value at the present time” in order to preserve “non-commercial resources

such as water and soils” or to “secur[e] the environmental and social benefits of preserving habitat for endangered or threatened species.”...Thus if the Board determines that a particular parcel of Admission Act land does not currently offer revenue-generating potential, the Board is free to manage it for any values that obtain the greatest benefit for Oregonians, consistent with the conservation of the resource under sound techniques of land management.” *Id.* At 483.

The Elliott State Forest was officially designated as an underperforming asset by the State Land Board largely due to the presence of federal endangered species and the state’s inability to log the older forests therein. The presence of federal endangered species, the cause of this underperformance, is inherently temporary. Either these species will recover and be removed from the list, or they will go extinct. There is also the distinct possibility the federal government will eliminate the Endangered Species Act altogether.

It would thus behoove the State Land Board “to set lands aside temporarily for the purpose of “banking” an asset while its economic value appreciates” in order to “maximize economic return to the Common School Fund over the long term.” Crookham Opinion at 482. We believe that banking the Elliott, and focusing management on restoring older forest and enhancing educational/recreational opportunities could position the asset for greater potential in the future as carbon markets develop and recreational focus on the forest expands. But regardless of your reasons for banking the Elliott, taking the conservative approach and not selling the asset while it is undervalued makes economic sense and would not amount to a violation of any potential trust obligations given the forest’s current position and the Land Board’s determinations up to this point.

Therefore, if the Board proceeds with a land sale of the Elliott, it would likely be required under trust obligations to “obtain full market value” for the land sale. *Id.* at 481. However, given the current losses sustained by management of the Elliott, the Board has wide fiduciary discretion on the disposition of the forest and is free to manage it for any values that obtain the greatest benefit for Oregonians, which pursuant to law, specifically include management for “fish and wildlife environment, landscape effect, protection against flood and erosion, recreation and production and protection of water supplies.” ORS 530.500(4).

In conclusion, as a result of the 1968 amendments to Oregon’s Constitution, the State Land Board currently has wide discretion on the management of Common School Fund assets, including the Elliott State Forest. However, certain restrictions have been placed on the forest’s disposition and management by the Legislature and must be respected. The Land Board is in no way obligated, or pursuant to trust responsibilities, bound to sell the forest at its currently low valuation. In fact, the current efforts to sell the Elliott while it is temporarily burdened by the presence of federally threatened and endangered species and at its low valuation may prove a violation of the Board’s fiduciary responsibilities to obtain the “greatest benefit” for Oregonians and certainly can be argued is a failure of the Board to obtain “full market value” for the land.

Please do not hesitate to contact me with thoughts or questions, jlaughlin@casewild.org or 541-434-1463.