

GEOS INSTITUTE

To: Interested Parties

From: Randi Spivak, Geos Institute

In Re: Summary Analysis and Critique of the O&C Trust, Conservation, and Jobs Act¹

Date: March 8, 2012

Summary

The O&C Trust, Conservation, and Jobs Act (hereafter the “O&C Trust Act”) would affect 2.6 million acres (~4,060 square miles) of publicly owned forests, known as the O&C lands that are managed by the Bureau of Land Management (BLM) and US Forest Service in Western Oregon.

The O&C Trust Act would create a timber trust on 1.479 million acres that generally have forests 125 years or less in age (including ~218,000 acres of National Forest lands). The trust would be managed for the sole purpose of maximizing revenues from logging for the benefit of 18 O&C counties in Western Oregon. These forests would remain public lands in name only. A Board of Trustees appointed by the Governor of Oregon would control surface management of these lands. The trustees are legally bound by a fiduciary obligation to “maximize annual revenue,” which will require clearcutting these lands. Because natural forests younger than 125 years old often contain an overstory of much older trees, the bill would allow clearcutting of old growth on the newly established Trust Lands.

BLM lands in Western Oregon not transferred to the timber trust (824,866 acres of forests generally older than 125 years) would be transferred to the Forest Service. Such lands would be managed under existing federal laws and the Northwest Forest Plan. An unknown subset of these lands would be permanently protected, if they were defined as “old growth forest” by a committee established by the bill.

Additionally, an estimated ~54,000 acres of public forests less than 125 years old currently managed by the BLM would be transferred to and managed with a similar mandate to maximize annual revenues by Coos County with revenues going exclusively to Coos and Douglas Counties.

The bill would establish 88,620 acres of new Wilderness, 128 miles of new Wild and Scenic Rivers, and repeal some provisions of the Oregon and California Lands Act of 1937.

This bill will effectively privatize and necessitate clearcutting on ~1.5 million acres of publicly owned O&C land—including lands in the National Forest System. Federal environmental laws would be waived and these public lands would be managed as if they were privately owned timberlands (in some cases with even less protection than private lands as the bill would additionally shield the timber trust from certain provisions of the Endangered Species Act and Clean Water Act that apply to private timberland owners).

It is estimated that 510 million board feet would be logged a year, a near tripling of recent average annual logging levels (186 million board feet/year), or 33 square miles of new clear-cuts each year. Because the Oregon Forest Practices Act (OFPA) has inadequate protection standards, this bill would degrade water quality, harm imperiled salmon and threatened wildlife.

¹ Prepared by Randi Spivak, Geos Institute (randispivak@geosinstitute.org) with input and review from The Larch Company, Oregon Wild and KS Wild.

Fiduciary Trust Lands and County Revenue

The establishment of a fiduciary trust obligation is the central element of the bill whereby the Trustees must act solely for the benefit of the beneficiaries, which are the 18 O&C counties. A fiduciary trust is the highest standard of care in law. It is a relationship of confidence or trust between two or more parties, in which the fiduciary is required to act at all times for the sole benefit and interest of the beneficiary.

The purpose of the timber trust would be to “produce annual maximum sustained revenues in perpetuity for Trust counties by managing the timber resources on O&C Trust lands on a sustained-yield basis...” (Sec. 211(b)). The bill requires that the lands be managed “in compliance with all Federal and State laws in the same manner as such laws apply to private forest lands” (Sec. 214 (a)), which is generally under the OFPA.

In order to fulfill their fiduciary obligation, the Board of Trustees will have to log as much as possible each year in order to *maximize* annual revenues. The most efficient and cost effective manner of logging is clear-cutting. The OFPA allows clear-cuts up to 120 acres for single landowners with “buffers” of 300 feet between clear-cuts. Half of the timber trust lands by fiduciary necessity will be managed on short rotations at the discretion of the Board of Trustees—the OFPA has no minimum requirements for rotation age. Standard practices are ~40 years on industrial private lands in Oregon.

The other half of the trust lands, are required to be managed in longer rotations between 100-120 years of age, including allowing clear-cuts up to 120 acres. Given that longer rotations mean less income, the trust board, in fact, will be obligated as a fiduciary to manage for 100-year rotation—not anything older. Revenues from logging would go to a fund established for payments to counties, and counties can sue the trust if it fails to maximize revenue.

The seven-members of the trust board would be appointed from different interest groups however the membership would be slanted toward the timber industry and counties. The bill calls for the appointment of two members of the timber industry and two county commissioners, one representative from the “scientific community” which could be a professor of forestry from the OSU School of Forestry, which depends upon timber industry funding. One representative of the general public and one statewide elected official or a representative of a Native American tribe would fill the remaining two positions.

As a practical matter, the a diversity of membership of the board does not matter, because the fiduciary responsibility removes virtually all discretion and requires the trust lands to be managed exclusively for maximum annual revenue. Whenever the board faces a forest management choice, the one that produces greater annual revenue must prevail.

The trustees would also have authority to broker limited land exchanges between ownerships including allowing for a loss of five percent of the timber trust land acres (Sec. 216 (c)). No federal laws that govern public land exchanges will apply, meaning there will be no evaluation of the environmental impacts, or an opportunity for the public to comment or challenge an exchange for not being in the public’s interest (Sec. 211(d)).

While the bill calls for payments to the United States Treasury of \$10 million for eight years, the certainty of those payments is not assured as the obligation is negated by the phrase “as soon as practicable” and payments to the Treasury are not prioritized above the fiduciary obligation to maximize trust revenues, or the obligation to establish a Reserve Fund of \$125 million within six years of the creation of the timber trust (Sec. 215 (b)).

The bill mandates continued sharing of timber revenues with the counties on the BLM forests greater than 125 years old that would be transferred to the Forest Service at the O&C Act rate of 50 percent—twice the rate of logging receipts on National Forest lands, 25 percent.

Log Exports

Export of unprocessed wood from the O&C trust would be prohibited (Sec. 214, (3)(e)). This is not a change from current law that already prohibits export of raw logs from these lands.

Environmental Laws and Public Participation

The bill states that actions on these lands would be deemed “non-federal” and federal environmental laws would not apply (Sec. 212, (a) 2). Specifically:

Public Involvement and Environmental Review: Public involvement under the National Environmental Policy Act (NEPA) would be eliminated and there would be no analysis of environmental impacts. Less damaging alternatives would not have to be analyzed and under the OFPA, there would be extremely limited opportunity for public review, comment, or objection.

Legal Challenges: The normal statute of limitations provides citizens 6 years to assess the facts, build a case, and hold appropriate parties accountable in federal court. This bill imposes a time limit of 60 days. Thereafter, only the counties will be able to seek judicial review to enforce requirements of the bill against the board of trustees. Neither the land management agencies, citizens, nor the State of Oregon can seek judicial review for violating the act following enactment of this legislation.

Endangered Species Act (ESA): Section 7 of the ESA— which requires consultation with US Fish and Wildlife Service before conducting activities that may harm a threatened or endangered listed species— would not apply on timber trust lands. The legislation even waives application of the ESA standard for private timberlands (Section 9) pertaining to the northern spotted owl. The Oregon Board of Forestry admits that, “compliance with the Oregon Forest Practices Act requirements does not ensure compliance with the federal ESA.”²

Clean Water Act: The bill waives current statutory requirements for pollution permits for certain logging roads and drainage ditches. Logging roads are the number one source of chronic sediment that bleeds into streams, which in turn smothers salmon eggs causing harm to fisheries and which can also increase costs to upgrade or install water filtration systems.³ Studies recently confirmed that stream protections were insufficient to meet minimal Clean Water Act requirements for stream temperature.⁴

Lands Excluded from the O&C Trust

The following lands are excluded from the O&C trust: wilderness areas, national wild and scenic rivers, federal lands within the National Landscape Conservation System; areas of critical environmental concern; national parks and federal lands in national monuments; and Oregon treasures. However, the bill *does not* exclude Inventoried Roadless Areas (up to potentially 86,000 acres), and Late Successional Reserves (up to potentially 565,000 acres) and Riparian

² Oregon’s Forest Protection Laws manual, page 38.

³ Amaranthus, M.P., R.M. Rice, N.R. Barr, and R.R. Ziemer. 1985. Logging and forest roads related to increased debris slides in southwestern Oregon. *Journal of Forestry* 83(4): 229-23.; Newcombe, C.P., and D.D. MacDonald. 1991. Effects of suspended sediments on aquatic ecosystems. *North American Journal of Fisheries Management* 11:72-82.; Ernst, C., R. Gullick, and K. Nixon. 2004. Protecting the source: conserving forests to protect water. *Opflow* (a journal of the American Water Works Association): 30: 1--7.

⁴ Jeremiah D. Groom, Liz Dent, Lisa J. Madsen, Jennifer Fleuret 2011. Response of western Oregon (USA) stream temperatures to contemporary forest management. *Forest Ecology and Management* Volume 262, Issue 8, 15 October 2011, Pages 1618-1629.

http://oregon.gov/ODF/BOARD/docs/2011_November/BOFATTCH_20111103_04_02.pdf

Reserves, both designated under the Northwest Forest Plan. Further, no trust lands can ever be designated as a National Monument.

Oregon Forest Practice Laws

Timber trust lands are to be managed in “compliance with all Federal and State laws in the same manner as such laws apply to private forest lands” (Sec. 214(a)). However, the bill further exempts the timber trust lands from certain provisions of the ESA and CWA (as noted above) that applies to private lands. Moreover, numerous studies have documented the OFPA’s grossly inadequate protections for fish, wildlife and water and landslides prone slopes.⁵ Current federal rules require significant buffers on streams both large and small. The OFPA does not. Specifically, protection buffers on streams would be reduced from >200 feet just 20 feet on large streams, and from ~100 feet to zero feet on small streams. The body of science is very clear about the need to maintain adequate buffers along streams to protect water quality, soils and fish. Chemical use would increase dramatically in order to suppress native habitat and favor ecologically simplified tree farms.

Old-Growth Protection

Forested stands generally >125 years of age on current O&C lands would be transferred to the Forest Service. A committee of scientists would develop the definition of “old-growth” and qualifying old growth would be permanently protected from logging, however, roads or other facilities needed for logging of adjacent trust lands would be allowed. Forests older than 125 years that do not meet the committee’s definition of “old-growth” retain their existing Northwest Forest Plan allocation and can be managed accordingly (e.g. if in matrix land allocation, they could still be logged).

Conclusion

The future management of these forests is of great interest to Oregonians (65 percent of Oregonians live within 10 miles of Western Oregon BLM lands) as well as national stakeholders of our public forests. These lands make significant contributions to environmental, social and other economic values. Three quarters of the BLM’s O&C lands contribute to the quality of domestic drinking water. Nearly half of the lands are critical for species listed under the Endangered Species Act, including 10 different salmon species. BLM forests are critical to the success of the Northwest Forest Plan—not only because of their habitat values, but also for the role they play in allowing species to migrate between large blocks of relatively intact habitat (National Forests, Late Successional Reserves, roadless areas and Wilderness). These values are not compatible with industrial approaches to logging. Industrial-strength logging was what caused the significant damage to rivers, salmon, wildlife and water quality through much of the last century.

On balance, the legislation would result in very large net loss of conservation values. Gaining statutory protection for a small fraction of the remaining old growth and a few modest Wilderness Areas and Wild and Scenic Rivers does not come close to compensating for 1.5 million acres of public forests placed in the timber trust for the aforementioned reasons. There are other means to address county funding issues that are not centered on logging as the solution. The American people, not just a few counties should be the beneficiaries of these public forests.

⁵ Independent Multidisciplinary Science Team. 1999. Recovery of Wild Salmonids in Western Oregon Forests: Oregon Forest Practices Act Rules and the Measures in the Oregon Plan for Salmon and Watersheds. Technical Report 1999-1 to the Oregon Plan for Salmon and Watersheds, Governor's Natural Resources Office, Salem, Oregon; <http://www.fsl.orst.edu/imst/reports/forestry.html>; National Marine Fisheries Service 1996. Position Paper on the Oregon Forest Practices Act. http://web.archive.org/web/20090211024048/http://umpqua-watersheds.org/local/nmfs_on_ofpa.html; National Marine Fisheries Service 1998. A Draft Proposal Concerning Oregon Forest Practices. http://www.coastrange.org/documents/NMFS_FP_pdf.pdf