Washington Supreme Court, Cause No. 99183-9
Conservation Northwest et al. v. Commissioner Franz, et al.
"Trust Mandate" Litigation – Case Overview

A coalition of conservation organizations and individuals, led by Conservation Northwest, filed litigation challenging the Board of Natural Resources' Resolutions 1559 and 1560, the December 2019 decisions adopting the long-term conservation strategy for the marbled murrelet (amending the State Upland's 1997 Habitat Conservation Plan and Endangered Species Act Incidental Take Permit), and setting the 2015-2024 sustainable harvest calculation. The primary focus of this litigation is a challenge to the State's "trust mandate" for management of its federally granted lands. The Washington Supreme Court granted direct review of the trial court's decision to dismiss the challenge, and oral argument on the case will likely be in the fall of 2021.

Conservation Northwest is seeking a decision from the Washington Supreme Court that would require Washington's federally granted lands to be managed for the public as a whole, rather than for the designated beneficiaries, including common schools, universities, and other state institutions identified in Washington's Enabling Act.

Background on Washington's Trust Mandate

Enabling Act

When Washington joined the Union, it received 3 million acres of land from the federal government. These "federally granted lands" were identified in the 1889 Omnibus Enabling Act, and were granted to support the common schools and six specific institutions.

The grant was consistent with the federal government's long-standing practice of deeding lands to the newly-formed states to support schools. Beginning with Ohio in 1803, the federal government granted new states one section of land in each township, and over time, the grants became larger, identified more beneficiaries, and were more restrictive.

Washington's Enabling Act is shared with three other states: Montana, North Dakota, and South Dakota. All three states' supreme courts have concluded that the Enabling Act created a trust, and that the federally granted lands are managed by the states in trust on behalf of the common schools and institutions identified in the Enabling Act. Other western states and the United States Supreme Court have reached the same conclusion in challenges to the use of federally granted lands in other states.

Washington's Constitution

Article XVI of Washington's Constitution addresses the "school and granted lands" from the Enabling Act. It states that the granted lands are "held in trust", and places limits on the sale of the lands and investment of the proceeds. In doing so, the constitution describes the lands as "granted to the state for educational purposes."

Washington Statutes

Washington's Legislature has also specified that the granted lands are held in trust, using the term "trust" as early as 1927. RCW 79.02.010(15)(a)-(g).

In addition, the Legislature created a second type of trust land, the "statutory trust lands" or "county trust lands," in the 1920s. RCW 79.22.010, 79.22.040. These are state forestlands deeded by counties to the state following tax foreclosures. The statutes specify that these lands are held in trust, and that the revenue from these lands is distributed to the counties, who distribute it to taxing districts. RCW 79.64.110.

Washington Case Law

Since 1893, Washington's Supreme Court has consistently concluded that the federally granted lands are held in trust for the designated beneficiaries.

The seminal trust case in Washington is *County of Skamania v. State*, 102 Wn.2d 127 (1984). Washington's Supreme Court held that legislation which benefited timber sale purchasers at the expense of the trust beneficiaries was a breach of trust, and reaffirmed that the lands are held in trust for the designated beneficiaries. Subsequent decisions have not modified that holding.

What are Conservation Northwest's Arguments?

Conservation Northwest's brief to the Supreme Court relies on four arguments to challenge the trust mandate:

- The "all the people" language in the Constitution means that the federally granted lands are held in trust for all citizens of the state, not the designated beneficiaries.
- The Enabling Act did not create a trust, because the term "trust" is not used in the Enabling Act.
- *Skamania* was not controlling law, and interpretation of Article XVI of the Washington Constitution is a question of first impression.
- As a matter of public policy, managing the lands for conservation and recreation is preferable to managing the lands to generate revenue for the beneficiaries.

What is the State's Position?

A large body of case law has concluded, for over 120 years, that the Enabling Act, Constitution, and statutes created a trust for the designated beneficiaries for the federally granted lands, and the Legislature created a trust for the counties by statute.

Those cases mean that the obligations of a trustee apply to the DNR and BNR when they make management decisions that affect the trust lands, including the fiduciary duty of "undivided loyalty."

Because there has been no modification to those governing laws, the State must continue to manage the lands in the best interests of the beneficiaries, and has limited discretion to manage the lands for other objectives. While multiple uses are permitted for the trust lands, if those uses impact revenue to the beneficiaries, the trusts must be compensated.

The State's responses to Conservation Northwest's arguments are:

- Washington's Constitution unequivocally created a trust, and the beneficiaries are the common schools and institutions identified in the Enabling Act.

- Washington courts and the courts of its sister states have analyzed the Enabling Act and concluded a trust was created, even though the word "trust" was not used.

- The question is not an issue of first impression because in addition to *Skamania,* 19 other Washington Supreme Court decisions conclude the Enabling Act and Constitution created a trust for the designated beneficiaries.

- To change the beneficiaries or the objectives of the federally granted lands requires a change to the Enabling Act, an act of Congress, an amendment to the Constitution, and a vote of the people, as well as changes to the statutes that govern those lands.

In fiscal year 2019, the state trust lands generated $183 million for the beneficiaries; $93.9 million from the statutory (county) lands, and $90.8 million from the federally granted lands.

Case Status

Conservation Northwest filed its litigation in January 2020, and its claims were dismissed by Thurston County Superior Court in October 2020.

A coalition of trust beneficiaries and advocacy groups intervened, and are parties to the litigation. The intervenors include five counties, seven taxing districts, AFRC, and the City of Forks.

The case could potentially be heard by the Supreme Court in June, but will more likely be heard during the fall calendar (September-November). There is a high likelihood that other states and interest groups will file *amicus* briefs with the court.

Contact Information

DNR:

- Angus Brodie, Deputy Supervisor for State Uplands: (360) 485-2266, angus.brodie@dnr.wa.gov
- Andy Hayes, Division Manager, Forest Resources Division: (360) 890-6043, andrew.hayes@dnr.wa.gov
- Kristen Ohlson-Kiehn, Assistant Division Manager, Projects and Planning Section, Forest Resources Division: (360) 701-9059, kristen.ohlson-kiehn@dnr.wa.gov

Attorney General's Office:

- Martha Wehling, Assistant Attorney General: (360) 742-2091, martha.wehling@atg.wa.gov
- Paddy O'Brien, Senior Assistant Attorney General: (360) 586-3288, patricia.obrien@atg.wa.gov