

January 13, 2016

**By Certified Mail, Return Receipt Requested**

Honorable Kate Brown  
Governor, State of Oregon  
State Capitol Building  
900 Court Street NE, 160  
Salem, OR 97301

Mr. Doug Decker, State Forester  
Department of Forestry  
Salem Headquarters  
2600 State Street  
Salem, Oregon 97310

Re: Oregon Rule of Civil Procedure 32H, Notice of Class Action and Demand  
for Correction  
Regarding the Management of Forest Trust Lands

Dear Governor Brown and Mr. Decker:

This firm is special counsel to Linn County. Since the 1930s, Linn County and certain other Oregon counties have transferred forestlands to the State (the “Forest Trust Lands”) pursuant to the Forest Acquisition Act, ORS 530.010 to 530.280 (the “Act”). Linn County, as a potential plaintiffs’ class representative, hereby provides thirty days’ notice of a class action it intends to file against the State of Oregon, the Board of Forestry, and the Department of Forestry based on breach of contract resulting from the State’s management of the Forest Trust Lands. Linn County intends to file the complaint on its own behalf and on behalf of a class including all other counties that have transferred Forest Trust Lands to the State pursuant to the Act (collectively, the “Forest Trust Lands Counties”), as well as all other government entities that share or receive revenue from the Forest Trust Lands (the “third-party beneficiaries”).

The State has improperly altered management criteria for the Forest Trust Lands. As a result, the State has failed to generate and transfer to class members the appropriate levels of timber revenue.

DWT 26959159v5 0103895-000001

The complaint will seek approximately **One Billion Four Hundred Thirty-Five Million, One Hundred Sixty-Four Thousand (\$1,435,164,000.00)** or more in damages on behalf of the class. The complaint will also seek injunctive and declaratory relief to alter the State's current management practices to ensure to the Forest Trust Land Counties and other class members the appropriate level of future timber revenues.

1. Background.

Beginning in the 1930s, the Forest Trust Land Counties acquired hundreds of thousands of acres of forest lands by tax foreclosure, in many cases because the owners had abandoned the land during the Great Depression and as a result of the forest fires in the 1930s and 1940s.

The consequent removal of these forest lands from the tax rolls of the Forest Trust Land Counties created substantial financial burdens on the counties which could not, in turn, devote sufficient resources for fire protection and management.

To address these problems, the State, in cooperation with the Forest Trust Land Counties, enacted legislation authorizing the counties to convey their forest lands to the State and for the State to manage the lands for the benefit of the Forest Trust Land Counties and local districts within the borders of the Forest Trust Lands. The State and Forest Trust Land Counties agreed that the State would be entitled to keep a set portion of the revenues derived from the Forest Trust Lands as a management fee, and would be obligated to return the remaining revenues to the Forest Trust Land Counties and local governments with boundaries within the Forest Trust Lands as third-party beneficiaries of the agreement.

The State promised to use its portion of the revenues from the Forest Trust Lands to graze, log, protect and care for the Forest Trust Lands "in accordance with the best grazing and forest management practices." Later amendments to the statutes confirmed that the State's portion of the revenues derived from the Forest Trust Lands would be reinvested "exclusively" for the "development, management and acquisition" of Forest Trust Lands in order to secure "the greatest permanent value" of the lands. At the time of such amendments, the parties understood the phrase "greatest permanent value" to mean the greatest potential to generate

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revenues for the Forest Trust Land Counties and their local districts on a sustainable basis.

The State actively promoted and encouraged the Forest Trust Land Counties to enter into agreements with the State under this contract. The Forest Trust Land Counties accepted the State's offer by conveying or authorizing the conveyance of more than 654,000 acres to the State. Of those acres, Linn County conveyed in excess of 21,000 acres.

In 1986, the Oregon Supreme Court considered the nature of the relationship between the State and the Forest Trust Land Counties in *Tillamook County, et al. v. Board of Forestry*, 302 Or 404 (1986) ("Tillamook I"). Based on the statutory scheme, the court determined that the conveyance of tax foreclosed lands by the Forest Trust Land Counties created a "relationship." Further, the court stated that "[u]nder these statutes counties possess interests that may be asserted against the state. These interests are defined by the statute as well. \* \* \* The statutory plan contemplates consensual dealings between the counties and the state (through the Board of Forestry), dealings that would create enforceable rights insofar as the state's management of formerly county owned forest land is concerned." *Id.* at 416. In 2005, the court in *Tillamook County, et al. v. State of Oregon*, Tillamook County Circuit Court Case No. 04-2118 ("Tillamook II") had occasion to further describe the relationship. In *Tillamook II*, Judge Richard L. Barron affirmed the importance of the relationship between the Forest Trust Land Counties and the State and held that "the State is contractually bound not only because of what comes from the statutory scheme, which has been a consensual arrangement for more than 70 years, but also from the deeds entered into by the Counties pursuant to the statutory scheme and which the State 'sought and bargained for' and gave 'assurances that the lands would be used to produce revenue.' \* \* \* [N]o other conclusion can be reached that the arrangement binds the State." Letter Opinion, July 5, 2005.

The State has violated this long-standing contractual relationship by managing the Forest Trust Lands in a way that does not seek to maximize revenues which could otherwise be distributed to the Forest Trust Land Counties and third-party beneficiaries. In 1998, the Board of Forestry promulgated OAR 629-035-

0020 (the “GPV Rule”), which defined “greatest permanent value” in a way that does not encourage maximization of revenues. The Forest Trust Land Counties and the third party beneficiaries did not consent to that material change in the contractual relationship. In doing so without the consent of the Forest Trust Land Counties and the third party beneficiaries, the State has breached its contract with the Forest Trust Land Counties (and its obligations with respect to the third-party beneficiaries). The Forest Trust Land Counties and third-party beneficiaries have thereby been deprived of substantial additional revenues to which they were entitled.

The Forest Trust Land Counties have attempted over the years to persuade the Board of Forestry and the Legislature through political means to recognize the obligations owed to them by the State. Their overtures have all been rejected. As recently as the 2015 legislative session, the Council of Forest Trust Land Counties supported an amendment to HB 3210 which would have required the State Forester to manage the Forest Trust Lands so that annual timber harvest would be at least 80% of the annual amount of harvestable timber expected to be grown on those lands. The amendment and the underlying bill were opposed by the Department of Forestry, in part because the bill “would override the authority of the Board to adopt management plans that achieve GPV, in effect changing the definition of GPV adopted by the Board in its administrative rules.” Letter from Paul Bell, Deputy State Forester to the Hon. Brad Witt, Chair, House Committee on Agriculture and Natural Resources. April 9, 2015. The legislation remained in the Committee upon adjournment.

2. Causes of Action which may be Asserted.

As the representative plaintiff, Linn County intends to assert a claim for breach of contract, which is supported by the holding of the circuit court in Tillamook II.

In Tillamook II, the plaintiffs’ complaint alleged that the statutory scheme described above created a contract between the Forest Trust Land Counties and the State. The State’s answer contended that no contract exists between them. Although the Supreme Court in Tillamook I “deem[ed] it unnecessary to describe the arrangement in contract or trust terms,” the State in Tillamook II argued that

the Tillamook II case “presents an issue that the court did not reach in Tillamook [I]: is the Oregon Legislative Assembly contractually bound to the counties with respect to the forestlands conveyed under ORS 530.010-530.170?” State’s memorandum in support of motion for judgment on pleadings or summary judgment, p. 11.

The court in Tillamook II stated in its opinion:

“The court finds that the State is contractually bound not only because of what comes from the statutory scheme, which has been a consensual arrangement for more than 70 years, but also from the deeds entered into by the Counties pursuant to the statutory scheme and which the State ‘sought and bargained for’ and gave ‘assurances that the lands would be used to produce revenue.’”

Opinion, p. 6.

A General Judgment was entered by the Tillamook II court, which “incorporat[ed] its letter opinions [t]herein as provided for under ORS 18.082(2)[.]” The General Judgment ordered, as a result of the contractual breach, “that the \$10 million transferred from the Forestry Department Account to the General Fund pursuant to Section 4(5) of House Bill 2148 (Chapter 734, Oregon Laws 2002) shall be transferred back to that account.”

The State’s appeal of the trial court judgment in Tillamook II was dismissed.

Although the Board of Forestry has, at times, referred to the decision in Tillamook II as an inaccurate statement of the law, the State and the Board are bound by the decision.

The doctrine of issue preclusion will apply to the specific finding made by the court in Tillamook II based upon the factors identified in *Nelson v. Emerald People’s Utility District*, 318 Or 99, 103 (1998):

1. Identical issues: The court in Tillamook II clearly addressed the issue of whether there is a contractual relationship, deciding that a contractual

relationship does, in fact, exist based on both the statutory provisions and the property deeds. It also held that any material change to the contract required the consent of the Forest Trust Land Counties.

2. Actually litigated and essential to the prior decision: The “contract” issue was actually litigated in Tillamook II - the State’s motion, in fact, set up this issue, and the court specifically addressed it. A litigated issue is deemed “essential” to the prior decision where the issue appears on the face of the final judgment “to have been so determined” or where it “was actually or necessarily included therein or necessary thereto.” ORS 43.160. The court’s letter opinion contains an express finding that there was a contract, and that letter opinion was expressly incorporated into the judgment. More fundamentally, the determination that a contract exists was clearly essential to the court’s final judgment – without a contractual obligation there could be no breach of contract.

3. Full and fair opportunity to be heard: Without question, the State actively litigated the contract issue in Tillamook II. The final judgment in the trial court, which was not appealed, constitutes a final and full resolution of the prior issue.

4. Same party. The State was the defendant in Tillamook II and will again be the defendant in the contemplated action.

5. Type of proceeding. The Tillamook II judgment was entered in an Oregon circuit court. The State has no basis to assert that the prior action was not the type of proceeding to which preclusive effect should be given.

The contract was materially breached when the Department of Forestry adopted the GPV Rule in 1998 and began to manage the Forest Trust Lands in accordance therewith. The management under the GPV Rule created a delta between the amount of revenues that should have been distributed to the Forest Trust Land Counties if the lands were managed in accordance with best management practices required of private landowners (while honoring all federal regulatory requirements) and the amount of revenues that have actually been distributed under the GPV management regime (the “Damages Delta”).

The numerous local districts which share in the revenues pursuant to ORS 530.115 are third party beneficiaries to this arrangement.

According to the court in Tillamook II, the consent of the Forest Trust Land Counties is essential to any material modification of the contract. Therefore, consent of the third party beneficiaries is also required. *See, e.g., Nordbye v. BRCP/Ellington*, 246 Or App 209 (2011) rev. den. 352 Or 33 (2012). The adoption of the GPV Rule and the management regime practiced thereunder constituted material modifications to which the Forest Trust Land Counties and the third party beneficiaries did not consent.

Furthermore, no statute of limitations impairs the recovery in an action for breach of contract by a class of governmental units. The class will therefore be entitled to recover damages dating back to the initial breach when the Board of Forestry adopted the GPV Rule in 1998.

Finally, Linn County further is entitled to pre-judgment interest in the amount of 9% per annum based on ORS 82.010 from the date of each breach to the present.

3. Damages.

Linn County intends to request, on behalf of the class, that a jury award damages in at least the following amounts:

A. The Damages Delta of at least \$35.24 million per year from 2001 (the year the management regime pursuant to the GPV rule was fully implemented) to the present, for a total of at least \$528,600,000;

B. Pre-judgment interest on the Damages Delta approximating \$25,564,000.00;

C. Future damages in an amount sufficient to yield a revenue stream of \$35.24 million per year in perpetuity. The net present value of such revenue stream, based on a discount rate of 4%, is approximately \$ 881,000,000.

4. Other Relief.

As stated above, the class will also seek declaratory and injunctive relief.

5. Demand under Rule 32H.

Pursuant to ORCP 32H(1)(b), we demand that the State correct this wrong (i) by making payment to the Forest Trust Land Counties pursuant to the Act in the amounts specified in Section 3 or (ii) by making payment of the amounts specified in Section 3A-B of this letter and implementing new management practices that fully comply with the State's contractual obligations to the Forest Trust Land Counties as described in this letter. Please coordinate any correction efforts through my office.

Very Truly Yours,

Davis Wright Tremaine LLP



John DiLorenzo, Jr.  
JAD:aw