History of Oregon BLM

The history of the 2.5 million acres of land managed by the Bureau of Land Management (BLM) in western Oregon dates back to how the west was settled. One of the biggest obstacles to westward expansion was transportation. Moving goods from one place to the next and encouraging people to move thousands of miles across a rugged, wild landscape was a challenge without the infrastructure and modes of transport we enjoy today.

Just after the Civil War, in order to assist settlement, Congress began offering land grants from federally owned land to assist rail and wagon road construction. In 1866 the State of Oregon was fortunate to receive a huge grant including every other square mile in a 40-mile swath of land stretching from Portland south to the California border.

Oregon then awarded a private railroad company the land, to sell to settlers, in order to cover the costs of railroad construction and to encourage settlement. Under the grant, the company – the Oregon & California Railroad – would take over management of the railroad they built, and other lands would be sold with certain stipulations:

- Bona fide settlers must buy and settle the land.
- Only 160 acres could be sold at a time, and only to one settler.
- $2.50 per acre was the maximum price.

The Great Oregon Forest Giveaway

The Oregon & California Railroad Company started building the important railway and promptly violated all three conditions placed on the disposal of the land. Instead, the company sold off the productive forests to the highest bidder. In 1903, the Southern Pacific Railroad – which bought the O&C Railroad Co. and finished the railway – ceased selling the land to settlers altogether because of the mounting value of the old-growth timber.

These violations led the State of Oregon – whose interest was in seeing the land settled, not sold off to timber interests – to seek action from Congress, which eventually passed a resolution that reclaimed the land to federal ownership. The railroad sued. Legal battles drug on for years and the case eventually made its way to the Supreme Court. The high court ruled that Southern Pacific had to give the land back and enjoined any further land sale.

The court left it to Congress to figure out what to do with the land. They passed the Chamberlain-Ferris Act in 1916 and the O&C Act in 1937, putting the management of these forests in the hands of the General Lands Office (GLO). The GLO merged with the Grazing Service in 1946 to become the Bureau of Land Management. Some of the revested O&C lands ended up under the management of the U.S. Forest Service, but about 2.4 million acres of public forestland was given to the BLM – an agency more accustomed to managing cows in arid deserts than forested watersheds – to administer.

Because the land granted to the O&C Railroad was every other square mile (section), it formed what has been called a “checker board” ownership pattern. Several areas have been consolidated

over the years as a result of land exchanges and large blocks of roadless ancient forest do still persist on the Oregon BLM.

Legacy of Abuse
The federal timber sale program began in earnest with the post-World War II housing boom. The logging of the Pacific Northwest's ancient forests is infamous. In 50 years, over 80% of the old growth was leveled. The western Oregon BLM Districts facilitated logging by administering timber sale contracts. Logging reached a feverish pitch in the 1980s, leaving many damaged watersheds, boom/bust rural economies, and a monoculture of tree plantations dominating a once lush landscape of cathedral forests.

Since the northern spotted owl was listed as threatened under the Endangered Species Act (ESA) in the early 1990s – because of the high rate that this old-growth forest dependant species' habitat was being removed – logging has been dramatically reduced on BLM forests. There are still old-growth timber sales, but many remaining forests were protected in old-growth reserves under the Northwest Forest Plan (NWFP).

Legal History of O&C Lands

The O&C Act of 1937
The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act) reads that O&C lands: "Shall be managed... for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating streamflow, and contributing to the economic stability of the local Communities and industries, and providing recreational facilities.[1]"

Although the language of the O&C Act includes multiple-use principles, BLM has maintained that the Act established timber production as the dominant use for the O&C lands, and until the Northwest Forest Plan, managed the O&C lands to maximize timber production without equal consideration of other forest uses.

In 1976 the Federal Lands Policy Management Act (FLPMA) was passed for the Department of Interior (the counterpart to the National Forest Management Act for Forest Service lands). The FLPMA language exempted O&C lands "insofar as they relate to management of timber resources and disposition of revenues...[2]". The Department of Interior interpreted the O&C Act as "a dominant-use statute" and that FLPMA did not apply to O&C lands.

In 1989, the group Headwaters sued the BLM over the Wilcox Peak timber sale, claiming that FLPMA applied to BLM timber sales on O&C lands. They also claimed that the BLM violated the O&C Act by failing to administer O&C lands for multiple uses. They lost in District Court and again in the Ninth Circuit, which concluded in 1990: "Congress intended to use 'forest production' and 'timber production' synonymously. Nowhere does the legislative history suggest

[1] 43 U.S.C. § 1181a
[2] 43 U.S.C. §§ 1701–1782

that wildlife habitat conservation or conservation of old-growth forests is a goal on par with timber production, or indeed that it is a goal of the O&C Act at all. The BLM did not err in construing the O&C Act as establishing timber production as the dominant use.[3]"

However, a closer look at the O&C Act and its legislative history belie the Ninth Circuit's holding in *Headwaters v. BLM*. The legislative history demonstrates that the impetus for the O&C Act was a desire for forest conservation and local economic stability, not strictly—or even predominately—timber production.[4] The O&C Act was a product of citizenry scarred by the Dust Bowl and fearful of a timber drought, as well as a Secretary who wanted to transform his DOI into the "Department of Conservation."[5]

"Conservation" as it was envisioned in 1937 is different than the "conservation" many environmentalists seek today; then, forest ecosystems were not valued because of their intrinsic worth or their ability to support biodiversity. Rather, the O&C Act says exactly why forests are valued: as a way to protect watersheds and regulate stream flow, a means to stabilize and sustain local economies, a source of recreation, and a permanent source of wood fiber. Today, ecology and economics have developed so that those components have a deeper, more scientifically grounded understanding than they did in 1937. Even the BLM has acknowledged that Congress intended the O&C lands to be managed under contemporary principles of ecology and conservation.[6] Thus, the ability of a forest to support biodiversity should be taken into account in managing the O&C lands because of biodiversity's importance to recreation, in protecting watersheds, and for the nontimber-based economic benefits of the forest to local communities.

The *Headwaters* case was not the last word. Soon after the *Headwaters* ruling, the Portland Audubon Society sued the BLM and had better results.[7] In 1993, the Ninth Circuit Court of Appeals upheld a lower court's ruling that BLM was violating the National Environmental Policy Act (NEPA) and the O&C Act. BLM had claimed that the O&C Act required them to log 500 million board feet (mmbf) of timber a year, and that implementing NEPA would illegally reduce that volume. The courts ruled that the O&C Act gave BLM discretion to sell less timber. The court also concluded that nothing in the O&C Act authorized a NEPA exemption for O&C lands.

The Northwest Forest Plan and O&C lands

The implication of *Portland Audubon Society v. Lujan* was important. The Ninth Circuit clearly held that the BLM was bound to comply with all other environmental laws, including NEPA and the ESA, when it comes to the management of the O&C lands.[8] Two years later, Judge Dwyer would follow the Ninth Circuit's decision in *Lujan* and rule that the Northwest Forest Plan was consistent with the O&C Act, This decision had major implications not only for multiple use, but

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[3] *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1184 (9th Cir. 1990)

[4] *The Oregon and California Lands Act: Revisiting the Concept of "Dominant Use,"* 21 J. ENVTL. L. & LITIG. 259, 299 (2007).

[5] *Id*. at 300.

[6] Memorandum from Solicitor, U.S. Dep't of the Interior, to Director, Bureau of Land Mgmt., Review of BLM Policy Statement for Multiple Use Management of the Oregon and California Railroad and Coos Bay Wagon Road Revested Lands (O&C Lands) 7 (Sept. 8, 1981)

[7] Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489 (D. Or. 1992).

[8] *The Oregon and California Lands Act: Revisiting the Concept of "Dominant Use,"* 21 J. ENVTL. L. & LITIG. 259, 29-94 (2007).

also for the nature of the reserve systems set up under the Plan. The timber industry had argued, among other things, that the O&C Act prohibited Late Successional Reserves (LSRs) and Riparian Reserves (RRs) on O&C lands. The court rejected this claim for several reasons.

First, the Endangered Species Act (ESA) specifically requires all agencies to ensure that their activities do not adversely affect listed species. Second, cases like *Portland Audubon* confirm that the BLM must fulfill conservation duties imposed by other federal laws, such as NEPA. According to Judge Dwyer, the plain language of both the ESA and the O&C Act gave the BLM sufficient discretion to change management policies to comply with the ESA and other conservation statutes. Third, the O&C Act required BLM management to "look not only to annual timber production but also to protecting watersheds, contributing to economic stability, and providing recreational facilities.[9]" Therefore, Judge Dwyer reasoned, the O&C Act gave the BLM authority to manage O&C lands for habitat conservation.

The court explicitly recognized the critical role of the O&C reserves to the viability of the Northwest Forest Plan. Because the government conceded that the plan was just barely sufficient to satisfy the requirements of the ESA, Judge Dwyer determined that "any more logging sales than the plan contemplates would probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions." Using this ruling, schemes like the BLM's now defunct Western Oregon Plan Revisions (WOPR) would have dismantled the NWFP's reserve system and increased logging to illegal levels.

To summarize, the courts have made clear that the BLM's management of the O&C lands enjoy no special exemption from federal environmental laws. Despite the *Headwaters* court's interpretation of the O&C Act as a dominant-use statute, and regardless of any effects on the agency's ability to maintain a high level of timber production, the BLM must manage the O&C lands for non-timber uses when required to do so by federal environmental laws like NEPA and the ESA.

O&C Lands and County Funding

The 1916 "Chamberlain-Ferris Act" which revested the O&C lands to the government distributed timber sale revenues to the O&C Railroad, the federal treasury, and the O&C Counties, such as Douglas County. In 1926 the "Stanfield Act" redistributed the funds, authorizing lump-sum transfers of $7 million to the O&C Counties at a rate of $500,000 per year. But this was not satisfactory to the O&C counties because they felt the Acts did not mandate enough cutting and they didn't get enough revenue.

The 1937 O&C Act overhauled the timber management and revenue distribution scheme. It allowed the federal government to pay fifty percent of gross timber revenues directly to the O&C counties, plus twenty five percent (for unpaid Railroad property taxes) to O&C lands. In 1953 Congress directed 25% of the revenue to road building and other capital improvements on the O&C lands, leaving only 50% paid to counties. These payment schemes tied timber harvests to county revenues and made county government a champion of increased logging.

This lasted until the "Secure Rural Schools and Community Self-Determination Act of 2000".

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[9] *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994).

Because of decreased timber revenues (most of the old-growth was cut and wildlife was going extinct on O&C lands), Douglas County Commissioners pushed to decouple timber harvests from county revenue. The "Secure Rural Schools" Act provides direct payment to counties from the federal government, in lieu of taxes. For example, Douglas County received $29,236,221 for BLM lands (and an additional $22,661,607 for Forest Service lands for a total of $51,897,828) in 2006. This Act was reauthorized in 2008, with a four year ramp-down in funding meant to expire in 2012. Efforts for additional extension of this funding are ongoing, as are a variety of alternative proposals.