Press Packet

Speakers:

- Roger Nyquist, Chair of the Linn County Board of Commissioners
- John DiLorenzo, Special Counsel to Linn County and partner at Davis Wright Tremaine LLP

Documents included:

- Press release
- Statement from Linn County Commissioners
- Historic timeline
- County-by-County impacts
- 32-H letter

Media contact:

Linn County Commission Chair Roger Nyquist (541) 967-3825

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FOR IMMEDIATE RELEASE

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Linn County Commissioners' Office

Linn County Pursuing Breach of Contract Class Action Lawsuit Against State of Oregon on Behalf of Forest Trust Land Counties and Local Districts

Seeks Over $1.4 Billion in damages for local services that include education, public safety, emergency response, libraries and more

Salem, Ore. (Jan. 13, 2016) -- Linn County delivered notice to Governor Kate Brown and State Forester Doug Decker today that it intends to file a class action lawsuit for breach of contract on behalf of over 150 beneficiaries of timber sales receipts from harvests off of Oregon Forest Trust Lands.

For over 70 years the state was to adhere to a legal framework for the conveyance of forestlands from the county to the state. In exchange for the conveyances, the lands were to be managed and revenues returned to the counties, with the state taking a management fee. The counties distribute the money received to taxing districts within the county, benefiting county services such as the sheriffs' office and other public safety organizations, education, care centers, libraries, and organizations such as recreation centers and 4H. The state is violating its contract with Forest Trust Land Counties by implementing a management plan that results in an annual $35 million reduction in revenue to the counties.

"This breach of contract has had devastating effects on local communities that have seen both poverty and unemployment rates skyrocket in the last two decades as a result of the current practices," said Roger Nyquist, Chair of the Linn County Board of Commissioners. "While there has been much talk about the plight of rural Oregon by statewide policy makers, there has been no action to address the fundamental problem. This litigation serves as an action step to improve the local economies of small towns located near county Forest Trust Lands all over the state."

Oregon courts have ruled that the state is contractually bound to manage Forest Trust Lands for the benefit of the 15 counties it actively sought and acquired land from in western Oregon over 70 years ago. Beginning in 1998 the state breached the contract when it adopted a new rule that de-emphasized revenue generation for the counties in exchange for other objectives. The state then implemented a management plan without the informed consent of the counties that resulted in roughly half the revenues the counties should have received if the lands were managed in accordance with best management practices required of private landowners.

"This is a straight-forward breach of contract case. The state's breach has strained county budgets and impacted

public safety, education and other basic services local citizens need," said John DiLorenzo, counsel to Linn County and partner at the law firm of Davis Wright Tremaine LLP. "The state has improperly altered management criteria for the Forest Trust Lands and subsequently failed to generate the appropriate level of timber revenue to the Forest

Trust Land Counties. Court rulings defining the relationship between state and Forest Trust Land Counties confirm that the forest trust land counties and their local districts are entitled to the benefit of their bargain.

We will be seeking damages in a class action lawsuit against the state for the breach of that bargain and we fully expect to prevail in court. We are doing this to benefit the people who reside in the Forest Trust Land Counties. Their lives and livelihoods have been impacted by the state's decisions. We hope this case will result in a vast improvement in their lives in many ways."

This class action lawsuit, representing over 150 taxing districts and counties, seeks over $1.4 billion in damages - $35 million per year from 2001 to present, pre-judgment interest on that figure, and future damages in an amount sufficient to yield a revenue stream of $35 million per year in perpetuity. Submission of today's letter of intent to file a class action lawsuit is required as a 30-day notice before the lawsuit can be officially filed and proceed to class certification and trial.

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About Oregon Forest Trust Lands

Since the 1930s, the Oregon Board of Forestry has acquired forestland to be managed as state forests with revenue from timber harvest returned to the counties that conveyed the land and the special taxing districts that serve those communities. Counties that receive revenue under the legal framework established by the state include Benton, Clackamas, Clatsop, Columbia, Coos, Douglas, Josephine, Klamath, Lane, Lincoln, Linn, Marion, Polk, Tillamook, and Washington.

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Administrative Officer

Joint Statement of the Linn County Commissioners

Leaders of Oregon's rural counties have become all too familiar with the challenge of supporting and maintaining services to our communities in the face of ongoing budget pressures. Like every government in Oregon, in Linn County we find our labor costs going up five to seven percent each year due to contracts that are guided by state statutes. We are also limited to annual three percent property tax increases as a result of the passage of measures 47 and 50. The long-running budget vise Linn County has been in requires an annual exercise in finding more ways to balance costs and services. For the sake of our communities, it's a reality that needs to change.

The purpose of this litigation is to enforce a contract that the State has willfully violated.
75 Years ago, Oregon's Forest Trust Land Counties gave land to the State under a protected relationship clearly defined in law and confirmed by an Oregon Supreme Court ruling. The State is required to manage these lands for the economic benefit of the counties. It's not doing so and hasn't been for a long time. Given our financial plight, the last thing we need is our partners at the state ignoring their contractual responsibilities.

This breach of contract has had devastating effects on local communities that have seen both poverty and unemployment rates skyrocket in the last two decades as a result of the current practices. While there has been much talk about the plight of rural Oregon by statewide policy makers, there has been no action to address the fundamental problem. This litigation serves as an action step to improve the local economies of small towns located near county Forest Trust Lands all over the state.

Counties have worked through the State's planning process to urge management of these lands in a sustainable way that brings more economic value to rural Oregon. Unfortunately, the State has failed to live up to its contractual obligations. We regret that it has come to the point where we have to enforce our contract through legal action, but we have no other choice. We do not take this action lightly or with any great enthusiasm, but as leaders in rural communities, we simply cannot continue to allow our citizens to shoulder the burden of the State's breach of contract.

Our intent is deliberate and clear: Linn County is filing a class action lawsuit against the State, and we will be seeking damages for the breach of contract and a declaration from the court requiring the State to manage our Forests in the future in a way that provides us the benefit of our bargain. The law and court rulings defining the relationship between the State and the Counties are not ambiguous. We fully expect to prevail in court.

HISTORY OF OREGON FOREST TRUST LANDS

...1929

Until 1929, tax-foreclosed lands, typically harvested forestlands, were passed onto the counties rendering them untaxable — resulting in a financial crisis for counties.

1929 – 1939

Laws passed to allow conveyance of land to state in exchange for management and distribution of revenues.

Additionally, legislature modified tax laws for forestlands.

1939 – 1951

State promotes conveyance of cutover land to be managed in trust for the counties.

Current state forestland base conveyed to state.

1986

Tillamook I: Court case establishes that a protectable interest exists between the state and the forest trust counties and that counties have enforceable rights related to land management.

1998

Board of Forestry revises rules to declare that state forests don't need to be managed primarily for revenue—and creates a new statutory definition for "greatest permanent value" (GPV) to guide all future management activities.

2005

Tillamook II: Court case affirms that a contract exists between state and forest trust counties and that state has contractual responsibilities to counties.

Today

Both counties and ODF are losing money on state forest management and the situation is projected to get worse over time.

1994 - 2001

State hosts public meetings to explain how forests will be managed and considers strategies for management.

2001

Northwest State Forest Management Plan adopted. Within months, ODF identified that its faulty modeling data would result in a 50-percent reduction in actual versus projected harvest levels. State decides to implement anyway, resulting in the counties being deprived of at least $35 million of total amounts due each year from 2001-2015.

1920 1930 1940 1950 ... 1980 1990 2000 2010 2020

Historic County Revenues from Forest Trust Lands & Annual Foregone Revenue

Average annual foregone revenue to Oregon's forest trust counties due to the state's breach of contract based on 2001-2014 data is $35,239,089.41. Likewise, Oregon Department of Forestry has foregone an average of $20,037,913.59 per year for management purposes since 2001. The annual total impact of these foregone revenues is $55,277,003.

	Total Actual County Revenue from State Forest Lands (2001-2014)	**Average Percentage of Total Actual Revenue**	**Average Annual Distribution (2001-2014)**	**Annual Foregone Revenue (2001-2014) from Breach of Contract**
Benton	$13,399,124.00	2.08%	$957,080.29	$731,479.84
Clackamas	$6,920,406.00	1.07%	$494,314.71	$377,796.15
Clatsop	$220,255,841.00	34.12%	$15,732,560.07	$12,024,122.42
Columbia	$10,954,868.00	1.70%	$782,490.57	$598,043.95
Coos	$3,478,030.00	0.54%	$248,430.71	$189,871.28
Douglas	$4,379,123.00	0.68%	$312,794.50	$239,063.40
Josephine	$213,155.00	0.03%	$15,225.36	$11,636.48
Klamath	$19,051,168.00	2.95%	$1,360,797.71	$1,040,034.06
Lane	$26,587,112.00	4.12%	$1,899,079.43	$1,451,433.42
Lincoln	$13,349,491.00	2.07%	$953,535.07	$728,770.29
Linn	$43,691,485.00	6.77%	$3,120,820.36	$2,385,188.80
Marion	$22,654,015.00	3.51%	$1,618,143.93	$1,236,719.30
Polk	$2,991,262.00	0.46%	$213,661.57	$163,297.83
Tillamook	$163,279,932.00	25.29%	$11,662,852.29	$8,913,715.45
Washington	$94,298,668.00	14.61%	$6,735,619.14	$5,147,916.73
Total	$645,503,680.00	100.00%	$46,107,405.71	$35,239,089.41

Assumption: Sustainable harvests into perpetuity for the benefit of current and future generations of Oregonians;

Historic County Revenues from Forest Trust Lands & Projections from Lawsuit Assuming Total Claim Available for Distribution

	Total Actual County Revenue from State Forest Lands (2001-2014)	Average Percentage of Total Actual Revenue	Average Annual Distribution (2001-2014)	Potential Distribution of Damages
Benton	$13,399,124.00	2.08%	$957,080.29	$29,790,597.62
Clackamas	$6,920,406.00	1.07%	$494,314.71	$15,386,306.64
Clatsop	$220,255,841.00	34.12%	$15,732,560.07	$489,700,157.55
Columbia	$10,954,868.00	1.70%	$782,490.57	$24,356,223.93
Coos	$3,478,030.00	0.54%	$248,430.71	$7,732,788.52
Douglas	$4,379,123.00	0.68%	$312,794.50	$9,736,210.46
Josephine	$213,155.00	0.03%	$15,225.36	$473,912.69
Klamath	$19,051,168.00	2.95%	$1,360,797.71	$42,356,924.24
Lane	$26,587,112.00	4.12%	$1,899,079.43	$59,111,771.46
Lincoln	$13,349,491.00	2.07%	$953,535.07	$29,680,247.37
Linn	$43,691,485.00	6.77%	$3,120,820.36	$97,140,339.12
Marion	$22,654,015.00	3.51%	$1,618,143.93	$50,367,221.43
Polk	$2,991,262.00	0.46%	$213,661.57	$6,650,545.41
Tillamook	$163,279,932.00	25.29%	$11,662,852.29	$363,024,236.10
Washington	$94,298,668.00	14.61%	$6,735,619.14	$209,656,517.47
Total	$645,503,680.00	100.00%	$46,107,405.71	$1,435,164,000.00

Assumption: Sustainable harvests into perpetuity for the benefit of current and future generations of Oregonians;

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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.

Anchorage
Bellevue
Los Angeles
New York
Portland
San Francisco
Seattle
Shanghai
Washington, D.C.
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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

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