

A Tale of Two “T”s: Timber and Trusts

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Insuring Timber



Insuring Timber

Question: Can we insure timber separately from the land on which it is located?

Answer: Maybe



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What's Covered by a Title Insurance Policy:

“Land”: The land described in Item 4 of Schedule A and improvements located on that land at the Date of Policy that by State law constitute real property. The term “Land” does not include any property beyond that described in Schedule A, nor any right, title, interest, estate, or easement in any abutting street, road, avenue, alley, lane, right-of-way, body of water, or waterway, but does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

We insure “real property”

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Is all of this real property?



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Insurability:

- *Standing timber is real property, but cut or fallen timber is personal property*
- We can insure standing timber, but we cannot insure cut or fallen timber

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Insurability:

- We cannot insure:
 - Particular sizes or species of trees
 - Trees sown, planted, seeded or germinated *after* the date of the conveyance
 - “Merchantability” of the timber

presents do grant, bargain, sell, convey and transfer unto the party of the second part, its successors and assigns, the merchantable timber (including timber which becomes merchantable during the term of this Timber Deed), as that term is defined in Exhibit “A” attached hereto.

Description of Merchantable Timber per specie as follows:

Merchantable shall be any and all timber, trees and logs, able to produce a 16 foot log with a minimum 4.5 inch top, together with pulp and ton wood of the same size, , whether lying, standing or growing, upon that certain following described land (the "Property"), located in Lewis County, Idaho (hereinafter "timber conveyed "), to-wit:

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Insurability:

- We cannot insure *timber rights* – the legal right to harvest and sell timber from a specific parcel of land (e.g., timber harvesting agreement)
 - We insure *ownership* of standing timber

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Conveyancing:

- Since standing timber is real property, it is conveyed in the same manner as other real property ... **timber deed**, reservation, etc.

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Access:

- There must be direct or indirect access from a public road to the insured timber - otherwise add a lack of access exception



Insuring Timber Access:

- If indirect access ...
 - Take exception to the terms and conditions of the easement
 - Does it contemplate access by logging trucks?
 - If not or unsure, add an exception for the possible *insufficiency of the easement* for use by logging trucks and other heavy equipment (i.e., overburdening)



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Title Requirements/Conditions:

- 1) Subject to State Underwriter approval of the form, terms and conditions of the proposed Timber Deed. Additional exceptions and/or requirements will be added to this report based on the form, including an exception for the terms and/or conditions of the Timber Deed.

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Title Requirements/Conditions:

- 2) Upon receipt of the proposed Timber Deed, the legal description of the land described in Exhibit A will be modified to limit said legal description to the timber described in the Timber Deed; provided, however, that said description of the insured timber will be limited to only “growing and/or standing *timber*” notwithstanding the terms of the Timber Deed.

Exhibit "A"

Real property in the County of Douglas, State of Oregon, described as follows:

All standing and/or growing timber as conveyed by Timber Deed from F.I.R.S. Holding LLC to Weyerhaeuser Company dated _____, 2018, recorded on _____, 2018, as Document No. 2018-_____, and located on the following described land:

ALL OF SECTION 8, TOWNSHIP 22 SOUTH, RANGE 8 WEST, WILLAMETTE MERIDIAN, DOUGLAS COUNTY, OREGON, LYING SOUTH OF THE UMPQUA RIVER. EXCEPTING THEREFROM THE SOUTH HALF OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SAID SECTION 8. ALSO EXCEPTING THEREFROM ANY PORTION LYING WITHIN ANDREA SAWYER DONATION LAND CLAIM NO. 49.

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Title Exceptions:

- 1) Subject to the terms, conditions and provisions as contained in the *Timber Deed* [under which title will be conveyed at closing]
- 2) Any question as to whether the timber described on Exhibit A is *real property or personal property*; the policy will not insure any timber that is or becomes personal property as defined under the Oregon Uniform Commercial Code (being ORS 71.1010 et seq.) or otherwise.

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Title Exceptions:

- 3) Notwithstanding the language of conveyance in the Timber Deed, the policy will not insure trees sown, planted, seeded, or germinated after the date of said conveyance or the Date of Policy, whichever is earlier, or fallen, downed, or cut trees, or the diameter, size or species of any trees.
- 4) The unmarketability or alleged unmarketability of title to the timber or to the estate or interest in said timber described on Exhibit A.

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Title Exceptions:

- 5) If access is by easement:
 - Terms and conditions of [the instrument(s) creating the easement]
 - Any question as to whether the [the instrument(s) creating the easement] is sufficient to provide access to and from said premises for logging trucks and other heavy equipment used for timber harvesting and transportation activities
- 6) Aboriginal rights of Native Americans, including but not limited to rights to protect sacred sites and burial grounds, as well as hunting and fishing rights

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Underwriting Suggestions:

- Due to the complexities involved, get a *state underwriter* involved early
- Review the timber sale agreement to understand the transaction and timber being conveyed
- **Add timber related requirements, conditions and exceptions to the title report/commitment**

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Underwriting Suggestions:

- Review form of timber deed
- Determine early if access is going to be an issue so there is time for corrective action

Trusts



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Trusts

Overview:

- A trust is a fiduciary relationship with a trustee holding assets for beneficiaries
- A trust is created by a settlor transferring property to a trustee, and the trustee holding that property for the beneficiaries – usually under a written Trust Agreement

Trusts

Overview:

- Functions of Trusts:
 - Assets bypass probate
 - Manage/Control assets after death
 - Minimize estate taxes
 - Provide privacy (vs. probate)
 - Protect assets from creditors (certain trusts)
- Common Types of Trusts:
 - Revocable
 - Irrevocable
 - Testamentary

Trusts

Overview:

- A trust acts through its trustee
 - The current trustee is our point of contact
- A trust cannot hold title to property in Oregon because a trust is not a recognized legal entity
 - The trustee holds title to the property
 - Example: *John Smith, Trustee of the John Smith Revocable Trust dated January 1, 2020*

Trusts

Trustee Powers:

- *Unless limited by the Trust Agreement, a trustee has the following powers:*
 - Buy and sell real property
 - Borrow money and grant security interests in trust real property
- **Proof of Trustee authority:**
 - Review the Trust Agreement
 - Review a Certification of Trust

Trusts

Review Trust Agreement:

- Request copies of the Trust Agreement and all amendments
- *All Trust Agreements are different* – you need to actually review the terms of the Trust Agreement and amendments to help determine the current trustee and relevant powers and limitations

Trusts

JOSEPH AND MARY BLANK JOINT REVOCABLE LIVING TRUST

DATED: _____, 2017

GRANTORS: Joseph Blank and Mary Blank

TRUSTEES: Joseph Blank and Mary Blank

1. DECLARATION OF TRUST.

The Grantors hereby establish a trust for the benefit of the Grantors, transferring the assets listed in Schedule A to the Trustees (hereinafter referred to in the singular). The purpose of this trust is to facilitate the management of the Grantors' estates during their respective lifetimes and to create a convenient vehicle for the disposition of their respective estates. This trust is revocable by either Grantor as to his or her separate property and as to his or her one-half interest in any Community/Joint Property and may be amended or modified by written agreement between the Grantors and Trustee at any time.

2. THE TRUST.

2.1 Initial Trust. The Grantors have transferred and delivered to the Trustee, to be held in trust pursuant to this Agreement, the property described in Schedule A attached to and incorporated in this Agreement. The Trustee acknowledges receipt of such property. In the event that Grantors (or either of them) do not convey legal title to any of the property described in Schedule A to Trustee, title to such property shall be deemed to be held in the name of the Trustee in the absence of clear and convincing evidence to the contrary. This property and any other property that is made subject to this Agreement shall be administered in accordance with this Agreement.

2.2 Name of Trust. The name of this trust shall be the "Joseph and Mary Blank Joint Revocable Living Trust".



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Trusts

9.2 **Powers.** The Trustee shall have the power:

(A) To **invest** and reinvest the trust estate in notes, mortgages, preferred and common stock or any other securities, savings accounts, and **other property, real or personal**, including any common trust fund administered by a corporate trustee;

(B) To purchase from a Grantor's estate, whether or not the Trustee would otherwise make such an investment, any of the assets thereof at the value shown by the Inventory of the Grantor's estate, in order to enable the Personal Representative of the Grantor's estate to convert such property into cash;

(C) To appoint one or more persons as an investment manager to manage trust assets. Upon the appointment of an investment manager, the investment manager is authorized and empowered to manage the trust to the same extent as the Trustee is otherwise authorized and empowered hereunder;

(D) **To manage, sell, convey, exchange, encumber, divide, subdivide, improve, and maintain the trust estate** or any part; to create restrictions, easements, and other servitudes; to carry insurance in such amount and against such hazards as the Trustee may deem advisable; to lease, license, and create such other rights, privileges, and interests as the Trustee may deem advisable for terms within or extending beyond the duration of the Trust;

(E) To pay assessments and other sums deemed necessary by the Trustee for the protection of the trust estate; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and in connection therewith to deposit securities with and transfer title to any protective or other committee or fiduciary; to give proxies, general and special; to exercise or sell stock options and subscription or conversion rights; to accept and retain as an investment any securities or other property, whether or not income producing or authorized by law for the investment of trust funds, received through the exercise of any of the foregoing powers;

(F) To realize, by suit or otherwise, upon any trust policy, any promissory note or other chose in action of the trust estate, and in settlement thereof to compromise, discount, adjust, extend, or abandon same;



Trusts

8. **TRUSTEES.**

8.1 **Removal/Appointment of Trustee.** Either Grantor may remove any Trustee and may appoint a Co-Trustee or a successor Trustee or act as the sole Trustee. Upon the death of both Grantors, the Grantors' adult children may, by unanimous consent, name a Trustee, remove a Trustee with or without cause, name a Co-Trustee, and name a successor Trustee.

8.2 **Successor Trustee.** If either Joseph Blank or Mary Blank is unable or unwilling to act or to continue as a Trustee, the other shall continue as sole Trustee. If both Joseph Blank or Mary Blank are unable or unwilling to act or to continue as Trustee, Fred Blank (shall, upon acceptance, serve as successor Trustee.

Executed as of the date written above.

GRANTORS:

TRUSTEE:

Joseph Blank

Joseph Blank

Mary Blank

Mary Blank

Trusts

Review Certification of Trust:

- The requirements for a Certification of Trust are set forth in ORS 130.860
- A transaction entered into in reliance on a Certification of Trust is binding on the trust -- *unless the person entering into the transaction knew the Certification of Trust was inaccurate*

Trusts

TRUSTEE'S CERTIFICATION OF TRUST (Pursuant to ORS 130.860)



File No.: _____

Given to First American Title Insurance Company of Oregon, First American Title Insurance Company, a Nebraska corporation, First American Title Insurance Company, National Commercial Services Division, and/or its duly authorized agent where the Title Insurance Policy is issued by that agent, in consideration of their issuance of a Policy or Policies of Title Insurance.

I/We, Joseph and Mary Blank, trustee(s) confirm the following facts:

1. The Joseph and Mary Blank Joint Revocable Living Trust is currently in existence and was executed on January 1, 2017.
2. The settlor(s) of the trust are: Joseph and Mary Blank.
3. The currently acting trustee(s) of the trust is (are): Joseph and Mary Blank.
4. The power of the trustee(s) includes:
(a) The powers to sell, convey and exchange ☒ Yes ☐ No (check one)
(b) The power to borrow money and encumber the trust property with a deed of trust or mortgage ☒ Yes ☐ No (check one).
5. The trust is ☒ REVOCABLE ☐ IRREVOCABLE (check one) and the following party(ies), if any, is (are) identified as having the power to revoke the trust: Joseph and Mary Blank.
6. The trust ☒ DOES ☐ DOES NOT (check one) have multiple trustees. If the trust has multiple trustees, the signatures of:
(mark one of the following:)
☒ ALL
☐ ANY _____ (specify number) of the Trustees are required to exercise the powers of the Trust.



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7. The Trust identification number is: XX-XXXXXXX (Social Security No/Employer ID).
8. Title to trust assets is to be taken in the following manner: Joseph and Mary Blank Joint Revocable Living Trust.

The undersigned trustee(s) declare(s) that the trust has not been revoked, modified or amended in any manner which would cause the representations contained herein to be incorrect. There are no provisions in the Trust which would require distribution to the Beneficiaries. The Trustee(s) powers, in addition to any powers contained in the Trust, include at least all those trust powers contained in the Uniform Trust Code set forth in ORS 130.650 - 130.730, inclusive.

(ALL SIGNATURES MUST BE ACKNOWLEDGED)

Joseph Blank

Mary Blank

Trusts

Conveyance to Trust, Not Trustee:

- Defective conveyance – the trust is not a recognized legal entity
- If the trustee is easily identified, your underwriter may make a risk decision
- Generally fixed by corrective deed
- Worst case, deed will have to be reformed by court action

Trusts

Successor Trustee:

- Risky situation! Be skeptical!
- Why is the original trustee no longer able to act?
 - Death, incapacity, unavailability, resignation, or removal?
- How do you know you are dealing with the correct successor trustee?
 - May want to review Trust Agreement and not rely solely on Certification of Trust
 - When in doubt, verify with one or more beneficiaries

Trusts

Co-Trustees:

- *Unless the Trust Agreement says otherwise ...*
 - Co-trustees may act by majority decision
 - If vacancy occurs, remaining co-trustee(s) may act for the trust

Trusts

Trustee Use of Power of Attorney:

- FATIC takes the position that a trustee cannot delegate his fiduciary power when it comes to the sale or encumbrance of real property
 - Other insurers may take a different approach
- This type of delegation may be okay – especially if allowed by the terms of the Trust Agreement

Trusts

No Trustee or Successor Trustee:

- Unanimous agreement of the beneficiaries
- Person appointed by the court

Trusts

No Trust Agreement:

- Potentially risky situation! Get a state underwriter involved early
- May be able to rely on certification of trust (fact specific – original trustees)
- Otherwise, a court may have to reform (or create) the terms of the Trust Agreement

Trusts

Trustee Conflict of Interest:

- A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary ... unless permitted by the Trust Agreement, or approved by the court or *beneficiaries*
- Example:
 - Conveyance of property to the trustee or trustee's family member, or an entity controlled by the trustee or trustee's family member, *even if consideration is involved*

Trusts

Settlor Failed to Transfer Property into Trust:

- FATIC will not recognize a property as part of a trust estate, unless conveyed to the trustee of the trust during the lifetime of the settlor
 - Other insurers may take a different approach
- There is an case that says property listed in a Trust Agreement is part of the trust estate [Samuel v. King]
 - This case is very fact specific and involved property listed in the Trust Agreement and subject to an Assignment of Property to Trust signed by the settlor and including words of conveyance

Trusts

Someone is Trying to Remove the Trustee:

- Risky situation – need to understand why
- Get state underwriter involved early to determine if transaction can proceed with current trustee