Certification on State Trust Lands: The Greatest Good? (Part 1)

The Pinchot Institute effort to test and evaluate forest certification on public lands is gaining momentum as field assessments get underway in several states. Senior Fellow Catherine Mater has worked closely with the states over the past year, so that now a total of 2.1 million acres in five states will be assessed in the next few months. The first field assessment took place last fall, when Scientific Certification Systems (SCS) assessed 1.2 million-acres of state-managed forestlands in Washington[1]. Forestlands in four other states will be assessed through the spring and summer of 2001—the next being forests in North Carolina. However, as the assessments hit the ground in each state, the imminent prospect of publicly-owned certified forests may provoke reconsideration of the reasons for public timber management, and how it is performed.

The Pinchot Institute is tracking the emerging dialogue to evaluate and report the decision process in the states. The lessons will vary among participants whose forestlands are managed by different types of organizations. In Washington, a Department of Natural Resources (WADNR) manages the 1.2 million acres of state trust lands that were assessed. In North Carolina, the 61,000 acres included in the pilot are distributed among 8 separate tracts, and are managed by three separate institutions: North Carolina State University, Duke University, and North Carolina Division of Forestry[2]. In Maine, 29 separate tracts composing the 480,000 acres included in the pilot certification, are "Public Reserve Lands" managed by the Maine Forest Service[3]. In Tennessee the lands to undergo assessment are managed by the Department of Agriculture's Forestry Division[4]. Finally, the last assessment to be carried out this year will be a 500-acre Marsh Billings Rockefeller Estate in Vermont managed by the National Park Service[5].

If the certification effort is given the appropriate attention in each of these states, there should be substantial and meaningful public discourse. Indeed, a major reason for the pilot approach is that becoming certified may challenge the forest planning and management processes originally developed in the public's interest. Any finding that significantly alters the management regime should require close scrutiny.

The "public interest" considerations are likely to be most significant where public lands are treated as a formal "trust." School Trust Lands exist in 12 states, mostly Western, each of which interprets this responsibility somewhat differently. All were federal lands granted by Congress, many through an Enabling Act passed when the States' Constitutions were approved and statehood granted.[6] Until the late 1800s most Enabling Acts provided minimal direction to the state, requiring only that they be used to fund the education of its citizenry (Souder & Fairfax, 1996). For example, the Oregon Constitution (1859) stipulates that, "...[the state] land board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of [the] state" (O'Day 1999). These revenues were generated according to the States' discretion, and included land sales, leases, timber sales, grazing permits, etc. In fact, the provision of federally granted lands for the education of new settlers is considered by some as a critical factor driving the population and birth of Western States.[7] In other words, these provisions were an incentive for statehood and not a *condition* imposed by the Federal government.

Over time, however, the language in the Enabling Acts stipulated by Congress became more and more precise. It limited the purposes for their use and disposal, eventually conveying a goal of revenue maximization. Now, whether stipulated or not in their Constitution and Enabling Act, state governments regard themselves as trustees exercising common law fiduciary responsibilities. Court decisions over the years reinforced this notion, building a substantial edifice on what was originally a broader mandate[8] (O'Day 1999).

Reviewing the history of court decisions and opinions of State Attorneys General, several commentators suggest that the fiduciary responsibilities of trustees are not violated by conservation-oriented administrative decisions, when they afford intergenerational protection to trust resources. As stated by Fairfax (2000), "When operating under the protective corpus of the trust, the trustee is obligated to maintain a full range of management options by protecting species of unknown, but potential value, and to manage conservatively." This interpretation is echoed by a Washington Attorney General opinion supporting a Habitat Conservation Plan, that included measures resulting in reduced trust revenues (Gregoire 1996). When cases in other states challenged measures for compliance with statutes like the Clean Water Act, courts consistently established the primacy of Federal law (O'Day

1999). However, these decisions served to interpret what was *required* by state or federal statute. Certification is a voluntary, market-based decision that is not currently *mandated* for public lands anywhere in the United States.

The questions posed to the states by this pilot project are a formidable test of certification as a tool for public land managers. It is a test that will be repeated in each participating state, with an outcome determined by the peculiarities of their decision-making processes. In several states, the Constitution originally vested trustee responsibility in the State Legislature. They in turn gave an elected Commissioner of Public Lands, the administrator for the Department of Natural Resources, responsibility for federal grant land management. Therefore the commissioner is also the effective *trust manager.* In this role, the commissioner makes administrative decisions, reflecting the policies set by an external body (e.g. Washington's Board of Natural Resources), and which may at any point be challenged in court by a trust beneficiary. "As trust manager, the Department is bound by the same fiduciary responsibilities and obligations that bind the state as trustee" (Gregoire 1996). It is therefore likely that once the recommendations and any conditions for certification are made public, the decision will need to pass muster with trust principles. The review must invoke the higher standards of common trust law, the most significant of which is the *Prudent Investor Standard.*

The test of certification therefore seems to be rooted in economics. As again stated by Fairfax, "Trust principles require an honest risk-benefit assessment.... They also rely on issues of profit and loss to define accountability" (Fairfax 2000). From this perspective, the state must decide whether certification is a *prudent investment* for the beneficiaries of the trust. Some critics of certification on Washington lands feel that the current certified market will not provide enough benefit to meet the revenue standard—yet it is not that simple. The lessons learned from certifying state forestlands in Minnesota, New York, and Pennsylvania suggest that states ought to consider non-market benefits in addition to product-premiums as a basis for prudent investing. In Pennsylvania, both the helpful guidance and the improvements in public perception provided by a nationally credible external review were invaluable to state land mangers. In this light, the premiums for certified wood that are now gradually increasing simply add to these other real values.

Therefore, decisions on certification that consider the financial aspects of trust responsibility, inherently ask the state to account for other types of benefits that are real, but harder to measure. Indeed, the market-based nature of certification makes it a tool for good stewardship that resonates well with the fiduciary role of trustees. Yet they will need to *justify* the economic, scientific, and social value of certification to the people of the state—and proclaim whether certified forestland is indeed the greatest good for their beneficiaries.

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[1] Washington State is the only assessment that will include only one certification system (FSC). Initially a dual assessment was planned and announced, but did not proceed due to lack of interest from verifiers. At the time of writing, the draft report had yet to be reviewed by the state and released to the public.

[2] The Plum Line (for SFI), and SmartWood (for FSC) will carry out North Carolina Assessments.

[3] In Maine, Scientific Certification Systems and an Interforest-Arthur Andersen team will perform the dual assessments in parallel.

[4] A "gap-analysis" (SFI) and "scoping" (FSC) were conducted to determine readiness to undergo certification. This was carried by PriceWaterhouseCoopers and SmartWood.

[5] Bioforest Technologies will carry out the SFI assessment and SmartWood will conduct the FSC assessment.

[6] Several states (e.g. Oregon, as Oregon Admission Act) entered the Union without an Enabling Act. (Fairfax 1996).

[7] See O'Day 1999. p. 175 on the 1785 General Land Ordinance ". . .Congress retained its vision of public education as the enticement for settlement."

[8] See Fairfax et. al 1992 p. 797. and Op. Wa. Attn'y Gen. (1996) in ref. to County of Skamania vs. State of Washington (1984).

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