PART II:

ISSUES AND COMMENTARY
CHAPTER 6

Agency and Trusteeship: Legal and Ethical Issues in Relationship with Employers and Clients

Professionals in natural resource and environmental management will often find themselves acting in agency and trusteeship roles during their careers. This may be during the conduct of their work with employers, or in off time civic work. I believe that a clear understanding of these concepts can provide a good base for understanding professional ethics, and that concepts of agency and trusteeship underlie the most important and valued traditions of our fields.¹

AGENCY: DEFINITIONS AND DUTIES

What is an agent? One who acts on behalf of another, “a person authorized by another to act for him, one entrusted with another’s business” (Black’s Law Dictionary) Key points are:

1. The agent takes actions,
2. on behalf of a client or principal, who has
3. authorized the agent to act on their behalf.

Degree of Independence

The relation of agency covers a variety of types of relationships. Agents act with a degree of independence typically agreed upon in advance with principals, or set by custom in a particular business.

¹ I would like to acknowledge valuable assistance from Mr. Jim Carolan, Associate General Counsel of Yale University.
A stock broker or investment adviser may have broad autonomy over investment decisions, or may act only on specific instructions from the client. An attorney is a very special kind of agent. The attorney client relationship is highly complex and covered by a vast array of laws and customs.

A consulting forester, when asked to manage land and sell timber, is acting as an agent for the land owner. This initial step of agreeing on prescriptions is not an agency relationship, but implementing it through timber sales or other actions often is. Many landowners at a distance may delegate broad authority to their managers, while others are actively involved in approving every action. Typically, in the former case, a long-term management contract with understandings concerning fees and expenses would be entered into.

A “power of attorney” is a specialized form of agency relationship that is usually very tightly drafted and often intended to be of limited duration.

**The Duty of Care**

Duty of care is assumed by the agent is an important issue. The agency relationship demands a commitment to a professional level of care in acting for the principal.

**The Principal’s Interests**

As examples, a real estate agent assists an owner in selling property. The agent may be empowered to accept the best offer, but often must clear important points like price with a principal.

An agent is entrusted with making business arrangements that are to the greatest benefit of the principal and not to the agent. The principal’s interests in an agency relationship are to take precedence over those of the agent. (Many of the issues that can arise in this area are considered below in Conflict of Interest.)

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FIDUCIARY RELATIONSHIPS

A fiduciary is “... a person holding the character of a trustee ... in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires.” (Black’s) Sections of the Land Trust Alliances Standards (Appendix) amount to an extended definition of trusteeship.

A trust relationship has four components:

- A corpus, or body of the trust. The corpus could consist of natural resources, land or other natural assets, buildings, patents, or financial instruments.

- A beneficiary, on whose behalf the corpus is to be managed.

- A trustee, who holds responsibility for seeing to it that the trust is properly administered.

- Trust requirements or constraints may be laid down in the legal instruments creating a trust. The requirements may constrain a land trust to maintain natural areas and not build shopping malls on the land, for example. A foundation’s benefactor may prescribe that its funds are to support certain kinds of medical research. I understand that at Yale University, for example, there is an endowment that supports the maintenance of campus flowerbeds.

Trustees may be individuals. This is not uncommon in providing for the executor of an estate or guardianship of a minor. Commonly, even for very small organizations like local land trusts, small family foundations, or churches, trustees are a group of individuals, in order to ensure thorough discussion of issues.

Large bodies of law and custom govern the duties of trustees. Typically persons appointed as trustees are asked to do so because their experience and judgment have been demonstrated. A trustee assumes duties of diligence, thoroughness, and prudence in carrying out trust responsibilities. As a trustee, an individual is rarely in the position of actually handing funds involved ... this is done through a group’s treasurer. But trustees commonly negotiate the purchase and sale of assets, the best method of investing endowment funds, and salaries and terms of employment of managers or consultants.
An agent, on the other hand, may be closely involved in handling and accounting for funds and property. An example is handling timber sales. Accountability for volumes harvested, assurance of payment, settling accounts with contractors and others, involves considerable recordkeeping, inspection and oversight, and other management activity. Consultants acting as agents for others maintain separate bank accounts so that a client’s funds are never commingled with their own funds. Current, accurate, and thorough recordkeeping is critical to adequate performance as an agent.

Trust requirements are enforced by the Attorneys General of the states. For example, when the Boston Red Sox, owned by a trust, were sold, the Massachusetts Attorney General conducted an inquiry to ensure that the price and terms were fair to the beneficiaries of the trust. Persons who believe that a trust has been improperly managed seek redress through the Attorneys General.

**TRUSTS IN NATURAL RESOURCES**

There are several important kinds of trusts in the natural resources field.

**Tribal Trust Lands**

Under treaties and federal law, many lands in Indian Reservations are legally held in trust by the federal government on behalf of the tribes. Many tribes also hold “fee simple” lands as well, which are under their own direct control. There has been considerable controversy of late concerning alleged default of trust responsibilities by the Department of the Interior in custody of funds and assets due the tribal members who are the beneficiaries of this trust.

**Land Trusts**

Land trusts are legally created as charitable institutions to hold land for conservation and closely related purposes for the public benefit. Lands or real estate are deeded to them with trust restrictions. When a person donates property to The Nature Conservancy, a form of trust is created that commits the Conservancy to maintain the land in a natural condition. A backup trustee may be named in the event that default by the primary trustee is found.
Constitutional Trust Lands

Some important natural resource lands descend from original ownerships by the crown or the federal government, and retain that status to this day. For example, some of the public lands of Maine are termed “Public Reserved Lands,” as they were originally reserved in the State Constitution for specified public purposes. Another well-known example is the school lands (Section 16 & 32 lands) of the western states. These lands were granted by the federal government on statehood. Their revenues were to benefit schools in the states. The State of Washington has received substantial timber sale revenues for highly productive timberlands in its state forests. The state is the trustee; the land is the corpus, and the schools – and the students – are the beneficiaries. Federal law and state constitutions provide the trust rules and constraints.

Public Trust Resources

There is a special class of resources that are called public trust resources. These include natural assets that are legally held in trust by the sovereign (state or federal governments) for the benefit of all the people. Such assets are typically held to be inalienable, though they may be leased out for uses deemed consistent with the public trust. A tract of land purchased for a wildlife refuge or state forest is usually not in this category. An example is the tidelands (with their fishery resources, recreational values, and oil and gas) held in trust by state or federal governments. The state’s ownership of the fish and wildlife (ferae naturae) shares some of the features of a public trust resource. A large and complex field of public trust law emerged as a prominent specialty in the 1960s and 1970s as environmental law came into its own in this country.