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MEMORANDUM

DATE: October 16, 2006

TO: Oregon Board of Forestry and
Marvin Brown, State Forester

FROM: Jas. Jeffrey Adams, Assistant Attorney-In-Charge
Natural Resources Section

SUBJECT: Existence and nature of fiduciary relationship between Forestry and the counties with respect to conveyed forest lands

Questions

1. Is there any source of authority that establishes a fiduciary relationship between the Board of Forestry and the State Forester (collectively, Forestry) and the counties with respect to conveyed forest lands?

2. If there were a basis of authority that established a fiduciary relationship between Forestry and the counties, would the nature of such fiduciary duties dictate how Forestry should manage the conveyed forest lands?

Short Answers

1. Neither the governing statutes nor the deeds conveying the lands nor any other sources of authority establish a fiduciary relationship between Forestry and the counties with respect to the forest lands conveyed by the counties.

2. Even if there were a source of authority for a fiduciary relationship between Forestry and the counties, that would not dictate how Forestry should manage the conveyed forest lands.

Discussion

An important question for the State Forester and the Board of Forestry (collectively, Forestry) is whether Forestry stands in a fiduciary relationship with counties that have conveyed county forest lands (conveyed forest lands) to the Board of Forestry under ORS 530.030. That issue has been the subject of an ongoing dialogue between Forestry and the counties.[1]

A fiduciary relationship between two parties is a special relationship that must be established by a source of authority, such as by statute, by deed, by contract, by partnership or by trust, in which one party owes the other party a special "fiduciary duty" to act for the other's benefit in managing an asset, while exercising the highest degree of care. Fiduciary duties generally include the duties of loyalty and care. A trust relationship typically involves a fiduciary duty owed to the trust beneficiaries to maximize the trust assets.

In the present context, we examine each potential basis for a fiduciary relationship in turn. If there were any basis for a fiduciary relationship, the question in this context would be the nature of the fiduciary duties owed and the degree to which those duties would dictate how Forestry should manage the conveyed forest lands.

1. Neither the governing statutes nor the deeds conveying the lands nor any other sources of authority establish a fiduciary relationship between Forestry and the counties with respect to forest lands conveyed by the counties.

a. The governing statutes do not create a fiduciary relationship.

In 1931, in an effort to assist counties with large tracts of tax forfeited lands, the Oregon legislature enacted a law that gave the Board of Forestry (Board) the authority to acquire state forest lands via gift, purchase, or transfer of title from the counties. Rice, *Pulp Fiction and the Management of Oregon's State Forests*, 13 J Envtl L & Litig 209, 223 (1998). That statute underwent some modifications, principally in 1939, 1941 and 1945, with minor changes in subsequent legislative sessions. In all versions of that statute, including the

[1] At the request of the Board of Forestry, the Oregon Attorney General, in rendering this opinion, has carefully reviewed a memorandum submitted to this office by legal counsel for Tillamook County on October 3, 2006, entitled "The State's Duties Toward the Counties with Respect to Forest Trust Lands in Oregon" (hereinafter referred to as "County Memorandum").

current version, the Board of Forestry acquires such lands in the name of the state, and those lands become state forests. ORS 530.010. The State of Oregon is the title owner of state forests. ORS 526.162.

In *Tillamook County v. State Board of Forestry*, 302 Or 404, 411, 730 P2d 1214 (1986) (*Tillamook I*), the counties sought a declaration from the court that the conveyance of lands under ORS 530.010 through 530.170 created a trust or a contractual relationship. The Oregon Supreme Court rejected the counties' attempt to establish the relationship as one based on trust or contract and instead looked "to the statutes to determine what flows from them." *Id*. at 416. The holding of *Tillamook I* is based on the statutes that establish and define the relationship between Forestry and the counties with respect to the conveyed forest lands.

This office has previously characterized *Tillamook I* as follows:

> The nature of the duties of the state to counties in managing county timber land under ORS 530.030 has been explored in some detail in advice from this office and commentary from various interest groups appearing before the Board of Forestry. However, the subject has come before Oregon's appellate courts only one time. In *Tillamook County v. State Board of Forestry*, 302 Or 404, 730 P2d 1214 (1986), the Oregon Supreme Court held that the Board of Forestry could not exchange timber revenue-producing county forest lands for privately owned old-growth land which would then be preserved as a state park. The Court's holding was based on the fact that, under ORS 530.030, the Board of Forestry had a duty to provide payment to the former county owner based on a percentage of revenue derived from the lands. ORS 530.030(1). The Court specifically declined to characterize the relationship between the state and the county as a trust or contractual relationship, but simply held that the language of ORS 530.030 gave rise to a duty on the state's part, enforceable by the counties. *Tillamook County* at 416. Thus, *Tillamook County* stands only for the proposition that, in management of county timber lands, the Board may not take actions which result in extinguishment of *all* revenue producing capabilities.
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> *Tillamook County* does not establish a general standard for managing county forest lands. The general management standard governing these lands is found in ORS 530.050 which requires the State Forester, under the direction of the Board of Forestry, to manage state forests to "secure the

> greatest permanent value of such lands to the state." ORS 530.050. In a 1991 letter of advice to Martha Pagel (then serving as the Governor's Assistant for Natural Resources and the Environment), this office concluded that reading ORS 530.050 together with the *Tillamook County* decision means that the Board of Forestry need not maximize immediate revenue (harvest returns) from county timber lands. Letter from Melinda L. Bruce to Martha L. Pagel at 6, July 17, 1991. The appropriate balance between present income maximization and future value (i.e., greatest permanent value) of such lands is primarily a question for policymakers to decide. *Id.*

Letter to David Morman, ODF, dated February 22, 2001, from Justin Wirth, DOJ.

The Oregon Supreme Court's interpretation of a statute becomes a part of that statute as if expressed in the statute itself. *Dennehy et al v. Roberts*, 310 Or 394, 398, 798 P2d 663 (1990); *State v. Clevenger*, 297 Or 234, 244, 683 P2d 1360 (1984); *Andrews v. Christenson*, 71 Or App 442, 446, 692 P2d 687, *rev den* 299 Or 37 (1984). Hence, ORS 530.050 has been definitively construed by the Oregon Supreme Court in *Tillamook I* to mean that the Board of Forestry may not take actions that result in extinguishment of *all* revenue producing capabilities of the conveyed forest lands.

We turn to the relevant statutes to determine the legislative intent. The intent of the relevant statutes appears to be clear, on the basis of text and context, under the template for statutory construction laid down by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (paradigm that examines first the statutory text and context, then the legislative history, and finally, canons of statutory construction to ascertain legislative intent).

None of the statutes that have defined the relationship between Forestry and the counties has ever expressly stated that a fiduciary relationship exists between the state and the counties. That is evident upon examining the early legislative enactments in 1931, 1939, 1941 and 1945, and the current version of the governing statutes.

The original 1931 version of the law that created the relationship between the state and the counties with respect to the conveyed forest lands did not express the relationship in fiduciary terms. Or Laws 1931, c 93.[2]

[2] Chapter 93 of Or Laws 1931 provided in its entirety:

> Section 1. The state board of forestry hereby is authorized and empowered to acquire, in the name of the state of Oregon, lands to be designated state forests, which lands, in the judgment and opinion of the said board, are suited chiefly for any or all of the following purposes: Growing forest crops, water conservation, watershed protection, recreation.
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> Section 2. Such lands may be acquired by the following means: Gift to the state; purchase by the state, or transfer of title to the state by any county. Before accepting conveyance of such lands the state board of forestry shall have the title to said lands examined and shall not accept title from the grantor or donor, unless a good and merchantable title, free and clear of all taxes, liens or encumbrances, is shown to be vested in said grantor or donor. Such title shall be passed upon and approved by the attorney general of the state of Oregon; provided, that not more than 100,000 acres may be so acquired after the passage of this act and prior to June 30, 1933; and provided, that not more than 15 percent of said 100,000 acres may be acquired in any county; and provided further, that no land may be acquired by purchase under this act except as funds for such purchase are made available by specific appropriation by the state legislature, which said appropriation act shall fix the maximum amount per acre that may be paid for lands so acquired.
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> Section 3. Such lands shall be conveyed to and become and be the property of the state of Oregon and shall be administered and managed by the state board of forestry for any or all of the following purposes: (a) Continuous forest production and so far as practicable to promote sustained yield forest management for the forest units of which such lands are a part; (b) water conservation or watershed protection; (c) recreation. These lands shall be reserved from sale, but the said board hereby is authorized to exchange such lands for public lands of equal value for the purposes of grouping isolated tracts into contiguous holdings for better administration and protection. The state board of forestry may, in its discretion, sell at public sale the timber and other products thereon and issue permits for use of said land.
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> Section 4. The county court of each county hereby is authorized and empowered to transfer to the state, title to forest lands which have been foreclosed for taxes and on which the required redemption period has expired.

In 1939, the distribution formula was amended, and the fund into which revenues were to be placed was denominated as the "state forest development fund." The 1939 statutory amendment made no mention of a fiduciary relationship between the state and the counties. Or Laws 1939, c 478. Similarly, in 1941, the distribution formula was again amended, and the duty to manage the conveyed lands was expressed in terms of "greatest permanent value": "The board shall manage the lands acquired pursuant to this act so as to secure the greatest permanent value of such lands to the state * * *." Or Laws 1941, c 236, §5. No mention of a fiduciary duty was made in the 1941 enactment. In the 1945 amendments to the statute, a fiduciary duty again was not mentioned expressly. Or Laws 1945, c 154.

The phrase "trust fund" did appear in the 1941 and 1945 versions of the statute in relation to the "state forest development fund in the state treasury," into which were to be placed revenues derived from the forest lands. Both statutory versions stated that the money should be held as "a trust fund for the redemption of the state of Oregon forest development revenue bonds and the payment of interest." Or Laws 1941, c 236, § 7; Or Laws 1945, c 154, § 7.

As explained by the Oregon Attorney General in a 1945 opinion, the phrase "trust fund" in the 1945 version of the statute was "used loosely" and described a trust fund "in the sense that it is to be expended only for the purpose and in the proportions specified in the act." 22 Op Atty Gen 257, 259 (1945). Because the "trust" applied only to administering the funds derived under the act, the 1941 and

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> Section 5. On lands that are acquired by the state under this act, the state shall pay the county 5 cents per acre annually and 12 ½ per cent of all revenues received from said lands. All funds paid to the county under the provisions of this act shall be deposited with the county treasurer, who shall apportion the same to the various taxing districts in which the lands are situated in the proportion that the tax levy of each taxing agency or district bears to the total tax levy against the property within such taxing district for the then current year. The remaining revenue from said lands shall be placed in and become part of the state irreducible school fund, and subject to all provisions of law affecting said fund.
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> Section 6. The state board of forestry hereby is authorized and empowered to promulgate rules and regulations not inconsistent with the law for the purpose of carrying out the provisions of this act.
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> Section 7. Chapter II of title XLII, being section[s] 42-201 to 42-2204, Oregon Code 1930, both inclusive, hereby are repealed.

1945 statutes contemplated a statutory trust fund to benefit the state. Nothing explicit in the 1941 or 1945 versions of the statute, including the phrase "trust fund," articulated the nature of the state's relationship to the counties in fiduciary terms.

The failure of the Oregon Legislature to state affirmatively that a fiduciary duty is owed by the state to the counties with respect to the conveyed forest lands has continued in every version of the statutes, up to and including the current version of the statutes. ORS 530.010 to 530.170. The legislature's failure to impose fiduciary duties on the state for the benefit of the counties must be deemed a deliberate choice. The legislature knows how to specify fiduciary duties when that is its intent. *See, e.g.* ORS 238.640(5) ("Notwithstanding the qualifications established for members of the board [Public Employees Retirement Board] under this section, all members of the board have the same fiduciary duties and must exercise the same degree of independent judgment.").

The dispositive statute now in effect is ORS 530.050,[3] which states in

[3] ORS 530.050 provides in its entirety:

Under the authority and direction of the State Board of Forestry except as otherwise provided for the sale of forest products, the State Forester shall manage the lands acquired pursuant to ORS 530.010 to 530.040 so as to secure the greatest permanent value of those lands to the state, and to that end may:

(1) Protect the lands from fire, disease and insect pests, cooperate with the counties and with persons owning lands within the state in the protection of the lands and enter into all agreements necessary or convenient for the protection of the lands.

(2) Sell forest products from the lands, and execute mining leases and contracts as provided for in ORS 273.551.

(3) Enter into and administer contracts for the sale of timber from lands owned or managed by the State Board of Forestry and the State Forestry Department.

(4) Permit the use of the lands for other purposes, including but not limited to forage and browse for domestic livestock, fish and wildlife environment, landscape effect, protection against floods and erosion, recreation, and protection of water supplies when, in the opinion of the board, the use is not detrimental to the best interest of the state.

(5) Grant easements, permits and licenses over, through and across the lands. The State Forester may require and collect reasonable fees or charges relating to the location and establishment of easements, permits and licenses granted by the state over the lands. The fees and charges collected shall be used exclusively for the expenses of locating and establishing the easements, permits and licenses under this subsection and shall be placed in the State Forestry Department Account.

pertinent part that the State Forester, under the direction of the Board, must manage lands conveyed by the counties in a manner that "secure[s] the greatest permanent value of those lands to the state." The governing statute, both in its current form and in all of its predecessor versions, has never explicitly described the relationship between the state and the counties in terms of fiduciary duties that the state bears to the counties with respect to conveyed forest lands.

Because the key statute, since its first enactment in 1931 up to the present, does not contain express mention of fiduciary duties vis-à-vis the counties, its meaning is clear on the basis of its text and context.

To the extent that the statutes could be deemed to be ambiguous, however, legislative history would then be relevant, under the statutory construction approach outlined in *Portland General Electric v. BOLI*. To that end, we have examined the extant legislative history for 1931, 1939, 1941, and 1945, and we have found no support therein for the proposition that the legislature intended to

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(6) Require and collect fees or charges for the use of state forest roads. The fees or charges collected shall be used exclusively for purposes of maintenance and improvements of the roads and shall be placed in the State Forestry Department Account.

(7) Reforest the lands and cooperate with the counties, and with persons owning timberlands within the state, in the reforestation, and make all agreements necessary or convenient for the reforestation.

(8) Require such undertakings as in the opinion of the board are necessary or convenient to secure performance of any contract entered into under the terms of this section or ORS 273.551.

(9) Sell rock, sand, gravel, pumice and other such materials from the lands. The sale may be negotiated without bidding, provided the appraised value of the materials does not exceed $2,500.

(10) Enter into agreements, each for not more than 10 years duration, for the production of minor forest products.

(11) Establish a forestry carbon offset program to market, register, transfer or sell forestry carbon offsets. In establishing the program, the forester may:

(a) Execute any contracts or agreements necessary to create opportunities for the creation of forestry carbon offsets; and

(b) Negotiate prices that are at, or greater than, fair market value for the transfer or sale of forestry carbon offsets.

(12) Do all things and make all rules, not inconsistent with law, necessary or convenient for the management, protection, utilization and conservation of the lands.

create a fiduciary relationship between the state and the counties with respect to the conveyed forest lands.[4]

Further, we have carefully reviewed the historical statements documented in A CHRONICLE OF THE TILLAMOOK COUNTY FOREST TRUST LANDS, Vols. I & II, Paul Levesque (1985) (CHRONICLE). Only one of the statements appears to have been made in the course of a session of the Oregon Legislature, and that was a statement by Governor Sprague at the start of the 1939 legislative session that articulated the concept that if logged county forest lands were acquired or managed by the state, revenues could flow back to the counties.[5] That statement accurately reflects the statute as it was enacted in the 1939 legislative session. The 1939 legislation provided for a percentage of revenues derived from the conveyed forest lands to be returned to the counties. 1939 Or Laws, c 478.

A number of historical statements were thereafter made by public officials that referred to the state's management of conveyed forest lands in terms of public trust concepts. Those statements were made outside the Oregon legislative process.[6] In short, none of the historical statements on which the counties would rely constitutes legislative history that a court would properly take into account in determining the intent of the Oregon Legislature in enacting ORS 530.050 or its predecessors.

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[4] ORS 530.050 has been amended since 1945, but none of the changes explicitly affected the relationship between the state and the counties. See Or Laws 1953 c.65 §5; Or Laws 1955 c.421 §3; Or Laws 1957 c.228 §1; Or Laws 1959 c.141 §1; Or Laws 1963 c.475 §1; Or Laws 1965 c.128 §1; Or Laws 1967 c.396 §3; Or Laws 1983 c.759 §9; Or Laws 2001 c.752 §8; and Or Laws 2005 c.103 §37. No one has suggested that the legislature intended in those subsequent amendments to create a fiduciary relationship between the state and the counties with respect to the conveyed lands, and, accordingly, we have not examined the legislative history of those later enactments.

[5] In 1939, Governor Sprague addressed the Oregon Legislative Assembly when it convened and, in the context of urging that logged county lands should be acquired or managed by the state, said: "Net proceeds from the lands could flow back to the counties and taxing units." CHRONICLE at 519.

[6] For example, Governor Sprague addressed the federal Joint Congressional Committee on Forestry on December 12, 1939, after the enactment of 1939 Or Laws, c 478, and characterized the state's acquisition of conveyed forest lands as the administration of "a permanent public trust." CHRONICLE at 545.

Further, the statutes cannot reasonably be read to imply a fiduciary relationship between the state and the counties. In Oregon, a fiduciary relationship "is found with its accompanying burdens and disqualifications wherever there is confidence reposed on one side and resulting superiority and influence on the other." *Rowe v. Freeman*, 89 Or 428, 437, 172 P 508 (1918).

In this context, the statutes governing the relationship between the state and the counties do not literally describe an unequal relationship or the vesting of confidence in one party. ORS 530.050 states that the conveyed forest lands must be managed in a manner that "secure[s] the greatest permanent value of those lands to the state." The duty to manage the conveyed forest lands for their greatest permanent value is owed to the state, not to the counties. The counties receive the majority of the revenues generated from the conveyed forest lands under ORS 530.110(a) & (b) and ORS 530.115 (counties receive 75% of 85% of the revenues generated from the conveyed forest lands). The counties' share of revenues may have been the historical *quid pro quo* for the counties' conveyance of the lands, but that fiscal arrangement does not imply a relationship beyond what is expressed in the statutes, apart from the implied proviso that the lands must be managed so as to produce some income.[7]

When a statute establishes and defines a relationship, such as the relationship between the state and the counties with respect to conveyed forest lands, common law principles cannot simply be lifted wholesale and engrafted into the law. The Oregon Supreme Court has held, for example, that where a statute specifically defines an employment relationship, "it is unnecessary and potentially misleading to turn to formulations found in other statutory or common law decisions." *Realty Group, Inc. v. Dep't of Revenue*, 299 Or 377, 383-84, 702 P2d 1075 (1985).

Moreover, agencies are creatures of statute and have no function or duties apart from those conferred by their enabling legislation. *City of Klamath Falls v. Envtl. Quality Comm'n*, 318 Or 532, 545, 870 P2d 825 (1994). Absent a statutory provision that explicitly places a state agency in a fiduciary role, the courts will not imply a fiduciary duty. *State of Oregon v. OHSU*, 205 Or App 64, 82, 132 P3d 1061 (2006) ("There is no statutory provision that places PEBB [Public Employees' Benefit Board] in a fiduciary capacity toward the individual insureds

[7] In the 1931 version of the statute, a provision stated in pertinent part: "These lands shall be reserved from sale * * *." 1931 Or Laws c 93, § 3. That provision does not appear in the current version of the statute.

with respect to the funds" that PEBB administers). *See* further discussion of the *OHSU* case, *post*. In the present context, the Board of Forestry and the State Forester are creations of statute. Their powers and duties are only as conferred by statute.

In *Beaver v. Pelett*, the Oregon Supreme Court declared obsolete the canon of statutory construction that would strictly construe statutes enacted "in derogation" of the common law (that is, statutes that would detract from the common law):

> The state argues that the contribution statute should be strictly construed because it is "in derogation of the common law." This formula, expressing in part resistance to changes in existing law and in part the profession's historical preference for caselaw over legislation, is long overdue to be put to rest. *Every statute "derogates" from prior law, if it is adopted for any substantive reason at all*. The "no-derogation" formula, coupled with the tendency to treat statutes, when possible, as codifications of prior caselaw, denigrates and confines the role of legislative examination, discussion, and enactment of public policies in those fields of law that traditionally have developed in private litigation. The statutes themselves direct, to the contrary, that "[i]n the construction of a statute the intention of the legislature is to be pursued if possible," ORS 174.020, and "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010.

Beaver v. Pelett, 299 Or 664, 668-69, 705 P2d 1149 (1985) (emphasis added).

The relationship between Forestry and the counties with respect to the conveyed forest lands is specifically outlined in the statutes, which, like all other statutes, necessarily would "derogate" from previous common law, to the extent that common law would have governed the relationship. After *Beaver v. Pelett*, there is no canon of statutory construction that would allow importing common law principles into a statutory system, particularly when those principles could conflict with the statutory duty of the state to manage the conveyed forest lands for greatest permanent value to the state.

In *Tillamook County v. State of Oregon*, Tillamook County Cir. Co. No. 04 2118 (2005) (*Tillamook II*), the counties argued that the state has many fiduciary obligations under the statutes, such as the requirement that the state furnish the counties with an annual report of money derived from the lands, and the state's

duty to cooperate with the counties when making decisions regarding managing the county forest lands. (Memorandum in Support of the Counties' Motion for Summary Judgment and Response to State of Oregon's Motion for Summary Judgment at 6). In the counties' briefing in that case, the counties extrapolated from the coincidence that some fiduciary-like duties are imposed by statute to argue that there must be a fiduciary relationship between the state and the counties with respect to the conveyed forest lands.

The presence of some duties imposed by statute that may in some circumstances be associated with a fiduciary relationship does not mean that a fiduciary relationship has been established. The logical fallacy in that approach is twofold: first, the false premise that independently having duties that may in some instances be the *consequence* of a special relationship somehow *creates* the special relationship, and second, the erroneous proposition that possessing one or two attributes of a special relationship suffices to establish the special relationship with *all* of its attributes.

That the presence of fiduciary-like statutory obligations does not necessarily establish the existence of a fiduciary relationship is underscored by comparison of such statutes with statutes that do expressly establish fiduciary obligations. For example, in a case analyzing PEBB's administration of benefit plans on behalf of state employees, the Oregon Court of Appeals has held that although PEBB's benefit administration arguably included the types of responsibilities carried out by a fiduciary, the statutory provisions that governed PEBB did not establish a fiduciary relationship. *OHSU*, 205 Or App at 79. The *OHSU* opinion reached that conclusion by looking at the statutory provisions governing the PEBB board and the state agency itself and the role of the agency, in comparison with statutes governing the Public Employees Retirement Board (PERB), which expressly described fiduciary duties.

First, the court in *OHSU* looked at the statutory provisions governing board members. Noting that PEBB board members are not described by statute as fiduciaries, the court compared the PEBB board member statutory provision to the description of PERB board members in ORS 238.640(5), which explicitly describes PERB board members as having a fiduciary duty, despite the different qualifications specified for different board positions. 205 Or App at 80. Like PEBB board members, but unlike PERB board members, Board of Forestry members are not described as fiduciaries in the governing statutes. ORS 526.009; 526.016.

The court in *OHSU* next looked at provisions describing the powers and duties of PEBB, a state agency. Comparing those provisions to PERB provisions set forth in ORS 238.601 and 238.660, the court found nothing in the PEBB provisions to demonstrate that PEBB acted in a fiduciary role. 205 Or App at 80. Similarly, in this context, the statutory provisions governing management of the conveyed forest lands do not demonstrate that Forestry functions as a fiduciary with respect to the counties. Forestry's duties are to manage the conveyed forest lands to secure the greatest permanent value to the state, albeit while maintaining those lands as revenue producing lands. ORS 530.050. By statute, most of their revenues flow to the counties under ORS 530.110, but that does not in and of itself establish a fiduciary relationship.[8]

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[8] ORS 530.110 provides for the following distribution of revenues derived from the conveyed county forest lands, including revenues paid to the counties:

(1) All revenues derived from lands acquired without cost to the state, or acquired from counties pursuant to ORS 530.030, shall be paid into the State Treasury and credited to the State Forestry Department Account and shall be used exclusively for the purposes stated in subsection (3) of this section, and in accordance with the following distribution:

(a) Fifteen percent shall be credited to the State Forests Protection Subaccount of the State Forestry Department Account until the amount in such subaccount shall reach $475,000. Thereafter, the revenues shall be disposed of as stated in paragraphs (b) and (c) of this subsection, unless needed to maintain the $475,000 level. All moneys in the State Forests Protection Subaccount are appropriated continuously to the State Forester who may use such money under the following priorities:

(A) First, in addition to or in lieu of other moneys available, to pay the cost of protection, as determined under ORS 477.270, for lands acquired under ORS 530.010 to 530.040.

(B) Second, to provide moneys needed for activities authorized by subsection (3) of this section.

(C) From remaining moneys, to pay costs incurred in the suppression of fire originating on or spreading from an operation area, as defined in ORS 477.001, on state-owned forestland acquired under ORS 530.010 to 530.040. The State Forester shall make payments with approval of the State Board of Forestry for such fire suppression costs; except that no payments shall be made for such costs or portion thereof when other parties are responsible under law or contracts for the payment of such costs.

(b) Seventy-five percent of all such revenues remaining after the percentage disposed of as stated in paragraph (a) of this subsection, shall be disposed of as provided in ORS 530.115.

(c) Twenty-five percent of all such revenues remaining after the percentage disposed of as stated in paragraph (a) of this subsection, shall be used for the purposes set out in subsection (3) of this section.

(2) All revenues from lands other than lands designated in subsection (1) of this

Finally, the court in *OHSU* looked at the role of the state agency. 205 Or App at 81. The court noted that the crucial aspect is not the label given to a relationship, but rather, the essential feature is the respective roles that the parties assume in a particular transaction. 205 Or App at 81, *quoting Strader v. Grange Mutual Ins. Co*., 179 Or App 329, 334, 39 P3d 903 (2002).

In the present context, Forestry's statutory duty in administering the conveyed forest lands is to secure the greatest permanent value to the state, while retaining them as revenue-producing lands. That statutory duty cannot reasonably be understood to give rise to an independent duty of loyalty owed to the counties. *See OHSU*, 205 Or App at 80 (statutory assignment of individual board members to represent particular interests is inconsistent with an undivided duty of loyalty to the employees). Under the approach set forth in *OHSU* for analyzing whether a

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section, acquired under ORS 530.010 to 530.040, shall be paid into the State Treasury and credited to the State Forestry Department Account and shall be used exclusively for the purposes stated in subsection (3) of this section, and in accordance with the following distribution:

(a) Until each legal subdivision of the lands has been credited with an amount equal to the purchase price thereof, the revenues shall reimburse the State Forestry Department Account. If sufficient revenue to reimburse the State Forestry Department Account is not generated from the purchased parcels within five years from the date of acquisition, the State Forester, with the consent of the affected county, shall deduct all or portions of the unreimbursed purchase costs from the revenue distributed to that county in accordance with ORS 530.115 (1). Thereafter paragraphs (b), (c) and (d) of this subsection apply.

(b) The percentage required under subsection (1)(a) of this section shall be credited to the State Forests Protection Subaccount, thereafter, the revenues shall be disposed of as stated in paragraphs (c) and (d) of this subsection.

(c) Seventy-five percent of all such revenues remaining after paragraphs (a) and (b) of this subsection have been complied with, shall be disposed of as provided in ORS 530.115.

(d) Twenty-five percent of all such revenues remaining after the percentage disposed of as stated in paragraphs (a) and (b) of this subsection, shall be used for the purposes set out in subsection (3) of this section.

(3) The moneys in the State Forestry Department Account derived from those percentages of revenues set out in subsections (1)(c) and (2)(d) of this section shall be used for the redemption of Oregon forest development revenue bonds and payment of interest thereon, for the acquisition, development and management of forestlands and for such other purposes as are necessary in carrying out ORS 530.010 to 530.110.

state agency has a fiduciary duty toward third parties, Forestry does not have a fiduciary relationship to the counties.

Because the statutes are not the only possible source of authority for creating a fiduciary duty, we also examine a number of other sources that have been identified by the courts, by other commenters and by the counties themselves. Those other potential sources of authority include the deeds from the counties, the deeds considered as contracts, the statutes considered as a contract, partnership principles, and express or implied trusts.

b. The deeds conveying the lands do not create a fiduciary relationship.

The deeds from the counties that transferred land to the state neither created nor implied a fiduciary relationship. A deed does have the ability to create a fiduciary relationship, for example, in the form of a trust deed. The question of whether a deed effectively creates such a relationship depends on several factors, including the relationship of the parties to each other and the language of the deed itself. A deed may have reservations and exceptions that subtract from, limit, or narrow the thing being granted. 23 Am Jur *Deeds* § 59 (2d ed 2002).

Several of the deeds from the counties contain reservations of land for use by lumber companies. Additionally, three of the deeds allow Polk County to continue mining the land (Polk County deed nos. 56, 59, 509). Also, there are a few deeds reserving logging rights for the county for five years (Polk County deed no. 97, Tillamook County deed no. 565) or for ten years (Clatsop County deeds nos. 62 and 177). The periods of time allowing a county to use the land in those ways, however, have long since expired. None of the deeds from the counties to the state contains any language, reservations, or exceptions that create a fiduciary relationship on the part of the state with respect to the counties.

c. Contract principles do not create a general fiduciary relationship.

Although the court in *Tillamook I* expressly declined to characterize the state-county relationship as contractual in nature, the court's interpretation of the legal effects of the statutory system reflected the state's obligation to manage the conveyed forest lands to produce at least some revenue. The circuit court in *Tillamook II* has expressly found a "statutory contract." Even if the statutes were deemed to create some form of contract between the state and the counties,

however, we see no basis to conclude that that statutory "contract" imposes fiduciary responsibilities on the Board of Forestry or the State Forester.

A contract can provide the basis for a fiduciary duty, but only if the terms of the contract have created a special relationship between the parties. The Oregon Supreme Court has made it clear that a contract does not establish a fiduciary duty, unless the terms of the contract create a special relationship between the parties as a matter of law, not as a matter of practice or fact. In *Bennett v. Farmers Ins. Co.*, 332 Or 138, 161-63, 26 P3d 785 (2001), the court said in pertinent part:

> The focus is not on the subject matter of the relationship, such as one party's financial future; nor is it on whether one party, in fact, relinquished control to the other. The focus instead is on whether the nature of the parties' relationship itself allowed one party to exercise control in the first party's best interests. In other words, the law does not imply a tort duty simply because one party to a business relationship begins to dominate and to control the other party's financial future. Rather, the law implies a tort duty only when that relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf. *Conway*, 324 Or at 241.
>
> * * * * *
>
> Nothing about the relationship as defined in the agreement suggested that plaintiff would relinquish control over his business or that Farmers would exercise independent judgment on plaintiff's behalf. Indeed, the agreement specifically provided that Farmers would do the opposite. As defined by the agreement, the nature of their relationship was not one in which Farmers was to step into plaintiff's shoes and to manage his business affairs. Accordingly, the parties were not in a "special relationship," and Farmers did not owe plaintiff a duty in tort. Therefore, when Farmers began to interfere in plaintiff's business in contravention of a contract term, plaintiff's remedy was in contract only. *See Georgetown Realty*, 313 Or at 106 (if plaintiff's claim is based solely on breach of provision in contract which itself spells out obligation, remedy normally is in contract; if gravamen of complaint is party negligently performed under contract, remedy is in tort).

In the present context, when the deeds are considered as a form of contract, they do not contain any provisions that establish a special relationship with fiduciary duties.

Contract principles were not a basis for establishing a fiduciary duty by the Oregon Supreme Court in *Tillamook I*. It bears noting, however, that the circuit court in *Tillamook I* based its partnership theory of fiduciary duty on a "joint venture" created by contract. *See* discussion *post* concerning partnership. The Oregon Supreme Court in *Tillamook I* specifically declined to analyze the issues in terms of contract. 302 Or at 416.

In the County Memorandum, Tillamook County cites the case of *Strickland v. Arnold Thomas Seed Service, Inc.*, 277 Or 165, 168-70, 560 P2d 597 (1977), for the proposition that a special relationship can establish fiduciary duties, even though the party owing the duty is not a trustee in the technical sense. County Memorandum at 8. Although that proposition may be true enough, it is not applicable in the present context. It is clear in *Strickland* that the basis for implying a fiduciary relationship was the agreement between seed growers forming a seed marketing pool and a seed dealer, in which the growers in the pool surrendered to the dealer all control over the price, date and terms of their seed sales. The seed growers contended the seed marketer had breached his fiduciary duties to them by trading in alfalfa seed in competition with the growers' pool. 277 Or at 169-70. The Supreme Court agreed, on the basis of the special relationship created between the parties by the agreement, which precluded the dealer from acting in competition with the growers. In the present context, there is no analogous written agreement between the state and the counties.

In the County Memorandum, Tillamook County suggests that the counties ceded control over the conveyed land in exchange for assurances that the conveyed lands would be used to "produce revenue" for them. County Memorandum at 8. Although that may be true, that arrangement is exactly what the statutes provide, without having created a special relationship between unequal parties. Hence, the conclusion that Tillamook County would draw from the comparison to *Strickland*[9] appears to involve a serious leap in logic, because the receipt of revenues by the counties does not necessarily implicate fiduciary duties.

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[9] Tillamook County concludes: "Thus, just like the growers in *Strickland* the Counties were entitled to expect that the State would manage the conveyed lands for their benefit according 'to the highest standards applicable to a fiduciary.'" County Memorandum at 8.

The counties have suggested that the state's assurances and the counties' reliance on those assurances, leading up to the enactment of the statutory system in 1939, resulted in a contract:

> * * *. The state actively promoted the program, with assurances of the preservation of county vested rights. It was in reliance on such assurances and in consideration of the anticipated returns that the county made the transfers. The counties contend that this constituted the contract for management or the trust for county benefit.

"Historical Overview," Resource Manual, Paul Levesque (Nov 2003), attached to Agenda Item A, June 7, 2006 Board of Forestry Meeting Agenda, Attachment No. 4 (Resource Manual).

In general, statements made *before* the creation of a written agreement are inadmissible under the parol evidence rule to establish the terms of a contract. *Allen v. Allen*, 275 Or 471, 479, 551 P2d 459 (1976). Previous assurances themselves could not prove the asserted contract. Moreover, what the counties describe is basically the *quid pro quo* that led to enactment of the governing statutes. As the Oregon Supreme Court said in *Tillamook I*, "Pursuant to the enactment of the statutory plan and to the assurances of the state, counties gave up control over their forest lands in consideration for a percentage of the revenue derived from such lands." 302 OR at 416. The "contract" that resulted from the assurances was precisely what the statutes provide: the counties ceded their control over management of the conveyed forest lands in consideration of receiving a percentage of the revenue derived from the lands.

In *Tillamook II*, statutory contract principles led to the circuit court's decision that "the revenues going to the State under ORS 530.110(1)(c) cannot be transferred to the General Fund by the state without the consent of the Counties." July 5, 2005, Letter Opinion at 5. The circuit court in *Tillamook II* stated that it found it "unnecessary to address the other claims for relief brought by the Counties," and the court specifically noted that it was "not addressing the claim of breach of a fiduciary duty." *Id.* at 7 and n 9.

For the same reason that the statutes themselves do not establish a fiduciary relationship, the statutory system, even when viewed as a statutory contract, does not create a special relationship between Forestry and the counties, with attendant fiduciary duties.

In sum, contract principles do not create a fiduciary duty owed by Forestry to the counties with respect to the conveyed forest lands.

d. Because the relationship between Forestry and the counties is not a "partnership," partnership principles do not create general fiduciary obligations.

In *Tillamook II*, the counties argued that a fiduciary relationship between the state and the counties had been created on the basis of partnership principles. As noted *ante*, the circuit court in *Tillamook II* declined to reach the counties' fiduciary duty claim. The circuit court's opinion in *Tillamook I*, however, although not followed by the Oregon Supreme Court, did mention partnership and joint venture principles. In an effort to examine all possible bases for a fiduciary duty, we have examined the partnership rationale. When that line of reasoning is subjected to closer scrutiny, it becomes apparent that there is no basis to import partnership principles into the statutory context that governs the relationship between the state and the counties with respect to conveyed forest lands.

In the circuit court decision in *Tillamook I*, Judge Ertsgaard stated:

> * * *. It is my opinion and conclusion that there was a binding contract, there being an offer, acceptance and consideration. This contract is in the nature of a *joint venture* where the State of Oregon has management control of the "business" for mutual benefit. * * *. As the managing agent in this *joint venture or partnership* the State of Oregon, through the Forestry Department, has control over the assets contributed by both. The general managing partner in this position has a fiduciary responsibility to its partners which are [sic] in the nature of a trustee obligation.

Opinion Letter of April 18, 1984 (emphasis added).

Judge Ertsgaard framed the relationship between the counties and the Board as a contract, which he characterized as being "in the nature of" a joint venture. A joint venture is "an 'association of two or more persons to carry out a single business enterprise for profit' * * * and is usually, but not necessarily, limited to a single transaction * * *." *McKee v. Capitol Dairies, Inc.*, 164 Or 1, 5, 99 P2d 1013 (1940) [internal citations omitted]; *see also Roselius v. Hoehne*, 147 Or App

687, 696, 938 P2d 229 (1997). Judge Ertsgaard equated the relationship to a "partnership," thus, in his view, creating a fiduciary relationship.

ORS 67.055(1) states: "[T]he association of two or more persons to carry on as co-owners a business for profit creates a partnership." Similarly, ORS 67.005(7) defines "partnership" as follows: "'Partnership' means an association of two or more persons to carry on as co-owners a business for profit created under ORS 67.055, predecessor law, or comparable law of another jurisdiction. A partnership includes a limited liability partnership." For partnership purposes, "person" can include government, governmental subdivisions, and agencies. ORS 67.005(11).

The arrangement between the state and counties with respect to managing the conveyed forest lands is missing the quintessential attribute of a partnership, which is co-ownership. Under Oregon law, partners are co-owners of the commercial activity. ORS 67.055(1). But in this context, the State of Oregon, not the counties, is the title owner of state forests. ORS 526.162. The lands were conveyed to and became the property of the State of Oregon. Or Laws 1931, c 93 § 3. That the state may not be entirely free to alienate the conveyed forest lands, after the holding of *Tillamook I*, does not make the counties a co-owner. Hence, there is not a co-ownership relationship between the state and the counties with respect to the conveyed forest lands. The lack of co-ownership of the conveyed forest lands is enough, in and of itself, to counter the claim of a partnership relationship.

Further, an association created under a law other than ORS Chapter 67 (or a predecessor statute or comparable law of another jurisdiction) is not a partnership. ORS 67.055(3). The relationship between the counties and the state was created by Or Laws 1931, c 93 and is currently codified in ORS 530.010 to ORS 530.170. None of those statutes is a part of or predecessor to ORS chapter 67. Thus, no partnership could have been created in this context, because the relationship was created by a different series of statutes than those governing partnership.

To the extent it would be possible for a relationship to be deemed a partnership that lacks the necessary attributes of co-ownership and creation under partnership laws, ORS 67.055(4)(a) sets forth several factors to be considered. Those factors include: (1) the right to share profits, (2) the intent of the parties, (3) a party's right to exert control of the business, (4) a party's liability to share losses and (5) a party's contributions toward the business. ORS 67.055(4)(a). *See also Stone-Fox, Inc. v. Vandehey Dev. Co*., 290 Or 779, 783, 626 P2d 1365 (1981);

Ferguson v. Ferris, 130 Or App 443, 451, 882 P2d 1119 (1994). A review of the Oregon partnership statutes, in light of case law,[10] demonstrates that no partnership, in the technical legal sense, exists between Forestry and the counties.

In Oregon, receipt of a share of the profits of a venture does not alone make a party a partner. *Hayes v. Killinger*, 235 Or 465, 472, 385 P2d 747 (1963). Rather, there must be a right to share in the profits resulting from the fact that the party is a part owner of the assets. *Id*. In this context, counties receive revenues from the state. *See La Grande v. Pub. Employees Retirement Bd*., 281 Or 137, 155 fn 29, 576 P2d 1024 (1978) (transfer payments from the state to counties includes sharing of revenues). But, as already noted, title to the assets in question– the conveyed forest lands – is in the name of the state. The revenues the counties received are not based on part ownership by the counties and hence the revenues received by the counties are unlike profits in a partnership.

Counties share in "profits" in the general sense that profits are gross revenues less costs. *See Stonebridge Life Ins. Co. v. Dep't of Revenue*, 18 OTR 423, 440 (2006). The counties share in a percentage of revenues that the state has an obligation to pay them under existing statutes, after subtracting costs for management and administration. ORS 530.110; ORS 530.115. Even if it were assumed for the sake of argument that such revenues could be treated like shared profits, despite lack of an ownership interest by the counties, profits received in consideration for the conveyance of property rebut the presumption that a person is a partner. ORS 67.055(4)(d)(F).[11] Under the governing statutes, the counties receive revenues, albeit on a continuing statutory basis, in consideration for having conveyed the land, a factor that tends to rebut the inference of a partnership in the present context.

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[10] Common law principles may supplement the partnership code. ORS 67.020(1).

[11] ORS 67.055(4)(d) provides in pertinent part:

> (d) It is a rebuttable presumption that a person who receives a share of the profits of a business is a partner in the business, unless the profits were received in payment of:
>
> * * * * *
>
> (F) Consideration for the sale of a business, including goodwill, or other property by installments or otherwise.

"The essential test in determining the existence of a partnership is whether the parties intended to establish such a relationship." *Hayes*, 235 Or at 471. The "parties" in this context include not only the counties but also the State of Oregon. Although the counties have adverted to various reports of assurances by public officials leading up to the enactment of the statutory system, the culmination of such assurances was the enactment of statutes that describe the relationship in some detail. Hence, the paramount focus is necessarily the Oregon legislature's intent. The best evidence of the legislature's intent is the statutory text. *See PGE v. Bureau of Labor and Industries*, 317 Or at 610-11. In this context, no statute articulates the relationship between the state and the counties as a partnership. Nor do any of the deeds evidence an intention that the relationship be a partnership.

Joint control is also generally essential to a partnership. *Hayes*, 235 Or at 477. "Its importance may be greatest in situations where there is an agreement to share profits without any agreement to share losses." *Id.* at 477-78. In such cases, the right to direct and control the affairs of the venture can often distinguish those who have a partnership interest from those who do not. *Id*. at 478. In the present context, the statutes governing the conveyed forest lands reserve management authority to the State Forester under the direction of the Board of Forestry. ORS 530.050. As the Oregon Supreme Court said in *Tillamook I*, the counties "gave up control over their forest lands" in exchange for the receipt of revenues. 302 Or at 416. The counties have an advisory and consulting role with respect to management of the conveyed forest lands.[12]

The sharing of losses is also one of the elements of a partnership, in the absence of an agreement to the contrary. *Hayes*, 235 Or at 475. An agreement between partners may provide for a disproportionate sharing of the losses or even the assumption by one partner of all the losses. *Id.* In the present context, no statutory provision exists to share actual losses experienced by the state with the counties. Any actual losses on the part of the state (incurred when total costs exceed total revenues) would presumably be absorbed by the state, given that no provision requires the counties to be responsible for the state's actual losses. In

[12] ORS 526.156(3) provides that an advisory committee made up of the board of directors of the Council of Forest Trust Land Counties shall advise the State Forester and the Board regarding management of the conveyed forest lands, and the State Forester and Board shall consult with the advisory committee.

other words, the counties would "share" loss primarily in the sense that revenues from the conveyed forest lands would be forgone.[13]

Finally, the contribution of property to the business is a factor indicating the creation of a partnership. ORS 67.055(4)(a)(E). "'Business' includes every trade, occupation, profession and commercial activity." ORS 67.005(1). To the extent that management and protection of conveyed forest lands can be considered a commercial activity and hence a business, the counties did convey the real property that is the basis for that business. *See* ORS 530.030. But as noted *ante*, the receipt of revenues in consideration for the conveyance of property in the present context, albeit on a continuing statutory basis, tends to rebut the presumption of partnership. ORS 67.055(4)(d)(F).

When the five statutory factors are applied to the state-county relationship concerning the conveyed forest lands, it is apparent that a partnership relationship has not been created in this context. The counties do not own the conveyed forest lands. They share in revenues as the *de facto* consideration for having conveyed the land, which tends to rebut the presumption of partnership. There is no provision for the counties to share in actual losses (when total costs exceed total revenues). Moreover, the counties gave up their right to control the management of the conveyed forest lands. Most important, the statutes governing the relationship contain no expression of intent to create a partnership. Thus, partnership principles cannot be the basis for finding a fiduciary duty owed by the state to the counties.

e. There is no basis for a trust relationship between Forestry and the counties.

i. There is no basis for an express trust.

The counties argued in *Tillamook II* that the 1945 Act, which contained the phrase "trust fund," is "almost identical" to the current language of the statute. Memorandum in Support of the Counties' Motion for Summary Judgment and Response to State's Motion for Summary Judgment at 8. The key word here is

[13] If no revenues at all were received, it is conceivable that counties would have to absorb their own costs of maintaining and supervising the conveyed forest lands, which otherwise would be paid out of the revenues distributed to them. ORS 530.115(1)(a). But the primary loss to counties would be forgone revenues.

"almost." The reference to "trust fund" does not appear in the current statute.[14] As discussed *ante*, its inclusion in the 1945 version of the statute arguably may support the concept of a statutory trust fund whose use cannot be altered, as the Circuit Court in Coos County has ruled in *Tillamook II*. The concept of a statutory trust fund, however, does not support the concept that the state therefore owes a fiduciary duty *to the counties*, particularly if such a duty would conflict with the governing statutes. (*See* discussion *post* concerning the primacy of the statutes governing the Washington county forest land system). The circuit court in *Tillamook II* expressly noted in its opinion letter that it was not reaching the counties' fiduciary duty claim. (Letter Opinion at 7).

As noted *ante*, the phrase "trust fund" did appear in the 1941 and 1945 versions of the statute, in provisions stating that revenues derived from the conveyed forest lands were to be placed in the "state forest development fund in the state treasury," which was denominated as "a trust fund for the redemption of the state of Oregon forest development revenue bonds and the payment of interest." Or Laws 1941, c 236, § 7; Or Laws 1945, c 154, § 7.

As explained by the Oregon Attorney General in 1945, as also noted *ante*, the statute described a trust fund "in the sense that it is to be expended only for the purpose and in the proportions specified in the act." 22 Op Atty Gen 257, 259 (1945). That language contemplated a statutory trust fund to benefit the state. Nothing explicit in the 1941 or 1945 versions of the statute, including the phrase "trust fund," addressed the nature of the state's relationship to the counties. And the reference to trust was subsequently deleted. There is no basis for concluding that the governing statutes establish an express trust.

The counties have relied on statements after the 1939 legislation was enacted made by various public officials, who on several ceremonial occasions referred to the enacted arrangement in terms of a trust. The counties contend such statements are relevant to whether a trust was created. (Resource Manual, Chapter V, at 545-49). A post-enactment statement, however, even if it were uttered by a legislator directly involved in passage of the legislation, does not constitute legislative history on which a court would rely, because it represents only the view of a "single participant in the legislative process." *Salem-Keizer Ass'n of*

[14] The only reference to trust in the current statutes appears in the designated name of the county advisory group. *See* note 2, *ante*. Inclusion of a particular word in the name of an advisory group does not have substantive effect, given the statutory context considered as a whole.

Classified Employees v. Salem-Keizer School District, 186 Or App 19, 26-27, 61 P2d 970 (2003). *A fortiori*, post-enactment public pronouncements by other public officials, do not prove the intent underlying the statutory system or themselves establish a trust relationship.[15]

Finally, "[t]he creation of a trust must be contemporaneous with the execution of conveyance." *Masquart v. Dick*, 210 Or 459, 482, 310 P2d 742 (1957); *see also Chance v. Graham*, 76 Or 199, 209, 148 P 63 (1915) (implied trusts cannot be created by the post-conveyance acts of the participants). Hence, given that the deeds conveying the county forest lands to the state do not establish an express trust, statements made either before or after their execution would not be contemporaneous. Moreover, the general rule is that "parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor." *Shipe v. Hillman*, 206 Or 556, 571, 292 P2d 123 (1955). Hence, regardless of before-the-fact or after-the-fact pronouncements by various public officials, no express trust was created by the deeds conveying the county forest lands, because the deeds themselves do not so provide.

ii. There is no basis for an implied trust.

In Oregon law, implied trusts are a category of equitable remedy that includes both resulting and constructive trusts. *Shipe*, 206 Or at 562; *Hurlbutt v. Hurlbutt*, 36 Or App 721, 724, 585 P2d 724 (1978).

The counties argued in *Tillamook II* that, because they retained a beneficial interest in the property conveyed to the state, a resulting trust was created in their favor. Clatsop County's Motion for Summary Judgment and Response at 12. But that basis for establishing a trust in this context does not withstand close scrutiny.

A resulting trust is a reversionary, equitable interest implied by law in property that is held by a transferee, in whole or in part, as trustee for the transferor or the transferor's successors in interest. Restatement (Third) of the Law: Trusts § 7 (American Law Institute 2003). A resulting trust arises only when the surrounding circumstances indicate that the transferor had no intention to transfer any beneficial interest in the property to the transferee. *Lozano v. Summit Prairie Cattlemen's Ass'n*, 155 Or App 32, 37, 963 P2d 92 (1998); *Belton v.*

[15] That having being said, however, historical perspectives may provide helpful context for the State Forester and the Board in achieving the values encompassed within the concept of greatest permanent value.

Buesing, 240 Or 399, 407 n 4, 402 P2d 98 (1965). A mere contractual obligation to convey property does not create a trust. *Lozano*, 155 Or App at 38.

In the present context, the original statute provided that the conveyed forest lands became "the property of the state of Oregon" and that the board was to manage them for "any or all" of the following purposes: continuous forest production via "sustained yield management," water conservation and watershed protection, and recreation. *See* Or Laws 1931, c 93, § 3. ORS 530.050 currently provides that the state is to manage the conveyed forest lands for its own benefit by requiring that the lands be managed "so as to secure the greatest permanent value * ** to the state." Hence, ever since the inception of this arrangement, the state has literally owned the conveyed forest lands. Moreover, the state receives 25% of 85% of revenues from the conveyed forest lands, or approximately 21%. ORS 530.110. The state received and continues to receive benefit from the arrangement, both in terms of title to the property and a share of the revenues. No resulting trust inuring to the counties has been established.

Nor is there any basis for implying creation of a constructive trust. A constructive trust may be imposed when a conveyance is induced by the agreement of a fiduciary or confidant to hold the property in trust for purposes of reconveying it, where the fiduciary or confidential relationship is one on which the grantor justly can and does rely, and where the breach of the agreement is an abuse of the confidence. *Shipe*, 206 Or at 565. A constructive trust may also be imposed when the original conveyance was induced by fraud. *Lozano*, 155 Or App at 39.

The elements required to impose a constructive trust are as follows: "(1) the existence of a confidential or fiduciary relationship; (2) a violation of a duty imposed by that relationship; and (3) failure to impose the constructive trust would result in unjust enrichment." *Hollen v. Fitzwater*, 125 Or App 288, 292 865 P2d 1298 (1993) (citations omitted); *rev den* 319 Or 80, 876 P2d 783 (1994). Proof of those elements must be made by clear and convincing evidence. *Albino v. Albino*, 279 Or 537, 550, 568 P2d 1344 (1977).

Those combined elements for a constructive trust do not constitute an independent substantive claim for relief. *Brown v. Brown (In re Estate of Brown)*, 206 Or App 239, 251, ___ P3d ___ (2006). Rather, Oregon courts impose constructive trusts as remedial devices to convey property back to the original grantor, to avoid unjust enrichment, when no other adequate remedy is available. *Id*. In other words, a constructive trust is a remedy that is based on a fiduciary

relationship, the effect of which is to require that the property be conveyed back to the grantor.

In the present context, a constructive trust would require that there first be a fiduciary relationship between the parties. As discussed *ante*, there is no basis in the statutes, deeds or any other sources of authority to conclude the relationship between the state and the counties is a fiduciary relationship. A constructive trust, which is an equitable remedy that is implied from a fiduciary relationship, does not have an independent existence that can create a fiduciary relationship. In other words, a fiduciary relationship may lead to the remedy of a constructive trust, but the inverse proposition, that a constructive trust can create a fiduciary relationship, does not hold true. That would make the *remedy* be the source of the fiduciary relationship, rather than *vice versa*.

There is some authority in Oregon for the proposition that when a person acts in the capacity of a trustee, that person will be deemed to be the trustee, even if the person was not validly appointed. *See Stephans v. Equitable Savings & Loan*, 268 Or 544, 558, 522 P2d 478 (1974) (financial institution that undertook to administer a trust fund in accordance with will of deceased is subject to duties of regularly appointed and fully qualified trustee and can be held liable for breach of such duties). But the gravamen of that line of cases is the following concept: "A person may become a trustee by construction by intermeddling with, and assuming the management of trust property, without authority. Such persons are trustees de son tort." *Id. at 486* (*quoting* Perry, TRUSTS (3d Ed.) § 245). The doctrine that a person acting as a trustee will be estopped to deny that capacity depends on there being a trust to administer in the first place. The doctrine of "trustee de son tort" can not itself create the trust.

In the present context, as discussed *ante*, there is no basis of authority that establishes a fiduciary relationship. Hence, the remedies of resulting trust or constructive trust, or the doctrine of "trustee de son tort," cannot provide the basis for establishing a fiduciary relationship between the state and the counties.

In summary, there is no basis for either an express or implied trust relationship between Forestry and the counties with respect to the conveyed forest lands. That is significant, not only because there is no basis for imposing a heightened fiduciary duty on Forestry associated with such a trust, but also because there are no trust provisions that would independently give direction to the State Forester or the Board in managing the asset in question, the conveyed forest lands.

2. Even if there were a source of authority for a fiduciary relationship, that would not dictate how Forestry should manage the conveyed forest lands.

a. General fiduciary duties would not resolve the policy decisions to be made by Forestry.

Even if there were a source of authority establishing that the state stands in a fiduciary relationship with respect to the counties, general fiduciary obligations flowing from that relationship would not necessarily dictate how Forestry should manage the conveyed forest lands.

Even when an agency assumes the responsibilities of a fiduciary, the scope of that fiduciary duty is not unfettered. *OHSU,* 205 Or App at 82. Agencies as creatures of statute have only the authority and duties provided by statute and the discretion delegated therein. *Id.* at 83. The Court of Appeals has declared that it will not second guess an agency's exercise of discretion in managing its affairs in a manner within its delegated statutory authority. *Id.* Forestry has a range of statutory discretion in managing the conveyed forest lands. ORS 530.050(1)-(11). Hence, even if Forestry owed general fiduciary duties to the counties, Forestry would still have considerable discretion in exercising those duties.

Fiduciary duties have been codified by Oregon statute, at least in the partnership context, to include the duties of loyalty and the duty of care. ORS 67.155(1).[16] In the present context, even if Forestry did owe general fiduciary

[16] The duties of loyalty and care are described in ORS 67.155(2) & (3) as follows:

(2) A partner's duty of loyalty to the partnership and the other partners includes the following:

(a) To account to the partnership and hold for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) Except as provided in subsections (5) and (6) of this section, to refrain from dealing with the partnership in a manner adverse to the partnership and to refrain from representing a person with an interest adverse to the partnership, in the conduct or winding up of the partnership business; and

duties to the counties, the fiduciary duties of loyalty and care would not dictate which particular decisions within the range of discretion should be made in managing the conveyed forest lands to achieve greatest permanent value to the state. For example, the duty of care includes the duty to provide an accounting , the duty not to act adversely to the "partnership," and the duty to avoid grossly negligent or reckless conduct. None of those components of the general duty of care would determine in this context how specifically how to manage the conveyed forest lands, within the range of discretion allocated to the State Forester and Board of Forestry.

An illustration may serve to explain why general fiduciary duties, even if they existed in this context, would not dictate how Forestry should manage the conveyed forest lands. Suppose that two persons were in a partnership owning a restaurant, with one partner as the managing partner. The issue to be decided is whether the restaurant should be remodeled, which would decrease short-term profits but potentially lead to long-term gain. That the managing partner may owe general fiduciary duties to the other partner or to the partnership itself does not resolve the business decision to be made: whether to remodel or not to remodel. Either choice could benefit the partnership, but in a different way: long-term versus short-term benefit. The choice between the two is a business decision, not a matter that can be resolved by reference to fiduciary duties. [17]

Similarly, the business decision to be made in this context, which involves governmental entities, is a policy decision on the part of the State Forester and the Board regarding how to manage the conveyed forest lands. General fiduciary duties, even if there were a basis for them to exist in the present context – which there is not – would not tell the Board what policy to follow in managing the

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(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.

[17] General fiduciary duties could, however, limit the universe of policy choices, such that the owner of the asset could not entirely change the nature of the enterprise. For example, the restaurant manager would presumably not be able to change the business into a nonprofit soup kitchen for the homeless.

conveyed forest lands to achieve the greatest permanent value to the state.[18] Rather, the policy decisions center on achieving the values encompassed by the concept of "greatest permanent value." *See* ORS 530.050; OAR 629-035-0020[19]

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[18] The universe of policy choices has already been limited by the Oregon Supreme Court as a matter of statutory construction in *Tillamook I*, such that the state must manage the conveyed forest lands so as to produce some revenue, a percentage of which will go to the counties under the statutory distribution formula.

[19] "Greatest permanent value" is defined in OAR 629-035-0020 as follows:

(1) As provided in ORS 530.050, "greatest permanent value" means healthy, productive, and sustainable forest ecosystems that over time and across the landscape provide a full range of social, economic, and environmental benefits to the people of Oregon. These benefits include, but are not limited to:

(a) Sustainable and predictable production of forest products that generate revenues for the benefit of the state, counties, and local taxing districts;
(b) Properly functioning aquatic habitats for salmonids, and other native fish and aquatic life;
(c) Habitats for native wildlife;
(d) Productive soil, and clean air and water;
(e) Protection against floods and erosion; and
(f) Recreation.

(2) To secure the greatest permanent value of these lands to the state, the State Forester shall maintain these lands as forest lands and actively manage them in a sound environmental manner to provide sustainable timber harvest and revenues to the state, counties, and local taxing districts. This management focus is not exclusive of other forest resources, but must be pursued within a broader management context that:

(a) Results in a high probability of maintaining and restoring properly functioning aquatic habitats for salmonids, and other native fish and aquatic life;
(b) Protects, maintains, and enhances native wildlife habitats;
(c) Protects soil, air, and water; and
(d) Provides outdoor recreation opportunities.

(3) Management practices must:

(a) Pursue compatibility of forest uses over time;
(b) Integrate and achieve a variety of forest resource management goals;
(c) Achieve, over time, site-specific goals for forest resources, using the process as set forth in OAR 629-035-0030 through 629-035-0070;
(d) Consider the landscape context;
(e) Be based on the best science available; and
(f) Incorporate an adaptive management approach that applies new management practices and techniques as new scientific information and results of monitoring become available.

(defining “greatest permanent value).

As in the restaurant remodeling illustration, even if Forestry had general fiduciary duties with respect to its relationship with the counties governing the conveyed forest lands, those duties would not dictate what policy choices the State Forester and Board of Forestry should make to achieve “greatest permanent value of those lands to the state.”

b. Even if a trust relationship existed between Forestry and the counties, a fiduciary duty based on trust principles could not dictate Forestry’s management of the conveyed forest lands contrary to statute.

In Oregon, a trustee has numerous responsibilities delineated by statute. A trustee’s statutory trust duties include the duty to administer the trust in good faith, in accordance with the terms and purposes of the trust and in the interests of the beneficiaries. ORS 130.650, 130.655. In addition, a trustee must be impartial, follow a prudent person standard, use his or her expertise in administering the trust, use reasonable care when delegating duties to a third party, control and protect the trust property, and keep records of the administration of the trust. ORS 130.660, 130.665, 130.680, 130.690, 130.695. A trustee also must enforce and defend claims involving the trust and exercise discretion in good faith, in accordance with the terms and purposes of the trust. ORS 130.700, 130.715. Those duties echo the general responsibilities in a fiduciary relationship, discussed *ante*.

A trust relationship may also carry with it a heightened fiduciary duty on the part of the trustee to maximize the value of the managed asset. To the extent a trust duty includes a duty to maximize the value of the so-called “trust corpus,” that arguably might more closely bear on the ongoing management of an asset held in trust.

In general, "[a] trustee almost always has a duty to cause the trust property to produce income." A. M. Hess, G. G. Bogert, and G. T. Bogert, THE LAWS OF

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(4) The State Forester shall manage forest lands as provided in this section by developing and implementing management plans for a given planning area as provided in OAR 629-035-0030 to 629-035-0100.
(5) The Board shall review 629-035-0020(2) (management focus) no less than every ten years in light of current social, economic, scientific, and silvicultural considerations.

TRUSTS AND TRUSTEES, sec 611 (3d ed 2000). When the trust corpus includes land, the terms of trust and the circumstances determine how the land should be made productive. IIA W. F. Fratcher, SCOTT ON TRUSTS sec 181 (4th ed 1987).

In the context of the Common School Fund in Oregon, there is some support for the notion that that a trustee's duty is to maximize income from the trust corpus. The state's duty with regard to the Common School Fund lands can be summarized as obtaining the full market value from utilization of the lands while managing the land as a prudent person. In managing the land prudently, the state is bound to execute the provisions of the trust "with the object of obtaining the greatest benefit *for the people of this state*, consistent with the conservation of this resource under sound techniques of land management." Or Const Article VIII, § 5(2) (emphasis added). That duty has been articulated as contemplating "a complete management responsibility of the state's land resources to make them productive of income or other values depending upon what will best conduce with the welfare of the people of the state and the conservation of the state's land resources." 36 Op Atty Gen 150, 223 (1972).

Two of the Oregon Attorney General Opinions addressing the Common School Fund have indicated that a trustee of a trust fund has a duty to maximize earnings from the corpus of the trust. 46 Op Atty Gen 468, 480, n 12 (1992); 37 Op Atty Gen 569, 576 (1975). All the Attorney General opinions discussing "maximum financial benefit" for the Common School Fund have done so, however, in relation to the specific language contained in Article VIII, Section 5, of the Oregon Constitution. *See* 46 Op Atty Gen at 480 n 12; 46 Op Atty Gen 208, 217 (1989); 43 Op Atty Gen 140, 143 (1983); 37 Op Atty Gen at 576; 36 Op Atty Gen at 150.

Moreover, although the state has a duty to maximize the value of, and revenue from, Common School fund lands over the long term, that does not mean the state is limited "to 'mechanical consideration' of economic factors." 46 Op Atty Gen at 482. Therefore, the state may take actions that are "intended to maximize income over the long term" by taking management actions that may actually *reduce* present income. *Id.*

In the County Memorandum, Tillamook County argues that the conveyed forest lands should be treated identically to Common School Fund lands, because the two programs were created by statute, the opportunity to transfer land was accepted in both programs, the purpose for both programs were prescribed, and both programs impose accounting duties. County Memorandum at 12-13. Those

perceived similarities, however, are so ubiquitous among legislatively authorized programs that they are not compelling arguments for implying a special fiduciary or trust relationship between the state and the counties.

Tillamook County cites *Lassen v. Arizona*, 385 US 458, 87 S Ct 584, 17 L Ed 515 (1967) for the proposition that a duty to assess value at market value establishes a fiduciary relationship, with a concomitant duty not to ignore the beneficiaries of lands when disposing of them. County Memorandum at 13. Tillamook County notes in that regard that state statutes require competitive bidding for timber sales, under ORS 530.050 and 530.059. County Memorandum at 13.

The lands at issue in *Lassen* were granted to Arizona by the United States to be held in trust. 385 US at 460. That trust relationship resulted in the need for Arizona to obtain full value for the asset when selling off the lands. 385 US at 469. The inverse proposition cannot possibly be true, i.e., that full asset requirements, including competitive bidding requirements, create the trust. The presence of competitive bidding requirements does not transform a statutory relationship into a fiduciary relationship, much less a trust relationship.

With respect to the lands conveyed to the state by the counties, this office has previously advised that although Forestry may not manage the lands in a manner that denies the counties *all* output from the lands, Forestry has discretion in forest management: "It is accurate to say that the board may not 'reduce' revenues to the counties by permanently conveying away or setting aside county forest lands. However, it does not follow that the board may not make reasonable forest management decisions consistent with its authority under ORS 530.050, even though those decisions may result in some reduction of revenues to counties." Letter dated July 17, 1991, to Martha Pagel, Governor's Office, from Melinda Bruce, Assistant Attorney General, at 2.

It may be useful at this point to compare the Oregon statutes to a similar statute in Washington. The major difference between the Oregon version and the Washington version is that, unlike the Oregon statute, the Washington statute indicates that "[s]uch lands shall be held in trust." Wash Rev Code § 79.22.040 (2006).[20] The Washington Supreme Court has held that the Washington statute

[20] Another difference is that the Washington Legislature first only permissively authorized the counties to convey these lands to the state, Laws of 1927, c 288, § 3, but later required the counties to transfer such lands on the state's request. Laws of 1935, c 126, § 1. *See* 1996 Op Atty Gen Wash No. 11, 155 n 15.

created a statutory trust governing conveyed county trust lands, which impose general fiduciary duties on the state as trustee. *County of Skamania v. State of Washington*, 102 Wn2d 127, 133, 685 P2d 576 (Wash 1984) ("This statute, like the enabling act [governing federally granted lands], imposes upon the State similar fiduciary duties in the management and administration of the forest board transfer lands.").

The Washington Supreme Court in *Skamania* concluded that enactment of the Forest Products Industry Recovery Act of 1982 (Act), which essentially allowed timber companies purchasing timber sale contracts to default on their contractual obligations and more easily modify or extend their contracts, violated the state's fiduciary duties. *Id.* at 130, 136. The court said: "In short, the Act released over $90 million in contract rights (including $8 million secured by performance bonds), and the State received very little in return." *Id.* at 136.

The court in *Skamania* also held that the state did not act prudently in allowing the release of valuable contract rights held by the state to encourage competition and maintain timber prices. *Id.* at 138. The court noted that "[t]he conclusion is inescapable that the primary purpose and effect of this legislation was to benefit the timber industry and the state economy in general, at the expense of the trust beneficiaries." *Id.* at 136.

Hence, in Washington, where the statutes expressly have created a statutory trust with respect to forest lands conveyed by the counties, the state has the general fiduciary duties of loyalty and the duty to act prudently, which require the state not to benefit the timber industry at the expense of the trust beneficiaries. *Id.*

Tillamook County has acknowledged that, unlike in Washington, the statutes in Oregon do not specifically state that the conveyed forest lands are held in trust. County Memorandum at 15. Tillamook County nonetheless argues that the *Skamania* decision is a "bellwether" opinion establishing a state's obligations to the beneficiaries of non-common school lands. County Memorandum at 15. Because Washington's statute expressly characterizes the conveyed lands as being "held in trust," however, and Oregon's statute does not, the Washington situation is distinguishable.

Moreover, the ultimate authority is what is specifically provided by the statutory system, even in Washington. As elaborated in a Washington Attorney General opinion discussing implications of the *Skamania* case in the context of Washington's statutory system, the legislature is free to modify the fiduciary

duties related to a statutory trust, and statutory provisions control over common law fiduciary principles. 1996 Op Atty Gen Wash No. 11, 39-43. The Washington Attorney General said in pertinent part:

> These principles are important in analyzing this question for several reasons. First, unlike the federal grant land trusts, the forest board transfer land trust is created by statute. It has no origin in the state constitution. *Any common law fiduciary obligations stemming from this trust, like the trust itself, are products of statute, subject to modification by the Legislature.* * * *.
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> The purpose of this discussion is not to set forth all of the terms of the forest board transfer lands trust. Rather, it is to point out that by virtue of *RCW 76.12.030*, the terms of the forest board transfer lands trust are found in statutes directing the administration and protection of state forest lands. These statutes define the trust relationship and the Department's obligations and authority in administering the trust. *For the reasons explained above, to the extent common law trust principles are inconsistent with these statutory terms, the common law trust principles give way.*

1996 Op Atty Gen Wash at 39, 43 (emphasis added).

The Washington Attorney General opinion supports the proposition that even when there is a statutory trust with respect to forest lands conveyed by the counties, the nature of the fiduciary duties on the part of the state are governed by the specific provisions of statute.

Hence, in the Oregon context, even if there were a statutory trust, it would nonetheless be a "product of statute." The notion that the state owes a separate fiduciary duty to the counties to maximize revenues would be incompatible with the statutory directive that the conveyed forest lands must be managed so as to secure the greatest permanent value to the state. It cannot simultaneously be true that Forestry has a statutory duty to secure the "greatest permanent value to the state" *and* a separate fiduciary duty to the counties to maximize the revenues the counties would receive. Those two duties would appear to be in irreconcilable conflict.

Conclusion

No basis for a fiduciary relationship between the state and the counties can be found in the statutes, in the deeds when viewed as deeds or as contracts, in the statutes when viewed as a statutory contract, in partnership principles, in trust concepts, or in any other source of authority that has been identified by the counties or by others.

There is thus no foundation for the existence of a fiduciary duty, whether general or heightened, owed by the state to the counties with respect to the conveyed forest lands. Further, even if any fiduciary duty did exist, it would necessarily have to be exercised in a manner consistent with the paramount statutory duty to secure the greatest permanent value of those lands to the state.

Accordingly, fiduciary principles do not meaningfully bear on the role of the State Forester, under the direction of the Board of Forestry, in making policy decisions concerning the management of the conveyed forest lands. At the same time, we acknowledge that the Oregon Supreme Court has construed ORS 530.050 to prohibit management of the conveyed forest lands in such a way as to eliminate county revenues. *Tillamook I.*

In the policy-making context, the greatest permanent value rule, OAR 629-035-0020, provides the State Forester and the Board of Forestry with broad latitude in determining how to manage the conveyed forest lands in consultation with the counties, pursuant to ORS 526.156(3). Management of the conveyed forest lands includes the "sustainable and predictable production of forest products that generate revenues for the benefit of the state, counties, and local taxing districts." OAR 629-035-0020(1)(a).

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