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MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES

STATE OF ALASKA

OFFICE OF THE COMMISSIONER

TO: Finance Committee Members

DATE: September 26, 1994

FILE NO.:

PHONE: 465-2400

FROM: Harry A. Noah
Commissioner

SUBJECT: Mental Health Legislation

Attached is the article referenced on page 19 by Judge Green in her preliminary approval of the proposed settlement of the Mental Health Trust Lands litigation.

As some of you may recall, the management standards found in HB 201 are taken directly from this article. (see pages 79-85)

The School Trust Lands: A Fresh Look at Conventional Wisdom

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WORKING PAPER 90 - 5

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These acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the *benefit of the common schools*, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. The State has an irrevocable duty, as Trustee, to manage the trust estate for the *exclusive benefit* of the beneficiaries, and to return *full value* from the use and disposition of the trust property.

Oklahoma Education Association* v. *Nigh, 642 P.2d 230 (Okla. 1982), at 235.

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I. INTRODUCTION

State lands are less studied than federal lands and management agencies. They are so obscure that the idea that a small subset of them, the state school lands, are the subject of a conventional wisdom which merits a fresh look may surprise even attentive observers of public resource debates. The basics are not unfamiliar: at or near the time of statehood, Congress granted sections of land to new states to support common schools. In 1803 Ohio became the first beneficiary of such a Congressional grant.[1] Details about the rest of the story are omitted from most texts.[2] However, the program evolved for over a century and played an integral role in the westward movement and state making process until it ended, for the purposes of this analysis, in 1912 when Arizona and New Mexico joined the union. Hence the lands have a complex and very interesting history.

More important, both the lands and the peculiar mandate under which they are managed are of great contemporary significance. Of the almost 322 million acres originally granted to the states for school and related purposes, approximately 135 million acres of surface and 152 million acres of mineral rights continue to be held in state ownership.[3] Twenty-two different states manage these lands; they contribute important financial support for education, though many have argued, less than they ought.[4] They also provide an enormous reservoir of experience for comparative analysis, and thereby, a unique window through which to explore alternative definitions of public resource management and management programs. This opportunity for illumination is enhanced by the fact that the state school lands are not managed subject to the same multiple use standard that currently directs federal resource management.[5] The school land and related grants are held "in trust" by the states. This fact makes the state's management programs especially interesting and comparisons with federal management particularly enlightening. Unfortunately, the mandate is insufficiently discussed and, we

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1 For a full story on the original grant to Ohio see Mansfield, "Educational Land Policy of the United States: Land Grants for Educational Purposes Within the State of Ohio." XXVIII Barnard American Journal of Education 59 (1878). Because it marks the beginning, Ohio is also discussed, occasionally in considerable detail, in all of the references below, n. 16.

2 Dana and Fairfax, Forest and Range Policy (1980) writes them off in less than a page, at 17.

3 Regarding original grants, see Gates, History of Public Land Law Development (1968), at 805-6. Current acreage data are based on the twenty-two states that contain the vast majority of the remaining school and institutional trust lands. See, Western States Land Commissioners Association, Directory 1988-89.

4 Discussed below at n. 23-25 and text accompanying.

5 Multiple Use and Sustained Yield Act of 1960, 16 U.S. C. §§ 528-531 (MUSY); National Forest Management Act, 16 U.S.C. §§ 1600-1647 (RPA-NFMA); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (FLPMA).

argue, generally misunderstood.

The purpose of this paper is to suggest that the conventional wisdom about state trust lands is misleading. The basic notions are easily summarized: "any derived benefit from the school trust lands must be used in support of schools and may not be used to support or subsidize other public purposes. Any arrangement not ensuring full fair market value for the use and/or sale of the school trust lands violates the trust obligation mandated by Congress."[6] The purpose of the grants was to "enable states to produce a fund with which the states could support the public school system."[7] Therefore, "...without exception, the principal goal—the overriding purpose—of the trust administrative agencies is to secure the highest monetary return."[8] This view is held by most state trust land managers,[9] and virtually all contemporary commentators.[10]

It is not difficult to imagine that this approach to the management of public lands could be an anathema to many. Maximum economic returns is barely tolerated as the controlling notion, and indeed, is rarely practiced, on lands privately held by corporations.[11] Many feel or believe that it has no place at all in the discussion of publicly owned lands. It is probably true, however, that this situation distresses fewer than it might: most citizens and school children, and indeed, many specialists in public land management, are not even aware that school lands

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6 Bassett, "Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act," 1989 Utah J. Energy Law and Policy 202 (1989), at 202.

7 Id., at 211.

8 Patric, Trust Land Administration in the Western States. (January, 1981), at 7.

9 Souder and Fairfax, Western States Survey Responses (1990). Hereinafter cited as Western States Survey Responses.

10 See Basset, supra, n. 6 and Patric, supra, n 8. For an arguable exception, see McCormack, "Land Use Planning and Management of State School Lands," 1982 Utah Law Rev. 525 (1982). A recent Oklahoma case restates what is considered obvious: "These acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. The State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and to return full value from the use and disposition of the trust property." Oklahoma Education Association v. Nigh, 642 P.2d 230, 235 (Okla. 1982) But see Beaver, "Management of Wyoming's State Trust Lands from 1890-1990: A Running Battle Between Good Politics and the Law," Land and Water Law Review, forthcoming, in which the state's senior assistant attorney general argues that the conventional wisdom as we describe it has not yet come to Wyoming: "When the trusts are viewed in the proper light, the public and state officials, *should* staunchly support management of state trust lands for the exclusive benefit of the named beneficiaries." (at 36, my italics). Beaver describes the operative conventional wisdom about the trust in Wyoming as "something the Attorney General's office dreamed up to prevent the public from fully enjoying (exploiting) their land." Pers. Comm, March 7, 1991, at 1.

11 See Sax, "The Claim for Retention of Public Lands" in Brubaker, ed., Rethinking the Federal Lands

exist. Yet, even given the general anonymity of state school lands, there has been surprisingly little public discussion of the trust notion. Nevertheless, under limited direct pressure from environmentalists,[12] and perhaps more pressure from evolving notions of what constitutes ecologically sound and politically acceptable land management, some states have sought flexibility within the trust notion.[13]

This article puts these developments into a comprehensive context. It is aimed at starting a conversation rather than ending or even defining it. We will argue that notions of trust law have been applied selectively, rather simplistically, and frequently inappropriately. Further exploration of basic trust concepts and management practice would, we suggest, reveal more flexibility than the standard discussion thus far. Our basic point is that trust land management is less confined—both *to* economic maximization goals and *by* economic maximization notions—than the received wisdom suggests.

The paper proceeds in four parts. The first part will describe, excessively no doubt, the lands and their history. It should leave the reader with a general appreciation of how the grant program evolved: how much land was granted; to whom; for what purposes; how the lands and the associated funds are managed. It will also also give a brief description of the granted lands, how much of the grants have been retained, who owns them, how much revenue they produce from which resources, and how much the permanent funds produce. The discussion of the evolving program will emphasize three themes: first, that accession was a bargain between the joining state and Congress; second, that the particulars of the bargain, and the details of the school land grants, varied considerably over time. Finally, we take issue with the prevailing wisdom by arguing that the bargains do not evince a pattern of increasing Congressional restrictions on use and disposition of the granted lands.

The second section looks primarily at 150 years of case law, to frame and discuss several questions which are central to our quest for flexibility: what is the trust instrument, and do we have a trust; what is the purpose of the grant and who or what is to benefit; what is the trust property; who or what is the trustee; and how can the trust be changed?

There is too much law and policy surrounding the assertion that the school land grants

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(1984) for general discussion on this and related points.

12 See, Patric, supra, n. 8; see also, North Fork Preservation Association v. Dept of St. Lands, 788 P.2d 862 (Mont. 1989) and Conda v. Colorado State Board of Land Commissioners, et al. Nos. 88 CA 0373 and 88CA 0375; Appeal No. 86 CV 2182, filed Sept. 7, 1989.

13 McCormack, supra, n. 10 and Bassett, supra, n. 1, analyze laws which try to get amenity and non-economic values into the operation.

constitute a "trust" for us to seriously argue the contrary. However, raising the question—and asking why, how, and at what point does a trust interpretation of these grants become reasonable, who is bound by the notion, and to do what—does underscore that the nuances are less clear than the dominant much cited phrases. There is more room for flexibility than the conventional wisdom suggests.

Part three adds some ground truth to the theoretical flexibility derived from case analysis by looking at trust land management in practice. The discussion will take the oft-repeated trust terms of maximized return and put them in the context of economic theory and reality. A brief review of timber management on trust lands in four western states will both specify and expand upon that theoretical diversity. Anything more than the most casual perusal makes clear that different states are <u>doing</u> different things. They are pursuing different economic strategies, using different definitions of sustained yield, of fair market value, and of multiple use of forested lands. They use different funding mechanisms and different revenue distribution procedures, all within different institutional structures. All this variability in management programs suggests that there is more flexibility than supposed in the trust doctrine. The simple truth of the matter is that maximum economic benefit turns out to be a very flexible mandate after all. More important, the trust mandate to preserve the corpus of the trust while making the trust productive permits more conservative management, and a broader range of social benefits, than the maximum benefits perspective at first implies.

We think it is important to be systematic in analyzing this flexibility for several reasons. The first has already been suggested. Since the first "environmental decade" several states have evolved planning and management programs for the school lands that chip away at the received wisdom. Our impression from talking to land managers in these states is that each perceives his or her situation to be unique or nearly so. Moreover, there is sometimes a large difference between the school land management regime as defined by state statute and as described by the managers themselves. Among other things, this perspective, and lack thereof, renders each of the state innovations difficult to imitate or to understand as part of a general pattern; it also makes them potentially quite vulnerable. As we move into a second environmental decade, providing even a partial glimpse at the "big picture" may be beneficial to continuing evolution of state school land management.

Without adding unduly to an already lengthy introduction, we want to be careful in stating our purpose. Our goal is not to erode either the trust obligation, or its emphasis on economic returns. We are not opposed in principle to achieving economic returns from publicly held lands, even if the result is the occasional or well-planned loss of amenity and environmental

values. Nor are we opposed, on the other hand, to environmentally responsible, even amenity oriented management of the trust lands.

Rather, we argue that the trust obligation provides an extremely useful, albeit misrepresented and underappreciated, context for public resource management. Indeed, just those environmental and amenity values which appear diametrically opposed to the trust obligation conventionally understood may, in fact, be well served by a more flexible and accurate definition of it. Critics of multiple use land management as historically practiced by the federal land management agencies may find much that is salubrious in consideration of the school lands. They will not, however, find it in the conventional wisdom currently surrounding school land management. Nor will lessees or beneficiaries find continuing succor in the traditional oversimplifications.

The school lands and state management programs merit the attention. In the more complex and comprehensive picture we propose, there are models and approaches to enrich discussions of public resource management now dominated by desiccated and polarized issues arising at the federal level. We aim, therefore, to complicate things.

II. Evolution of the Grant Program and Overview of the Lands, Revenues and Resources

This overview will introduce first, the evolution of the grant program, and then, the retained lands in ten western states.

Evolution of the Grant Program

1. The Context

Although we must point to the humility[14] appropriate to studying a policy which has thirty-five distinctive variants and which began just after the nation was founded, it is important that the notion of granting land to support common schools is actually much older. One enthusiastic scholar discounts the importance of the program's colonial heritage but mused that the beginnings of land grants for schools perhaps began in ancient times; he was, however, able to penetrate no deeper than Henry V.[15] For present purposes it is sufficient to note that the idea

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14 This section draws heavily upon but recasts and corrects material found in Souder and Fairfax, "The State School Trust Lands." A Paper presented at the Annual Meeting of the Western Political Science Association, Newport Beach, California, March, 1990.

15 See Taylor, The Educational Significance of the Early Federal Land Ordinances. Teachers College, Columbia University Contributions to Education No. 118, (1922). Another notes that after the monasteries were destroyed by Henry VII, many grammar schools were lost in England and it became common for

of granting, donating, or bequeathing land in support of schools was common throughout the colonial period. It was, however, most characteristic of the northeastern states, especially Massachusetts, New York, Connecticut, and New Hampshire, "where it developed steadily in the direction of a public land grant system."[16]

The idea of land grants for schools was just one of a number of concerns, both profound and less so, which swirled about the western lands before, during, and after the Revolution. The need to resolve some of those issues was given urgency in the early 1780s by several major events, the most pertinent in the present instance being the acceptance of the Virginia land cession[17] by Congress in 1783.[18] Congress was obliged to announce some policies about what would be done with the lands which had been ceded. In two statutes remarkable for their brevity, durability, and dignity, Congress did so. The General Land Ordnance of 1785

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individuals to endow schools with land. Schafer, The Origin of the System of Land Grants for Education. Bulletin of the University of Wisconsin [Madison], No. 63. History Series, Vol 1, No. 1, (1902), at 8-10.

16 Schafer, id., at 11. For a fulsome listing, much of it overlapping, of colonial programs; see, in addition, Commissioner of Education, Report of the Commissioner of Education for the Year 1895-96: The American Common School in the Southern States During the First Half Century of the Republic, 1790-1840 (1897); Dienst, The Administration of Endowments with Special Reference to the Public Schools and Institutional Trusts of Idaho, Columbia University Contributions to Education, No. 560, (1933); Dixon, The Administration of State Permanent School Funds: As Illustrated by a Study of the Management of the Utah Endowment. Southern California Education Monographs, No. 9, (1936); see also, Green, Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy. 1930, 1966; Hibbard, A History of the Public Land Policies (1924); Knight, History and Management of Land Grants for Education in the Northwest Territory (Ohio, Indiana, Illinois, Michigan, Wisconsin). 1885; Swift, History of Public Permanent Common School Funds in the United States 1795-1905 (1911); Swift, Studies in Public School Finance: The West--California and Colorado, Research Publications of the University of Minnesota--Education Series No. 1, (1922); Swift, Federal and State Policies in Public School Finance in the United States. (1931). And, for a series of charts tracking different provisions in state constitutions circa 1930 see Koch, Constitutional Provisions for Common School Funds in the Several States. Masters Thesis. The Ohio State University, (1930). Unfortunately, for present purposes, the thesis does not contain original constitutions and therefore is not a consistently reliable guide to what states originally agreed to. The best general source on grants to the states is Orfield, Federal Land Grants to the States with Special Reference to Minnesota. University of Minnesota Studies in the Social Sciences. No. 2 (1915). See also Waggener, "The Federal Land Grant Endowments: A Problem in Forest Resource Management." PhD Diss., University of Washington, 1966, and the references cited therein.

17 The Virginia land cession obviously resolved many issues, but it created a number as well. The original thirteen colonies vigorously pursued enormous, overlapping claims to all the land between the Appalachians and the Mississippi. Following the Revolution, they ceded their claims gradually to the central government. Virginia's claim was the most extensive and the cession most central in the process under discussion here. There is an enormous literature. See Hibbard, supra, n. 16; Robbins, Our Landed Heritage: The Public Domain 1776-1936 (1942); and Gates, supra, n. 3, and the references cited, particularly in the latter.

18 Not unexpectedly, the Virginia cession and kindred phenomena are also the subject of much analysis. For good reason: the terms of the Virginia cession are key to almost literally everything that follows in American political and social history: inter alia, the ceded land was to be laid out in states; the states formed were to have a republican form of government and were to be admitted to the Union; all land not taken up by military bounty claims was to be a "common fund for all the states." A good place to start is, as always, Gates, supra, n.3.

provided for the rectangular survey[19] and sale of western lands. It also initiated the program of land grants for schools, providing that lot number 16 in every township would be reserved "for the maintenance of public schools within the said township."[20] The Northwest Ordnance, passed two years later, provided for establishing a system of territorial governance and transition to statehood which technically applied only to the states formed out of the ceded lands (Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota east of the Mississippi). However, the principles of that document and many of its key phrases became, during the experience of implementing them, the template of all western expansion and a pervasive architectonic of American political and social life.[21] In a series of fits and starts, the simple commitment to granting lands for schools was elaborated and expanded. It too became so woven into the warp and woof of both education and lands policy that it is, as noted above, scarcely seen today.[22]

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19 The survey "organizes land into six-by-six mile townships divided into thirty-six sections of one square mile each." Again, there is an enormous literature. See, for example Johnson, Order Upon the Land: The U.S. Rectangular Survey and the Upper Mississippi Country (1976); Treat, The National Land System: 1785-1920 (1910). Many recent authors discuss the survey in terms of straight lines, which nature abhors as much as vacuums. Property lines and fence lines followed the survey lines, and farmers plowed along the fence line, hence some have asserted, the dust bowl. Reality and the literature are more complex, but you get the picture. More relevant here, Treat discusses the decision in terms of a regional sociological conflict: the South versus the New England states and styles the survey and sale notion as a victory for the New England approach to ordering both land and community life. See especially Chapter 2. See also Treat, "The Origin of the National Land System Under the Confederation," Annual Report of the American Historical Association for the Year 1905 (1906). There are also whiffs throughout the literature that the south east was not really wholly enthusiastic about common or free schools, preferring to concentrate resources on educating the sons of the aristocracy. Daughters everywhere are more ambiguous, and whether education for all includes them depends considerably on where and when.

20 Most of the writers cited above, see n. 16, are at great pains to correct a misconception, which apparently gained currency at the time of the centennial of the Northwest Ordnance, that the 1787 statute rather than the 1785 one provided for public schools. They are quite correct. The Northwest Ordnance lauds education but does nothing for it "except that it established a form of territorial government which led to the rapid settlement of the unoccupied lands and therefore made effective and useful the land grants for public education." See Swift, 1911, supra note 16. There is also much in the early discussion to suggest that Thomas Jefferson wrongly claimed or was incorrectly given credit for having advocated or imposed the notion of land grants for schools. Indeed, Jefferson did pen a pivotal 1784 report on what to do with the territories but that document did not mention school land grants. Duly noted.

21 The most important strand of which is the "equal footing" doctrine which has become so ingrained that many people look for it, erroneously, in the Constitution. Again, there is an enormous literature. However, the fact remains, it was the 1785 not the 1787 ordnance that provided for land grants for common schools.

22 Because of the school land grant programs' current invisibility, and because the terms and contours of current social science analysis were not live when it was visible, it is worth noting, if only in passing, the enormity of what transpired in a single sentence in a statute now considered interesting primarily to a small bunch of geographers and public land scholars. Under the Articles of Confederation, known and unloved for its allegedly sapless central government and powerful states, Congress assembled and imposed a uniform education policy—and a means for funding it—on the states. Common schools meaning schools paid for by the government rather than the students, would be made available in all the new states. Originally the term meant grammar or pre-university schools. The evolving concept of "school" can be read in the progression of detail in

It is clear, however, both from its antecedents and from its early implementation, that although the idea of granting land for education was broadly familiar, what the grantee was supposed to do with the lands in order to support the schools was not well defined.

It will shock no one to learn that much of the land and its potential benefit were lost due to incompetence, indirection, and corruption. Much of the loss was connected to a fairly consistent decision made by the states to sell the lands rapidly, to spur settlement and support early schools.[23] School land grants are little different from other 19th century land policies in one regard: corruption and ineffective administration were rampant. This is, however, easily and frequently overplayed.[24] Viewed from the perspective of the current value of the land and resources, it is reasonable to feel that it would have been preferable to rent a given section rather than to give it in salary to the school teacher. However it is worth wondering whether many of the policies which would have been more beneficial to current students would have deprived the earliest generations of school children of much of the benefit of the grants.[25]

19th century constitutions. Compare the 1792 New Hampshire constitution (Thorpe, IV, 2487) with Utah's from 1896 (Thorpe, VI, 3720), for example. See also School District No. 20, Spokane County v. Byrun 99 P.28 (1909) for an interesting dispute in this arena. Consensus is that this step was taken, and continued to be taken, because it was everywhere acknowledged that if common schools were obliged to rely on locally instituted property taxes, education would not be generally provided in the new territories. See, for example, Swift, 1911, supra, n. 16, at 160 ff, who argues that the idea of free schools was controversial even in Connecticut where the support for a permanent school fund was greatest. The idea motivating the grants was to avoid the need for taxes to support schools. For those who would argue that federal tentacles did not start to encroach upon the states until the Commerce Clause developed its many sets of wings, or that federal subsidies did not become significant until the Depression or the Civil War, it is interesting to note that this tentacle/subsidy antedates the Commerce clause by half a decade, its wings by a hundred and fifty years, more or less, and the Civil War by almost a century.

23 Sale of the lands was originally not authorized. However, with so much free land for the taking, leasing the lands was not feasible. But see Taylor, supra., n. 15, at 123: "It was never intended that the land should be held for the benefit of future generations more able to maintain schools than the pioneers. If the early settler could derive the greatest aid from the land grants by selling school lands, such sales were wise." Early states provided explicitly for quick sale of the lands. See, for example, Minnesota's original Constitution, "the best one-third [of the land] was to be sold in the first two years of sale... ." Discussed in Segner v. State Investment Board, No. C-587-489319 (Ramsey County District Court, August 11, 1988), at 6.

24 See, for example Bruce, "State Socialism and the School Land Grants," 33 Harvard Law Review 401 (1920). For a better discussion, see Jon A. Souder, "Economic strategies for the management of state and institutional trust lands: a comparative study of ten western states." Ph.D. Dissertation, University of California, Berkeley, 1990.

25 The sell-lease-hold option will be discussed in terms of evolution of authorities, below at n. 61 and text accompanying, and in the context of economic development and management options in Section 4.. This is not the place to evaluate the land grants/permanent school fund's contributions to education. It is of course true that if the resources had been handled differently at the outset, the funds might possibly be larger and more important now. However, the cost of imposing order would have been enormous. The general theme of the discussion seems to be that the grants were pivotal in getting things started. See Dixon, supra, n. 16, at 12, ff. and references cited. Note also that Dixon, supra, n. 16, muses that in Utah the dependency of statehood and the promise of grants for schools may have had the opposite effect, that is, the Utah settlers waited for the grants to start schools (at 106). Although credible in the case of Utah, which was characterized by an unusually high

2. The Basic Grant Program[26]

With that background regarding state school lands, it is possible to discuss the evolution of the grant program. In order to give an idea of the actual content of the diverse documents and the state and federal components thereof, the section will begin and end with a discussion of specific states: Indiana is taken as representative of an early grant program, and New Mexico will be presented as the final one. The section will describe the evolution of four central aspects of the grant program: (1) how much land was granted; (2) to whom; (3) for what purpose; (4) how were the lands to be administered? The last category will discuss the growth and limits on state authority to dispose of land, the rise of the permanent fund as a concomitant of the land grants, and the evolution of the State Land Commission as manager, arguably trustee.

From this evolution three important observations emerge. The first is that for new states, joining the union involved a process of bargaining with Congress.[27] States typically submitted offers and countered Congress' counter offers, literally negotiating their way into the Union. During the 19th century, predictably, the process became more and more generous to new states.[28] Although the process dragged on sometimes for several decades or more, in every instance, statehood was a literal contract. States were required to accept the terms and conditions specifically.[29]

The second theme, not unexpectedly, is variation. Over time, the grant process changed significantly. Thus, different states now operate under quite different mandates. Finally, it is crucial to note, most of the variation arises from changes in state not federal policy. Although

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degree of social cohesion, that point may be less applicable in other areas where, Swift has argued the lack of a strong sense of community was a barrier to the establishment of schools. See Swift, supra, n. 16, at 115, ff.

26 The major sources for this section are Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States and Colonies Now or Heretofore Forming the United States of America [7 vols.] (1909) printed pursuant to an Act of Congress as House Doc. 357, 59th Cong., 2d Sess. and Shepards Citations, Inc., Digest of Public Land Laws (1968). Reading the progression of documents was aided by Gates, supra, n. 3, Hibbard, and Koch, both supra, n. 16. Citations will be to Thorpe, followed by the appropriate volume and page number.

27 See Fairfax, "Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism as If States Mattered" in Foss, (ed.) Federal Lands Policy (1987), and the references cited therein.

28 In addition, the "old" states, and the early "new" ones insisted on partaking of Congress' increasing generosity through retroactive land and cash grants and grants of "scrip" which entitled states where no public domain remained to select lands further west. The classic reference here is Gates, The Wisconsin Pine Lands of Cornell University (1943). Orfield, supra. n. 16 does an interesting job of early Congressional roll call voting analysis to chronicle the emergence and growing power of older new (perhaps we could call them middle-aged) states.

29 See Treat, (1910), supra, n. 19 for a discussion of the "quid pro quo" in Chapter XI.

the grant program over time became incontrovertibly more specific about state responsibilities, there is no pattern, much discussed in the cases and some recent literature, of the federal government evincing increasing concern for the dissipation of the granted lands. Nor, contrary to the assertions of many court and scholarly discussions,[30] is there a pattern of the federal Congress imposing a trust agreement on the states: prior to 1910, such trust obligations as exist arise entirely from state commitments made in state constitutions. In order to illustrate these important points, we begin almost at the beginning, with the grants to Indiana, a typical set of early documents and circumstances.

3. Indiana—a typical beginning

The Enabling Act and Acceptance. In 1814 Congress authorized the "laying off" of the Territory of Indiana into districts for the election of a legislative council. Two years later an Congress passed "Act to enable the people of the Indiana Territory to form a constitution and State Government, and for the admission of such State into the Union on an equal footing with the original states."[31] Section 6 of this enabling act contains the provisions that most interest us. In language and format that soon became standard, it begins:

> **And be it further enacted,** That the following propositions be, and the same are hereby, offered to the convention of the said Territory of Indiana, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States: **First,** That the section numbered sixteen, in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.[32]

This language or something similar was contained in every accession package until the accession era ended in 1912. This is all that the Indiana Enabling Act says about school lands. There is no supplementary discussion of trusts, fiduciary obligations, restrictions on use to protect any trust, or any instructions regarding what constitutes "use of schools." The rest of Section 6 of the Indiana Enabling Act makes additional grants: saline land grants,[33] five per

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30 See, for example, Gladden Farms, Inc. v. State, 633 P. 2d 325, 327 (Ariz. 1981). Usually cited in this connection is S. Rept. 454, 61st Cong, 2d Sess, 3-28-1910 , To Accompany HR 18166, at 18-21.

31 Thorpe, II, 1053.

32 Thorpe, II, 1055.

33 The saline grants are most fully discussed in Orfield, supra, n. 16, Ch. IV. The second provision, granting salt springs to the people of the state also became a standard feature of accession statutes. It provides an important comparison with the school land grants:

> "Second, That all salt-springs within the said Territory, and the land reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt-springs, not exceeding, in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said State, for the use of the people of the said State, the same to be used under such terms, conditions, and regulations as the legislature of the said State shall direct: **Provided,** The said legislature shall never sell nor lease the same for a longer period than ten years at any

cent of the net proceeds of land sales shall be reserved for making public roads and canals, three-fifths of which shall be applied within the state under the direction of the state legislature and two fifths for roads leading to the state under the direction of Congress;[34] one entire township to be designated by the president of the United States to be reserved for the use of a seminary of learning, and vested in the legislature of the said State, to be appropriated solely to the use of such seminary by the said legislature;[35] four sections of land for the purpose of fixing their seat of government thereon.

The Section concludes:

> **And provided always,** That the five foregoing provisions, herein offered, are on the conditions that the convention of the said State shall provide by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of December next, shall be and remain exempt from any tax, laid by order or under any authority of the State, whether for State county, or township, or any other purpose whatever, for the term of five years from and after the day of sale.[36]

Every state was required to formally accept the terms and conditions offered in the enabling act documents. Two months later, in June, 1816, the Convention of the Territory of Indiana met and did so.[37] In December of the same year a Congressional resolution took note of the

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one time." Thorpe, II, 1055.

Variants in this provision are also seen repeated throughout the accession process, although the particular language here is important for two reasons. The Congress made numerous specific provisions to protect the saline grants, and although the some of the galaxy of trust paraphernalia is implicit, the salt-lands were not and are not consistently viewed as trusts. The fact that land was granted for a specific purpose should not therefore automatically be interpreted as a trust, implicit or otherwise. Second, it suggests the kind of language that Congress used when it was concerned about the integrity and utilization of granted lands. From the beginning of the 19th century, Congress labored to protect the salt-land grants from abuse and dissipation. A hundred years later, the U.S. Supreme Court was inclined, while interpreting the language of 20th century enabling acts, to read a similar concern for school lands into early 19th century grants.See, Lassen v. Arizona Highway Department 385 US 458 (1967) and U.S. v. 111.2 Acres of Land, supra, n. 2 at 1047. It is therefore interesting to note that language and provisions doing anything more than granting the lands did not appear in Congressional acts until the statehood process was nearly over, beginning with Colorado in 1876.

34 This is another standard grant never identified as a trust and containing more careful restrictions than either the school or salt land grants. Subsequent states took this grant with more or less restrictions on what the proceeds could be spent on, and by whom. Many states that received the grant subject to no restrictions subsequently allocated the receipts to school or other specific purposes. Discussed in Orfield, supra, n. 16, at Chapter 6.

35 This provision led to the earliest of the school trust land cases, Trustees for Vincinnes v. State of Indiana, 55 U.S. 268 (1852). The Enabling Act provisions applied to the seminary grant in 1816 are similar to those which were attached to the school grants in the 1890s.

36 Thorpe, II, 1055-56. The latter provision was designed to assist settlers purchasing land on credit. When the credit sales program was abolished in the 1840s, the provision dropped out of state constitutions, beginning with Arkansas and Michigan.

37 The document states that the convention does "for ourselves, and our posterity, agree, determine, declare and ordain, that we will, and do hereby accept the propositions of the Congress of the United States, as made and contained in their act...." Thorpe, II, 1056.

Convention's June ordinance accepting the terms and conditions and its July constitution "republican, and in conformity with the principles of the articles of compact between the original states, and the people and States in the territory northwest of the river Ohio" and declared that the State of Indiana was "admitted to the Union on an equal footing with the original States, in all respects whatever."[38]

The State Constitution The Indiana Constitution contains two sections in Article IX which refer to the school land grants. One part declares that

> it shall be the duty of the General Assembly to provide, by law, for the improvement of such lands as are or hereafter may be granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands or from any other quarter to the accomplishment of the grand object for which they are or may be intended. But no lands granted for the use of schools or seminaries of learning shall be sold by authority of this State prior to the year 1820; and the moneys which may be raised out of the sale of any such lands, or otherwise obtained for the purposes aforesaid, shall be and remain a fund for the exclusive purpose of seminaries and public schools.[39]

Although the "be and remain a fund for ... schools" may appear to be a nascent permanent school fund, it merely reiterates that the proceeds from the grant will be spent for the purpose intended.[40]

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38 Id.

39 Thorpe, II, 1067-68.

40 An actual permanent school fund was added when Indiana revised its Constitution in 1851. Article VII of the 1851 Constitution describes diverse sources of income for the fund, including the township fund and the lands belonging thereto, the saline fund and lands, all lands and other estate which shall escheat to the state, and taxes which may be assessed. The principal of the Common School Fund "may be increased but never diminished," and "the income thereof may be appropriated for the support of Common Schools, and to no other purpose whatever." Section 7 provides that "All trust funds held by the State shall remain inviolate and be faithfully and exclusively applied to the purposes for which the trust was created." [Thorpe, II, 1086]. This language, or variations on it, was typical of the Constitutions of the 1850s. Indiana unambiguously added the lands to a trust in its amended constitution. Many, but not all states did so as well, most typically beginning in the 1870s. See Fairfax and Souder, "State Accession Documents Provisions Relating to the Grant of School and Related Lands, Working Paper 90-4, n.d. Cited hereafter as Working Paper 90-4. Beginning in the 1850s and more dramatically after the Civil War, the old new states "lapped" the new ones—that is, before the process of writing new Constitutions was completed, the old states substantially revised theirs. Hence, the process of writing Constitutions for new states begins to draw not only on previous new Constitutions but, in addition, on document revisions undertaken in the older states. The current analysis focuses almost exclusively on the original Constitutions. It also ignores statutory changes. The Indiana legislature, had, however, paid considerable attention to the school lands well in advance of the 1851 Constitution. Beginning in 1821, with a report from a special Senate Committee appointed to "investigate the condition of the school lands," the legislature pondered how to make money off the lands. An 1824 statute incorporated the Congressional townships for the purpose of "creating a controlling power over section sixteen." Commissioners elected in each township were to control the lands therein and to "dispose of them in such manner as for the best interest of the schools." There were no limits on the disposition; due to the dissipation of the grant, the law was repealed but one year later so that leases could not be given for more than ten years. Numerous legislative enactments over the next several decades sought to protect the lands from dissipation by the commissioners, to little avail. A legislative effort to abolish the congressional townships and centralize management of the grants at the state level was challenged by Springfield Township and was held by the state court to be a violation of the original grant. See, Knight, 71-72, discussing State et al v. Springfield Township, 6 Indiana Reports, 83,

Indiana provides a template against which we can now project four key points of programmatic evolution.

4. Key Points in the Evolution of the Grant Program

How Much Land Was Granted? Because the courts and others at the close of the 20th century have tended to see in the evolution of the grants an increasingly concerned Congress guarding against state mis- and malfeasance with ever more stringent Enabling Act provisions,[41] it is well to begin with the most obvious pattern: increasing Congressional generosity to the states. Over the 19th century, school land grants to the states became larger and larger. Ohio and states thereafter until 1850 received one section per township.[42] Starting with California and Oregon, all states received two sections per township. Then, at the Utah accession in 1896, four sections per township were granted. That continued through 1910 grants to Arizona and New Mexico.[43]

This increasing generosity was manifest in related areas as well. Many of the accompanying land grants and donations are relevant because the proceeds were added, at accession or by Constitutional revisions, to the permanent school fund.[44] In 1841, 500,000 acres of land was

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which eventually gave rise to the more familiar Springfield Township v. Quick, et al. 63 US 56 (1859).

41 See, for example, Deer Valley Unified School District v. Superior Court 760 P.2d 537 (Az, 1988), Lassen v. Arizona, supra, n 33, at 463-64, and the references cited therein, particularly S. Rep. 454, 61st Cong., 2d Sess., at 18.

42 Although this discussion emphasizes, among other things, variation, there are several points on which there was none. Most notably, from first to last, Congress provided for "in lieu" selections when the granted lands were occupied by settlers, or squatters, in advance of the land surveys that identified the granted areas.

43 Oklahoma, which joined in 1907 was, as Gates notes, "treated differently." Oklahoma received sections 16 and 36 "for schools." Section 13 of Indian lands, when opened, were to be "one-third for the University of Oklahoma and its associated preparatory school, one-third for normal schools, and one-third for a colored A & M school. Section 33 of the Indian lands was assigned to charitable and penal institutions." Arizona and Oklahoma also received $5 million in lieu of the school sections which they would not have in the Indian Territory. Oklahoma wound up with only 4.6% of its total acreage, which compares unfavorably with the 11% it would have received if it had gotten four sections like the others. "On the other hand the Oklahoma lands were likely to produce revenue much earlier than those of Arizona, partly because of their minerals and because they had greater value as farms." See Gates, supra, n 3, at 314-15. Alaska was treated differently still, of course. However, Alaska has a perhaps surprising analogue in Nevada; both states ultimately received land selection rights rather that grants of specific sections. Counsel for the Utah State Lands Commission dissents: "...the reason four sections were granted was due to the relatively poor quality of the lands rather than to increasing generosity." See Bassett, supra, n. 6, at 197 citing 26 Cong. Record 182 (1893). This is also true today: grazing rates per A.U.M. for Kansas and Nebraska are four times those of Utah, Arizona, and New Mexico, and returns are further reduced by the limited number of A.U.M.s per acre in the latter three states. Only minerals in the form of oil and gas have saved these states—and that was unintentional since mineral lands were excluded from the grants." Steven F. Alder, Assistant Attorney General, Utah, pers. comm. March 1, 1991. But see below, n. 49.

44 For example, Oregon 1859; Kansas, 1861; Nevada 1864; Mississippi, rev. 1868.

granted to each public land state which had not already received such aid.[45]. In 1862 land or scrip was granted to all old and new states "not in rebellion" for the purpose of endowing agricultural and mechanical colleges. This program was extended, after the war, to the southern states.[46] It is difficult to describe succinctly this pattern of increasing Congressional openhandedness because grants to states were so munificent, so frequent, and so frequently made retroactive. Further, many grants were made to the states to be re-granted to developers of internal improvements, such as railroads. Hence it would be difficult to identify an appropriate set of programs for analysis. Though drawing lines is difficult,[47] and for present purposes unnecessary, there is no confusion about the pattern: over time the federal government gave more and more land to new and middle aged states, at accession, as well as before and after. The states were effective bargainers in their own behalf.

Another component of the grant program, Congress' inconsistent efforts to protect its own growing interest in public domain lands, had the effect of increasing the extent of the grants. As national public domain policy shifted from disposition to retention, Congress tried sporadically to exempt federal land reservations for forests, parks, and Indians, from the school land grant process. In the 1889 "Omnibus" enabling act for North and South Dakota, Montana and Washington,[48] as well as in the 1896 Utah enabling act, it is clearly stated that the provisions granting sections in every township do not apply to federal land reservations.[49] Arizona and New Mexico were successful, in 1910, in having that provision specifically disavowed. Hence, Arizona and New Mexico were able to select land in lieu of sections contained in national forests.

Congress had the same difficulty achieving a consistent policy with regard to minerals: it did not not specifically exempt mineral lands from the grant process until 1889. The four-state enabling act provided for land selections in lieu of mineral lands. In 1896, minerals were not

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45 See Gates, supra, n. 3, discussing the 1841 Preemption Act, at 238. See also, Orfield, supra, n. 16, at 98-102.

46 See Gates, supra, n. 3, at 335-36.

47 The best general source is Orfield, supra, n. 16. Hibbard, supra, n 16, and Waggener, supra, n. 16 do more than adequate jobs generically. For the composition of the institutional trust grants in just one state as an illustration, see Dienst, supra, n. 16, at 4-10.

48 Sections 16 and 36 which were located in permanent reservations for national purposes were not subject to grants or in lieu selections. Thorpe, IV, at 2293. These restrictions were not included in the Idaho Enabling Act one year later. See Thorpe, II, 914.

49 And, as noted above, although differently stated, the same principle was applied to Oklahoma, see n. 43. However, note that the potential for "damage" as perceived by the Omnibus Four and Utah was nowhere what it would have been for Arizona and New Mexico, wherein Congress backed off: the Forest Reserve Act did not pass until 1891, and was not extensively implemented for almost a decade, much past statehood for those five.

mentioned in the Utah enabling act; this omission led to litigation which gave the Supreme Court the opportunity to opine that whatever Congress had said, it *intended* to reserve minerals, not only in the Utah enabling act, but in *all* such grants.[50] In 1927 Congress enacted legislation to reverse the Supreme Court decision, its last flourish of generosity, perhaps, of the accession period.

To Whom Were the Lands Granted? Although it is now common to list school lands under the heading "grants to the states," the issue of who should receive the grants was not easily answered at the outset. Congress resolved this issue in a number of different ways during the first half of the 19th century before settling into the now familiar standard pattern. When Ohio made application for statehood, it proposed an arrangement similar to the 1780s land sale contracts with the Ohio Company, that *the townships* receive section 16 or equivalent for the use of schools. Congress rejected that and after a series of concessions and counter proposals provided that all sections for the use of schools be vested in the legislature of that state.[51] Thereafter, the pattern evolved as follows: after Ohio, grants of land were made to the township for use of schools in the township. Then the lands were granted to benefit schools in the township but were to be managed by the county. Then the lands were granted to benefit schools in the township but to be administered by the state. Finally, Congress granted to lands for the benefit of schools in the state to be administered by the state.[52]

This shift from township to state ownership made sense for several reasons. First, the township was frequently a name for lines on a map and did not always exist as a government. In any event, the local level was not generally adequate to administer the resources.[53] Second, the townships were not equally endowed by the grants. In some townships the section was valuable or marketable land and provided support for schools in the township. In other areas, the resource was not marketable, but the township still needed support for schools. The gradual evolution ended in a Congressional policy for granting land to the states for supporting

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50 See, Sweet v. U.S. 228 P. 421 (1915); rev'd U. S. v. Sweet, 245 U.S. 565 (1918); rev'd by legislation; but see, Andrus v. Utah, 446 U.S. 500 (1980). See also, Robinson, Land In California (1948), at 190-91. For more detail regarding minerals lands see Shearer, "Federal Land Grants to the States: An Advocate's Dream, A Title Examiner's Nightmare." 14 Rocky Mt. Mineral Law Inst. 185 (1968). See also Colby, II. Mining Law in Recent Years, 36 C.L.R. 371 (1948).

51 See Hibbard, supra, n. 16, p. 309-10.

52 Swift, 1911, supra, n. 16, at 107 ff has the most detailed discussion of this progression. See Also, Hibbard, 310, ff, and Taylor, supra, n. 15, at 115 ff.

53 The problems encountered by townships are detailed in numerous sources. See particularly, Swift, 1911, supra n. 16, at 115 ff; Taylor, supra, n. 15, at 85 ff; Taylor notes that the earlier settlers' educational work was hampered by physical hardship; Indian hostility; general poverty; scarcity of money; scattered population; difficulty in getting teachers; lack of social coherence.

the schools statewide.

What is the Purpose of the Grants? The conventional wisdom suggests that if nothing else, the purpose of the grants ought to be obvious. Unfortunately it is not. From state to state, and, more interesting, in diverse documents affecting any one state, there appears slight but significant variation in the language describing the purpose of the grants. All of the variations imply something just a little different concerning use of the resources. For example, typical enabling act language from Ohio forward grants the lands "for the use of schools." That normal phrase changed during the 1860s to read "for the support of common schools"[54] and shifted again in 1907 when Oklahoma was granted land "for the use and benefit of common schools." California, being its typical peculiar self,[55] received land in 1853 for "the purposes of public schools." Even more confusing, perhaps, is the Omnibus Enabling Act which grants the school lands, again, "for the support of common schools,"[56] but authorizes in lieu selections of excluded mineral lands for the "use and benefit" of the schools.[57]

Variation in the enabling act languages are compounded by equally subtle shifts in language in other key documents. For example, Wyoming was among those states granted lands "for the support of common schools." However, its Constitution formally accepts the grants, as was required by Congress, "for educational purposes."[58]

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54 This phrase first appeared in West Virginia's 1863 Enabling Act.

55 This is not the place to discuss in detail the peculiarities of the California situation. However, the lands,were granted three years after statehood and therefore came apart from the normal context of provisos and quid pro quos which characterize other grants. There is, accordingly, no compact, hence no basis for arguing that there is a trust agreement with the federal government attaching to the California school grants. The state has taken the position that its grant is "honorary," rather than binding. At least one court seems to have been confused by this. See 111.2 Acres, supra, n. 33, discussed below at 161 and text accompanying. For a fuller but still preliminary discussion of California's peculiarities, see Gates, supra, n. 3, at 301-04, and Philips, "The Intermixed School Trust Lands: A Legal Perspective on Their Management," a Professional Report submitted in partial satisfaction of the requirements for the degree of Master in City Planning, University of California, Berkeley, (1984), at 2-9.

56 Thorpe, IV, 2293.

57 Id., at 2296.

58 Wyoming's Act of Admission provided that proceeds of lands should be a fund "expended in the support of said schools... ." But the lands were "reserved for school purposes only..." which seems broader. And the Constitution accepted "the grant of lands ... for educational proposes... ," which seems broader still. Cited and discussed briefly in Beaver, "Comment: Wyoming School Trust Lands Trapped Inside Grand Teton National Park - Alternative Solutions for the Commissioner of Public Lands." XX Land and Water Law Review 207 (1985), at 208-09. See also, Beaver, supra, n. 10, at 9-10 for apparent errors in interpreting Wyoming's constitution in the Legislature and the courts. Nebraska, a state from the middle of the process (1867) provides useful illustration of the significant questions this verbal variation presents. An 1854 act authorizing the organization of a territorial government for Nebraska and Kansas reserved sections numbered sixteen and thirty six in each township "for the purpose of being applied to schools in said Territory ... ." (Thorpe, II, 1168). Nebraska's enabling act, ten years later, granted the same sections to the state "for the support of common

The variety in language presents interesting questions for use and management of the grants. For example, can land management or permanent fund investment policies be designed to support schools by enhancing local property tax base from which the schools derive much of their funding? The answer would depend, in part, on whether the grant was made "for educational purposes," to be "applied to schools," "for the support of schools," or some combination thereof. Similarly, one recent commentator argued that "particular sections [of granted land] may have historical values that should be preserved to give future generations of school children the opportunity to observe land and the life it supports in a natural setting."[59]

This issue will be revisited below when we attempt to identify the "trust document" and the "trust purpose." For the present it is sufficient to note that although the goal of fostering education is everywhere apparent, the precise definition of that commitment is not. The language stating the purpose of the grant varies considerably.

Evolution of Administrative Provisions. Questions concerning who receives the lands and for what purpose are closely related to practical questions of how they should be managed and by whom. One of the problematic aspects of interpreting the grants, is that there was very little discussion of how they ought to be administered by the recipients. This gives rise to numerous questions: who is the owner, the manager, the trustee (if such there be); how shall management expenses be paid and what costs are legitimately charged against income? Herein we shall discuss the evolution of three key aspects of school land administration: the recipient's authority to lease or sell; the evolution of a permanent fund, and the rise of State Land Boards or Commissions.[60]

Lease, Sell, or Hold It was not always clear that any of the granted lands would be retained and/or managed. Although nothing is said in early Enabling Acts on this subject, the original assumption appears to have been that the townships would lease the lands and use the profits to support schools. Indiana's Constitution, as quoted above, clearly contemplates "improving" the lands for leasing.[61] However, various leasing systems were tried in each of

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schools." (Thorpe, IV, 2345). And the state Constitution, adopted in 1866, contained refers primarily to funds arising from lands granted for "educational and religious purposes." (Thorpe, IV, 2358).

59 McCormick, supra, n. 10, at 537.

60 Terminology varies. Hereafter we shall use the term Commission for generic references.

61 See supra, n. 39 and text accompanying. Congress reserved school lands for for Indiana in 1804. In 1808 the Indiana Court of Common Pleas in various counties were "authorized to lease school sections during the ensuing year, on improvement leases, for not more than five years... Two years later, the same courts were empowered to lease the lands under such restrictions as seemed best to them.... The proceeds were to be applied by the courts 'to the support of common schools according to the true intent of the Act of Congress.' Here, then, six years before the lands had actually been granted and Indiana had become a State, was a law looking to

the five states of the old Northwest, and "in every case it was discarded as a failure."[62] In 1827 Ohio petitioned Congress for authority to sell rather than lease the lands, [63] and thereafter, school lands were generally sold.[64] The shift from lease-dominated to sales-dominated thinking about the school land grants occurred with little ado after early painful experience with leasing.

For present purposes, the more interesting issues concern the evolution of restrictions on sales, and the gradual emergence of a policy of retaining the granted lands. The federal government did not impose sales restrictions as grant conditions until 1875 when the Colorado Enabling Act provided merely that school property had to be sold "at a public sale for not less than $2.50 per acre." All states entering the union after Colorado with the exception of Utah have done so with enabling act restrictions on the sale of the school allotments specified in their enabling acts.[65]

Over time, the provisions became more detailed.[66] This fact is apparently the origin of the argument that Congress, concerned about the lands, became increasingly more cautious in the granting process. The states, however, began imposing sales restrictions on themselves in their own constitutions much earlier. And, the state restrictions from mid-century were much more restrictive than the Enabling Acts *ever* became.[67] For example, the original Kansas constitution, and several versions adopted thereafter between 1861 and 1868, provide for minimum sales prices. The education article of the 1859 version provides that "the school-lands shall not be sold unless such sale is authorized by a vote of the people at a general election."[68] This is still sixteen years before Congress enacted its first sales restriction in Colorado's Enabling Act.

A bouncing ball pattern is apparent in the evolution of sales restrictions provisions: a state

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the establishment of a revenue for the schools. Without discussion, the plan of leasing had been adopted." See Knight, supra, n. 16, at 135.

62 See, for example, Taylor, supra, n. 16, at 93.

63 Discussed in Knight, supra, n. 16, at 139.

64 It is enlightening to note that the Indiana Constitution (discussed supra, n. 31, ff, and text accompanying), disallowed sales until 1820; Congress did not formally grant authority to sell land until 1828. See Knight, supra, n. 16, at 139.

65 Hibbard, supra, n. 16 at 317. See also Koch, supra, n. 16, at 43-56.

66 Compare this provision in the Colorado Enabling act to the language of the New Mexico Enabling Act, discussed below below at n. 87-88 and text accompanying.

67 See Fairfax and Souder, Working Paper 90-4, supra, n. 40.

68 Thorpe, II, 1252.

adopts a restriction in its constitution; variations show up in subsequent state constitutions and occasionally in Enabling Acts; a subsequent state adopts variations on those conditions with further elaborations. This was all played out as a part of individual bargains with states at accession. The courts have tended to style this process of evolving restrictions as federal punishment for bad state behavior.[69] Our data suggest that the courts have failed to understand the origin of the restrictions, and their rationale.

The matter of who authored or agreed to the provisions is more significant than may first appear. As shall be discussed in more detail below, if the restrictions were part of the Enabling Act, then they bind the state and probably cannot be altered absent the consent of Congress. Moreover, if they were a part of the Enabling Act they are also arguably binding on the Federal government and some would assert cannot be abrogated without the consent of the state. If, however, the restrictions are self imposed, the state itself can alter them and the federal government is less likely to feel bound or be held to be bound by them.[70]

By the mid-1830s, the lease-only policy had given way in favor of sales and the sales program gradually became more restrictive. The shift to land retention is less explicit: there is no apparent shift in Enabling Act or Constitutional language, and no plethora of states applying to the federal government for changes that would authorize the states to retain and manage the lands.[71]

How then, did the western states initiate the now dominant program of retaining and managing the granted lands? The shift to retention appears to have occurred gradually at the state level in much the same way it evolved at the federal level. Over time the assumption that the federal government would dispose of all of the public domain lands eroded under a number of pressures.[72] The states were carried along in this same national reorientation. Indeed, many

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69 See Ervien v. United States, 251 U.S. 41, 47-48 (1919), and *Lassen*, supra, n. 30, at 463-64..

70 Discussed below, n. 150 and text accompanying.

71 We have located one case on the subject, one which holds that the authority to sell clearly includes the authority not to sell. This is in accordance with normal trust management principles but the Court ties the conclusion instead to the conditions prevailing at the time of the grant, and the reasonable contemplation a that they would change. See State ex rel. Koch v. Barrett 68 P.2d 504, 507-08 (Mont. 1901).

72 This evolution was not explicit or final until 1976. Everything from the rise of science and scientific bureaucracies in government, the beginning of the Progressive era, and the closing of the frontier to the death of the last passenger pigeon is involved. See Gates, supra, n.3, and Peffer, The Closing of the Public Domain (1950) for starters. See also Fairfax, "Coming of Age in the Bureau of Land Management: Range Management in Search of a Gospel," in National Research Council, Developing Strategies for Rangeland Management, National Academy of Sciences, (A Report Prepared by the Committee on Developing Strategies for Rangeland Management) (1984), at 1689. A key indicator, without so stating, that the federal government was going to retain far more extensive land holdings than the park and forest reservations previously authorized was the passage of the Mineral Lands Leasing Act of 1920. Because the lands had been withdrawn from entry

states did not formally recognize retention as their official policy until the mid-1970s, the same as at the federal level.[73] States that joined the union toward the end of the granting process did so as the sales program ebbed into retention—they retain and manage most of their lands. Older new states vary in the degree to which they held onto their grants.[74]

One consequence of this gradual and unexplicit evolution toward land retention is that the states continue to have a choice regarding whether to sell or retain the lands. And the shift is not absolute. Like the federal government, the states continue to engage in land sales and exchanges.[75] Hence, the shift to retention does not imply that no state trust lands will ever be sold, but rather that the presumption is in favor of retaining rather than disposing of the lands.[76]

Permanent School Fund[77] The concept of a state wide fund and a process for disbursing receipts to local school districts was a logical concomitant of the shift from townships to states as grant recipients: there had to be a kitty from which the state could disburse money to the school districts. This is true even though the permanent fund has a separate history quite apart from the land grants program. At the urging of numerous public and professional groups established to foster public education, even states that did not receive school sections soon established permanent funds for supporting schools. When states rather

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and therefore from patent, leasing was necessary to access the resources, primarily coal. But the subtext, now frequently overlooked, is that the lands would be retained in federal ownership. See Fairfax and Yale, The Federal Lands: A Guide to Planning Management and State Revenues (1987), at 59-62. There are a number of issues concerning which much of the discussion of the shift from a disposition policy to a retention policy at the federal level is not applicable to state policy. Most states began with leasing as part of their mandate. Although leasing was justified primarily as a stopgap until the market stabilizes so it can be sold at a profit, it is different from the federal mandate. The federal government began with a mandate to dispose. These differences are not trivial. However, for the purposes of explaining why there are no clear road signs in this shift in policy from disposition to retention, the same facts are relevant.

73 See FLPMA, supra, n. 5.

74 See below, Figure 2 and text accompanying.

75 Literally every state is still selling land as part of its management activities. See below, n. 278, ff.

76 It is interesting to compare the state trust land managers' notion of retention with that of most federal land managers. At the state level, retention typically implies the idea of maintaining a portfolio of lands for investment and management purposes. The federal land managers seem much more concerned with holding onto the specific acres which are "theirs" to administer. California, Arizona, and Washington have recently established "land banks" to facilitate real estate transactions in their portfolio. All states engage in land exchanges to block in their scattered sections except California which does not. Oregon and Arizona have moved particularly effectively in this direction. See generally, Dragoo, "The Impact of the Federal Land Policy Management Act Upon Statehood Grants and Indemnity Land Selections." 21 Az. Law. Rev. 395 (1979).

77 Not all states use the term permanent school fund. Equivalent phrases include perpetual fund for schools, common school fund, public school fund, and state school fund. The nomenclature varies largely according to what the states first constitution called it. See Dixon, supra, n. 16, p. 3, for a list of which states use which terms. See also Koch, supra, n. 16, pp. 7-22.

than townships began to receive the lands, the idea became ubiquitous and closely tied to school land management.[78] Increasingly elaborate state constitutional provisions detailed the content and management of the permanent school funds. The pattern of evolving permanent fund provisions is confused by the fact that old new states "lapped" the new new ones: that is, long before the accession process was complete, early joiners rewrote their constitutions and included provisions that were then current in the accession process. For example, Louisiana, which had been admitted in 1812 without any school lands, revised its constitution in 1845 to provide for dealing with the proceeds of retroactive grants made by Congress at the insistence of older new states.[79]

Clearly, the whole operation was highly refined before Congress made its first reference to a permanent school fund in school land grant provisions of the 1876 Colorado enabling act. As in the case of restrictions on sales, Congress' direction was far less consequential than those then current in state documents: Congress merely required Colorado to set up a permanent fund, the interest only of which should be expended in the support of schools.[80]

One of the most interesting aspects of the permanent funds is that it confuses a central question which arose toward the close of the century: if there *is* a trust, what is the trust property or corpus? About the permanent funds, there is little question. As soon as there is a trust, it includes the funds. Many state constitutions specifically declare that their permanent funds are to be treated as a "trust." Although the term is not always employed, the implication is quite clear beginning with Michigan's 1837 constitution.[81] Far fewer states have specifically included the lands in the trust. Since most of the specific requirements concerned investment of the funds, the management of retained lands is sometimes confused by provisions which never contemplated lands. To these important issues we will return in section three.

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78 States were soon making detailed provisions regarding how localities could qualify to receive what were then state funds. One of the first was that no school district which offered less than three months of schooling would qualify for what were by then state funds. Perhaps at some future moment in the evolution of K-12 education, some might wish that the federal government had not established a system that was centralized within each state. With the school land grant program, they clearly did so.

79 Specifically, the new constitution provided that the proceeds of all lands heretofore granted by the United States to this State for the use or support of schools, and of all lands which may hereafter be granted or bequeathed to the State "shall be and remain a perpetual fund *on which the State shall pay an annual interest of six per cent;* which interest, together with all the rents of the unsold lands, shall be appropriated to the support of such schools, and this appropriation shall remain inviolable." Thorpe, III, 1047.

80 Thorpe, I, 472-473. Compare with Michigan's Constitution of 1837, infra, n. 81.

81 Thorpe, IV, 1939. Article X of Michigan's original Constitution is typical: "a perpetual fund, the interest of which, together with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the state."

State Land Commissions and Commissioners The pattern regarding grant administration is, as noted above, that very little arrangement was made at the time of the grant for administration thereof. Considering that every state still holding school lands, and some that do not, has a variation on a State Land Commission or Board and Commissioner or Commissioners, it is perhaps surprising that the Congress never mandated same in an enabling act. And, early state constitutions are mixed as to whether responsibility for the lands, and/or the permanent school funds, was vested in the Legislature or in some Commission.

Oregon appears to be the first to provide for a land commission in its original Constitution. Section 5 of the education article in the 1857 Oregon Constitution, two years prior to statehood, establishes a Board of Commissioners. Consisting of the Governor, the Secretary of State, and the State Treasurer, the Board was charged with selling the school lands and investing the fund arising therefrom.[82] This pattern was adopted in other states which established such boards in their constitution. The New Mexico constitution (1910) merely establishes a Commissioner, without a board. Colorado (1876), South Dakota (1889), Montana (1889), Idaho (1890), Wyoming (1890) and Oklahoma (1907) all established boards consisting of a collection of similar ex-officio state officers. South Dakota included on its board the School Superintendents of all its counties. Although this pattern for boards became familiar, they were not uniformly adopted. Kansas (1857), Nevada (1864), Nebraska (1866-67), North Dakota (1889), Washington (1889), Utah (1895), and Arizona (1910) all specifically directed in their constitutions that the Legislature was responsible for providing for the school lands. Interestingly the four states that came in under the 1889 enabling act (North and South Dakota, Washington, and Montana) split on this key aspect of school land management, two setting up commissions and two not, as did Arizona and New Mexico, which both joined under the same 1910 enabling act.

5. What Did this All Look Like at the End?

In the preceding discussion of Indiana's early accession and patterns of grant program evolution in subsequent ones, we emphasized numerous points at which Congressional language protecting granted lands was far less detailed than state language. The same observations are accurate concerning Arizona and New Mexico—the states imposed more rigorous requirements on themselves than Congress did. Indeed, it is also true that most of the later joining states restricted themselves more stringently than the Congress restricted New

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82 Thorpe, V, 3011. Ex Officio boards were widespread and much complained of as a source of school land mismanagement. See Knight, supra, n. 16.

Mexico and Arizona. However, twentieth century accessions are so different from Indiana's that we shall conclude this programmatic overview with a brief look at one of them. Taking New Mexico as an example, the conventional wisdom begins to make sense.

The Enabling Act. Section 15 of the 1850 Congressional act establishing the Territory of New Mexico[83] reserves sections 16 and 36 "for the purpose of being applied to schools... ." Approximately 60 years later a second Enabling Act was passed. In distinction to the brief provisions concerning school land grants to Indiana, New Mexico's grants are the subject of six lengthy sections of the Enabling Act.[84] The school lands figure most prominently in Sections 6, 9, and 10.

Section 6 grants, in addition to the previously reserved sixteenth and thirty sixth sections, sections two and thirty two. Mineral lands are excluded and sections included in national forests are to be administered as part of the forest, with the appropriate portion of forest receipts going to the common school fund, until indemnity lands are selected.

Section 9 makes the ancient grant of 5 per cent of the proceeds of sales of public lands lying within the state. The money is to be paid to a"permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within the said state."

Section 10 specifically provides that lands granted to the state are held "in trust, to be disposed of in whole or in part only in manner as herein provided for and for the several objects specified in the respective granting and confirmatory provisions, and the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

It further provides that disposing of any of the lands or money or other thing of value directly or indirectly for any object other than that for which the lands were granted or in any manner not in conformity with the act will be deemed a "breach of trust." It makes numerous provisions regarding the manner of sale or lease ("only to the highest and best bidder at a public auction") and about the manner of advertising the mandatory auction; about appraisal and minimum prices (lands to the east of certain ridges are not to be sold for less than $5 per acre; to the west, not less than $3 per acre; irrigable lands, not less than $25 per acre). Section 10 also provides that a separate fund shall be established for each of the several objects for which grants are made. It directs the state treasurer on which securities are approved for

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83 Act of September 9, 1850, 9 Statutes at Large 446, Chapter 49.

84 36 Stat. 557 (1910).

investment of the fund, and it declares that any lease, sale, conveyance or contract not in conformity with the provisions of the Enabling Act shall be null and void. Finally, Section 10 declares that it is the duty of the Attorney-General of the United States to prosecute to enforce the provisions relative to the application and disposition of the lands, the products thereof and the funds derived therefrom.[85]

Section 11 provides for surveys of the granted lands by a commission consisting of the governor, the surveyor-general and the attorney-general of the state and Section 12 confirms all grants of lands previously made by Congress. Section 18 reserves all saline lands in the state from entry until Congress shall provide for their disposition.[86]

The State Constitution To these lengthy provisions, the New Mexico state constitution adds little.[87] It describes the management of the school fund in less detail than the Enabling Act.[88] It establishes a formula for distribution of the school fund. Article XIII, which treats public lands is but two paragraphs long. Section 1 establishes a minimum price of $10 per acre for school lands not contiguous to other state lands, and prohibits their sale for ten years after statehood. Section 2 provides for a Commissioner of Public Lands to have "direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law." Article 21 contains a lengthy "compact" with the United States which adds nothing pertinent here.

The brevity of New Mexico's Constitution in comparison to the Enabling Act is striking. In the New Mexico bargain, virtually all the restrictions and conditions are in the congressional statute.

6. Summary

The New Mexico enabling act and constitution represents the end of the accession period. The early enabling acts merely granted the land, and the early state constitutions left major issues to the legislature to sort out. Half way through the 19th century, the states were concerned

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85 This provision is unique to Arizona and New Mexico. It may partially explain why key U.S. Supreme Court decisions are therefore unusually likely to involve cases about those two states. The general trust rule is that once a trust is established the settlor has a very limited role in the administration of the trust. However, the U.S. Government is not a typical settlor.

86 Congress never did loose its grip on the saline lands. See Orfield, supra, n. 16 for the fullest discussion.

87 Thorpe, published in 1909 does not contain the pertinent original Arizona and New Mexico documents. Here we rely on Secretary of State, The Constitution of the State of New Mexico Adopted by the Constitutional Convention Held at Santa Fe, N.M., from October 3 to November 21, 1910, and as Amended, November 6th, 1911 (1912).

merely to provide for the establishment and preservation of a permanent fund whose income was to be devoted to the support of common schools. Later state constitutions make provisions regarding the sale price of school lands, the securities in which the proceeds of the sales can be invested,[89] the management of the fund, and the like.[90]

The pattern observed in the proliferation of both sales restrictions and the spread of permanent school fund and fund management requirements does not support the conventional picture of a concerned Congress acting ever more stringently to bring profligate states to heel. The restrictive provisions are literally all initiated in state constitutions, and are initially elaborated at that level.

Only at the very end of the process, specifically in the 1910 Arizona and New Mexico's accessions, is something which might be called Congressional vigilance apparent. That Enabling Act is peculiar because it is considerably longer than the state constitution. It shows us from whence the conventional wisdom emanates, and further supports the assertion that the grants vary considerably from state to state and over time. Although there is a clear core to the grant program, it evolved differently in the different bargains struck by different states.

The Land and Resources

This same variability is seen in decisions—both historic and contemporary—that different states have made regarding the management of the granted lands and the permanent funds arising therefrom. This section will briefly introduce the current status of those resources by discussing two topics: first, land holdings and holding patterns; and then, resources and the revenues they produce.

1. Land Holdings and Patterns

In the ten western states where we are concentrating, approximately 41 million acres are

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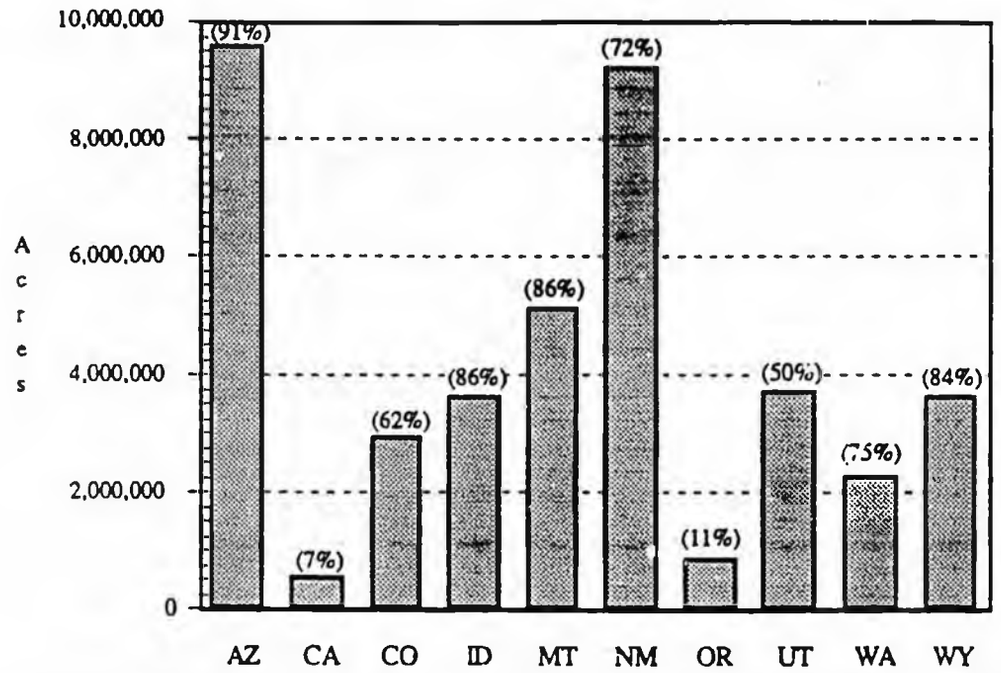
88 Id., Article XII, §§ 2 and 7.

89 Investment policy in the states was, to use Dixon's word, "confused:" "On the one hand existed the notion that the money was intended to be used to build up the state and develop her resources, while it was contended, on the other hand, that the purpose of the trust was to aid the institutions endowed." Supra, n. 16, at 92-93.

90 See Swift, 1911, supra, n. 16, at 124. Some of the impetus for protecting the permanent fund and its purpose may have come from the fact that many of the funds were diverted to other purposes during the Civil War, for the conduct of the war. In addition, many of the railroads and other internal improvements in which the funds were invested, especially in the south, were destroyed during the war. See Swift, id., at 150. Railroad investments lost in the Civil War and never replaced were the subject of recent litigation in Mississippi. See Papasan v. Allain, 106 S. Ct. 2932 (1986).

currently managed by states as part of the school land grants. Three fairly distinct classes can be differentiated based on the extent of land ownership, as can be seen in Figure 1 below.

Figure 1. Current state trust surface land ownership, with percentages of original grants.



Source: Table 6. *Western States Survey Responses*, excluding county forest lands in Oregon and Washington. Original grant acreage, Gates at 806.

Clearly the last two states to receive their trust lands, Arizona and New Mexico, still have the largest amounts - due largely to the fact that they received four sections per township, and that their lands were difficult to sell because of both constitutional limitations and the quality of the land. Those two states, plus Montana, each retain title to over five million acres. Those three states also continue to hold the vast majority of their original grants. Other states (Washington, Idaho, Wyoming), have also held onto most of the lands they were granted, but they do not appear as large holders because they were granted less land to begin with. States which sold most of their lands have the least: California and Oregon. Both states began with enormous granted acreage and neither holds more than a million acres now.[91] The middle group of six

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91 Robinson describes the process whereby granted lands passed speedily into private hands in California. See supra, n. 50, at 189-92. Nevada is a special case. For reasons that aren't too hard to figure, there was not a huge demand for school sections scattered in the desert. Twenty years after statehood Nevada petitioned Congress asking to trade the 4 million acres of scattered sections for approximately 2 million acres of selection rights so that the resources could be concentrated where the demand was. Congress acceded to this request. Most of Nevada's land was taken up as a result of this opportunity to select desirable land, leaving only about 2,000 acres of state trust lands remaining. See Townley, Alfalfa Country: Nevada Land, Water and Politics in the 19th Century, (1976), pp 1-18.

states includes three which have have sold some or much of their lands (Utah, Montana, Colorado), and the three who began with less land. Note that both Oregon (652,000 acres) and Washington (622,500 acres) have large amounts of forest board lands which came to the counties through tax reversions and and purchases[92] and are managed in trust for them by the state.

Although total acreage held is an important data point, the pattern of land holdings is more significant. The shift from disposition to retention left the states holding many parcels which resemble many of the federal lands now managed by the Bureau of Land Management; that is, they are still in public ownership not because anybody had intended to retain them but because they could not be marketed during the era when "disposition" was the goal. For example, 85% of the remaining school lands in California are located in the California desert.[93] Moreover, many of the states continue to hold the majority of their lands in the dispersed pattern of two to four sections per township in which they were granted. This pattern is typical of the state school lands west wide and has significant consequences for management of those *and other* lands. Most obviously it is difficult to plan for and administer scattered parcels of land.

This can be seen in detail in Figure 2. Even in Arizona, New Mexico and Utah where four sections per township were granted for the public schools, no sections have common property lines. This scattering of state owned parcels means that state granted lands are uncommonly likely to be surrounded by neighbors—especially the U.S. Forest Service and Bureau of Land Management—who operate under a significantly different management mandate than the state, and who frequently do not share the state's priorities. This has been particularly difficult when state mineral lands are completely surrounded by federal holdings such as wilderness study areas. Getting access to the parcel and pursuing conflicting goals has been an increasingly difficult problem for state school land managers.[94] Not surprisingly, many states

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92 Washington State has purchased about 80,000 acres of Forest Board Purchase Lands with bond money. Nick Handy, Chief Counsel, Washington State Department of Natural Resources, Pers. Comm. March, 6, 1991.

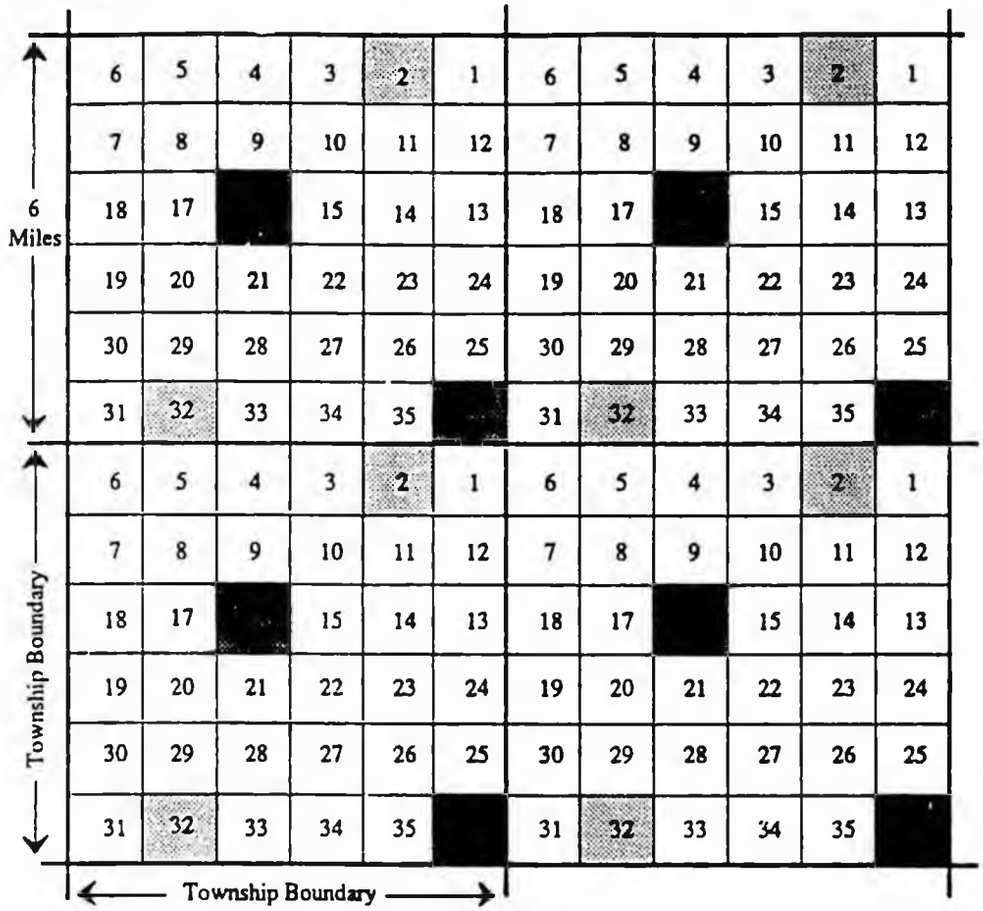
93 But, although it is standard to say of the Federal unreserved, unentered public domain that it was the dreck and nobody wanted it, sometimes that is not the case. Regarding many parcels the truth is that somebody was able to enjoy the benefit of the land without purchasing it and paying taxes on it. By fair means (the state parcel happened to be completely surrounded by Pappy's farm) or foul (e.g., Pappy illegally fenced the state lands and took pot shots at all comers) many settlers successfully trespassed on state school lands for decades. Hence the lands remained in state ownership not because they were worthless but because they had been effectively stolen and title transfer would have been an expensive formality. Discussed in Fairfax, Developing Strategies, supra, at. 72.

94 See for example, Utah v. Andrus [Couer] 486 F. Supp. 995 (1979).

Figure 2. State trust land ownership patterns in each township for public school grants.

State Trust Lands for the support of public schools (common school lands).

Additional sections for public schools in Arizona, New Mexico, and Utah.



pursue land sales and exchanges to "block in" their holdings, that is trade sections with federal and private land holders to aggregate the sections into compact, efficient management units.[95] The original scattering also means that many of the state parcels, once regarded as grazing or agricultural lands, are now surrounded by cities and/or otherwise quite valuable for commercial development. Several states have evolved programs to exploit the commercial development

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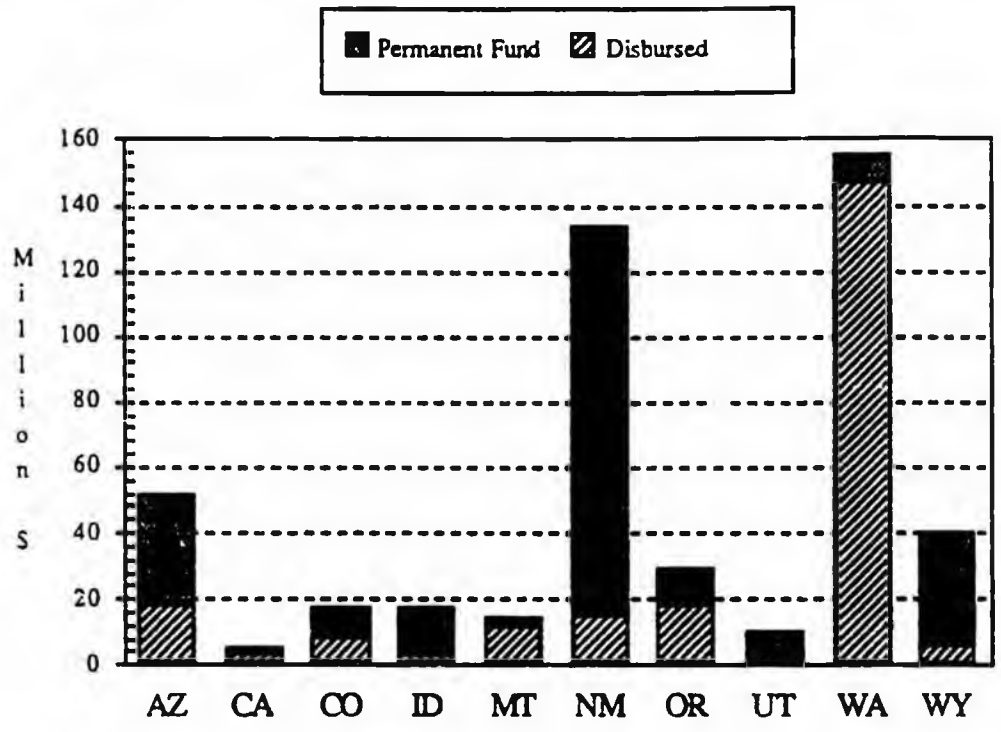
95 Utah's selection efforts were frustrated in Andrus v. Utah 446 U.S. 500 (1980), which held that the Taylor Grazing Act gave the Secretary of the Interior authority to reject state land selections. See Tomsic, "The Loss of the States' Right to Indemnify Preempted School Land Grants on the Basis of Equal Acreage." 1981 Utah Law Rev. 409 (1981). This led the Governor to propose a massive federal-state land exchange, known as Project Bold, which also failed. See Matheson and Becker, "Improving Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience." 33 Rocky Mt. Mineral Law Inst. 4-1 (1987) and references cited.

potential of these lands. Arizona, California, and Utah are also still in the process of selecting lieu lands.[96]

2. Resources and Revenues

Revenues are received by the state land office from three basic sources: (1) royalties from the sale of non-renewable resources, again usually oil, gas, coal, and minerals; (2) revenues from the sale of granted trust lands; and (3) revenues from the use of use of renewable resources, usually agriculture and grazing fees, timber sales, commercial or special purpose leases, and the surface rentals and bonus bids received for oil, gas, coal, and mineral leases.

Figure 3. Annual receipts from state trust land management activities, 1987-88.



Source: Table 1. Western States Survey Responses

Figure 3 shows annual receipts from state trust land management activities in ten western states. There is considerable variation in the annual revenues received by the states from trust lands. States can be divided easily into two or three categories: those that receive less than $20 million per year in revenues (CA[97], CO, ID, MT, and UT); those that receive greater than $20

96 See supra, n. 27, that when the granted section had been sold, granted or otherwise disposed of the state was authorized to select alternative land "in lieu" of the original parcel.

97 Sovereign lands managed by the State Land Office are not included as trust lands. California is somewhat

million per year but less than $60 - $80 million per year (AZ, OR, and WY); and those that have very high levels of trust revenues (NM and WA). If breaking down into only two categories, clearly New Mexico and Washington are still in a category by themselves and every other state is lumped.

Permanent Funds

State permanent funds are the repository of, among other things, revenues received from the sale of trust lands and from royalties on non-renewable resources, usually from oil, gas and coal, leases. The annual interest from these funds is disbursed to beneficiaries based on the contributions of their lands. State constitutions vary considerably regarding what is included in the fund in addition to the revenues. Indiana's original constitution simply stated that money raised from the sale of the lands would "be and remain a fund for the exclusive purpose of promoting the interest of literature and science." Louisiana's 1845 revised constitution was the first to provide that the permanent fund would include all escheat land and property. Wisconsin's fund added fines, payments made in lieu of military service, all unspecified federal grants and the 5% of receipts on sale of federal lands in the state which it was customary to grant to the states.[98]

Inspection of Figure 4 shows the extent of the permanent funds in ten western states. The states cannot necessarily be easily divided into groups according to how much money is in the fund. California has the least amount of permanent funds since its fund was liquidated.[99] Utah has the next lowest amount of permanent funds due to the fact that in the early 1980s, faced with a large budget cut of one-third, the beneficiaries were allowed to liquidate a portion of their permanent funds to maintain their budgets. New Mexico and Wyoming have high levels of permanent funds due to oil and gas and coal royalties. The high level in Arizona is

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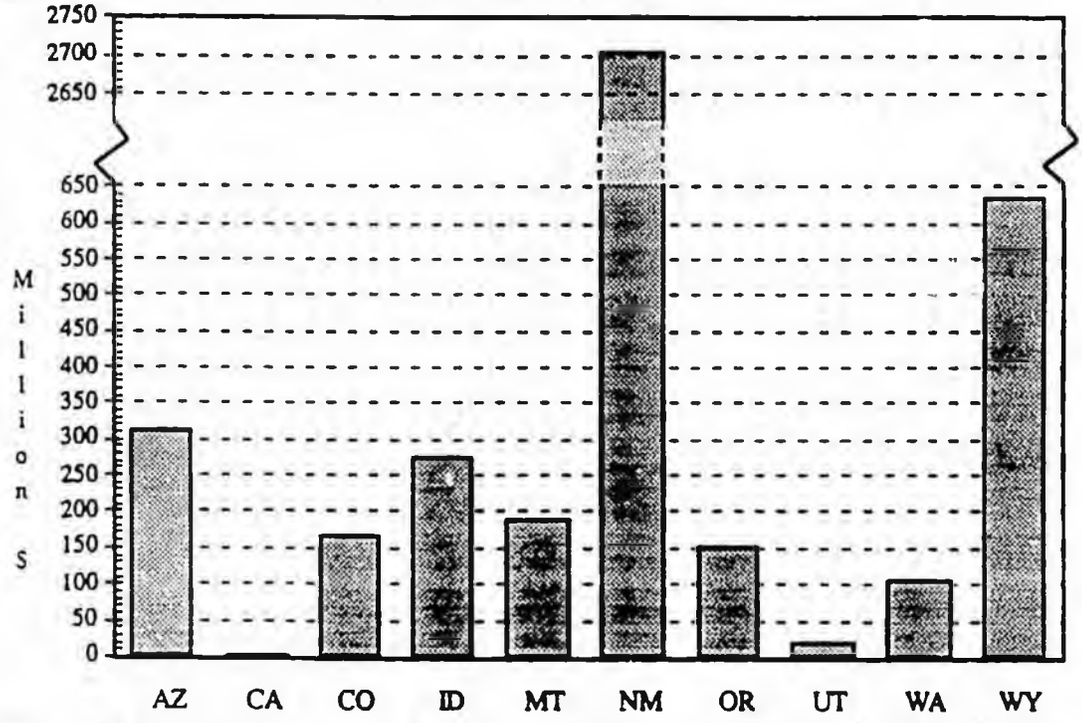
peculiar, since if you look at its total state land office revenues they lead all other states with about $230 million in annually. However, about $220 million of this is from oil and gas royalties and rentals on their sovereign lands in the Santa Barbara Channel.

98 Fairfax and Souder, Working Paper 90-4, supra, n. 40.

99 All net income (both rentals and royalties) from school and in-lieu lands is now placed in the state Teachers' Retirement Fund (A.C.C.-P.R.C. §6217.5 and A.C.C.-E.C. §24702(a)), while net receipts from land sales go into the State Land Bank to purchase replacement lands (A.C.C.-P.R.C. §6217.7). There are two exceptions to this division: (1) the two state sections within the Elk Hills Naval Petroleum Reserve that the state claims; royalties from these lands, or their in-lieu replacement, go into the State Land Bank (A.C.C.-E.C. §24702(a) with the interest only going into the Teachers' Retirement Fund. (2) Geothermal indemnity lands (A.C.C.-P.R.C. §3826) income is divided fifty percent to the Geothermal Resources Development Account (30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions, and 40% to the county where the revenues were generated; while the other fifty percent goes to the Teachers' Retirement Fund (A.C.C.-P.R.C. §3826 and A.C.C.-E.C. §24702).

less easily explained: it has no significant oil, gas or coal royalties, its mining royalties where set below fair market value until recently, and it still retains almost all its originally granted lands (92%). However, in 1987-88 the land office received almost $24 million in land sales, mostly for lands surrounding urbanizing areas. Washington's case is similar; however, its permanent fund came primarily from early land sales. Its current policy of not decreasing its trust land base means that land sales receipts no longer are deposited in the permanent fund, but are used instead to purchase replacement property. The other states with smaller amounts of permanent funds have either sold many of their lands (Oregon), or have more limited amounts of royalty income than the top producers (Colorado, Idaho and Montana).

Figure 4. State permanent fund levels, 1987-88.



Source: Table 3. Western States Survey Responses. For Washington, Office of Financial Management. Comprehensive Annual Financial Report for the Fiscal Year ended June 30, 1987, at 22, for common school permanent fund only.

Differences among the states in the division of revenues are primarily a result of their original constitutions.[100] The original reason for their creation is that permanent funds were considered just that—permanent—while the lands were expected to pass into private hands. Basically, the differences today in the amounts of permanent funds is due to two factors: (1) the amount of lands sold for low prices in the early days of statehood; and (2) the amounts of mineral royalty income accruing to the permanent funds. Lands sold before the 1927 passage of the Jones Act

100 See Fairfax and Souder, Working Paper 90-4 (1990), supra, n. 40 for a complete enumeration.

gave the states legal title to their school sections classified as mineral in character also prevented the states from selling the mineral rights along with the surface lands.[101]

Thus California, Colorado, Nevada, and Oregon sold whatever unknown minerals were on their lands, often only retaining a one-sixteenth royalty right, if any. This problem was especially prevalent in states that had lands valued for surface uses, while the value of the subsurface resources was unknown, or masked for fraudulent purposes.[102] In the other states where surface rights were not in demand, settlement and land claims did not occur on a large scale until either the restrictions on purchase of lands were stricter (New Mexico), or after passage of the Jones Act (Utah and Wyoming). The Jones Act allowed states "lucky" enough to have lands that nobody wanted to capture the mineral values of these lands for the trust.[103] This occurred in most states after the OPEC oil embargoes in 1973 pushed the prices for petroleum products up and spurred demand for state leases.[104]

The tendency to treat the granted lands as if they were all the same is clearly inaccurate. As the program evolved, different states assumed different responsibilities for the care and management of the land and the funds it produced. The resources granted vary even more strikingly--some states received apparently worthless desert which they could not sell and are now possessed of valuable minerals deposits. Apparently better endowed states, such as California, now hold neither extensive lands nor significant permanent funds.

III. QUESTING AFTER MANAGEMENT FLEXIBILITY

We have seen that the grants do, or ought to, mean different things in different states. It is now possible to proceed with the main business of the paper: confronting and unwinding the idea that the management of the granted lands is narrowly constrained by economic maximization principles. This single mindedness arises, as noted at the outset, from the deeply ingrained idea that the school lands management is bound to simple pursuit of economic returns because it is defined by basic trust notions.

This leaves us with two questions: First, are the school land grants appropriately viewed as a

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101 See supra, n. 50.

102 See Puter, Looters of the Public Domain (1908) for the classic, first hand account of fraud associated with state land selections. See also Uzes, Chaining the Land: A History of Surveying in California (1977).

103 Basically, if there wasn't water, nobody wanted the lands. See Townley, supra, n. 89, for a description of the problems in Nevada's early days with selling its trust lands.

104 See Souder, supra, n. 24, particularly Chapter 5 for a further discussion of price trends in crude oil and coal and their effects on trust revenues going into permanent funds.

trust? Our "yes" on that issue has more qualifications and textures than the conventional wisdom, but leads nevertheless to the second query: does the trust bind school land managers to pursue economic maximization? The "no" response here includes two arguments: first, economic maximization is not the only component of trust management; second, economic maximization is not an inflexible mandate in any event. In the main, these points are not startling discoveries. However, they have not been adequately raised and discussed in the context of the school lands management, and there is profit, in terms of perspective and flexibility, in doing so now.

Before we begin that discussion, a few words about the general contours of the case law are in order. The present section makes two kinds of observations about nearly five hundred cases which were reviewed in the process of preparing to write it.[105] First, it discusses why, if a review of the historic documents reveals so much diversity among states, is the conventional wisdom appear so monochromatic?[106] Second, it characterizes the disputes and makes some preliminary comments about the cases as a group.

Origins of Unanimity

One of the interesting things about reading the case law as opposed to the constitutions is that it rapidly begins to appear that the school land grants are all essentially the same. After such excruciating efforts to understand and describe diversity and change in the grant program, we have asked why this is so. Our answer begins with the routine observation that when any aspect of the confusion we have so carefully exhumed results in a dispute, the issue is defined and interpreted by courts. Lawyers and judges have, not unpredictably, looked to familiar trust principles[107] and previous decisions to unravel claims and counterclaims about the school

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105 Fairfax and Phillips, State Trust Lands Case Law and Attorney General's Opinions. A Joint Program of the State Lands Project and the Western States Land Commissioners Association Legal Committee. Draft. (1991).

106 It would be easy to overstate the consistency. As everyone who has read a group of cases in any area knows, eventually somebody mentions almost everything conceivable. We are describing, of course, the overriding and much cited themes rather than all the wild hares that ever ran through a single or a few decisions. Nevertheless colleague Nick Handy, Chief Counsel, Washington Department of Natural Resources answers this rhetorical question differently. He asserts that similar terminology in different documents [see e.g., supra, notes 54-59 and text accompanying] means essentially the same thing from one state to another, and that the courts have been "remarkably consistent" in interpreting those documents. Hence, there is less diversity than we have alleged. Pers. comm., March 6, 1991.

107 It will be argued below that the trust theme did not appear until relatively recently in land grant interpretation. One reason is the late arrival on the scene of the Arizona-New Mexico Enabling Act. See supra, n. 93. The other reason may be that the trust notion itself did not emerge until the turn of the 19th century century as a stable component of American law. A course in trusts was not taught in American law schools until a Professor Ames initiated the first course at Harvard in 1882. His casebook on the subject, first published in that same year, contained 200 cases, one hundred and seventy five of which were English cases. See Scott,

lands.

Two familiar judicial procedures have inclined the decisions, on balance, to simplify around a few tractable themes. These procedures are not peculiar to school lands cases. First, it is difficult to gather data on one state's situation, let alone gather enough to see patterns over time. The effect has been for the distinctions to be blurred and for what is familiar, the trust principles, to dominate what is not familiar, the peculiarities of public lands history and policy.

Second, normal deference to U.S. Supreme Court decisions has given this blurring a particular flavor in the school lands setting. Unique provisions in the Arizona and New Mexico Enabling Act authorize the U. S. Attorney General to enforce the provisions of the act.[108] Cases from Arizona and New Mexico have dominated Supreme Court discussion of the school lands. But those states are not an accurate guide to grants in other states. Nevertheless, precedents from Arizona and New Mexico have become central in interpreting the grants in other jurisdictions.[109]

This suggests, correctly, that the conventional wisdom, and the unanimity are of relatively recent origin. Although a trust has been mentioned in connection with the lands since the 1850s, the frequency of the references and the dominance of the doctrine is most apparent as the 20th century advances.[110]

To suggest the validity of those observations without becoming mired in 150 years of cases, we will discuss but one. A brief review of *County of Skamania* v. *State*[111] will demonstrate

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"Fifty Years of Trusts." 50 Harvard L.R. 60 (1936).

108 It is not clear how much of the domination of Arizona and New Mexico cases to attach to this provision. The first federal prosecution, Ervien v. United States, 251 U.S. 41 (1919) was not long in coming. The Supreme Court was explicitly reluctant to hold that a state law allowing use of trust receipts to advertise New Mexico lands generally was a "breach of the trust" (at 48) but affirmed a Eighth Circuit opinion so stating. The key case in the contemporary interpretation of the school grants, Lassen v. Arizona Highway Department, 385 U.S. 458 (1967) contains a more explicit discussion of trust obligations but did not directly involve the U.S. Attorney General. The U.S. was granted special leave to argue the case as an amicus curiae however.

109 This is in spite of the fact that the Supreme Court has been uncommonly careful to avoid sweeping generalizations and is uncharacteristically well informed about the grant process. It is interesting to note, however, that the Supreme Court noted in its *Lassen* decision that it took the case "because of the importance of the issues to other states which received the grants." At 461.

110 Discussed below at n. 144-151 and text accompanying.

111 685 P.2d 576 (Wash. 1984). The facts concern timber purchase contracts entered into by the State Department of Natural Resources, which manages the school lands in part by selling harvest rights to timber on state lands. The contracts were entered into during the period January, 1978 and July, 1980. At that time, purchasers expected the value of timber to rise, and bid quite high for timber which, in the natural course of events they would harvest several years hence. When the opposite occurred, and timber prices plummeted, the state legislature in Washington passed a statute which, among other things, allowed the purchasers to terminate their contracts if they forfeited their original small deposit. *Skamania* at 578-79. The Legislature justified its

that the process of simplification is operational. Two things interest us in this context: the admixture of citations from diverse jurisdictions without adequate response to differences in state obligations, and the centrality of Supreme Court decisions without apparent awareness that imports from Arizona and New Mexico are occurring and/or are particularly inappropriate.

The *Skamania* Court began by asserting the relevance of trust principles: "Every court," it asserts, "that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees."[112] The *Skamania* court draws our attention, "for cases in which courts have applied private trust principles to federal land grant trusts," to cases from Oklahoma, Alaska, and Nebraska. Further on, the Court concludes that "divided loyalty constitutes a breach of trust," and argues that its holding "is consistent with a host of cases from other jurisdictions. To our knowledge, every case that has considered similar issues has held that the state as trustee may not use trust assets to pursue other state goals."[113]

Trust principles in state A do generally resemble trust principles in state B, but the Court draws an over simplified picture of case law from other jurisdictions. What is problematic is that the similarities in trust law from state to state have been substituted for a clear understanding of the differences in the school land grant programs from state to state, and even for an awareness that differences in case law exist. The Court's reliance on simplified versions of precedent from other states may be peculiarly inappropriate in this instance, but it is characteristic of the school lands cases in general.

This process has been exacerbated by reliance on decisions of the Supreme Court. In the case of land grants this normal deference is likely to be misleading because the special role of the U.S. Attorney General defined in the Enabling Act gives rise to a disproportionate number of Supreme Court decisions interpreting the Arizona and New Mexico Enabling Acts. This is not, as has been repeatedly noted, a good guide to what was agreed to in other states. The problem is well illustrated by the *Skamania* court. For the notion that the trusts are real and enforceable and "impose upon the state the same fiduciary duties applicable to private trustees"

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action, vis-a-vis the trust, on the grounds that acted in both the long and short term benefit of the trust—it protected the trust by preventing bankruptcies and disruption within the market for its assets. *Skamania* at 581. Skamania County sued the state alleging that the Act was "a breach of the state's fiduciary duties to the trust and a violation of several state and federal constitutional provisions." *Skamania* at 579.

112 The matter is slightly more complex than that: according to its Constitution, Washington's granted land may be "held in trust *for all the people*." Hence the meaning of the provision vis-a-vis undivided loyalty to a particular beneficiary is less unambiguous than the courts discussion would suggest. We will return to this in the next section.

113 *Skamania*, at 582.

the court relies on *Lassen v. Arizona.* [114]

In *Lassen* the Supreme Court overturned a state court decision allowing an uncompensated taking of school lands for use by the state highway department. The *Skamania* Court embraced *Lassen* fully, noting that "[a]lthough *Lassen* involved a different enabling act, the principle of *Lassen* applies to Washington's Enabling Act." This assertion is supported by reference to a Washington case, which presumably ought to be interpreting Washington law. However, that case, *United States* v. *111.2 Acres of Land,*[115] merely cites *Lassen* again:

> There have been intimations that school land trusts are merely honorary, that there is a "sacred obligation imposed on (the state's) public faith," but no legal obligation. These intimations have been dispelled by *Lassen* v. *Arizona* ... This trust is real, not illusory.[116]

In Washington the trust is unquestionably "real." Washington entered the Union under the Omnibus Enabling Act which did not establish a trust. Washington's state constitution clearly did so. Its specific provision is especially relevant to the issue of "undivided loyalty" about which the *Skamania* court was so emphatic: it states unambiguously that "all lands granted are held in trust *for all the people.*"[117] That language does not obviously justify use of trust resources to support stability among timber purchasers or in local economies. However, if the trust is to benefit all the people, it is not clear how undivided loyalty ought to be defined. The *Skamania* court never addressed the issue.

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[114] *Skamania*, at 580: "the Supreme Court, interpreting the Arizona Enabling Act, held that Arizona could not transfer easements across trust lands without compensation to the trust. The Court stated that the Arizona Enabling Act "contains 'a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose.'" *Lassen*, as the *Skamania* court notes, was actually citing Ervien v. United States, 251 U.S. 41, 47 (1919). Whether *Ervien* supports the *Skamania* court's point is unclear following a reading of the subsequent paragraphs in the 1919 decision. Discussed supra, n. 106.

[115] 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd F.2d 561 (9th Cir. 1970).

[116] Id., at 580. It is worth noting that both *111.2 Acres* and the *Skamania* court do cite in addition State ex rel. Hellar v. Young, 21 Wash. 391, 58 P. 220 (1899) as a case "in which courts have applied private trust principles to federal land grant trusts" *[Skamania*, at 580] or for the notion that "Section 10 of the Enabling Act and Article XVI, section 1 of the Washington Constitution constitute a declaration of trust." [*111.2 Acres*, at 1049]. Hellar in fact does neither of those things. It does not mention the Enabling Act or Section 10 of the Constitution, although it does discuss parts of Section 5 on one page. Nor does it discuss trust principles or even mention the word trust beyond one simple sentence ("But the permanent school fund of this state must be regarded as a trust fund." at 221), in a decision which holds that warrants drawn by the auditor of the state upon the state's general fund cannot be paid out of the permanent fund when there is no money in the general fund "legally available to pay the warrant." Id, at 220-21.

[117] Thorpe, VII, 4000. Clearly "all the people" must remain within the context of the purpose of the grant as expressed in the enabling act. Don Lee Fraser, former Supervisor of the Washington Department of Natural Resources comments as follows: "It was our impression that in earlier grants to other states ... the 16's and 36's were to support school within the township. Washington's constitution made it clear that this was not the case." Pers. Comm., March 13, 1991. This issue is not peculiar to Washington. See Jerke v. State Department of Lands, 597 P.2d 49 (Mont, 1979), at 50, and cases cited therein. See also Beaver, supra, n. 10, discussed n. 58 supra, n. 10 for another view of this issue.

The point here is a simple one. Trust principles, especially those enshrined ambiguously[118] in a relatively few Supreme Court cases, have come to dominate judicial understanding of school grants. The difficulty of obtaining alternative information has combined with the standard reliance on precedent and higher courts to erode appreciation of differences in state accession bargains. Citing a Washington state court decision that relies, at bottom, on *Lassen* invisibly incorporates Arizona's statehood bargain into Washington state's. This gradual process of accreting judicial decisions has rounded the angles and left us with the operating assumption that the grants are trusts and they are basically the same.

A Note about the Cases More Generally

All of the cases that involve school lands are not of equal interest, either because some issues of great moment in a previous era are now considered resolved, or because they are beyond the scope of the present inquiry. For example, numerous early disputes between rival title holders center on determining at what point in the granting process the state, as opposed to the federal government, became qualified to sell or otherwise dispose of the lands.[119] That issue is now resolved, and although the discussion in some of the cases is interesting, occasionally still relevant to live issues, the specific issues are not. Similarly, much of the case law in Utah involves the issue of indemnity land selections, particularly as they are or are not applied to mineral lands.[120] That is still an interesting and important conflict, but it is the subject for another paper.

In spite of such diverticulae, it is fair to say that the bulk of the cases concern the relationship between the State Land Commissioner and lessees who work the land.[121] Frequent issues

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118 *Ervien* appears to put little reliance on trust principles and draws instead on the authority of the federal government to make specific grants for specific purposes (at 48). The application of trust principles is also selective, emphasizing undivided loyalty and maximum returns, and rarely, if ever protection of the trust property. See Beaver, supra, n. 10, at 1.

119 See, for example, Doll v. Meador 16 Cal. 295 (1860); Middleton v. Low 30 Cal. Sp. Ct 59 (1886); Jacobs v. Walker 90 Cal. 43 (1891). See also Trustees for Vincinnes.University v. State of Indiana, 55 U.S. 268 (1852) in which the township successfully defended its status as trustee against a state attempt to usurp the role. Note however, that this is a university grant not a school grant case.

120 Utah's enabling act is neutral about whether or not mineral lands are included in the sections designated as school lands. An early case United States v. Sweet, 245 U.S. 562 (1917) upheld the Department of the Interior's view that "known mineral lands" were excluded "by implication" in Utah's enabling act. Congress changed this by statute in 1927 and explicitly included mineral lands in the grants for schools See Act of Jan. 25, 1927, 44 Stat. 1026027, as amended 43 U.S.C. Sec. 870-71.

121 Like the federal government, the school land managers have generally relied on private entrepreneurs to cut the timber, explore for and extract the minerals, and manage the cattle on their lands. Recent efforts by some states to develop urban, waterfront and other commercially valuable real estate holdings constitute a notable exception to this generalization.

include the legality and implementation of a preference right to renew a lease; the Commissioner's discretion to reject or accept a specific bid; and the right of the lessee to compensation for improvements made on leased land. Over time, the trust doctrine has increasingly come into play in answering these questions For example, if the lessee has a preference right to renew a lease, but another party offers a higher return to the trust, must the statutory preference right fail?[122] Or, is the Commissioner authorized to reject the high bid if s/he concludes that a lower bidder will be a better steward of trust resources?[123]

Nevertheless, the cases are not always resolved by unalloyed reference to trust principles. Unlike a normal trustee, such as a bank, the State Land Commissioner is both a trustee and a government administrator. Hence two threads of standard judicial doctrine get intertwined.[124] The Courts frequently appear to lay aside trust obligations to rely on deference which the courts traditionally pay to administrators exercising discretion in their area of expertise.

It would be too tidy to assert that when a Commissioner's decision is challenged by a beneficiary, trust obligations are the primary decision rule and if challenged by a lessee, the decision goes off on discretion. However, the pattern is clearly that beneficiary suits are resolved with the trust the dominant theme, and in the much more frequent lessee challenges, administrative law principles are far more visible.

It is also true that disposal as sale is more likely to get scrutinized under strict application of trust principles than disposal as lease.[125] When leasing is involved, and the dispute is among lessees, discretion is likely to be an issue, if not the central issue. Indeed, the interplay between administrative discretion and trust obligations is one of the aspects of trust land case law which intrigues one further and further into the morass.[126]

The most interesting disposal cases are those which involve a taking of school lands for a

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122 Jerke v. St. Dept of Lands 597 P.2d 49 (1979) is interesting on this point.

123 Caffall Bros Forest Products v. State, 79 Wash. 223, 484 P.2d 912 (1971) is typical of the genre.

124 The two strands are especially clear in Jeppeson v. St Department of Lands 667 P.2d 428 (1983).

125 Although what real estate transactions constitute disposal is itself frequently the issue. See U.S. v. Fuller, 20 F. Supp. 839 (D. Idaho, 1937).

126 This trust/discretion issue frequently gets expressed in questions as "who is the trustee?" Administrator's decisions appear to have least weight when they are undertaken in response to acts of the Legislature which is frequently viewed by courts as an outsider trying to protect an established industry. This was the scenario, as the court perceived it, in *Skamania*. See also the tension in the following passage from *Nigh* : "While the Legislature does have the power to, and may, regulate the activities of the Commissioners [the Trustees] it can neither abridge nor impair their freedom to function in utmost good faith in the day-to-day discharge of their public obligation as managers of the trust estate and while acting on behalf of the State as Trustee." Supra, n. 10, at 238.

public purpose. There are three potential protagonists: a private corporation such as a ditch company which has been granted a way of necessity; the state, for highways or other purposes; the federal government, for park, road, or irrigation purposes. As shall be discussed in more detail below, early state cases permitted use of school lands in diverse contexts, and typically found no need to compensate the permanent fund for the use.[127]. One sign that the trust concept was taking hold in connection with school lands management is to be found in the growing number of cases over time that prohibit takings and require compensation.[128]

Another important pattern is that historically the beneficiaries have rarely been plaintiffs in trust land litigation. Beneficiaries have had a difficult time bringing complaints to the federal courts. The Supreme Court has long held that "Congress alone has the power to enforce the conditions of" grants it has made.[129] Until the state courts began to embrace trust principles, state litigation was not likely to be fruitful. The beneficiary's cause was not unlikely, however, to be defended by the trustee. When State Land Commissioners believe their authority is threatened, they will under the right political circumstances, defend trust principles.[130] Conversely, the beneficiaries have apparently "lost" in many cases in which they were not a party—for example those which tend to put local economic development over the trust.[131] Beneficiary initiated litigation is recent and successful.[132]

1. Question One--Is This A Trust

Earlier, we raised the point that it is not clear that the trust notion is appropriately applied to school land grants until fairly late in the accession process, perhaps not until the very end.

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127 See, for example Ross v. Trustees of the University of Wyoming, 30 Wyo. 433, 222 P. 3 (1924); Grosetta v. Choate 75 P. 2d 1031 (Ariz. 1938).

128 See for example State v. Walker. 301 P.2d 317 (1956); Ebke v. Board of Educational Lands and Funds 47 N.W. 2d 520 (Neb. 1951).

129 Emigrant Co. v. County of Adams, 100 U.S. 61, 69 (1879); see also Mills County, Iowa v. Burlington and Missouri River Railroad Co., 107 U.S. 557 (1881); Sterns v. Minnesota 179 U.S. 223 (1900). In Essling v. Brubaker 55 F.R.D. 360 (D. Minn 1971) the attempt of two minor school children to challenge acts of the Commissioner as a breach of trust was denied because the court did not have jurisdiction over the subject matter. In Segner v. State Investment Board, supra, n. 23, Minnesota argued that the schools not the school children were the beneficiary. Gail Lewellan and Andrew Tournville, Assistant Attorneys General, Minnesota, pers. comm., March 11, 1991.

130 *Skamania* is apparently an example of the wrong political circumstances. Although the DNR was clearly on record opposing the legislation at issue and supported the county in court, it did not bring the case. See also *Papisan*, supra, n. 88.

131 See, for example, Manning v. Perry, 62 P.2d 693 (1935). But see also *Ervien* and *Lassen* where they "won" without being a party.

132 See *Nigh*, supra, n. 10 and *Skamania*, supra, n. 111, for example.

Clearly both Congress and the states viewed the New Mexico and Arizona grants as trusts from the outset. Also clearly, somewhere in the Indiana process, the state created a trust. But for the intervening states, we have seen, the questions of who made the trust, hence, who is bound by it are live and important issues.

We begin with definitions of fundamental terms:

> A *trust* is a fiduciary relationship with respect to property in which person by whom the title to the property is held is subject to equitable duties to keep or use the property for the benefit of another.
>
> A *fiduciary relationship* places on the trustee the duty to act with strict honesty and candor and solely in the interest of the beneficiary.
>
> The *settlor* of a trust is the person creates a trust.
>
> The *trustee* is the person holding property in trust is the trustee.
>
> The property held in trust is the *trust property* .
>
> The *beneficiary* is the person for whose benefit the trust property is held in trust.
>
> The *trust instrument* is the "manifestation of the intention of the settlor" by which property interests are vested in the trustee and beneficiary and the rights and duties of the parties (called the trust terms) are set forth in a manner which admits of its proof in judicial proceedings.[133]

When a trust is established it invokes an enormous range of rules, defined over centuries in British common law and more recently in American common law,[134] codified with some state-by-state variations, and which are enforceable in the courts. Most of the rules, and certainly the ones most pertinent here, define the obligations of the trustee. Without the deep veneer of case interpretation, the obligations sound not unlike the Girl Scout Oath: to exercise prudence, skill and diligence in caring for the trust; to proceed with undivided loyalty to the beneficiary; to deal with the beneficiary with fairness, openness, honesty, and disclose fully to the beneficiary; to make the trust productive; to preserve and protect the trust property; to defend the trust against the settlor and all others; to separate the trust property from all other properties. Where the duty to make the trust productive might conflict with the duty to preserve and care for the trust, the rule is that the trustee must act as a prudent investor.[135]

Although it is not necessary to have a formal document or agreement which explicitly states that there is a trust[136], neither will the court presume that there is a trust implied,[137] For example,

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133 Herein we weave together Restatement, Second, Trusts §§ 2, 3, and 4, and the less turgid prose of George T. Bogert Trusts (1987), at 1-2.

134 See supra, n. 105.

135 See Restatement, Trusts, Second, §§ 170-183.

136 Restatement, Second, Trusts, § 24 (1).

neither the absence nor the presence of the word "trust" in whatever language is alleged to have established the trust is dispositive of the issue.[138] Nor will courts find an intention to establish a trust in mere "precatory words," that is words that express "a suggestion or wish that the transferee should use or dispose of the property in a certain manner or "impose merely a moral obligation."[139]

In order to have a trust, three elements must be present. First, there must be an expression of intent. No trust is created unless the settlor "manifests an intention to impose duties which are enforceable in the courts."[140] Second, there must be at least a beneficiary. "If the beneficiary cannot be ascertained, no trust is created."[141] Finally, there must be a property interest which is in existence or ascertainable and is to be held for the benefit of the beneficiary.[142]

There is no question about the last—the Congress clearly had title to lands which it could and did convey. And, although discussions below will elaborate somewhat on confusion already introduced about beneficiaries, we are not arguing that the beneficiary has been inadequately identified. The issue is with the first, the *intent* to establish a trust. Although the Courts will not require a settlor to make explicit identification of the trustee, the beneficiary, clarity about those things is an important indicator of intent, and "ambiguity in the description of the trust elements may tend to show that no trust was intended."[143]

Once it is found to be established, the description of the trust elements are central in deciding how it should be administered. Therefore, this discussion will focus on very basic questions: what is the trust document, who can alter it and how; what is the trust property; what is the stated purpose of the trust and who or what is the beneficiary; and who is the trustee? We will not explore every nook and cranny of these issues; rather we will point to general trends and issues that are either ripe for further exploration or which point, as this section intends, toward greater management flexibility.

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137 Id., § 24 (2). We are not particularly interested in the notion of an implied trust here. With inconsequential exceptions, the idea is that the accession documents are the trust instrument, and that no implication of trust is required.

138 Id., at § 24 (2).

139 Id., at § 25 (b).

140 Id., at § 25 (a).

141 Id., at § 25, 112.

142 Bogert, supra, n. 131, at 5.

143 Id., at 25 paraphrasing Restatement, Torts, Second, § 25.

2. What Is the Trust Instrument

"A state's obligations concerning school trust lands," intones one recent commentator discussing Utah, "stems from the state's enabling act and the state's constitution."[144] But the matter is far more complex. It is not atypical to find an enabling act that does not say the same thing as the state constitution, or a state constitution that says conflicting things at different places. So, while obligations may indeed "stem from" those documents, they are not defined by them. Moreover, the state's obligations are not the only ones that concern us. We are also interested to know what, if anything, obliges the federal government.

To be logically complete, this quest for a full definition of trust documents and trust obligations would have to deal with the full hierarchy of federal and state constitutions, amended state constitutions, and federal and state statutes, their relationship to each other and to trust principles.[145] Although we have discovered that questing after such completeness has some entertainment value, it is beyond the scope of the present undertaking. Fragments of the full hierarchy of questions will appear in subsequent sections concerning trust purposes and the trustee. Herein we will focus on the most obvious "trust instrument" issues: what accession language binds either the federal government and/or the state?

Even this small subset of the question has enormous practical sig. ficance. If the lands were granted by a trust agreement that binds both state and Congress, it would arguable that there would be some limits on subsequent federal programs which impede the state's ability to pursue trust objectives. Similarly, it would seem that having bound itself to a trust in its Constitution, the state would be restricted in its ability to enact subsequent statute which violate the trust or limit its own ability to pursue trust objectives. Finally, if state and federal government are mutually bound by a contract entered into at statehood, it would seem that neither can change the trust without the consent of the other.[146] Obviously, identifying the trust document is a central task.

The Trust Document

There would seem to be three points of departure for doing so. First, one could ignore the

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144 Basset, supra, n. 6, at 198.

145 We will ignore the issue of preemption here, having just recently pawed through it in a different but relevant context elsewhere. See Cowart and Fairfax, "Public Lands Federalism: Judicial Theory and Administrative Reality." 15 ELQ 375 (1988).

146 It is also possible that neither party can change the contract at all. Because they have been changed frequently, see below, n. 302, ff, we will ignore that logical possibility. .

state constitution and argue that trust obligations are defined in the enabling act. Second, one could find the trust document in the combination of the enabling act and the state's acceptance of its provisions.[147] Finally one could argue that the "compact irrevocable" includes both the enabling act provisions and the initial state constitution provisions regarding management of lands and funds.[148]

The first option is most damaging to the conventional wisdom. If we are confined to interpreting enabling act language, it is difficult to describe anything other than Arizona and New Mexico school grants as a trusts. Not surprisingly, this position has considerable support in federal case law. When the Supreme Court reviews the grants, it interprets the enabling act requirements. *Lassen* speaks explicitly and exclusively of the enabling act requirements and the intent of Congress.[149] When the states interpret the school land grants they typically do not discuss the issue of whether an obligation was mutually agreed to, or subsequently and unilaterally assumed. States are, obviously, bound by their own constitutions.[150]

We will discuss the second option, the enabling act and acceptance provision combination, under the heading of "who is the beneficiary." As already has been indicated, most state's acceptance language adds little that is on point to the enabling act except to the beneficiary question.

The third option seems to be what the conventional wisdom implies. Including the full text of pertinent sections of each state's original constitution in a mutually binding contract would have the effect of imposing trust obligations earlier in time, that is, in more states. It would also be more restrictive on those states because it would involve the federal government in any changes in state constitutions affecting their mutual agreement. The argument in favor of the third position is that in the process of accession, states presented their Constitutions for Congressional approval; in theory at least, and sometimes explicitly in the documents, it is stated that the Constitution having been read and seen to be in conformity with republican

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147 This is the position expressed in Oklahoma Education Association v. Nigh. See supra, n. 10.

148 But see Regents of University of New Mexico v. Graham 264 P. 953 (1928) for judicial acknowledgment that the "intent of Congress is not to be discovered from the Enabling Act alone. Behind it lay the Ferguson Act. The two are in pari materia." at 954. This is a university lands case not a school lands case. However, it gives support for what was suggested above, that the accession packages are far more comprehensive, hence sloppier, than the two parts focused upon herein.

149 See for example, n. 6, at 462. Note also that the Court appended to its decision Sec. 28 of the enabling act and nothing from the Arizona constitution. *Ervien*, the other major Supreme court case in this area, ignores both trust principles and the state constitution, concluding merely that the grantor of the lands can make conditions on the use of the grant and see that they are enforced.

150 See Deer Valley Unified School District v. Superior Court, 760 P.2d 537 (Ariz., 1988).

principles, State X is admitted.[151] This could imply that there is some kind of elixir over the state Constitution, or at least the lands provisions specifically offered and accepted, which binds the Congress.

Are the Feds Bound — and To and By What?

If Congress were bound by the trust, one might argue that it was barred from enacting legislation or undertaking programs that would undercut the trust land's economic value. That point is likely to appeal to trust land managers currently confounded by the presence of endangered species on trust lands.[152] Although it unlikely to carry, it is worth exploring in order to plumb the degree to which the federal agencies are or are not respectful of the trust notion. Obviously, the best place to look for such an elixir, or less onerously, for evidence of federal deference to a trust agreement, would be in efforts by New Mexico or Arizona to thwart some apparent Congressional violation of the trust. We have not found any such disputes at present writing. In many other contexts courts do not have a well established tradition of finding the federal government bound by the contents of state constitutions.[153] Part of the weight of that argument could perhaps be shifted by noting that the school lands are, in fact, part of an explicit set of terms and conditions negotiated between the Congress and the State, and that the state constitution's provisions on those matters are therefore included in the specific compact irrevocable required by Congress. Thus, even if Congress is not bound by the entire programme of a state constitution, on this particular point, where the bargaining was specific and the Congressional insistence on state acceptance of a contract binding both parties was explicit, the mutuality is arguably weightier.

Although this argument is not without some logic, little in reality supports it. States have frequently made fundamental changes in constitutional provisions dealing with school lands, and these have only occasionally been of any interest to Congress.[154] Hence, there is no

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151 See discussion of Indiana's accession, for example, supra, n. 37 and 38.

152 We need not speculate. The Endangered Species Act, most particularly the desert tortoise and the spotted owl were the subject of a panel at the winter meeting of the Western States Lands Commissioners' Association, St. George, Utah, January 1991. It has also motivated the State of Washington to sue the U.S. Secretary of Commerce on grounds that the Forest Reserves Conservation and Shortage Relief Act of 1990 (104 Stat. 629) singles out logs harvested from state lands in banning timber exports, and that the export ban is a breach of the federal government's fiduciary obligation as trustor. The state alleges that the export ban provisions "unilaterally impair and amend the Trust Compact in a manner that is harmful to the trust beneficiaries." Board of Natural Resources v. Mosbacher, No. C90-5495, November 16, 1990, at 5.

153 The most interesting cases in this area are probably the reapportionment cases, especially Baker v. Carr, 396 U.S. 186 (1962) and Reynolds v. Simms, 377 U.S. 533 (1964), discussed in Tribe, American Constitutional Law (1978, at 746-7, and Coyle v. Smith 221 U.S. 559 (1911) discussed in Tribe, at 300-06.

154 See the discussion of the forestry programs Section IV, B, 4.

established practice which would support the idea that either states or the federal government have considered the state's constitutional provisions regarding state lands as part of a mutually binding pact.

Stepping back from the notion of obligations binding on the federal government, we find two categories of cases which are of some relevance, to the broader question of federal respect for the school grants: the right-of-way-cases and the access cases. Neither are directly on point, but they give some indication of the terms of discussion.

The right-of-way cases involve agencies seeking uncompensated access across school lands. Over time the basic theme has altered dramatically from fairly unfettered rights-of-way without compensation or any reference at all to a trust to strict invocation of trust principles. In early state cases, such as *Grosetta*[155] and *Ross*,[156] state courts did not find either state constitutional *or* enabling act provisions regarding appraisals, public auction, et cetera, requisite to disposition of school lands to be a barrier to state agencies using school lands for state purposes. The Arizona Supreme Court's decision in *State* v. *Lassen* is crystal clear about early state interpretation of the Enabling Act: "For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government ..."[157]

Early cases involving federal agencies seeking rights of way across school lands produced the same result. Two federal courts found the school land grants no barrier to an uncompensated state grant of right-of-way across school lands for federal irrigation projects. In *Ide* v. *United States*, the Supreme Court found that a Wyoming statute granting rights of way over "all lands of the state for ditches 'constructed by and under the authority of the United States'" to be lawful without ever referencing or discussing the trust notion.[158] Some years later, the District Court in Idaho reached the same result, noting an 1866 federal statute and a 1905 state statute which permit the granting of rights-of-ways across school lands without regard to any restrictions on alienation of granted lands. The court argued further that the right-of-way is an easement which does not convey fee title. Again, the trust notion was not mentioned in

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155 Grosetta v. Choate, 51 Ariz. 248, 75 P.2d 1031 (1938).

156 Ross v. Trustees of the University of Wyoming, 222 P. 3 (1924). Note that *Ross* is a university not a school lands case.

157 State v. Lassen , 407 P.2d 747; rev'd Lassen v. Arizona, 385 U.S. 4358 (1967).

158 Ide v. United States , 263 U.S. 497 (1923), at 502.

resolving the issue.[159]

More recent cases reach the opposite conclusion. In *United States* v. *78.61 Acres of Land in Dawes and Sioux Counties*, the Supreme Court was presented with exactly the same question: "whether the Nebraska Legislature had the power to grant to the United States a right-of-way over school lands without compensation."[160] Citing *Lassen* and invoking the trustee's duty of undivided loyalty to the beneficiary, the court concluded that "a sharing by the trust property in the general benefits to the state of an irrigation project is not sufficient compensation to the trust."[161] Further, the Court concluded that the fact that the United States is the grantee does not "alter the principle that the *res* of the trust may not be depleted."[162] Similarly, in *111.2 Acres of Land in Ferry County*, the court held that the state could not donate school land to the federal government.[163]

This increased respect for school lands purposes, does not provide a strong basis for arguing that the federal government must respect the trust. Although *111.2 Acres* clearly states that the federal government is bound by what it agreed to in the enabling act, the decision turns on the state's inability to donate trust lands to the federal government. Similarly, although both the *78.61 Acres* court and the *111.2 Acres* court conclude that there is a trust, the trust in the analysis binds the state not the federal government.

Perhaps a more productive path for those seeking restrictions on the federal government is the access issue as discussed in a 1979 access dispute in Utah known as the Cotter case.[164] A federal court held that the Bureau of Land Management must grant to a holder of a state oil and

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159 U.S. v. Fuller, 20 F. Supp. 839 (D. Idaho, 1937).

160 United States v. 78.61 Acres of Land in Dawes & Sioux Cos., Neb 265 F. Supp 564 (1967) at 566. The court notes that the Nebraska enabling act "did not contain the express restrictions which were incorporated in later, similar acts" and cites *Lassen*. "Nevertheless, " the Court continues, "the grant was undoubtedly in trust for a specific purpose as was recognized by the Supreme Court of Nebraska." But look at the language which the court cites for that conclusion. It contains nothing about trusts: "The provision of the enabling act making the grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant ... and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants. [T]he state was and still is under a contractual as well as constitutional obligation to refrain from disposition or alienation of the use of this property except as allowed by the enabling act and the Constitution." State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N.W. 2d 841, 847-48 (1943). Ellipses as cited in *78.61 Acres*. A contract regarding means of disposal is not, obviously, a trust. The Court goes on to discuss *Lassen*.

161 78.61 Acres, id., at 567.

162 Id.

163 United States v. 111.2 Acres of Land in Ferry County , 293 F. Supp. 1042 (1968), aff'd 435 F. 2d 561 (1970).

164 State of Utah v. Andrus 486 F. Supp. 995 (1979). See also Sierra Club v. Hodel, 675 F. Supp 594

gas lease access to a school land parcel wholly surrounded by a federal land in a wilderness study area. At first blush, the result of the case appears to suggest that having granted the lands as a profit maker to the state, the federal government cannot thereafter take or regulate away that profit making potential. Although the result is subject to that interpretation, the text suggests that, to the contrary, the decision turns on general notions of property rather than on the land's trust status. The Court discusses the land's trust status but also notes that "traditional property law concepts support Utah's claimed right of access."[165] It employs standard takings analysis to conclude that the state's access rights "cannot be so restricted as to destroy the lands' economic value."[166] A further embellishment of that standard point, that "the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their *full* economic development,"[167] arguably gives the trust more than it would have received as a private land owner. However, that is clearly tied in the decision to Congressional intent expressed in the grant as a limit on BLM discretion rather than to a trust notion restricting subsequent Congressional action.

The Cotter Court does specifically address the "special" status of the granted lands in two ways. First, in arriving at its conclusions about Congressional intent of the grant, the Court noted that legislation dealing with school lands has "always been liberally construed." That is, whereas a federal grant to a private person or railroad would be construed strictly, with nothing "held to pass to the grantee except that which is specifically delineated in the instrument of conveyance," school grants are liberally construed following *Wyoming* v. *United States*.[168] Nothing in the string of cites underlying the reference suggests any tie to trust principles.

The second and more interesting and pertinent material on the lands' special status comes in the *Cotter* Court's discussion of "'special legislation."[169] Under rules of statutory construction,

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(1987); aff'd in part and rev'd in part 848 F.2d 1068 (1988).

165 Cotter, at 1002.

166 Id., at 1009.

167 Id., my italics.

168 Wyoming v. United States 255 U.S. 489 1921; which actually relies on Johanson v. Washington, 190 U.S. 179 (1902), which cites, at 183, Mr. Justice Field in Winona & St. P R.R. Co v. Barney, 113 U.S. 618, 625 (1884): "To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

169 Utah v. Andrus, at 1009. The preliminary discussion and fuller cites are found in an early round on the indemnity lands selection case Utah v. Kleppe, 586 F.2d 756, 768-69 (1978). The *Kleppe* court discussed the established rules of statutory construction regarding "special legislation" and likened the school lands to the "special treatment of Indians recognized in Morton v. Mancari, 417 U.S. 535 (1974). An analogy to Indian lands would not seem to give the states much leverage in binding federal actions to strict trust principles however. Nor would the *Kleppe's* court's assertion that the "strict, continuing 'trust' obligations imposed by Congress on the 'public land' states ... in the school land grant statutes" appear to give much support for the

the Court argued in Cotter that special acts prevail over other, even subsequent acts, unless there is some indication that Congress intended to modify the special act.[170] The Cotter Court relied for this argument on a fuller discussion of the same subject in a previous District Court opinion in an indemnity land selection case then on appeal. Cotter's application of the notion appears to be as far as any court has been willing to go in finding the state land trust obligatory on the federal government: Congress must indicate that it is modifying a special statute when violating the trust. Whether this argument would be useful in forestalling administrative actions not already vulnerable to the fifth amendment or Congressional statutes is not clear. However, subsequent activities in the indemnity case do not add luster to the thought: the Supreme Court rejected the lower Court's conclusion and did not address its reasoning when *Utah* v. *Kleppe* was appealed as *Andrus* v. *Utah*.[171] Even if it were firmly rooted in Supreme Court prose, however, the notion of "special legislation" puts the finish line fairly close to the starting gate on trust obligations affecting the federal government.

Are the States Bound — To and By What

Discussion of state obligations is less speculative. States are obviously bound by both their enabling acts and their own constitutions. If the state binds itself to manage the funds and/or the lands as a trust. some management issues are clarified by trust principles. It is important to underscore that the topic here is state interpretation of state obligations. The federal government is obviously authorized, and in Arizona and New Mexico it is actively encouraged, to enforce the terms of the grant. However, prior to Arizona and New Mexico's 1910 accession, there are relatively few federally defined grant terms, and state requirements are far more numerous and restrictive. Neither Congress nor the federal courts have evinced much interest in state changes in state requirements.[172]

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assertion that the federal government is also bound. Most damaging of all, the fulsome treatment given the special status of the state lands in Utah v. Kleppe, although picked up soon thereafter in the *Cotter* case, was totally ignored by the Supreme Court in the appeal of Utah v. Kleppe, that is, Andrus v. Utah, 446 U.S. 500 (1980).

170 Utah v. Andrus at 1009-1010.

171 446 U.S. 500 (1980). Interestingly, the line of argument was also ignored by state amicus briefs in support of Utah. See Brief for Amicus Curiae, State of California, Arizona, Colorado, Montana, Nevada, New Mexico, Oregon and Washington, Andrus v Utah 78-1522, October term, 1978. Although Cotter was not specifically overturned by the subsequent indemnity land selection case, it is relevant to it. See also, Sierra Club v. Hodel, supra n. 164.

172 Although the courts have repeatedly held that enforcement of the grant conditions is an issue between federal and and state governments, and that only Congress can enforce the conditions of the grant (see supra, n. 127) the feds have not been aggressive. See Dienst, supra, n. 16, at 105-06; Orfield, supra, n. 16, at 81 ff, 119.

The issue of what document[s] define state responsibilities is still important for at least two reasons. First, it is necessary to sort out what management direction arises from statute, hence can be changed by statute, what arises in the Constitution, and requires a change in the state constitution, and what can only be altered with permission of Congress. Given the inattention of the Congress to administration of school lands and the focus of most state constitutions on the management of the permanent funds rather than the granted land, it is also important to distinguish statutory direction regarding the lands from Constitutional direction regarding the funds. We have already said "uncle" to the challenge of sorting out the full hierarchy of trust principles as they entwine with federal and state enactments in the present report. We will take up two issues.

First, two recent Arizona cases underscore the importance of fully exploring differences and continuities between the Enabling Act, the Constitution and subsequent amendments, and subsequent statutes. Second, it is important to inquire whether the state's ability to make subsequent regulation affecting the trust is limited by its initial agreement, either in its constitution or with the federal government. The case of *Deer Valley Unified School District* v. *Superior Court*, [173] ironically involves the effort by a school district to obtain trust lands for school construction purposes. When the State Land Department refused to hold a public auction at which the School District would have an opportunity to obtain the land, Deer Valley filed an action to condemn the proposed school site.[174] The District Court and then the Arizona Supreme Court held that "neither the state nor its subdivisions could condemn land held in the school trust."[175] In so doing, the Arizona Courts rejected the United State Supreme Court's decision in *Lassen* as a guide to the State Land Commission's authority. *Lassen* had concluded that the form of the trust rather than the specific requirements of the enabling act must be respected, and that it was acceptable to sell lands to the state for highway purposes without the appraisals and auctions required by both the enabling act and the state Constitution. The state court in *Deer Valley* concluded the opposite. "The Enabling Act, as interpreted in *Lassen*," argued the Court, "merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more."[176]

The Arizona Court noted that although the Supreme Court took a "strict view of the full

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173 760 P.2d 537 (Ariz., 1988)

174 Id., at 537-38.

175 Id., at 538. But see Independent School District of Virginia v. State of Minnesota, 124 Minn. 271, 144 N.W. 960 (1914) for an instance where a school district condemned school lands for school purposes.

176 Id., at 541.

compensation provision of the Enabling Act," it did not "literally construe the public notice, public auction, and high bid provisions of the same act." This was based on the Supreme Court's "belief that the public notice/public sale provisions of the Enabling Act were useless in an acquisition by a state agency because the state eventually could condemn the land in any event."[177] In *Deer Valley* the state court rejected that conclusion. While noting that their view created "some divergence" between federal and state interpretations of "substantially identical provisions," nevertheless, the Arizona court concluded that "the state may not dispose of its school trust lands other than by be compliance with the specific terms and conditions of the Arizona Constitution."[178] Although the Supreme Court interpreted the Enabling Act in Lassen and held "that condemnation is a permissible method of disposal" of state school lands, the Arizona Supreme Court declined to "follow that case in interpreting the identical language in the Arizona Constitution."[179]

The logic of *Deer Valley* led to a sharp curtailment of the Commission's land exchange authorities in a subsequent case. The issue of whether the State Land Commissioner has authority to exchange lands begins with the 1934 Taylor Grazing Act, which, among other things allowed states to exchange trust and located within a federal grazing district for other land. In 1936, Congress amended section 28 of the state enabling act to "permit extended leases and exchanges of school trust land."[180] The Arizona state legislature adopted the terms of the 1934 and 1936 Congressional acts in statute without ever amending the state constitution. In the wake of *Deer Valley*, the State Land Commission doubted its authority to make such exchanges. The issue was litigated in *Fain Land and Cattle Co.* v. *Hassel.* Reiterating its "two levels of protection" theme, and rejecting the assertion that an exchange is not a sale and that therefore sales restrictions do not apply, the court disallowed the exchange.[181]

Turning to the second issue, although we have looked in vain for promising paths which would impose limits on post-grant federal actions which would undercut the trusts, the same question is more fruitful and interesting when pressed at the state level.

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177 Id., at 540 citing *Lassen* at 464.

178 Id., at 541.

179 Id., 541.

180 Act of June 5, 1936, ch. 517, 49 Stat. 1477 cited in Fain Land and Cattle Co. v. Hassel, No. CV-89-01 86 SA, March 30, 1990, at 6.

181 Fain, id., at 8, ff. A New Mexico state effort to have its land exchange authority amended in Congress succeeded. However, P.L. 101-386 was rejected in a statewide referendum in the November, 1990 election. See 15 Public Lands News 1 (September 27, 1990.).

There are numerous cases in which the school lands are found to enjoy exemptions from burdens or principles which would affect private land. Diverse jurisdictions have held, for example, that the school lands are exempt from local taxation,[182] adverse possession,[183] assessments for irrigation,[184] and which allow taxation of lessees operating on state trust lands[185] These cases occasionally produce some interesting language about the sanctity of trust lands, but they nevertheless have a familiar ring to them: it is difficult to discern a theory under which the trust status of the land alters the reasoning or the outcome any more than would simple state ownership.

There is, however, another line of cases which merits attention. In discussions in several contexts and jurisdictions we find the assertion that legislative regulations which may impede maximum profit to the trust are impermissible. For example, in *Oklahoma Education Association* v. *Nigh*, the Oklahoma Supreme Court sharply rejected what it characterized as respondent's contention that the Enabling Act authorized the legislature to "enact practically any rule or regulation it chooses with regard to selling or leasing the federally granted land."

> For if respondents are correct, then a potentially self-defeating incompatibility exists between the stated purpose and objective of the trust on the one hand, and the alleged unbridled authority granted the State Legislature to defeat that strategy by means of creative rules and regulations on the other hand.[186]

Instead, the court argued as follows:

> No Act of the Legislature can validly alter, modify or diminish the State's duty as Trustee of the school land trust to administer it in a manner most beneficial to the trust estate and in a manner which obtains the maximum benefit in return from the use of trust property or loan of trust funds.[187]

At issue in *Nigh* were statutes which the majority alleged provided for low-interest mortgage loans of trust funds to farmers and ranchers and low-rental leases of trust lands.[188] Although these provisions were arguably justified in the Constitution, an issue to which we shall return shortly, the pattern is nevertheless clear. The courts tend to disallow legislation, even when it

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182 People ex rel. Dunbar v. City of Littleton 515 P.2d 1121 (1973); Little v. Trustees of School of Township 197 N.E. 262 (1886); Erickson, et al. v. Cass County 92 N.W. 841 (S.D. 1902); but see Toule City Irrigation District v. State 67 P.2d 989 (1937). See also Kelley v. Allen, 49 F.2d 876 (1931).

183 See, for example, Hellerud v. Hauck, 13 P.2d 1099 (1932); Newton v. Weiler, 87 Mont 164 (1930); Van Wagoner v. Whitmore, 58 Utah 418, 199 P. 670 (1921). For a slightly different flavor see Duchesne County v. State Tax Commission 140 P.2d 335 (1943).

184 See for example Southern Drainage District v. State 112 So. 561 (Fla 1927); Toule Irrigation District, supra, n. 182.

185 Idaho Gold Dredging Co. v. Balderston 78 P.2d 105 (1938)

186 Oklahoma Edcn. Assoc. Inc. v. Nigh, 642 P.2d 230 (1982), at 237.

187 Id., at 236.

188 Id., at 230.

reflects Constitutional priorities, when the provisions appear to violate the standard trust notions of undivided loyalty.

The more interesting question is joined, however, when the court is reviewing the ability of the state to enact regulations which *indirectly* cut into the potential profitability of the trust lands. In *Department of State Lands* v. *Pettibone,*[189] a Montana case considering who owns water diverted or developed on school land, the state Supreme Court noted that the trusts created in the enabling act preempt state laws or constitutions. The court cited *Utah* v *Andrus* [190] for the conclusion that "*any* restriction on the use ... of school trust land that effectively devalues it cannot be sustained."[191]

A more recent Montana case could be interpreted as applying the *Pettibone* logic to a review of a Department of State Lands decision to approve an oil and gas lessee's operating plan without an environmental impact statement. The result is that the EIS is not required. It is not entirely clear whether the court's conclusion might arise from the special trust status of the school lands as opposed to discretion due to an administrative agency. The issue was whether the lower court had applied the correct standard of review. The Supreme Court concluded that it had, thereby allowing the Commission's decision not to do an EIS stand. The pertinent paragraph reads as follows:

> The Department in this case was carrying out its statutorily imposed fiduciary duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands. The Department also had to carry out duties imposed by MEPA. This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to the Department, not the courts.[192]

Although the Court is clear that the Department's status as trustee does not exempt it from compliance with MEPA, still the special status of the responsibilities, even though they are attributed to statute rather than to the constitution, appear to effect the calculus regarding the appropriate standard of review.

The most explicit argument in this context is a Colorado case involving a county challenge under state law to a State Land Board lease.[193] State mine reclamation law allows counties to

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189 702 P. 2d 948 (Mont. 1985).

190 Supra, n 92.

191 Department of State Lands v. Pettibone 702 P.2d 948, 952-53 (Mont. 1985). Italics mine.

192 North Fork Pres. v Dept of State Lands 778 P.2d 862, at 867 (Mont. 1989). But see MPIRG v. MEOC, 237 N.W. 2d 375 (1975).

193 Cases directly on point are rare, apparently for political reasons. A recent Western State Land Commissioners' Association meeting panel discussed the question "Should State and Trust Lands be Subject to Local Land Use Regulations?" Consensus was achieved: state trust lands are exempt from local regulation. However, rather than fight a locality, trust land officials will delay or alter their proposed action. January, 1991,

declare mining an "inappropriate use" of land. Boulder County denied a permit to a school land lessee. The leased parcel is in the county's designated open space and therefore the county classified it as unsuitable for mining. Both the lessee and the state argue that the county's denial of the permit is impermissible for numerous reasons. The interesting arguments here are those which assert the impermissibility of county regulation due to the special status of state trust lands. The state argued that "any statutory delegation of land use authority over state school lands would be unconstitutional" because the State Land Board is supposed to manage the lands for the exclusive benefit of the beneficiaries. The State also asserts that although the legislature has authority to make rules and regulations regarding trust lands management, that authority does not extend to determine the use to be made of state school lands. That right is the Board's exclusively, and reasonable legislative rules must be "limited to rules that regulate the manner in which the [Board's] land use decision is carried out."[194]

Discussion of constraints on the state's ability to enact regulations that limit the value of the trust lands are certainly more robust and varied than the equivalent question at the federal level. And, the state level question seems less fully resolved by principles such as the supremacy clause. If this line of argument were pursued by either a regulation-averse lessee or a grasping beneficiary, it could have interesting consequences.

Before leaving the issue of by what and to what the state is bound, let us revisit the Oklahoma case briefly. Although the enabling act's reference to preference right sales is unusual, the broader question is not. Long standing use of school land grants to support the agricultural community are increasingly under attack in the courts as violations of the undivided loyalty principle. In *Nigh*, one might argue, they were laid to rest. However, given the specific language in many state constitutions, it is not clear that the conclusions in *Nigh* are appropriate.

At issue in *Nigh* were statutory provisions which appeared to the Court to violate a trust principle of undivided loyalty to the beneficiary. However, it is a question which deserves fuller explication and deeper thought than the decision provides. The Court simply asserted that the express "designation of the school lands and funds as a sacred trust" had the effect of "irrevocably incorporating into the Enabling Act, Oklahoma Constitution and conditions of the

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St. George, Utah.

194 Brief of Appellant Colorado State Board of Land Commissioners Court of Appeals Case Nos. 88 CA and 88 CA 0375. 23-25. Having lost at the District and Appeals court, the state is appealing the case to the state supreme court. Case No. 89 SE 612.

grant, all of the rules of law and duties governing the administration of trusts."[195] Second, the court defines, without reference to the documents, the "manifest objective of the Enabling Act provisions, viz., to assure the realization of maximum rents, profits, and returns for the trust estate for the benefit of the school children of this State."[196] The Court failed to note that it was the state Constitution and specifically not the Enabling Act that characterized the grant as a trust. The Court simply turned the whole set of documents into a single mush. Thus it misrepresents the state's own choices as "conditions of the grant."

Thus positioned, the Court arguably made two serious misinterpretations. First, it dismissed out of hand the notion that there could be any justification for state school lands policies that appear to benefit the state's agricultural economy: "Just as a State may not use school land trust funds assets to subsidize its highway construction program, a State may not use school land trust assets to subsidize farming and ranching," the court asserted, citing *Lassen*.[197] The question is not so simply resolved, or at least it ought not to be.[198] Proper attention to the specific content of the documents at issue would yield a different discussion entirely, and likely a different result in this instance.

There is, in fact, nothing in any of the pertinent Oklahoma documents which would suggest any thought at all by the state or the federal government to regarding highway construction.

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195 Id., at 236.

196 Id., at 237. Note that the Oklahoma court has muddied an issue that the Minnesota court has been careful to sort out, that it is, it has brought in school children as beneficiaries in spite of the clear language of the constitution that it is the common schools which are to benefit. See also Beaver, supra, n.10, at 9-10 for a discussion of the Wyoming legislature and court confusing the issue on beneficiaries.

197 Oklahoma Edcu. Assoc. Inc. v. Nigh, supra, n. 10, at 236.

198 One of the more intriguing issues to arise in work related to the present study is whether the trust purpose of benefitting the schools is better served by managing the trust lands for profit from the lands, or by managing trust assets to support the local tax base which provides the overwhelming proportion of the school budget it most jurisdictions. In the present discussion we put aside that question and ask merely whether the terms of the trust document have or ought to have any bearing on this matter. Cases like *Nigh*, *Lassen* and *Skamania* clearly reject the notion of "enhancement," that is making trust assets more productive by allowing highways to be built or by supporting the local economy. We are here making a significantly different argument, that if the land is to be used in support of schools, perhaps the best way to do that is to use the trust assets, in part, to enhance the local tax base on which the local schools depend. This was discussed in a recent Minnesota case, wherein school children's challenge to a sale of trust assets was rejected because, among other things, their claims "assume that the permanent school fund is an end unto itself. The permanent school fund is only one facet, a relatively small one, of Minnesota school finance system. The legislature has concluded that sale of lakeshore lots in this instance provides more overall benefits to school finance in Minnesota than indefinite leasing because, beside providing immediate investment cash for the permanent school fund, sale also immediately places title to the lots in the hands of private owners who are more likely to make significant new capital investments as owners rather than lessees. The consequence of sale will expand the local tax base, which experience demonstrates has provided the most economically healthy school districts ... with a sound financial base." Segner v. State Investment Board, No. C5-87-489319 (Ramsey County District Court, August 11, 1988), at 11.

The court's conclusions about using trust assets to subsidize highway construction are not likely to be debated. However regarding "maximal" returns, the Constitution is clear. There is also nothing express or implied in any of the documents which favors maximized economic returns as the guiding theme of resource management. Indeed, the Oklahoma Constitution is explicit that "safety and permanency of investment"[199] rather than maximized returns is the guiding principle. There is, moreover, language in the Enabling Act easily interpreted as support for stability in the agricultural community. And the Oklahoma constitution is explicit that investment in farming is the first priority of the trust portfolio.

The Oklahoma Enabling Act says nothing about trusts. The only pertinent language in the Enabling Act gives lessees a preference right to purchase their leasehold at time of sale for the highest bid.[200] This was cited by defendants as evidence of the trust purpose of supporting stability and preventing waste in the agricultural community.[201] That would seem a permissible but not mandatory reading of the phrase. Those provisions were interpreted in what the Court characterizes as the "context of the overall text." as part of analyzing rule making authority granted to the legislature by the Enabling Act. The Court concluded that the rule making authority was intended "to promote rather than impede attainment of the manifest objective of the Enabling Act provisions, viz., to assure realization of maximal rents, profits, and returns from the trust estate for the benefit of the school children of this State."

Yet, the Enabling Act says nothing about either a trust or about economic returns. All of the language about trusts is, as was true of every state accession package prior to Oklahoma's accession, in the state's Constitution. The state Constitution is quite clear that it will establish a trust fund, and about the management priorities of the of permanent school funds. The constitution, as originally written and as amended, expresses a priority on safe and permanent investment of the funds. The Court ignores the plain language and overrides that clearly expressed intent with an emphasis on "maximum return from the trust property." ostensibly derived from trust principles.[202] There the Court appears to prefer an extreme statement of the trust principle to make the trust productive to both the plain language of the trust document and the explicit trust principle to preserve the trust.

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199 Thorpe, VII, 4320.

200 Thorpe, V, 2968.

201 Nigh, supra, n. 10, at 236.

202 The dissenters pointed to the conflict between safety of investment and maximizing economic returns. "The people could have adopted a provision requiring the state to obtain the maximum possible return, but they did not. It is obvious that they intended to forego some return in favor of more secure investments, such as

It also dismisses Constitutional provisions regarding investment priorities which have direct bearing on the question of "subsidiz[ing] farming and ranching."[203] The original Oklahoma Constitution directed that the school funds should be invested in "first mortgages upon good and improved farm lands within the state," or in state, city or county bonds, in school district bonds, or in U.S. bonds, preference in the order stated.[204] The Constitution at the time of the litigation also included "promissory notes evidencing federal and state insured loans made to students under any federal or State of Oklahoma insured student loan program" as permitted investments.[205] It is not clear why the provisions of the document establishing the trust are not read as dispositive regarding the purposes of the trust. The framer's intention that trust assets be used to secure stability and economic development of farms is unambiguous. One could take issue with the implicit assumption that first farm mortgages and, more recently, student loans, are appropriate securities if the stated goal is safety and permanency of the investment. Nevertheless, it is difficult to justify brushing aside the stated intent of the trust document regarding support for the agricultural community in favor of imposing a conflicting and dubious duty to "maintain the maximum return to the trust estate from the trust properties under their control ...."[206]

The Court is quite obviously correct that the state constitution and state statutes are constrained by the requirements of the Enabling Act. Even this cursory impression suggests several significant conclusions. First, carefully identifying and parsing the trust documents is not a fruitful way to find limits on federal activity. The broadest possible reading of the only thread obliging federal deference to the trust gets us very little (if any) beyond the respect owed in our system to any private property, or to non-trust state owned lands. The thread is not anything

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mortgages and school bonds, etc." Nigh, dissent, at 243.

203 Nigh, supra, n. 10, at 236.

204 Thorpe, VII, 4320.

205 Article XI, § 6, cited in Nigh, at 238, n. 13.

206 Nigh, supra, n. 10, at 239. Compare *Nigh* with State v. Babcock 409 P.2d 1966 wherein the Board's discretion to reject the high bid in favor of the low bid was sustained on trust principle grounds: The Board noted that the high bid was "considerably over the landlord's share prevailing in the area, and that good husbandry and sustained income required that they have a lessee who could complete the term of the lease while making enough profit to protect the leasehold and not cut corners on good husbandry practice. If the competing bid is considerably higher, there is danger that the lessee will not fulfill his term because of inability to make money or that he will cut corners on good husbandry practice. In the meantime, the qualified proven farmer may have gone out of business or left the area. As trustees charged with managing this land in a prudent careful manner, I do not believe we can take these risks." At 810. The Court said that the Board's mandate to receive a sustained income coupled with full market value put them in an "awkward position" in circumstances such as this. However, it concluded that the Board had to have discretion to determine "what will most benefit the public." At 813.

resembling a bright or fixed line, and the notion of "special legislation" does not provide much protection for the trust in any event. Second, regarding state obligations, careful identification and interpretation of the trust documents is more likely to identify standards regarding state authorities and obligations.

Changing the Trust

Questions about what the trust binds the states and federal government to do lead reasonably to questions about how one might alter the obligations. After all, this is a programme that has been in operation for almost two hundred years; surely altered circumstances might give rise to pressures to alter its basic dimensions.

The answers to these questions are surprisingly unenlightening. Very little issue seems to have been generated around changing the trust and, when the issue has been raised, it has been resolved without apparent reference to trust principles.

The dominant theme in case law surrounding changing the trust is the unsurprising notion that both state constitutions and state statutes must comply with Congressional statute, that is, the enabling acts. Further, and also unexceptional, state statutes must comport with state constitutions. One implication of these unstartling facts is that states cannot make changes in school lands programs as they are described in the state's enabling act without the permission of Congress. As stated in a very standard Arizona case:

> ... any limitation upon the disposition of public land provided in the Enabling Act is absolutely binding on the state of Arizona, unless the Congress of the United States may consent to a change, and any statute or amendment to the state Constitution in conflict therewith is null and void.[207]

It is also true that since Arizona and New Mexico have the most specific enabling acts, they are the most likely to seek acquiescence from Congress in the redefinition of their management authorities. Congressional approval is routine.[208]

Moreover, states with few enabling act restrictions alter their programs considerably by constitutional amendment without participation of the federal Congress. In the late 1960s, modification of the Oregon state constitution broadened the concept of trust from a narrow interpretation as solely for the benefit of the trust institution and solely for maximum revenue generation. The amended document states that:

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207 Boice v. Campbell 248 P. 34 (Az.1926).

208 *Deer Valley*, supra, n. 41, notes numerous instances in which "Congress has periodically amended the Enabling Act to allow Arizona more flexible use of its school trust land." at 539, cites omitted.

> The board shall manage lands under its jurisdiction 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."[209]

This provision is codified to provide for the management of those lands administered by the Oregon State Forester:

> ... so as to secure the greatest permanent value of the lands to the whole people of the State of Oregon, particularly for the dedicated purposes of the lands and the common schools which the resources of the lands are devoted."[210]

It would seem that the effect of this change is to broaden the definition of the trust to include the entire populous of the state, not just the interest of the beneficiaries, while giving preferential treatment to the original purposes of the grants.[211] The criteria for securing the greatest permanent value of the lands is different from securing maximum benefit, especially if maximum benefit is thought of in present value terms.[212]

This is not to suggest, of course, that there are never controversies. The State Supreme Court in both Utah and Oklahoma have, for example, voided amendments to their state Constitutions regarding expenditure of trust land mineral royalties because they were incompatible with the states' Enabling Acts.[213]

What is perhaps surprising about all of this is that trust principles providing for flexibility in the administration of trusts appear not to have been invoked in support of reasonable flexibility. Notably, the cy pres[214] power appears never to have been relied upon in resolving school lands cases. The rule may be applied when the court holds that it is impractical, impossible or

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209 Oregon Constitution, Article VIII, §5(2). Amended by HJR No. 7, 1967 and adopted by the people May 28, 1968. See Johnson v. Department of Revenue,639 P.2d 128 (1982).

210 Oregon Revised Statutes (O.R.S.) §530.490.

211 This read William R. Cook, Assistant Attorney General, Oregon, pers. comm., April 5, 1991. Cook suggests that the referendum of May, 1968 constitutes approval by the beneficiaries of the change in the trust. See for consent of beneficiaries to change a trust, Restatement, Trusts, Second, §338.

212 Waggener supra, n. 16, at 8. We shall return to this in detail in the next section.

213 State ex re. Williamson v. Commissioners of the Land Office 301 P. 2d 655 (Okla., 1956); Jensen v. Dinehart , 645 P.2d 32 (Utah, 1982). In Williamson, the Oklahoma Education Association, as an amicus, argued that the Congress was without authority to "prescribe any such conditions operating to limit in the future the legislative powers of a new state over matters in their nature confined exclusively to the state as a part of their sovereign powers; that the establishment, maintenance and promotion of schools throughout the State is a matter of state concern and power and an exercise of sovereignty in a field reserved to the States, and that the Federal Government has no delegated powers in such field." (at 658).

214 See Restatement, Second, Trusts, §399. See also, Fisch, The Cy Pres Doctrine in the United States.(1950).Ch 5. It is clear that cy pres applies only to charitable trusts. See Restatement, Trusts, Second, §349. We leave most of this to the trust attorneys. However, this looks like a charitable trust to us. Occasionally the courts use the term.

inexpedient to pursue purposes of the trust specifically as described by the settlor.[215] A similar principle allows the courts to approve a trustee's "deviation"[216] from the mechanics of a trust in order to protect or achieve its goals. It seems not to have been mentioned. Finally, putting aside the exotica, the simple trust duty to preserve the trust property[217] is everywhere apparent in the discussions; however it does not seem to be given much sway when juxtaposed with maximized economic returns.

Regarding the preservation of the trust or corpus principle, part of its absence from the discussion may be explicable by the fact that when the courts reject lessee's complaints and sustain Commissioner's efforts which might be characterized as "trust preservation" it gets packaged as respect for the administrator's discretion.[218] Therefore, one might argue, the idea is operative even if the nomenclature is missing. However, in the more difficult context, protecting the trust from beneficiaries demands, the principle is occasionally mentioned but never relied upon in preference to maximum returns.[219]

Approximately the same is true regarding deviation. One could argue that the deviation principle was relied upon if not endorsed by name in *Lassen* and numerous cases which cite it.[220] There it was held that although the trust must be compensated for land allocated by the state to highway use, it was not necessary to go through the specific procedures of appraisal and auction in order to achieve that purpose. The Supreme Court's conclusion is unevenly adhered to[221] but apparently the trust principle has never been explicitly invoked.

The classic cy pres case suggests why it might be useful in protecting trust lands from over-exploitation by economic maximizers. It involves an 1861 bequest designed to support efforts to create "public sentiment that would put an end to Negro slavery" and to benefit fugitive slaves. The settlor's heirs requested that the trust be dismantled when Negroes were freed as a result of the Civil War. The court instead invoked the cy pres doctrine to direct use of the fund to support the broader purposes of the grant, that is, the aiding persons of the Negro race, with

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215 Bogert, supra, n. 131, at 524-26.

216 Restatement, Second, Trusts, §381. Sometimes called equitable deviation. See Bogert, supra, n. 131, 518; *Chester*, "Cy Pres: A Promise Unfulfilled," 54 Indiana L. J 406 (1979).

217 Restatement, Second, Trusts, §176.

218 See discussion below, n. 243 ff.regarding who is trustee,

219 For recent cases, see, most explicitly, Nigh, supra, n. 10, and less emphatically, *Skamania*, supra, n. 109.

220 Supra, n. 33.

221 See *Deer Valley*, supra, n. 41.

education and welfare programs.[222] More relevant, perhaps, a New York court applied cy pres to a bequest of land to a town to enable it to build a hospital. The hospital was not needed and the court held that the testator's intent was actually to create a memorial to her husband; accordingly the court allowed the land to be used for a memorial town administration building.[223]

Apparently the only case that appears to mention the doctrine did not rely on it. A New Mexico case involving lands granted to establish and maintain a hospital for miners provides an example of how the doctrine might be applied. As part of a reorganization of state hospitals, New Mexico downgraded its miners' hospital to an intermediate care facility and planned to provide surgical and other services at trust expense to miners at a central facility. This was disallowed, and the District Court refused to apply the doctrine of cy pres.[224] The Appeals Court noted that fact but did not discuss it while affirming and amending the decision.

Changing the trust appears less complex than one might have predicted. The idea of a "compact" seems not to have much meaning in this context. The federal government is bound by little, and the states are free to alter their management of the granted lands so long as they do not violate their enabling act. Moreover, trust principles regarding changing the trust seem not to have been applied. The trust notions that have emerged in connection with the land grants seem fairly restricted to economic returns and undivided loyalty. "Preserving the trust property, " cy pres, and equitable deviation are rarely to never mentioned by the courts.

3. What is the Trust Property?

It is not initially obvious that this question is more than a formality. It arises from the fact that when state constitutions declare that there is a trust they are likely to mention only the permanent school fund and not mention the granted lands. This is because, as noted above, it was widely presumed during the accession period that public land ownership was temporary—that both the state and federal government would transfer their lands into private ownership. The concentration on the funds in most constitutional discussions of trusts could lead one to ask whether the granted lands are included in the trust. Certainly the answer is not obscure: the corpus of the trust includes both the lands and the funds arising therefrom.[225] Courts and

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222 Bogert, supra, n. 131, at 526-27 and Chester, supra, n. 2.3; see also Scott, "Deviation from the Terms of a Trust," XLIV Harvard L Rev 1025 (1931) on general flexibility in trusts;

223 Chester, supra, n. 220,discussing In re Will of Neher 279 N.Y. 370 (1939), at 415.

224 United States v. New Mexico 536 F.2d 1324, 1326 (1976).

225 Not all lands which produce income paid into the trust are automatically part of the trust. For example, in Minnesota, "proceeds from minerals underlying navigable lakes are paid into the permanent school fund

statutes have made this absolutely clear. Why then do we bother with the topic at all, apart from emphasizing the by now familiar point that it is helpful to read the specific documents in specific states? Because raising the issue allows us to dwell, albeit briefly, a number of pesky little peculiarities that do, in fact occasion a significant portion of both recent case law and pressing contemporary policy issues. First, and most significant, the constitutional detail regarding the trust funds varies, as does everything else, from state to state. Any attempt to analyze school land or fund management must begin by sorting out in each jurisdiction what funds arising from what real estate transactions wind up in the permanent fund and elsewhere. We will do so here in a preliminary way. That will occupy the bulk of this section.

Two other points deserve mention. First, we simply observe that the predominance of fund management in constitutional discussion of trustees duties appears to us to have potentiated the emphasis on economic returns in discussion of trust obligations. This is after all the component of the conventional wisdom that most irks us. So, while we cannot prove the point, we cannot resist making it.

Second, the constitutions discussed primarily the funds. When the lands are mentioned it usually is in the context of disposition. Thus, when the trust documents discuss the trustee, it rarely reaches the subject of trustee as manager of the lands. This will be treated more fully under the heading of "who is the trustee." In this context we simply note that some of the confusion arises in connection with the nature of the trust property: only in Oregon and Oklahoma are the lands and the funds managed by the same administrator.

Returning to the overriding question of the funds, we have already noted that the trust that generates revenues for the beneficiaries from the trust corpus is made up of lands, resource revenues, and permanent funds. Revenues are generated from three basic sources: (1) royalties from the sale of non-renewable resources, usually oil, gas, coal, and minerals; (2) revenues from the sale of trust lands; and (3) revenues from the lease or sale of renewable resources, usually grazing fees, timber sales, commercial or special purpose leases, and the surface rentals received for oil, gas, coal, and mineral leases.

It is important to note that exact paths through which moneys travel before reaching the beneficiaries varies in different states according to three factors: (1) the source of the revenues, (2) the beneficiary of the lands which produced the revenues, and (3) the deduction for managerial expenses which varies among land type and beneficiary. In Figure 5 solid lines

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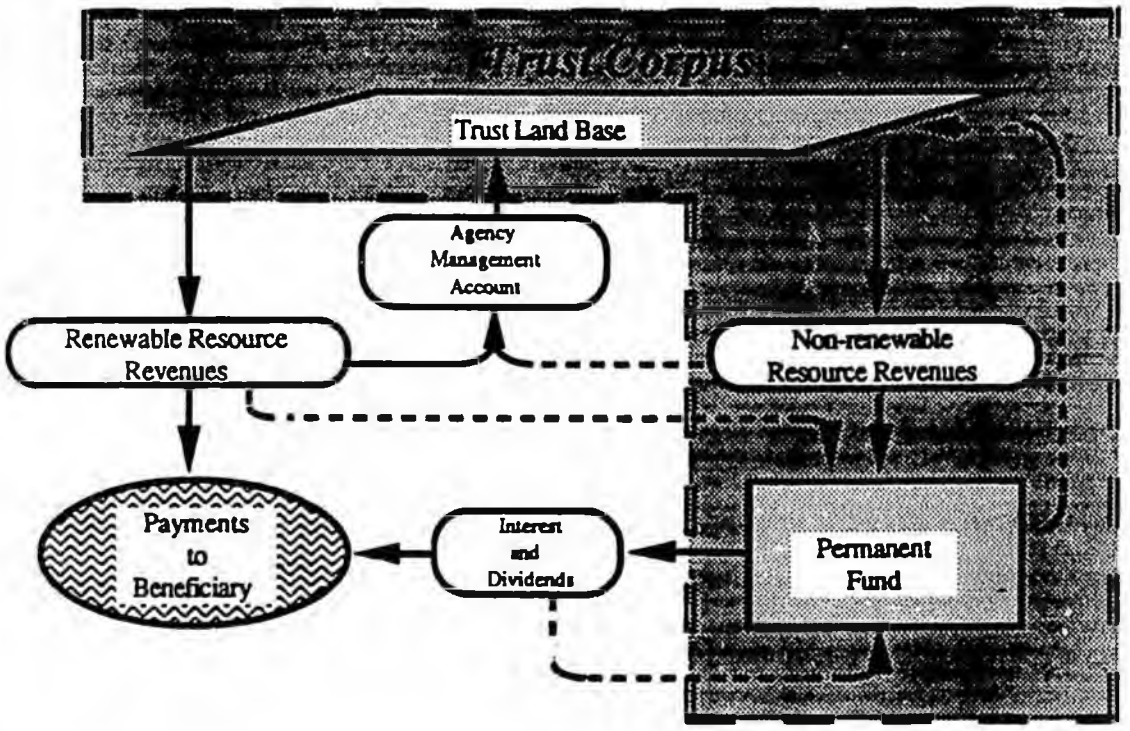
pursuant to Minn. Stat SS 93.06--93.07." Personal communication, Gail Lewellan and Andrew Tourville,Assistant Attorneys General, Minnesota, pers. comm., March 11, 1991, at 4.

with arrows denote the normal revenue flows which are common to all states; dashed lines with arrows represent flows in which variations are found in one or more states. The the double-dashed line encloses what can be thought of as the overall corpus, or body, of the trust. Contemporary policy analysts are enjoined to "follow the money." It is not easy in the case of school lands, but it can be done.

Figure 5. General model of revenue flows from state trust lands to beneficiaries.

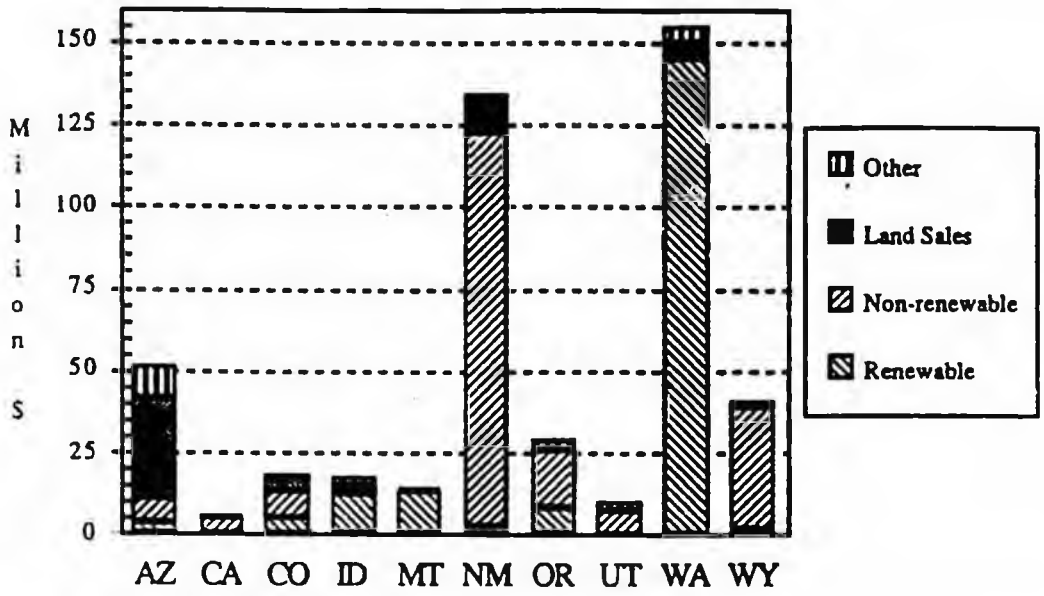


Revenues from the first two categories, royalties and land sales, usually go into an "inviolate" permanent fund, with only the interest disbursed to the beneficiaries.[226] Receipts from surface and renewable resource leases are generally channeled directly to the beneficiaries, in some cases after the state land office deducts its operating expenses. Generally, these monies do not go into the permanent fund. They are generally classed as "rental" income in land office financial statements. This is the flow on the left-hand side of Figure 5. Receipts from non-renewable resources, including land sales, are placed in permanent funds with only the

226 There are two exceptions to this generalization: (1) Utah in 1981 allowed its beneficiaries to withdrawal principal from their permanent funds in the face of a one-third cut in their appropriations from the legislature. See Jensen v. Dinehart, 645 P.2d 32 (Utah, 1982) for a discussion of the Jones Act and minerals revenues with respect to state trust lands. (2) States which have a land banking process, Arizona, California and Washington, allow proceeds from the sale of trust lands to be retained in a special account which is then used to purchase other lands for the beneficiaries.

dividends and interest from these funds distributed annually. This is the flow on the right-hand side of Figure 5.

Figure 6 Differentiation in revenues by character: renewable, non-renewable, land sales and other (primarily interest and fees) in 1988-89..



Source: Table 1. Western States Survey Responses.

The levels of revenues, and their type, are significant since they may contribute to different emphases in resource management in different states. Figure 6 shows these differences in broad categories. Frequently the statesemphasize management of their major revenue source (such oil and gas in the case of New Mexico and California, and timber in the case of Washington and Oregon). Further, if some resources return revenues to the operating expenses of the state land office, they may gain a priority in use compared to other uses.[227] For example, the land office may emphasize, or over invest in a use that returns operating funds to them (such as grazing) instead of a use that would return more to the trust even though it would involve selling the lands (such as commercial development). For this reason, the differentiation in Figure 6 between revenues going into permanent funds and those disbursed to beneficiaries may be significant.[228] Distribution of revenues varies on a state-to-state basis,

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227 This possibility was pointed out by Rick Lopez, Assistant Commissioner of Commercial Resources and Exchanges, New Mexico State Land Office during interview August 2, 1988. This is also the case in Utah. Steven F. Alder, Assistant Attorney General, Utah, pers. comm., February 25, 1991.

228 This differentiation will be elaborated upon in the discussion of land office funding mechanisms, infra, this section.

and by whether the trust beneficiary is the county or the public schools and institutions. Table 1 shows this variation among the ten western states. All the states' public school and institutions' non-renewable revenues are placed in permanent trust funds.

Both renewable resource receipts and the interest on the permanent funds from the public school trust lands go into the common school construction fund in Washington. This, until recently, was the only state source of funds for school building construction in Washington.[229] Receipts from public school trust lands in the other states are undesignated for purpose, and comprise only a portion of the states' contribution to education, usually apportioned to the school districts according to student numbers. Idaho is different from the other states in placing receipts from the sale of timber, along with land sales, easements, and mineral royalties into a permanent endowment fund, with the interest distributed to the beneficiaries.[230] Montana differs from the other states in disbursing only 95% of the renewable resource revenues, and only 95% of the interest on the permanent funds to the public schools; the remaining 5% of each of these funds is placed in the permanent fund.[231] This variation is shown in Figure 5 by dashed lines from the renewable resource revenues to the permanent fund, and from the interest and dividends to the permanent fund.

4. Trust Purpose — What Were the Grants For and Who is the Beneficiary?

It has already been noted that variation in language in pertinent documents gives rise to a broad range of potential purposes for the granted lands.[232] Nevertheless, trust purposes have been derived from generic statements rather than specific ones, and presents greater clarity and uniformity than can be found in the documents and their definition of the beneficiary. Simplification in discussion of the beneficiaries derives from three basic themes which by now must be familiar: the trusts are for the schools; the trust principle of undivided loyalty prohibits any consideration being given to general benefits; and the benefit will be accrued by raising money for the schools.

Herein, we will suggest three alternative notions of beneficiary: (1) the direct use by the schools of the lands, in the form of (a) lands for the construction of schools or (b) for

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229 Washington DNR. Proposed Forest Land Management Plan, at 29. In recent years, the Legislature has given additional funds for school construction. Nick Handy, Chief Counsel, Washington Department of Natural Resources, personal communication, March 6, 1991.

230 Idaho Department of Lands. Idaho Forestry Opportunities 1980 - 1990, (March, 1988), at 3.

231 Montana Constitution Article X, §5.

232 See above, n. 50 and text accompanying.

Table 1. Division of revenues between direct disbursement to beneficiaries (net of land office expenses, if applicable) or placement in beneficiaries' permanent fund. (B=Disbursable to Beneficiary; PF=Permanent Fund; OT=Other; LB=Land Bank; ?=Unknown). Western States Survey Responses and state statutes.

Revenue Source	AZ[a]	CA[b]	CO[c]	ID[d]	MT[e]	NM[f]	OR	UT	WA	WY
Renewable										
Agriculture	B	B	B	B	B	B	PF	B	B	B
Grazing	B	B	B	B	B	B	PF	B	B	B
Timber	PF	B	B	B,OT	PF	B	PF	B	B	B
Water	PF	B	?	?	?	?	PF	?	?	B,PF
Commercial	?	B	B	?	B	B	PF	B	B	B
Other Noncommodity	?	B	B	?	?	B	PF	B	B	B
Non-renewable										
Minerals										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	?	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
Oil and Gas										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	PF	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
Coal										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	B	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
Geothermal										
Surface Rental	?	B,OT	?	?	B	B	PF	PF	?	B
Royalties	?	B,OT	?	?	PF	PF	PF	PF	PF	PF
Other Commodities										
Surface Rentals	?	B	B	PF	B	B	PF	PF	?	B
Royalties	?	B	PF	PF	PF	PF	PF	PF	PF	PF
Lands & Misc.										
Right-of-Way	B, PF	B	PF	PF	?	?	PF	PF	PF	PF
Land Sales										
Interest	B	LB	PF	?	?	?	PF	PF	LB	B
Income	PF	LB	PF	PF	PF	PF	PF	PF	LB	PF
Fees and Permits	B	B	?	B, PF	?	?	PF	B	B	OT

a. A.R.S.A. §37-521 for receipt placement into permanent fund.

b. California no longer has a permanent fund. California P.R.C. §6417.5 for the use of school and in-lieu lands, §6417.7 for the sale of school and in-lieu lands. Geothermal revenues are divided differently with 50% net going to income fund and 50% into the Renewable Resources Development Account which is divided into three categories: 30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions; and 40% to the county where the revenues were generated.

c. Based on C.R.S. §36-1-116. C.R.S.§36-7-202 says that 75% of timber revenues go to the income fund and 25% go to the county school fund for lands within designated state forests.

d. I.C.A. §58-503 for distribution of timber receipts on acquired lands: 50% net to general fund and 50% to county school fund.

e. M.C.A. §77-3-106 for metallic minerals receipts distribution; §77-3-318 for coal receipts; §77-3-436 for oil and gas receipts; §77-4-127 for geothermal receipts distribution. Note that only 95% of disbursable and 95% of permanent fund interest is distributed, the remaining 5% in each category goes back into the permanent fund by Article X§5 of the Montana Constitution.

f. N.M.S.A. §19-1-18.

environmental preservation and education for the edification of school children or others; (2) the possibility that the school grants contemplated other benefits or beneficiaries than schools; and, if that is too far from what is now considered normal, a third category (3) indirect

benefits, a redefinition of the raise money theme. We do not question the idea that that the trustee owes a duty of "undivided loyalty" to the beneficiary. We simply believe that the plain language of the trust documents permits a broader conceptualization of both who the beneficiaries are and what benefits them than is presently acknowledged.[233]

What appears to be the easiest inroad into the traditional definition of trust land uses involves direct use of the lands by the currently recognized beneficiary, the schools. Reference to *Lassen*, the basic case in the most restrictive state, is sufficient to establish the point that the conditions of the grant do not preclude it. *Lassen*, in fact, appears to presume that schools will make direct use of appropriately situated parcels. The *Lassen* court states that in granting the lands, Congress never "supposed that Arizona would retain *all* the lands given it for *actual use by the beneficiaries;* the lands were obviously too extensive and too often inappropriate for the selected purposes." Congress could scarcely have expected, the Court argued, that *many* of the 8,000,000 acres of its grant "for the support of the common schools,"all chosen without regard to topography or school needs, would be employed as building sites."[234] In the mind of Congress, we may conclude that building sites for schools would seem a wholly appropriate use of the granted lands.

This does not entirely resolve the issue, however. There may be, in some particular state, constitutional or statutory provisions which preclude this use of trust lands. Whereas the Washington[235] and Oregon constitutions would appear to raise no barrier, the Idaho one arguably does. Section 8 Article 9 of the state constitution clearly directs the State Board of Land Commissioners to treat with the land "in such manner as will secure the maximum long term financial return therefore." A hypothetically thwarted school board might argue, depending on the cost of an alternative school site and the return that the particular parcel it coveted for building was generating, that direct use as a building site was still the preferred use.

Much of the same logic would apply to what appears to be a harder case—dedicating land of

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233 See Johnson v. Dept of Revenue, 639 P.2d 128, 292 Or. 373 (1982).

234 *Lassen*, at 463. There are two issues here. The first is whether the school district has a right to make use of the school lands. The second is, if yes to the first, must the school district compensate the trust. If there is no compensation to the trust, one could argue that state programs for spreading the benefit of the trust and permanent fund are trumped.

235 Washington does currently "use trust property as educational interpretive areas if [they will be] accessible equally to appropriate trust beneficiaries. On charitable, educational, penal and reformatory institutional trusts, [the state] allows the trust property to be used for construction of facilities usable by the beneficiary pursuant to advice of legal counsel." Nick Handy, Chief Counsel, Washington Department of Natural Resources, pers. comm., March 6, 1991.

historic or ecological interest, as discussed in the opening section of this paper, for educational purposes. Again, state constitutions vary. Even if an Idaho school district could have prevailed with the economic return argument in the building site hypothetical, it is not clear that the same logic would apply to the biological preserve case.[236] However, if the precise wording in another jurisdiction was "maximum possible benefit" rather than amount, the opportunities would seem far less constrained.

Part of this argument would depend on whether the enabling act and or the state documents permit a broader definition of the beneficiary than merely schools. If trust principles becomes operational only as a result of state commitments, then the content of the state document ought to have more weight than has been apparent in post-*Lassen* interpretations. Wyoming provides, as noted above, a clear case. Although the lands were granted "for the support of schools" they were accepted "for educational purposes." Arguably this would authorize use of land as an ecological or historical site. In Idaho the educational use might prevail as opposed to a grazing lease, but perhaps not as opposed to an oil well. The possibilities are not limitless,but they are far more varied that they appear at first blush.[237]

Outside of Arizona and New Mexico, the narrow passage on the second question, broader beneficiaries, is not the enabling act's basic notion that the grants were to support (or for the use and benefit of) common schools, but the trust principle of undivided loyalty. The Wyoming acceptance language, "for educational purposes,"[238] would not appear to provide much assistance for those arguing that land management programs and farming interests seeking to defend a preferred position such as is granted in the Oklahoma constitution to agriculture. However, language accepting the lands in trust "for all the people" as in Washington, and the more recent language in Oregon,[239] might arguably do more, or at least do different things. At a minimum it would require that a court evaluate whether a specific use violated the enabling act rather than simply enveloping the entire turf in a selective recitation of trust principles.

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236 However, it is worth noting that the basic Idaho case interpreting its trust land, Barber Lumber Co. v. Gifford, 139 P. 557 (1914) endorses wide discretion by the board in defining and securing "maximum benefit." This included rejecting the high bid both because a lower bidder promised more general benefits and because it was not, in the eyes of the court, imprudent to refuse to sell timber to someone that they did not know. at 562.

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238 Thorpe, VII, Article XVIII, at 4147.

239 Discussed below, at n. 293, ff.

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The goal here is to challenge the knot between school lands and fund raising, not to erode hard won protections for the school lands in order to open them to industry predation. This leads us to press to a third possibility. What happens when as empirical matter the greatest benefit to the schools would come from managing them in such a way as to provide a long term stable base for real estate and other school supporting taxes in a jurisdiction? It is not clear that this notion violates trust principles: Is so doing obviously divided loyalty, or the essence of prudent protection of trust resources?

The Courts have been, as required by trust principles, quite unwilling to accept diversion of the trust resources to other purposes,such as highways. They may, however, have been excessively restrictive regarding the use of trust resources that arguably enhance the trust.but which also create a general benefit not exclusively enjoyed by the beneficiary.[243] In the *Nigh* case we have suggested that the Court appears to have misread both the trust documents and trust principles to prevent a school land management regime that arguably benefits the agricultural community. But this is not the only result. Other courts, with a less emphatic

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241 Thorpe, VII, Article XVIII, at 4147.

242 Discussed below, at n. 293, ff.

243 The divided loyalty issue is not simply resolved. Compare *Ervien* and *Skamania* with Toomey v. State Board of Land Commissioners, 106 Mon.. 547 (1935) which holds that the lands are held in trust for "the people." and State ex rel. Thompson v. Babcock 409 P.2d 808 (Mont. 1966) which holds that the steward can turn away the highest bid to protect the trust.

maximum economic returns, been willing to to entertain the notion.[244]

5. What is a Trustee

All this potential variability in uses of the land ought to make us wonder about who is managing them: who is the trustee? Is the manager or managing agency the same as the trustee? Or is the legislature, or the governor, or the state treasurer the trustee and the land commissioner merely the manager. Conventional wisdom would suggest, with considerably authority, that the State Lands Commission or Commissioner is the trustee. For example, in a 1983 Montana case, the state Supreme Court asserted that the "lands granted by the federal government to the states for the support of public schools constitute a trust, and the state is trustee of those lands. ... Thus, a fiduciary duty is placed upon the Board of Land Commissioners and the Department of State Lands to manage the trust according to the highest standard. The department, under the direction of the board, has responsibility for leasing, managing, and otherwise disposing of these lands, ... subject to the trust guidelines."[245] This may be taken as the conventional wisdom on the subject, certainly as expressed by the land commissioners.[246]

When the courts deal with this issue, the response becomes slightly more complex and interesting. This question is typically a simple question of whether a Board's exercise of discretion can be justified. Many times, in these cases, it does not matter that the manager may also be a trustee. Frequently the trust plays little or no role in the court's evaluation of the administrator's decision. A Colorado court upheld the Board's authority to cancel a grazing lease to accommodate a more recent coal lease even though doing so clearly exceeded the statutory criteria for when lease cancellation was authorized.[247] Without ever mentioning the notion of trusts or trustees, the Court upheld the cancellation concluding "[i]n our view, the constitution mandates that, unless limited by express statutory regulations, the Board shall enter into whatever leases it deems to be most beneficial to the state. It may therefore utilize

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244 Although the *Skamania* court appears to line up with *Nigh* on the issue of undivided loyalty, parts of the decision suggest that if they state had presented even a credible hint of data which suggested that enhancement or stability were important, they might have at least considered the argument. As an empirical matter, subsequent events suggest that the court was correct. The Washington State situation would make an informative comparison with national forest timber purchasers who, in the absence of a trust notion, persuaded Congress to allow them out of their contracts. As a result of the decision, the state did not let timber contractors out of their purchase contracts. Predicted bankruptcies and economic collapse in the industry did not occur. Pat McElroy pers comm., April 6, 1991. This is a comparison which deserves further analysis.

245 Jeppeson v. Dept. of State Lands, 667 P.2d. 428 (Mont 1983) at 431.

246 Souder and Fairfax, Western States Survey Response, supra, n. 40

247 C.R.S. §36-1-131 (1973) for violating lease provisions or making false statements in lease application.

any lease terms not prohibited by law ...."

It is also common to find trust notions providing a minimum, verbal flourish in what would otherwise be a standard deference decision.[248] Because the courts give themselves enormous latitude to take hard looks, or not, at administrative discretion, and use a wide range of more or less demanding criteria to determine the appropriateness of agency action, it is not possible to identify cases where trust principles have clearly tipped the scales in favor of an agency action that would otherwise have been disallowed. The Montana Supreme Court, after referencing all the trust trappings cited above, appeared in *Jeppson* to conclude without regard to them:

> ... this Court will not compel a state agency to make a particular decision with respect to a matter when that agency exercises its own judgment and discretion and has not violated any statutory provisions or engaged in fraudulent action. In sum, we find no evidence of arbitrary and capricious action on the part of the department so as to justify the extraordinary relief requested by the appellant.[249]

However, it is also clear that throughout, the notion of the trust played a role in defining the scope of the discretion. For example, the Court notes that the fact that "the statute and regulations did not include provisions respecting the evaluation of a party's willingness and ability to make timely payments does not remove them from the list of criteria that *a fiduciary* could consider when acting upon a proposed assignment."[250]

The question of how important is the trust notion to the definition of the manager/trustee's discretion is complicated by the fact that in cases which do not uphold the Board's exercise of discretion the Court is likely to simply redefine the trustee, hence the locus of discretion. When binding the Board to the specific detail of the disputed statute, the Court will frequently not decide that trust principles have been exceeded or distorted or ignored. It will simply find that the legislature rather than the Board is the trustee. Upholding a Montana legislature's decision regarding oil and gas lease terms, the Court found that the legislature was in an awkward position because it "had the duty of discharging two trusts in disposing of state lands." Yet, the two trusts conflicted: "There can be no sacrifice of the rental for additional royalty without, at the same time, violating § 1, Article XVII, as to the interest disposed of by renting."[251] Hence, the Board is bound by the decision of the trustee, the Legislature.

Discussed in Evans v. Simpson, 547 P.2d. 931, at 933.

248 See State v. Babcock, supra. for a case where trust principles provide a veneer rather than a central part of the analysis. Compare with Jeppeson, supra, n. 242 less than 20 years later.

249 Jeppson, supra, n. 242, at 433-34.

250 Id., 433. My italics. Compare North Fork Pres. v. Dept of State Lands, supra, n. 192.

251 Montana ex rel. Strandberg v. Board of Land Commissioners, 307 P. 2d 234, 236-7 (1957).

Other contenders for the role of trustee emerge from the fact that different parts of the trust are typically administered by different agencies: the State Treasurer or Auditor is frequently considered to be, or styles him/herself as, the permanent school fund trustee. Who decides when a warrant against the permanent fund is a legitimate use of trust assets and ought to be paid? In an early Colorado case, the State Board of Land Commissioner's efforts to comply with statutory direction regarding investment of public school funds in loans on "unencumbered cultivated farm lands within the State of Colorado" were thwarted by the refusal of the state treasurer to pay the amount of the loan as directed. The Treasurer asserted that he was authorized by the constitution to securely and profitably invest the school fund, and that the statute which the Land Commissioners were attempting to carry out was unconstitutional because it grants to farmers special privileges. The Legislature was again identified as the appropriate Constitutionally designated body to be making the final decisions, again without reference to any trust or trustees. The Trustee was required to pay the warrant.[252]

More recently, Idaho's long-time state treasurer has waged a similar, and similarly unsuccessful battle, to assert authority over trust funds as against what she considered to be legislative/statutory frittering away of the assets.[253] Other jurisdictions have reached other conclusions on the same points.[254]

It is not, of course, unusual for different branches and bodies of government to dispute among themselves about who has the authority to make a decision; even more frequently, perhaps, an affected interest group or individual will prefer one agency's position and will argue in court, or elsewhere, that other agencies lack authority to decide. Discussion of which administrator or entity has the authority, or how much discretion does an administrator have, is familiar and not tied to trusteeship even though the language may be used upon occasion. The trustee issue becomes relevant when an agency asserts that its actions are based on trust principles, and those principles trump what might be characterized as the normal order of things.

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252 People ex rel. Miller v. Higgins, 168 Pac. 740 (Colo. 1917).

253 In a number of cases involving legislation allowing the Land Board to use up to ten per cent of receipts for expenses, statutes defining how to calculate permanent fund losses, which under the Idaho Constitution must be repaid, and similar, the legislature and not the state treasurer has been found to have authority. See Moon v. Investment Board, 525 P.2d 335 (Id. 1874); Moon v. Investment Board, 548 P.2d 861 (Id. 1976); Moon v. Investment Board, 560 P.2d 871 (1977); Moon v. State Bd. of Examiners, 567 F.2d 858 (1978); State ex rel. Moon v. State Bd. of Examiners, 662 P.2d 221, cert. denied, 464 U.S. 992 (1983).

254 See on administrative expenses: In re. Salaries of Commissioners and Employees of State Land Board 133 P. 140 (Colo 1913); U.S. v. Swope, 10F.2d 215 (1926); and on determination of losses, see State ex rel. Boucher v. Bartling, 31 N.W.2d 422 (Neb 1948).

The cases simply do not support the profits only, or even the profits primarily, notion of school lands. So, while we believe that the courts have oversimplified, we do not find in the cases the straight jacket that others extract from the Golden Oldie key quotes from key cases. Further, we find in our preliminary plunge into trust law a number of notions which encourage and invite creativity and responsiveness to changed circumstances. Hence we are not discouraged in our quest to support emerging flexibility by moving from the historical background to the horse's mouth on conventional wisdom. Even the worst case analysis—that we are wrong about the history, it is all a trust and all the states are bound by it—does not leave school land management tied in economic maximizing knots.

Turning to the second issue, we argue that states are not immutably bound to inflexible or uniform standards. First, the trust is basically defined by the states and the states can change it; not easily, but not impossibly either. Second, all states are clearly not bound, and arguably no states are bound, to merely use the land to raise money. Even where the trust doctrine is applicable, it is less constricting than the conventional wisdom suggests. The obligation to make the trust productive is balanced, in constitutions, statutes and trust principles, by the duty to protect the corpus of the trust.

The next section will take this discussion out of the realm of case law and onto the ground, combining economic theory and management reality to underscore imprecisions in the concept of economic maximization. While not wanting to assert that everything currently being done as putative trust land management is actually acceptable under the doctrine, the diversity of programs demonstrates that there is more dispersion than might be assumed.

IV. MANAGEMENT ON THE GROUND

The forestry programs provide a clear range of alternative roles that a state can play in management of its trust resources. Even if we accede to conventional wisdom and accept managing the lands for maximum economic returns as the only possibility, there is still—this section will demonstrate with regard to just one program—enormous flexibility. The state has a choice in managing these lands solely for the production of revenues, either in the short- or long-term, or the state can manage the lands so that other beneficiary concerns are incorporated into management strategies. For example, in those states and counties that have a high dependency on timber for jobs and public finance, the state managing agency may modify the revenue maximizing strategy to provide for long-term sustained yield, or to even out expected revenues fluctuations based on changing harvest levels, or to provide for the development of infrastructure such as roads as a part of the state forestry program. In each of these cases, the beneficiaries' concerns affects management of their lands and provides a feedback mechanism

back to the trustee agency. This process is in contrast to other resources managed in trust by the state, such as grazing and non-renewable energy resources, where beneficiary input in the states' managing decisions is not large.

This section is organized as follows. The first part describes the context for state trust lands forest management. The origins of the timberlands and their extent are described for the ten western states with trust lands, with a subset of four major state trust timber producers selected for detailed examination. The organization of the state agencies responsible for management of trust lands is compared among these four states. Timber receipt flows from both school and "county trust lands" are described.[255] The second section shows variations in how the states' trust responsibilities affect their timber management strategies.

Management Context

In many cases, especially in the northwest, the lands attractive for timber were sold, or the rights to those sections previously claimed or within the forest reserves were bought by speculators to use for selections of federal lands elsewhere in lieu of the state lands.[256] The state trust lands that passed into private ownership were frequently consolidated into large holdings by timber companies. The timber on these lands, and the federal lands privately obtained under the various land disposal acts, was then harvested as demand justified, and they were then either retained by the companies, sold to individuals to be converted to pasture lands, or allowed to revert to the counties for back taxes. This last option was frequently exercised during the depression and after forest fires wiped out any value that the lands might have had for timber production in the near future.[257]

In two states, Oregon and Washington, county forest lands managed in trust by the state are significant: 652,000 acres in Oregon and 622,500 acres in Washington.[258] These lands are of two types: (1) tax forfeited lands deeded by the county to the state and managed in trust for the county; and (2) lands purchased with bond revenues by the state. The latter are managed by the state and net revenues are returned to the county but they are not considered trust lands. The difference in the trust mandates between these county forest lands and the forested state trust lands will be discussed at greater length below; suffice it to say here that these tax-reverted

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255 These are tax forfeited lands not granted lands. See below, .

256 The best description of the processes used to fraudulently obtain timbered public lands (federal as well as state) in the northwestern United States is found in Puter Looters of the Public Domain (1908).

257 See Levesque. A Chronicle of the Tillamook County Forest Trust Lands.(1985).

258 Souder and Fairfax. Western States Survey Responses, supra, n. 40.

lands have a different trust mandate, different beneficiaries—and in Oregon even a different trustee—from those trust lands originally obtained by the state through federal grants. In our subsequent references to these lands, the county tax-reverted and purchased lands with the county as beneficiary will be called the "county forest lands", while the forested school and institutional trust lands will continue be called the "state trust lands" to differentiate between these two types of trust mandates.

1. Forest Land Base

Forested lands and timber revenues form a significant part of state trust lands management in some states. Timberlands are defined as those lands that are producing, or are capable of producing twenty cubic feet per year per acre of industrial wood, and that are not withdrawn from timber production by statute or administrative action.[259] Figure 7 shows these areas for the ten western states. Three major clusters of states categories break out based on timberland ownership. The largest holder is the State of Washington, with an ownership of slightly over 2 million acres. Medium sized owners include Idaho with over 1 million acres, Montana with 638 thousand acres, and Oregon with 827 thousand acres. Small timberland holding states are Arizona with 12 thousand acres, California with 95 thousand acres, Colorado with 274 thousand acres, New Mexico with 112 thousand acres, Utah with 150 thousand acres, and Wyoming with 203 thousand acres.

The four states selected for detailed examination are those with the largest amounts of commercial forest trust lands: Washington, Oregon, Idaho, and Montana. In terms of production and revenues, the classes are somewhat different. Figure 8 shows the production from the four largest state trust land managers. The rank order of the four states is still the same, however the differences in production, based on volume harvested per acre, are quite distinct. Over the ten year period from 1978 to 1987, Montana harvested 47 thousand board feet (MBF) per acre, Idaho 148 MBF/acre, Oregon 285 MBF/acre, and Washington lead with 359 MBF/acre of state trust forest lands. The reasons for these differences in harvest intensity from state trust lands can be attributed to differences in site quality, stocking levels, and markets.

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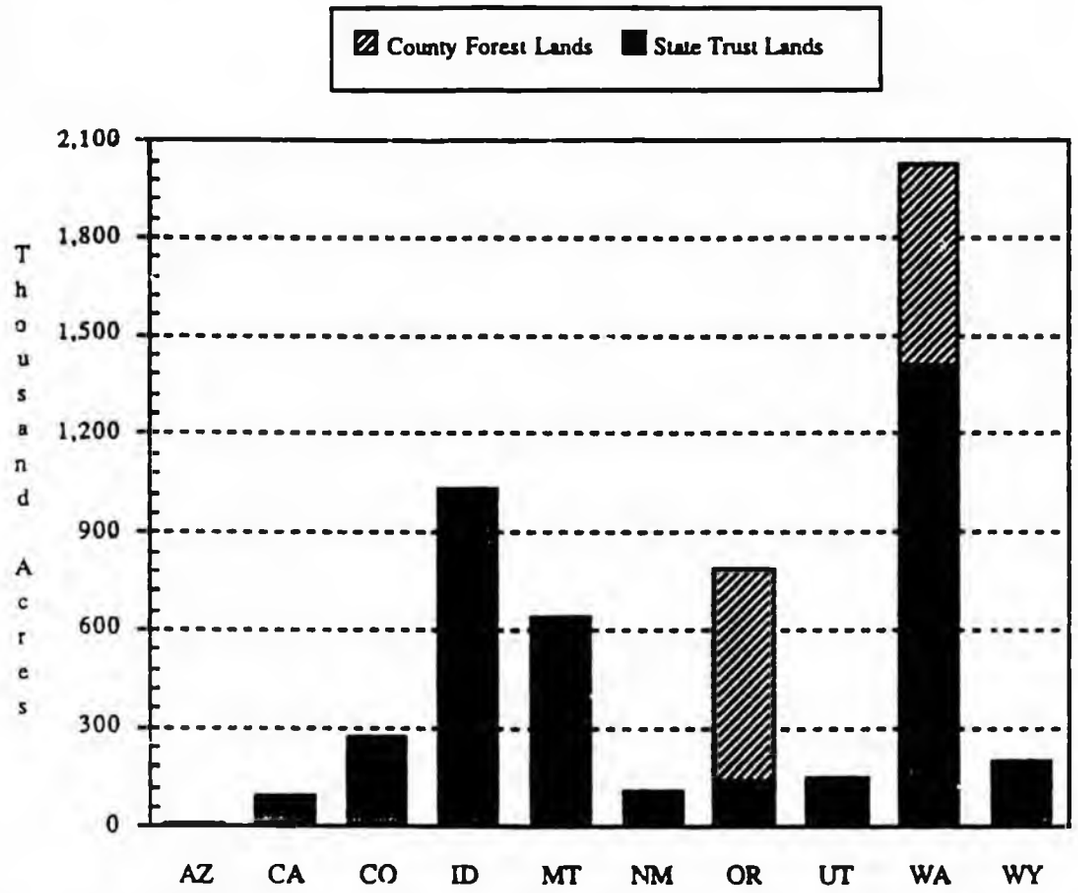
259 Waddell, Oswald, and Powell. Forest Statistics of the United States, 1987. Resource Bulletin PNW-RB-168. Pacific Northwest Research Station, (1989).

Figure 7. State-owned or managed timberlands in the western United States.



Sources: Table 2, 1987 data in Waddell, K., D. Oswald, and D.S. Powell. Forest Statistics of the United States, 1987 (Resource Bulletin PNW-RB-168. Pacific Northwest Research Station, U.S.D.A. Forest Service. Portland, OR. 106pp. 1989) and Souder, J.A. and S.K. Fairfax Western States Survey Responses. (State Lands Project. Department of Forestry and Resource Management. University of California, Berkeley, CA. 143pp. December, 1989).

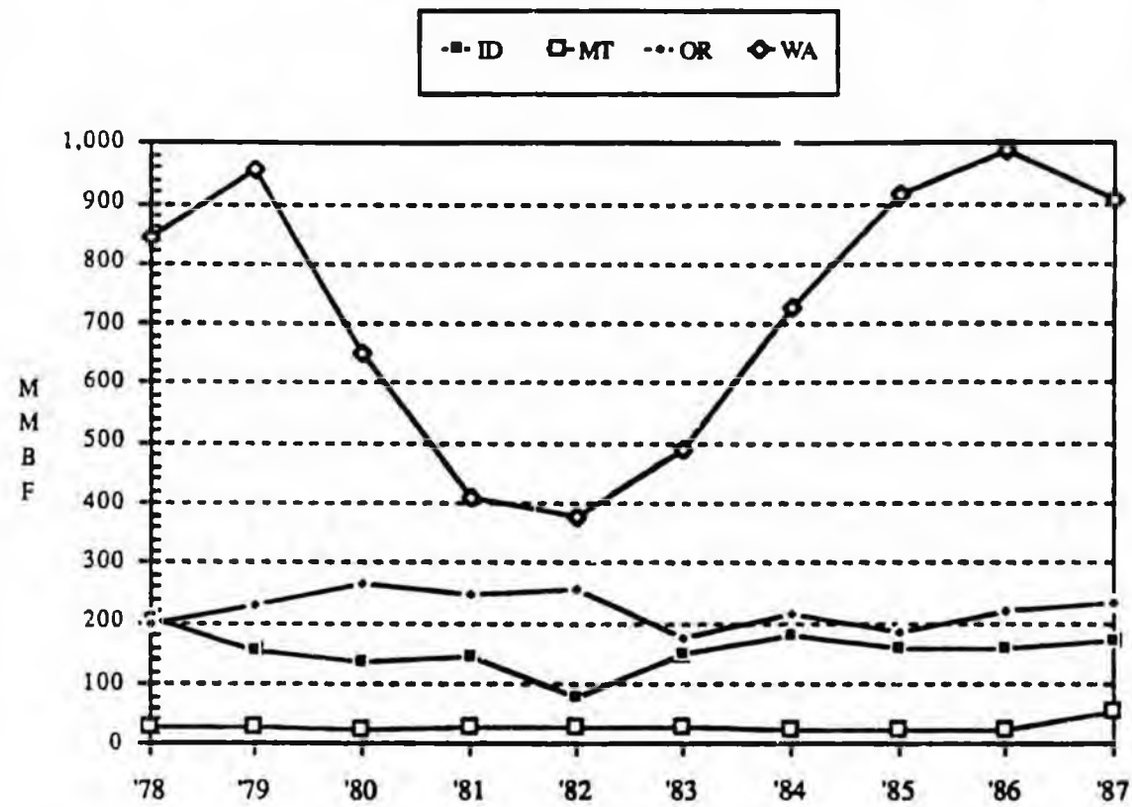
The land base for both the state trust lands and the county forest lands, while not fixed in place, is not expected to be reduced. Washington has specific legislation allowing the state to sell lands, place the proceeds in a land bank, and use these bank funds to purchase other lands with natural resource or income-producing potential.[260] Oregon also has a policy of maintaining its county forest lands.[261] In 1969 the Oregon Land Board decided to stop selling state trust lands and instead to manage them for long-term income production, with the exception of scattered

260 Washington Department of Natural Resources. Transition Lands Policy Plan. Final. (1988). Land sales and land bank legislation is found in the Revised Code of Washington (R.C.W.) §79.66.

261 Levesque, supra, n. 252. The Oregon Department of Forestry operates under the provisions of Oregon Revised Statutes (O.R.S.) Chapter 526. Public Lands are regulated under O.R.S. Chapter 274.

and isolated parcels.[262] No equivalent policies have been found for Idaho and Montana. However, Idaho will not sell more than 100 sections (64,000 acres) per year of all types of lands, and sells only to eliminate management and administrative problem areas.[263] On the other hand, Idaho exchanged approximately fifty thousand acres of trust lands during 1985 - 87.[264] The Montana State Land Board has a policy of not selling state lands at the present time, while exchanges are made to acquire land of equal or greater value, with high revenue generating potential and having good access and site productivity, while getting out of isolated parcels and federal special management areas.[265]

Figure 8. Timber Harvested from the largest state trust timberland owners, 1978-87.



Source: Souder, J.A. and S.K. Fairfax. State Trust Lands Management Project: Western States Survey Responses. Department of Forestry and Resource Management. University of California, Berkeley, CA. 143pp. 1990.

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262 Western States Survey Responses, supra, n. 40, at 49, 50.

263 Id., at 48, 51, 55 and 59. As mandated by Article 9, § 8 of the Idaho Constitution.

264 During that period Idaho deeded 51,231.36 acres and acquired 45,145.40 in exchange. This acreage was not predominantly forest land. Most current and anticipated exchanges involve non-forested BLM land. Stephanie Balzarini, Office of the Attorney General, Idaho, pers. comm., March, 1991.

265 Id., at 50, 58, and 59.

2. Institutional Structures for Forest Management

Three institutional structures for the management of state forested trust lands are found in the four states. In Oregon, the Department of Forestry manages all the county forest lands, and manages the forested state common school and institutional trust lands under contract with the Division of State Lands.[266] The Oregon Board of Forestry is composed of seven public members, with the State Forester serving as secretary of the board. In contrast, the Oregon State Land Board is composed of three elected officials: the governor, secretary of state, and state treasurer. Even though about 20% of the lands managed by the Department of Forestry are entrusted to the Oregon State Land Board, it does not have representation on the Board of Forestry; however the State Land Board has sole authority over policy issues on state trust lands, even when the lands are managed by the Department of Forestry.[267]

The separation of management responsibilities is not found in the other three states. In Washington, the Department of Natural Resources manages both the county forest lands and the state school and institutional trust lands.[268] A similar situation is found in Idaho and Montana. Although these states do not have county forest lands, the Department of State Lands in each of these states manages both the forested and non-forested trust lands.

Along with the management of trust forest resources, each of the four state agencies administrates other programs. All of the states have forest fire protection responsibilities.[269] Forest practices are regulated in all four states by the same agency managing the trust forest lands. Extension forestry is also an administrative function of these offices. In addition, the states that manage the entire compliment of trust lands have grazing, commercial leasing and development, and sovereign lands programs within their jurisdiction.

3. Revenues Distribution and Management Funding Mechanisms

Revenue from timber sales goes either to the beneficiary or to the permanent fund after management expenses have been deducted. In Montana and Oregon net receipts from state trust land timber sales go into the permanent fund. Net receipts from all other timber sales—

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266 Jones "State Forest Lands," in Lettman, ed. Assessment of Oregon's Forests. Oregon State Department of Forestry.(July, 1988), at 50.

267 William R. Cook, Assistant Attorney General, Oregon, pers. comm., _____, 1990.

268 Washington Department of Natural Resources. Proposed Forest Land Management Program 1984 - 1993. (November, 1983).at v. The Department of Natural Resources manages the University of Washington trust lands but cannot sell them without the Regent's permission. (RCW 79.01.184) Nick Handy, Chief Counsel, Washington Department of Natural Resources, pers. comm., March 6, 1991.

269 Western States Survey Responses at 5. Oregon reference in Levesque, supra, n. 254, at 75, ff.

from state trust lands in Idaho and Washington,[270] and from county forest trust lands in Washington and Oregon[271]—go directly to the beneficiary. The counties will not receive any revenues from the purchased county lands until the bonds are repaid.[272] Revenues from land sales and rights-of-way are also generated by county forest lands; these revenues are used to purchase replacement lands in Washington,[273] but are distributed directly back to the county of origin in Oregon.[274]

The states' timber management expenses are funded by a number of different processes. The most common is that a percentage of revenues from renewable resource receipts is deducted prior to distribution. In Oregon, only renewable resource revenues are used to fund the operations of the Department of Forestry for both state trust and county forest lands. There is a difference in the split in revenue between county trust lands and state trust lands in Oregon. The Oregon Department of Forestry receives 36-1/4 percent of the revenues from the county forest lands, but recovers only administrative costs for forestry management on the common school lands.[275] In the case of county forest lands, receipts from land sales and rights-of-way are used to purchase other lands, or returned to the county of origin.[276]

In Washington, timber management expenses may also be funded through a percentage of non-renewable resource receipts. The Washington Department of Natural Resources receives up to twenty-five percent of the revenues from both renewable and non-renewable resources, including land sales, for its operational cost accounts for the state school and institutional trust lands.[277] In contrast, up to twenty-five percent of revenues from tax-reverted county forest lands, and up to fifty percent of revenues from those county forest lands obtained by gift or purchase by the board can be used for management expenses in Washington.[278] Proceeds

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270 Until 1966 net receipts from timber sales on state trust lands in Washington went into the permanent fund. Don Lee Fraser, former Supervisor, Washington DNR, pers. comm. March 13, 1991.

271 O. R. S. §530.110.

272 O. R. S. §530.210 et seq.

273 R. C. W. §76.12.

274 Levesque , supra, n. 354, at 751, ff.

275 Oregon Department of Forestry. 59 Forest Log 6 (August - September, 1989). Comparative percentages of sales are not discussed. Whether the cost recovery is on a sale-by-sale basis, by management area (75% of the forested state trust lands are in the Elliot State Forest in Clatrop County), or on a program-wide basis is not stated. Generally the deduction for management expenses has been 25%. Pam Wiley, Assistant Director, Oregon Department of Lands, pers. comm. ____

276 Levesque, supra, n. 254, at 751, ff.

277 WDNR, Proposed Forest Land Management Plan , supra, n 263, at 29.

278 Id., at 28.

from sales of Washington county forest lands are used to buy replacement lands.[279]

In Idaho and Montana the majority of timber management expenses are funded directly from the state general fund, with small exceptions. Management cost recovery in Idaho includes a Forest Improvement Program to maximize the revenue production from state-owned forestlands by levying a ten percent fee on gross revenues from timber sales on these lands to fund the program.[280] The remainder of the funds are deposited into the permanent fund; timber management operations of the Idaho Department of Lands are funded from direct legislative appropriation.[281] Montana has a resource development program funded by an amount not to exceed 2-1/2 percent of the income received from trust lands, although it is primarily used in range and agricultural development projects.[282] An additional eleven dollars per thousand board feet of timber sold is retained from receipts for brush control and another eleven dollars per thousand board feet is retained for timber stand improvement activities.[283] The remainder of Montana's forestry management activities are funded through direct legislative appropriations of general funds.[284]

Trust Responsibilities

Four areas of forestry and land management on the state trust lands are significant in light of the specific trust responsibilities of the states towards the beneficiaries. These are: (1) maintenance of the trust land base; (2) management for the benefit of the trust; (3) management for long-term sustained yield of products from the lands; and (4) management for multiple-use on trust lands. Each of these areas will be discussed in light of trust responsibilities.

1. Maintenance of Trust Land Base

Perhaps the most elementary question of trust land management is whether the trust lands will

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279 R. C. W. §76.12.

280 Idaho Forestry Opportunities 1980 - 1990, at 9.. I.C.A. §58-140 requires that funds derived from specific activities, such as timber, be used only to improve the productivity and revenue generation of that activity. For timber, allowable activities are timber management, protection, and reforestation.

281 Idaho Department of Lands. Fourteenth Annual Report 1987 - 1988. (June 30, 1989), at 7.

282 Office of the Legislative Auditor. Department of State Lands: Report on Examination of Financial Statements, Two Fiscal Years Ended June 30, 1983. Report 83-20. (1983), at 3-10. Program established in 1967 by the Legislature (M.C.A. §77-1-604). §§ 77-1-605 allows funds to be used to improve productivity of timberlands.

283 M.C.A. §77-5-100 et seq.

284 Id., at 10. the "infusion of non-trust funds to support management and administration" adds weight to the argument that school lands are not quite a trust or a trust with a twist.... Generally, a trust would use its own assets to pay its expenses." Gail Lewellan and Andrew Tourville, Assistant Attorneys General, Minnesota, pers. communication, March 11, 1991,at 4. See also, Restatement, Trusts, Second, § 188.

be retained or sold. Early state policies throughout the west encouraged the sale of trust lands, both for their revenues and as an inducement to settlement.[285] Present state policies in Washington, Oregon, Idaho, and Montana mandate the maintenance of the forest land base on the state school and institutional trust lands, while allowing for sales and exchanges to rationalize the pattern of ownership. In Washington, exchanges may be facilitated by a Land Bank, where the WDNR temporarily places proceeds from the sale of lands while waiting to purchase other lands identified as having potential benefits to the trusts.[286] Isolated and fragments of sections of state trust lands that are not suitable for management in Oregon may be sold with the proceeds designated for purchase of replacement lands.[287] The policy with respect to Oregon county forest trust lands is to replace them within the same county, otherwise return the proceeds from the original sale to the county of origin.[288] In Idaho, "...all state-owned lands classified as chiefly valuable for forestry, reforestation, recreation, and watershed protection are hereby reserved from sale and set aside as state forests."[289] Proceeds from land sales in Idaho go into the permanent fund; however, forest lands may be acquired by the Department, with the acquisition cost being repaid by timber sales revenues.[290] Lands classified as timberlands in Montana are restricted from sale.[291] Land exchanges may be conducted with the approval of the county commissioners.[292]

2. Management for Benefit of Trust

Management for the benefit of the trust has three component parts. First, there is the granting of the lands by the federal government to the states, with the states acting as trustees for the beneficiaries. Second, there is a requirement that the states attain fair market value for those lands and resources sold. And third, there is the concept of maximizing revenues from the sale

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285 See supra n. 23.

286 "The legislature finds that from time to time it may be desirable for the Department of Natural Resources to sell state lands which have low potential for natural resources management or low income-generating potential or which, because of geographic location, or other factors, are inefficient for the department to manage. However, it is also important to acquire lands for long-term management to replace those sold so that the publicly owned land base will not be depleted and the publicly owned forest land base will not be reduced." R.C.W. §79.66.010. The Land Bank is allowed to accumulate a maximum of 1,500 acres before transfer to a specific trust beneficiary. R.C.W. §79.66.020.

287 O. R. S. §273.413 (1) and (2). This applies to state trust land managed by the State Land Board only.

288 Levesque, supra, n. 250, at 580, ff.

289 I. C. A. §58.133.

290 I. C. A. §58.504. This is not an active program. the "Idaho Department of Lands does not sell its timber land, nor has it sought to purchase any in the past 20 years." Stephanie Balzarini, Assistant Attorney General, Idaho, pers comm., March, 1991.

291 M. C. A. §77-2-203.

292 M. C. A. §77-2-201.

and lease of the trust lands. The exact language in these documents varied depending upon when the state was admitted to the Union.[293] Some states have also petitioned Congress to modify their Enabling Acts and have amended their Constitutions to change the trust language. Because of this, the concept of the states' trust role has evolved over the years.

The language in the Article X of the Montana Constitution of 1972 regarding state trust lands is explicit regarding the trust duties, and requiring the attainment of fair market value:

> (1) All lands of the state that have been ... granted by congress ... shall be public lands of the state. They shall be held in trust for the people ... for the respective purposes for which they have been or may be granted.
>
> (2) No such land ... shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state....[294]

The language in the Washington Constitution is practically identical.[295]

In contrast, Article 9, § 8 of the Idaho Constitution requires securing the maximum possible gain for the beneficiary, stating:

> It shall be the duty of state board of land commissions to provide for the location, protection, sale or rental of all lands heretofore ... granted to the state by ... the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return ... provided that no state land shall be sold for less than appraised value.

These grants of lands by the federal government to Idaho were found in *Barber Lumber Co.* v. *Gifford*[296] to constitute a trust fund with the board of land commissioners as the instrument to administer this trust. The principle that the board must act to secure the greatest measure of advantage to the beneficiary was also found to hold in *Barber*.

Managing to attain fair market value for those products sold from the trust lands is operationally different from managing those lands to produce the maximum revenues from the lands. The former requirement is reactive, i.e., if products such as timber are sold, they may not be sold for less than the fair market value. In contrast, revenue maximization may require managing lands in a specific manner before the resources are sold.[297] In forestry, this type of management may cause impacts to local communities, and may result in revenue fluctuations due to fluctuations in the amounts of timber being harvested from state trust lands, or in the

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293 See Souder and Fairfax, Working Draft No. 90-4, at 18 ff.

294 Montana Constitution, Article X, §11.

295 Washington Constitution, Article XVI, §1.

296 25 Idaho 654, 139 P. 557 (1914).

297 Waggener, Some Economic Implications of Sustained Yield as a Forest Regulation Model. [Report No.