

ALASKA LEGISLATURE

HOUSE and SENATE FINANCE COMMITTEE FILES,

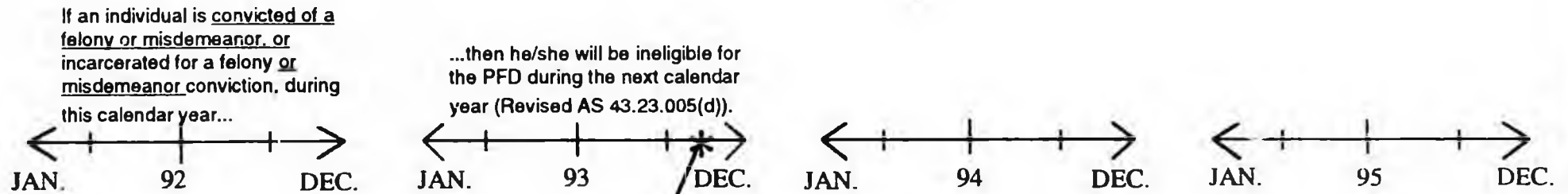
1993-1994

1242

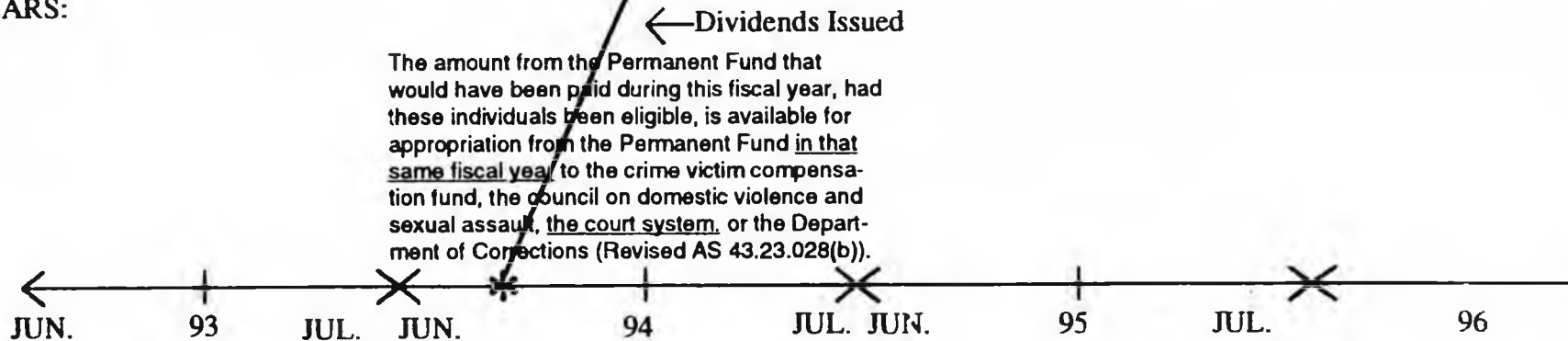
316

PROPOSED PROCEDURE: Forfeiture of PFD by Individuals Convicted of Felony or Misdemeanor

CALENDAR YEARS:



FISCAL YEARS:



SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERR.

Imp

DATE: 4/14/94

FURTHER: Finance

Date of 5-Day Notice: 4-14-94
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 4-20-94

State Affairs Committee considered SB 378

"An Act relating to permanent fund dividend program notice requirements and to dividends of individuals convicted of felonies or misdemeanors; and providing for an effective date."

and recommends:

replace with _____ CS. SB 378 (STA)

and recommends it be replaced with

same title
 new title
 technical title change (HB only)

attaches amendment(s) and report it back as follows

adopts _____ Letter of Intent

further referral to the _____

do pass

do not pass

no recommendation

individual recommendations

*OFFER'S
FIN'S*

FISCAL NOTE INFORMATION

Department	Date	Zero	Fiscal
DOR - PFD	4-18-94	✓	
DOC	4-15-94	✓	
COURTS	4-20-94		✓

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note

Governor's Bill with Previous Fiscal Notes (enter information above)

DO PASS:

OTHER RECOMMENDATIONS:

① Mike Miller

② Duncen - No Rec

③ Edwin L. Taylor No Rec

① Steven A. Lemaw Do Pass
Chair: Signature and Recommendation

*CS
CB
CB*

SB

379

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 4/22/94

FURTHER:

DATE TURNED INTO OFFICE: _____

The Finance Committee considered SB 379

"An Act extending the termination date of the Board of Marine Pilots; and delaying the repeal of a statute relating to tariffs for pilotage services."

Died in SFC 1994.

and recommends:

- replace with _____ CS _____ (FINANCE)
or adopt previous _____ CS _____
 attaches amendment(s)

- same title
 new title
 technical title change (HB only)

- adopts _____ Letter of intent
 further referral to the _____

- do pass
 do not pass
 no recommendation
 individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal

- Appropriation No Fiscal Note

DO PASS.

OTHER RECOMMENDATIONS:

1. _____
Co-Chair: Signature/Recommendation

2. _____
Co-Chair: Signature/Recommendation

ALASKA STATE LEGISLATURE
SENATE BILL NO. 379

HISTORY IN THE SENATE

1994
4/22

Read first time and referred to:
FIN

_____ RPT(____) CS ____ DP ____ NR ____ DNP ____ AM
New Title _____ Same Title _____ Previous FN _____
FN ____ OFN _____ To _____

_____ RPT(____) CS ____ DP ____ NR ____ DNP ____ AM
New Title _____ Same Title _____ Previous FN _____
FN ____ OFN _____ To _____

_____ RPT(____) CS ____ DP ____ NR ____ DNP ____ AM
New Title _____ Same Title _____ Previous FN _____
FN ____ OFN _____ To _____

_____ Rules Calendar(____) CS ____ AM ____ Other
New Title _____ Same Title _____ Previous FN _____
FN ____ OFN _____

Read second time

_____ CS Adopted (____) _____ New Title
_____ Amended _____ Advanced

Read third time

_____ Letter of Intent adopted
_____ Return to second for specific amendment

PASSED EFD Same ____ or
Yeas Yeas
Nays Nays
Excused Excused
Absent Absent

Reconsideration
Reconsideration not taken up

PASSED EFD Same ____ or
Yeas Yeas
Nays Nays
Excused Excused
Absent Absent

Reported correctly engrossed
Signed by President, to House

Secretary of the Senate

HISTORY IN THE HOUSE

19

Read first time and referred to:

_____ RPT CS(____) _____ New Title
_____ DP _____ DNP _____ NR _____ AM
_____ FN _____ OFN _____ Previous FN _____

_____ RPT CS(____) _____ New Title
_____ DP _____ DNP _____ NR _____ AM
_____ FN _____ OFN _____ Previous FN _____

_____ RPT CS(____) _____ New Title
_____ DP _____ DNP _____ NR _____ AM
_____ FN _____ OFN _____ Previous FN _____

Read second time
CS(____) Adopted

Amended

Advanced

Read third time

Return to second for specific amendment

PASSED EFD Same ____ or
Yeas Yeas
Nays Nays
Excused Excused
Absent Absent

_____ Intent adopted

Reconsideration
Reconsideration not taken up

PASSED ON RECON. EFD Same ____ or
Yeas Yeas
Nays Nays
Excused Excused
Absent Absent

_____ Intent adopted

Reported correctly engrossed, signed by the Speaker
and returned to the Senate

Chief Clerk of the House

SENATE-HOUSE HISTORY Continued

19	<p>Received from the House Version: _____</p> <p>Concur in House amendment Y ___ N ___ E ___ A ___ _____ Efd same or Y ___ N ___ E ___ A ___</p> <p>Failed to concur in House amendment, ask House recede Y ___ N ___ E ___ A ___</p> <p>House failed to / receded from amendment Y ___ N ___ E ___ A ___</p> <p>CC appointed by Senate _____ Chair _____</p> <p>CC appointed by House _____ Chair _____</p> <p>(S) Granted Limited Powers of Free Conference</p> <p>(H) Granted Limited Powers of Free Conference</p>
----	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

19	<p>(S) Adopted CC Rpt _____ Y ___ N ___ E ___ A ___ _____ Efd same or Y ___ N ___ E ___ A ___</p> <p>(H) Adopted CC Rpt _____ Y ___ N ___ E ___ A ___ _____ Efd same or Y ___ N ___ E ___ A ___</p> <p>To enrolling Received from enrolling Sent to Governor</p> <p>_____ By Governor</p> <p>Chapter Number _____</p> <p>Filed with Lieutenant Governor</p>
----	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

SB

381

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

cc ✓
FN ✓

DATE: 5/2/94

FURTHER:

24 hr
Date of 5-Day Notice: 5-2-94
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 5-4-94

Finance Committee considered SB 381

"An Act relating to the construction of the Alaska Orbital Launch Complex by the Alaska Aerospace Development Corporation."

and recommends:

- replace with _____ CS _____ (FINANCE)
- or adopt previous _____ CS _____
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

adopts _____ Letter of Intent

further referral to the _____

to pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal
<i>DAVED Aerospace</i>	<i>5/2/94</i>	<i>0</i>	

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note

DO PASS:

Steve Z...
Greg ...
Tim Kelly

OTHER RECOMMENDATIONS:

Bert ... No Rec

1. ...
2. ...

Co-Chair: Signature/Recommendation

Co-Chair: Signature/Recommendation

FISCAL NOTE

SB 381

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 381

Revision Date: 5/2/94
 Title: Relating to an Alaska Orbital Launch
complex
 Sponsor: Senate Finance
 Requestor: Senate Finance

Department Affected: Commerce and Economic Development
 BRU: Alaska Aerospace Development Corp
 Component: _____

COMPONENT SERIAL NO. _____

Expenditures/Revenues:

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 94) cost: \$ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: [Signature]
 Division: _____

Phone: 465-2500
 Date: _____

Approved by Commissioner: Paul Fuhs
 Agency: Commerce and Economic Development

Date: 5-1-94

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The Alaska Aerospace Development Corporation (AADC) is focused on two major projects: the location of satellite ground stations in the Fairbanks area and the construction of the Alaska Orbital Launch Complex (AOLC) on Kodiak Island. Alaska is a strategic location for aerospace operations and is an intersection to global markets. The aerospace industry being developed by AADC appears to be the answer to commercial exploitation of these advantages.

The aerospace industry and technology that will be brought to Alaska should create a new source of skilled, high-paying jobs, unique educational opportunities for our children, and encourage spin-off industries of direct benefit to a broad range of Alaskans.

All of Alaska will benefit from AADC's activities. The construction of the AOLC and the development of a global ground station center in Fairbanks comes at a crucial time in the emergence of a commercial space industry in the United States. AADC's efforts will enable Alaska to diversify its economy by exploiting one of Alaska's under-used natural resources, its aerospace potential.

ALASKA ORBITAL LAUNCH COMPLEX

The market for polar orbit satellites is increasing rapidly, with a number of large constellations currently in development. These range from Iridium's 66 satellite network to Teledesic's 840 satellite network. We expect the market for polar orbit satellites to continue to increase, jeopardizing the ability of American companies to satisfy market demand. Currently Vandenberg AFB is the only launch site in the United States available for polar orbit launches, and even if it were expanded to its maximum capability, Vandenberg AFB cannot support all of the launches required to maintain the planned satellite constellations. Several new launch vehicles are being developed for this market, and the federal government is expected to make excess Minuteman vehicles available for university and Department of Defense launches.

Kodiak Island is an optimal location for the first commercial rocket launch facility in the United States. The location at Narrow Cape AADC boasts unobstructed southern launch paths, safe distances from other development and activities, a minimum of environmental impact, and supportive communities and governments. While the vast number of commercial polar orbit launches are several years away, the commercial sector must be able to plan for those launches now. If launch capability will not be available in the United States, then companies may be forced to look elsewhere, or to scale back their plans. Alaska's plans for the AOLC address the needs of the commercial sector.

FAIRBANKS GROUND STATIONS

The Fairbanks area is an ideal location for polar orbiting satellite ground stations operations. Fairbanks' strategic latitude is complimented with state-of-the-art telecommunications systems, a global reach air transportation system, world-class university faculty and facilities, available skilled employees and contractors, and a warm and receptive community.

Polar orbiting, or near Polar orbiting satellites are best serviced from ground stations located near the Polar regions. The optimal location would also allow an extended North - South horizon to horizon view of the satellite. In both cases, optimal flyover rates and field of view, Fairbanks is arguably one of the best locations on the planet.

Beyond geography, the satellite operator must also consider available infrastructure, local cost of operations, market access (transportation) and community support (tangible and intangible). These things are either already available in Fairbanks or easily developed as part of a strategy to support ground station development.

COST ESTIMATE SUMMARY

CASTOR 120 BASED VEHICLES

a)	Launch Pad and Service Structure (SLC 1)	\$2,981,100
b)	Integration, Checkout and Encapsulation Facility (ICF)	\$1,718,600
c)	Spacecraft Assemblies Transfer Building (SCAT)	\$ 563,250
d)	Launch Operations and Control Center (LOCC)	\$ 324,000
e)	Supporting Roads	\$ 500,000
f)	Fiber Optic System - 30 Fiber	\$ 107,500
g)	Power Generation Facility (750 KW, complete)	\$ 175,000
h)	Security	\$ 20,000
i)	Area Lighting, Utilities	\$ 20,000
j)	Engineering, Testing, Administration	<u>\$ 518,258</u>
	Total	\$7,420,218

K Rocket Motor Storage Bldg. \$ 750,000

March 3, 1994

*The Honorable Ted Stevens
United States Senate
522 Hart Office Building
Washington, DC 20510-0201*

Dear Ted,

It is my understanding that the Alaska Aerospace Development Corporation (AADC) recently selected Kodiak Island as the site for the development of an orbital launch facility. I am writing to express my support for that decision.

The development of an orbital launch facility within the State of Alaska is a positive step towards diversification of the state's economy. It is anticipated that the launch facility will result in increased economic development within the state, including the creation of highly-skilled and high-paying jobs. It is also anticipated that the launch facility and the personnel who work there will provide the citizens of Kodiak Island with valuable educational opportunities.

For the reasons stated above, I urge your continued support of the AADC and its development of an orbital launch facility on Kodiak Island. Thank you for your consideration of this important issue.

With best regards,

Sincerely,

S/S WALTER J. HICKEL

*Walter J. Hickel
Governor*

*cc: Mr. Pat Ladner
WJH/BPM/ec*

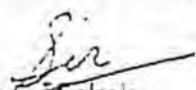
*0101
Support for AK Aerospace Development
Corp. Kodiak site*

THE FOLLOWING PAGE MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL.

ALASKA
AEROSPACE
DEVELOPMENT
CORPORATION

March 10, 1994

The Honorable Walter J. Hickel
Governor, State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001


Dear Governor Hickel:


I would like to take the opportunity to inform you of the invaluable contribution Commissioner Paul Fuhs made at the recent meeting between the Alaska Aerospace Development Corporation (AADC) and Lockheed Missiles and Space Company held in Sunnyvale, California on March 8, 1994.

The recent decision of the AADC Board of Directors to designate Kodiak as the location for the Alaska Orbital Launch Complex has generated excitement within the aerospace industry. As you know, Lockheed invited AADC to Sunnyvale to present information about the development of Alaska's launch complex. In addition to design and safety information presented by AADC, Commissioner Fuhs was able to demonstrate Alaska's willingness and ability to support the launch complex. The Commissioner's knowledge and background allowed him to communicate numerous ways in which Alaska stands ready and able to support this venture including, pricing strategies, transportation, and funding for training.

Lockheed executives were so impressed by Commissioner Fuhs and Alaska's commitment to the development of this industry that they immediately decided to undertake a trade study to consider use of the Alaska Orbital Launch Complex for Lockheed's polar launches. AADC and the State of Alaska owe a great deal of gratitude to Commissioner Fuhs, as his efforts made the difference in Lockheed taking the next step toward making a commitment to the Alaska Orbital Launch Complex.

Please do not hesitate to contact me if you have any questions or if I can provide you with additional information.

Sincerely,


Pat Ladner
Executive Director

cc: The Honorable Senator Ted Stevens
The Honorable Senator Frank Murkowski
The Honorable Don Young
Commissioner Paul Fuhs
AADC Board of Directors

Launch from Kodiak Island Taurus Stages

Stage 1 (314 nm)

Fairing (1133 nm)

Stage 2 (1384 nm)

220

210

200

190

180

170

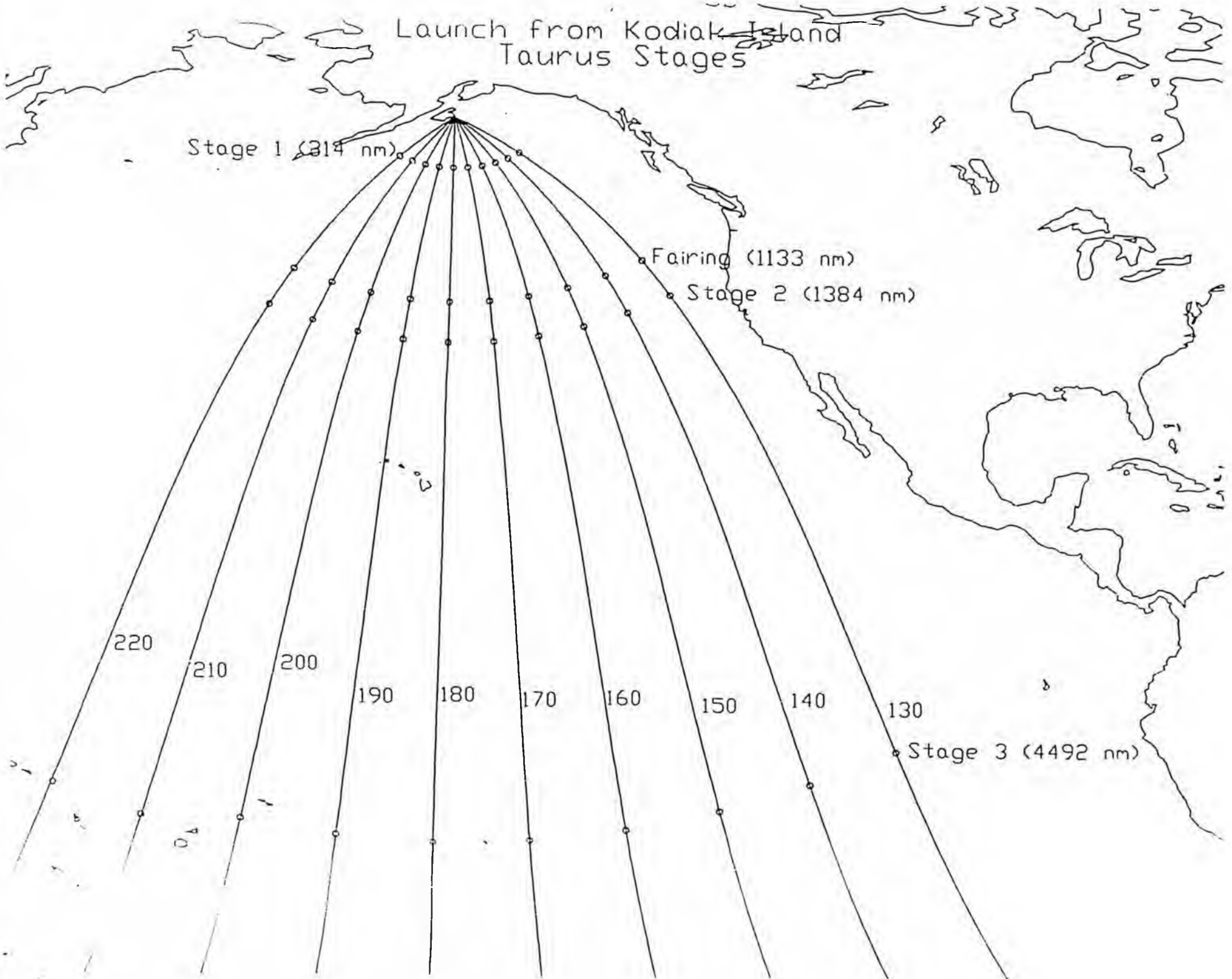
160

150

140

130

Stage 3 (4492 nm)



SPACE LAUNCH COMPLEX 1

Castor 120 and Smaller Based Vehicles

LAUNCH OPERATIONS
& CONTROL CENTER

FUTURE ROCKET
MOTOR STORAGE

INTEGRATION CHECKOUT &
ENCAPSULATION FACILITY

LAUNCH
PAD & SERVICE
STRUCTURE

SPACECRAFT
ASSEMBLIES
TRANSFER FACILITY



ALASKA AEROSPACE DEVELOPMENT CORPORATION

SENATE FINANCE COMMITTEE REPORT

DATE: 5/2/94

FURTHER:

24 hr
 Date of 5-Day Notice: 5-2-94
 (in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 5-4-94

Finance Committee considered SB 381

"An Act relating to the construction of the Alaska Orbital Launch Complex by the Alaska Aerospace Development Corporation."

and recommends:

- replace with _____ CS _____ (FINANCE)
- or adopt previous _____ CS _____ (_____)
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

adopts _____ Letter of Intent

further referral to the _____

- do pass
- do not pass
- no recommendation
- individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal
<i>ALASKA Aerospace</i>	<i>5/2/94</i>	<i>0</i>	

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note

DO PASS.

Steve Kim
Greg Harkin
Tim Kelly

OTHER RECOMMENDATIONS:

Bert Thompson No Rec

1. _____
2. _____

1. _____
 Co-Chair: Signature/Recommendation

2. _____
 Co-Chair: Signature/Recommendation

SB

382

HFIN

FILE

Date of Committee Action: 9-27-94

The FINANCE Committee considered:

SB 382

SENATE BILL NO. 382

MENTAL HEALTH LAND TRUST SETTLEMENT

"An Act relating to the mental health land trust, the mental health trust income account, and the mental health land trust litigation, Weiss v. State, 4FA-82-2208 Civil, and amending ch. 66, SLA 1991, and ch. 5, FSSLA 1994 relating to the trust, the account, and the litigation; and providing for an effective date."

RECOMMENDATIONS:

[] the same title
be replaced with _____ [] a new title

[] have attached amendments(s)

[X] do pass

[] do not pass

[] no recommendations

[] individual recommendations

[] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____

APPROVES PREVIOUS: (Dept/Date) _____

[] fiscal impact _____

[] fiscal note(s) _____

[] zero fiscal note _____

[X] zero fiscal note(s) 9-26-94 all agencies

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Eileen P. Michern</i>	✓				
<i>Ronald J. Lee</i>					
<i>Mark Stanley</i>	X				
<i>Larry M. ...</i>	X				
<i>Sean P. Parnell</i>	X				
<i>Ben ...</i>	X				
<i>Gene Hoffman</i>					
<i>Mike ...</i>	X				
<i>Jay Brown</i>	✓				
<i>Tom ...</i>					
<i>Richard ...</i>	X				

Ronald J. Lee *Eileen P. Michern*
CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 1

Bill Version: SB 382

(S) Publish Date: 9-26-94

**STATE OF ALASKA
1994 LEGISLATIVE SESSION**

Revision Date: 9/22/94 Dept. Affected: All Agencies
 Title: An Act relating to the mental health trust, trust income account and litigation BRU: _____
 Sponsor: Rules Committee Component: _____
 Requestor: Office of the Governor COMPONENT SERIAL NO. _____

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ()						

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: \$ _____

POSITIONS	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nancy Slagle *Nancy Slagle* Phone: 465-4681
 Division: Division of Budget Review Date: 9/22/94
 Approved by Commissioner: Nancy Bear Usura *Nancy Bear Usura* Date: _____
 Agency: Office of the Governor

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SB

382

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 9/26/94

FURTHER:

Date of 5-Day Notice: 9/20/94
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: 9-26-94

Finance Committee considered SENATE BILL NO. 382

"An Act relating to the mental health land trust, the mental health trust income account, and the mental health land trust litigation, Weiss v. State, 4FA-82-2208 Civil, and amending ch. 66, SLA 1991, and ch. 5, FSSLA 1994 relating to the trust, the account, and the litigation; and providing for an effective date."
and recommends:

- replace with _____ CS _____ (FINANCE)
- or adopt previous _____ CS _____ (_____)
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

adopts _____ Letter of Intent

further referral to the _____

do pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal
OMB/All agencies	9/22	0	

Appropriation No Fiscal Note

DO PASS:

[Signature]
[Signature]
[Signature]
[Signature]

OTHER RECOMMENDATIONS:

1. [Signature] no pass
 Co-Chair: Signature/Recommendation

2. [Signature]
 Co-Chair: Signature/Recommendation

FISCAL NOTE

No. 1

Bill Version: SB 382

(S) Publish Date: 9-26-94

**STATE OF ALASKA
1994 LEGISLATIVE SESSION**

Revision Date: 9/22/94 Dept. Affected: All Agencies
 Title: An Act relating to the mental health trust, trust income account and litigation BRU: _____
 Component: _____
 Sponsor: Rules Committee
 Requestor: Office of the Governor COMPONENT SERIAL NO. _____

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: \$ _____

POSITIONS						
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nancy Slagle *Nancy Slagle*
 Division: Division of Budget Review
 Approved by Commissioner: Nancy Bear Usera
 Agency: Office of the Governor

Phone: 465-4681
 Date: 9/22/94
 Date: _____

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ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Finance

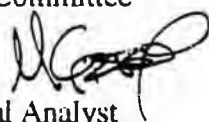


P.O. Box 113200
Juneau, AK 99811-3200
(907) 465-3795
FAX (907) 463-4885

September 26, 1994

TO: Representative Larson
Representative MacLean
Co-Chairs
House Finance Committee

Senator Frank
Senator Pearce
Co-Chairs
Senate Finance Committee

FROM: Michael Greany 
Legislative Fiscal Analyst

RE: Analysis of Mental Health Special Session Draft Legislation

The Division of Legislative Finance has prepared the attached analysis to assist you in your understanding of the September 21, 1994 draft legislation.

The principal fiscal analysts assigned to the mental health issue are Susan (Sorenson) Taylor, 465-5410 and Fred Fisher, 465-5411. Please refer any questions you may have to them or for further assistance you may require.

cc: Senator Randy Phillips, Chairman
Legislative Budget and Audit Committee

Analysis of the Effects of the 9/21/94 Draft Amendments to the Mental Health Trust Settlement

	Ch 6, FSSLA 1994	
Sources:	as enacted	per 9/21/94 draft amds (estimated)
Mental health trust income account (AS 37.14.011) (1)	33,000.0	40,700.0
Department of Natural Resources - mental health trust income in the general fund (2)	11,700.0	13,000.0
Proceeds from sale of Department of Natural Resources land sale contract portfolio (3)	25,000.0	16,000.0
Constitutional Budget Reserve Fund	130,300.0	130,300.0
Total	200,000.0	200,000.0

(1) Chapter 5, FSSLA 1994 repealed the Mental Health Trust Income Account (MHTIA) on its effective date, June 24, 1994. Section 3 of the draft amendments to Ch 5, FSSLA 1994 and Ch 66, SLA 1991 would reinstate the MHTIA in order to provide a valid funding source for appropriations made from that source. AS 37.14.011 (b) & (c) which provided the income source (6% of unrestricted general fund revenues) of the MHTIA were also repealed by Ch 5, FSSLA 1994. The repealed income provision is not reinstated but replaced by section 5 of the draft amendments to Ch 6, FSSLA 1994, which appropriates the amount necessary to fund MHTIA appropriations including FY95 operating and capital from the general fund. Section 4 of the draft amendments to Ch 6, FSSLA 1994 identifies the MHTIA as one of the sources for covering shortfalls in other funding sources, such as the land sale contract portfolio. As stated previously, the amount needed to fund MHTIA appropriations will be forthcoming from the general fund.

(2) Department of Natural Resources - mental health trust income in the general fund. Section 4 of the draft amendments identifies these funds as a source for covering shortfalls in other funding sources. As of September 20, 1994, an additional \$1.3 million would be available from this source, due to the receipt of additional coal royalties and other income.

(3) The actual value of the portfolio is unknown at this time. For the purposes of this analysis, the value is conservatively estimated at \$16 million. It is assumed that the value will be less than the \$25 million originally estimated due to withdrawal of certain types of contracts from the portfolio, the increase in interest rates, and the receipt of additional payments on principal since the initial estimates were made. DNR is in the process of soliciting bids for the land sale contract portfolio. The actual value of the portfolio will be known after the bids have been opened, which is expected to occur on October 14, 1994.

**Comparative Analysis of FY95 Mental Health Spending
Based on DOR Spring Revenue Forecast, Mid-case**

	8/15 spend plan	9/21/94 draft amds
FY 94 MHTIA Balance	48.0	47.7
FY95 Revenues, @ Spring mid-case \$13.97/bbl.	101.8	
Estimated FY95 general fund transfer, per section 5 of draft amendments to Ch 6/94		109.6
FY95 AVAILABLE	149.8	157.3
FY95 Expenditures		
Operating-Mental Health	106.4	106.4
Education	8.1	8.1
Capital	0.4	0.4
Special Appropriations/Fund Transfers	1.1	1.1
New Legislation	0.6	0.6
From MHTIA to MHTF, estimated	33.2	40.7
FY95 EXPENDITURES	149.8	157.3
FY95 MHTIA Balance	0.0	0.0

Ch 5, FSSLA 1994 repealed AS 37.14.011(b) & (c) as of 6/24/94 which ended the automatic transfer of 6% of unrestricted general fund revenues to the mental health trust income account (MHTIA). Section 5 of the draft amendments to Ch 6, FSSLA 1994 appropriates general funds to the MHTIA as needed to cover existing appropriations including any shortfalls in other funding sources for the capitalization of the mental health trust fund. The net shortfall in other funding sources, primarily the DNR land sale contract portfolio, is estimated at \$7.8 million. Assuming the DOR spring mid-case revenue forecast, the \$7.8 million in additional funding needed for the capitalization of the mental health trust fund would be withdrawn from the Constitutional Budget Reserve Fund (CBRF) under section 39(c) of Ch 3, FSSLA 1994, increasing the estimated withdrawal from \$350.2 million to \$358.0 million. However, if FY95 unrestricted general fund revenues exceed the spring mid-case forecast of \$13.97/bbl., which is likely, there would be sufficient general funds to cover the \$7.8 million and to further reduce the estimated withdrawal from the CBRF by an estimated \$160 million at \$15.50/bbl. (latest Executive Update) and by \$270 million at \$16.60/bbl. (year-to-date average).

**Comparative Analysis of FY95 General Fund and Mental Health Trust Spending
Based on DOR Spring Revenue Forecast, Mid-case**

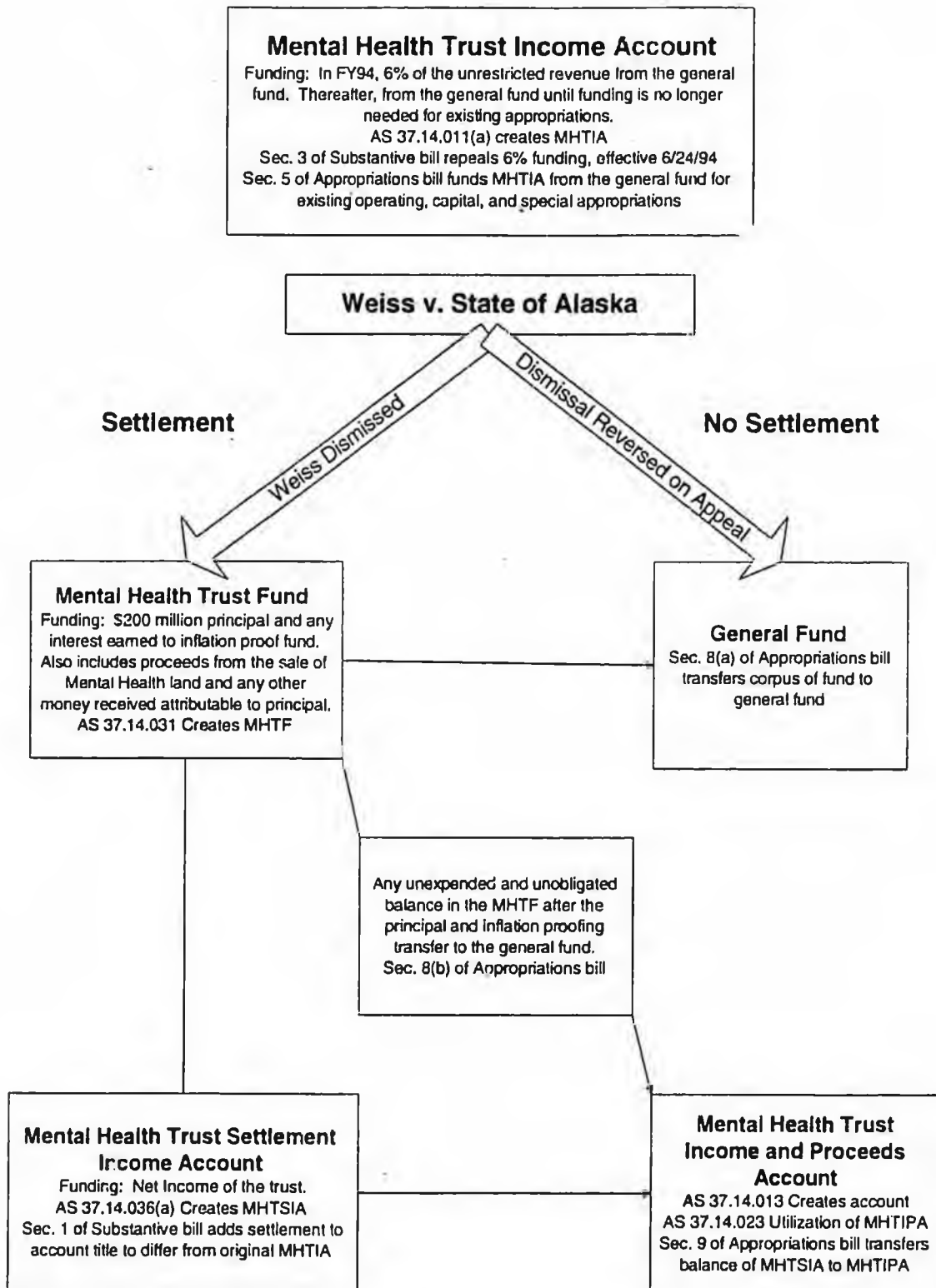
	per 8/15 Legislative Spendplan	per 9/21/94 Draft Legislation
FY95 REVENUES		
Unrestricted General Fund	1,696.9	1,696.9 Spring Forecast, Mid-case
Revenue Adjustments	32.7	32.7
FY95 AHFC Dividend	200.0	200.0 Section 17(d), Ch 3/94
Executive Life/ILTF Recovery	37.6	37.6 Section 39(a), Ch 3/94
AIDEA	60.0	60.0 Section 39(b), Ch 3/94
From Constitutional Budget Reserve	350.2	358.0 Sec 39(c), Ch 3/94,
From Constitutional Budget Reserve	68.7	68.7 Section 40, Ch 3/94
From Sale of DNR Land Sale Contract Portfolio	25.0	16.0 Ch 6, FSSLA 94
From Mental Health Trust Income Account	48.0	47.7 Updated per sec 24, CH2/94
FY95 AVAILABLE	2,519.1	2,517.6
FY95 Expenditures		
Operating	2,196.3	2,196.3
Debt Service	133.1	133.1
Capital	100.4	100.4
Special Appropriations/Fund Transfers	89.3	87.8 See note below
FY95 EXPENDITURES	2,519.1	2,517.6

Constitutional Budget Reserve Balance	109.2	101.4	Estimated as of 6/30/95
Mental Health Trust Income Account Balance	0.0	0.0	Estimated as of 6/30/95

Note: FY95 specials and fund transfers have been adjusted as follows:

Ch 3, FSSLA 1994 Fund Transfers Sections 19(b), 20(a), 26, & 27	31.1	31.1
Ch 6, FSSLA 1994 GF to MHTF based on value of DNR land contract portfolio	25.0	16.0
Ch 6, FSSLA 1994 MHTIA to MHTF	33.2	40.7
Total	89.3	87.8

**Flowchart of Mental Health funds and accounts if settlement occurs
(Weiss is dismissed) or does not (dismissal is reversed on appeal).**



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*

Sally K. Fairfax
Jon A. Souder
Gretta Goldenman

WORKING PAPER 90 - 5

State Lands Project
Department of Forestry & Resource Management
University of California
Berkeley, CA 94705



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

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

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 Bassett, *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 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

(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 doing 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 humility¹⁴ 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

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 cession¹⁷ 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 Ordinance of 1785

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 survey¹⁹ 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 Ordinance, 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

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 Ordinance, that the 1787 statute rather than the 1785 one provided for public schools. They are quite correct. The Northwest Ordinance 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 ordinance 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. Byrum 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 on 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 Program²⁶

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

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 Herebefore 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

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

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 Vincennes 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 1800s.

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

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

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 than 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 Basset, 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 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

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

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), pp. 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, *U.S. 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

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 purposes..." 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

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

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

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 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 kin, 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

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.

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, , 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

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 Mexico⁸³ 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 Act⁸⁴ 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

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

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

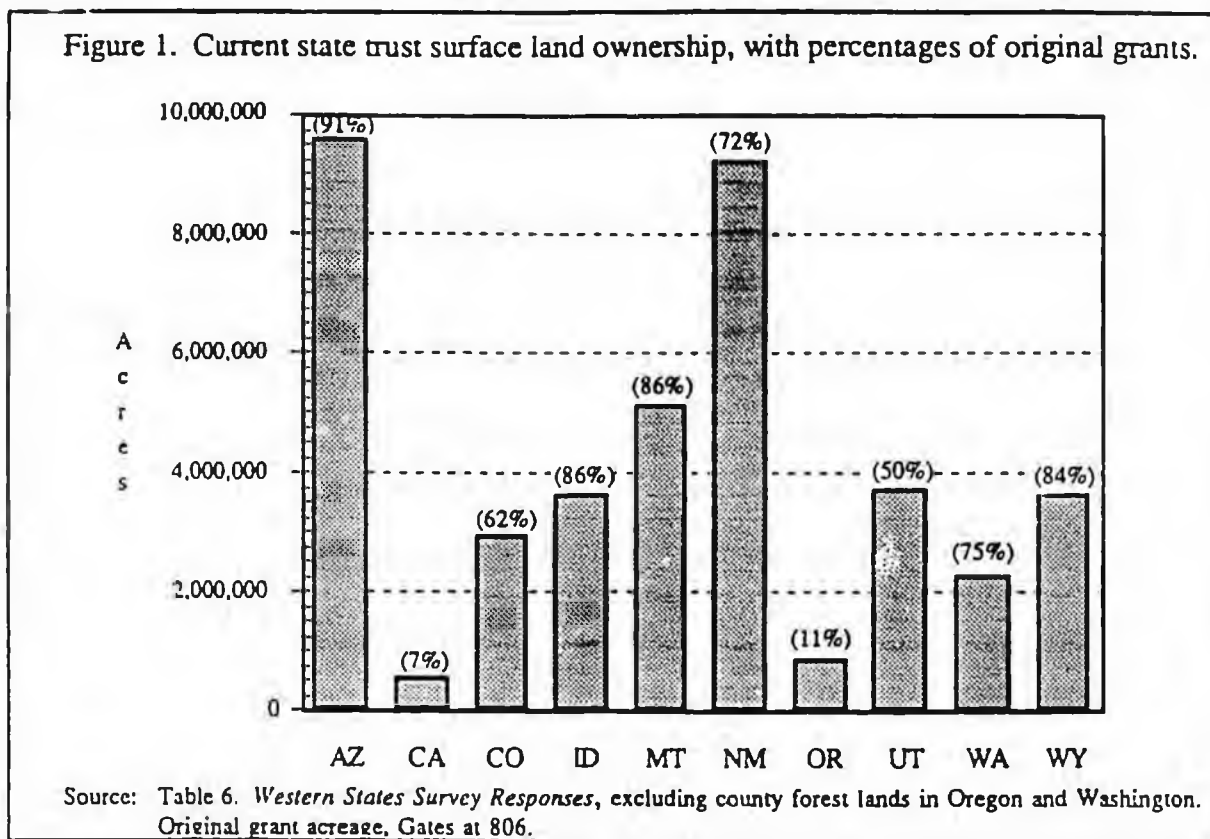
In the ten western states where we are concentrating, approximately 41 million acres are

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 92-9?

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. Alain*, 106 S. Cl. 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.



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

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 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 purchases⁹² and are managed in trust for them by the state.

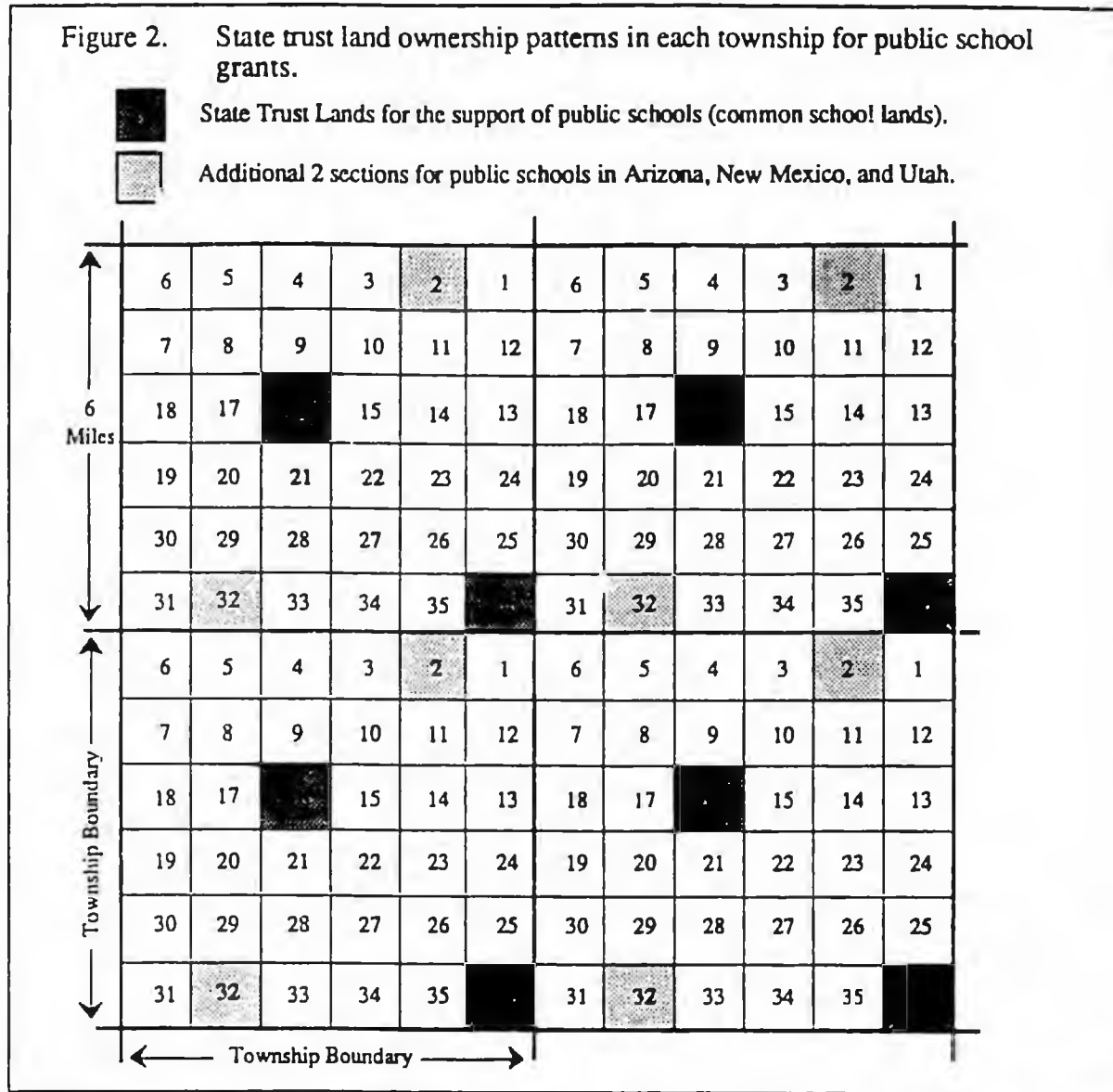
Although total acreage held is an important data point, the pattern of land holdings is more significant. The shift from disposition to retention left the states holding many parcels which resemble many of the federal lands now managed by the Bureau of Land Management; that is, they are still in public 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

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 druck 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, n. 72.

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



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

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 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.

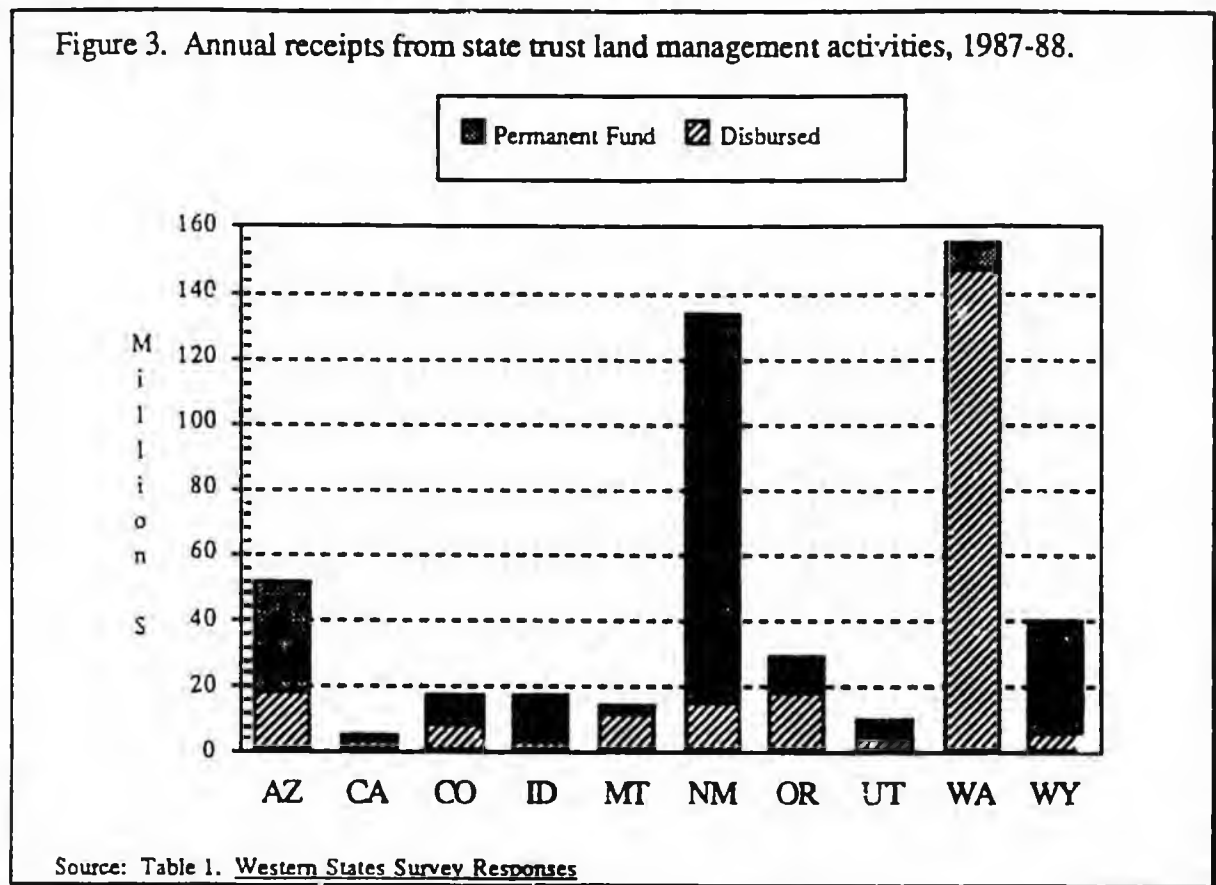


Figure 3 shows annual receipts from state trust land management activities in ten western states. There is considerable variation in the annual revenues received by the states from trust lands. States can be divided easily into two or three categories: those that receive less than \$20 million per year in revenues (CA⁹⁷, 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

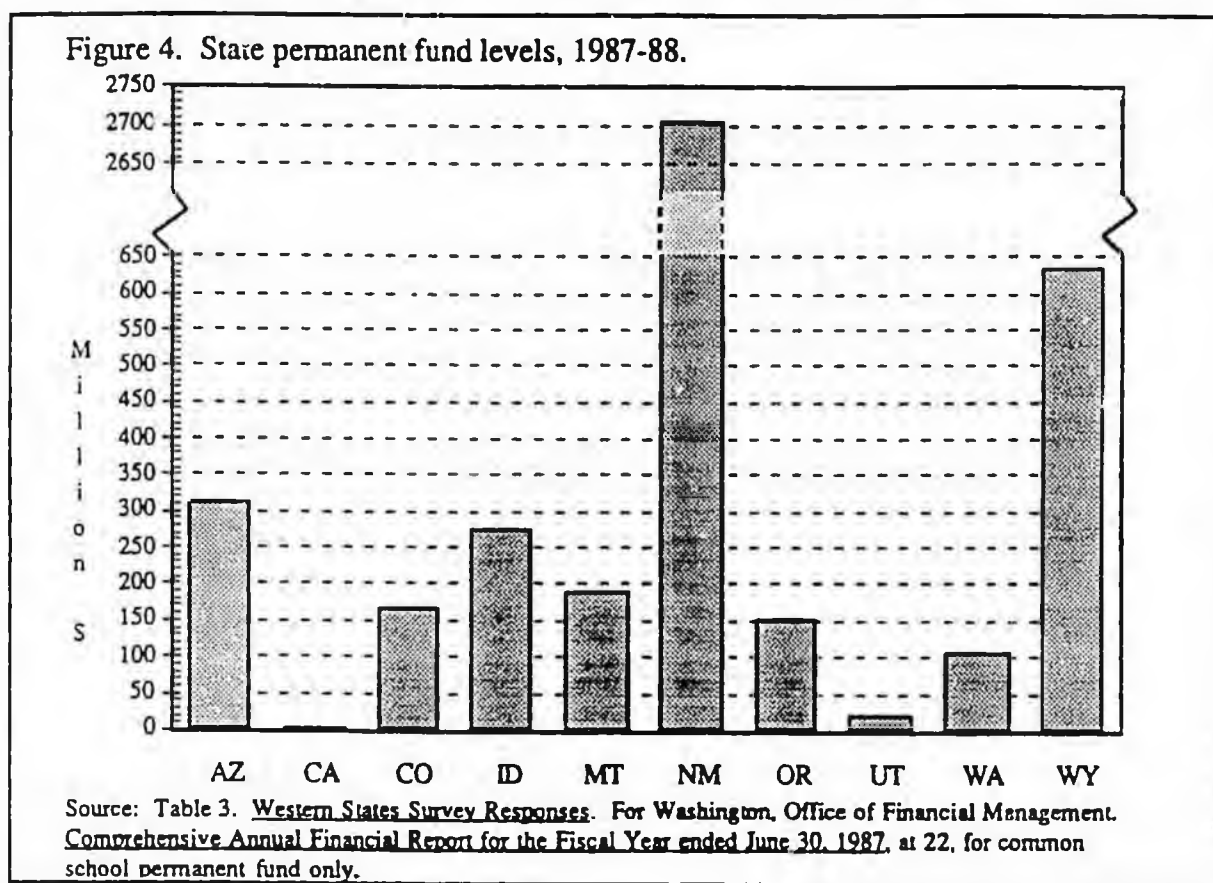
Inspection of Figure 4 shows the extent of the permanent funds in ten western states. The states cannot necessarily be easily divided into groups according to how much money is in the fund. California has the least amount of permanent funds since its fund was liquidated.⁹⁹ Utah has the next lowest amount 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

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 were 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).



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

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 principles¹⁰⁷ and previous decisions to unravel claims and counterclaims about the school

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 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 these 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

"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, *Ervin 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"

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.

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 part 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 ambiguously¹¹⁸ 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

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

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 land's 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

I. 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.

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*, 190 U.S. 61, 69 (1879); see also *Mills County, Iowa v. Burlington and Missouri River Railroad Co.*, 107 U.S. 557 (1881); *Stems 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 Tourville, 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 *Papisaq*, supra, n. 88.

¹³¹ See, for example, *Manning v. Perry*, 62 P.2d 693 (1936). 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 trust¹³⁶, neither will the court presume that there is a trust implied,¹³⁷ For example,

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.

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.