

**ALASKA LEGISLATURE**

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## 2. What Is the Trust Instrument

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

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

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

### The Trust Document

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

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<sup>144</sup> Basset *supra*, n. 6, at 198.

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

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

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

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

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

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

<sup>147</sup> This is the position expressed in *Oklahoma Education Association v. Nigh*. See *supra*, n. 10.

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

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

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

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

#### **Are the Feds Bound — and To and By What?**

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

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

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<sup>151</sup> See discussion of Indiana's accession, for example, *supra*, n. 37 and 38.

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

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

<sup>154</sup> See the discussion of the forestry programs Section IV, B, 4.

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

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

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

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

<sup>155</sup> *Grosetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938).

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

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

<sup>158</sup> *Ide v. United States*, 263 U.S. 497 (1923), at 502.

resolving the issue.<sup>159</sup>

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

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

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

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

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

<sup>161</sup> *78.61 Acres*, *id.*, at 567.

<sup>162</sup> *Id.*

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

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

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

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

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

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

<sup>165</sup> *Cotter*, at 1002.

<sup>166</sup> *Id.*, at 1009.

<sup>167</sup> *Id.*, my italics.

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

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

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

#### Are the States Bound — To and By What

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

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

<sup>170</sup> *Utah v. Andrus* at 1009-1010.

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

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

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

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

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

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<sup>173</sup> 760 P.2d 537 (Ariz., 1988)

<sup>174</sup> *Id.*, at 537-38.

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

<sup>176</sup> *Id.*, at 541.

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

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

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

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<sup>177</sup> Id., at 540 citing *Lassen* at 464.

<sup>178</sup> Id., at 541.

<sup>179</sup> Id., 541.

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

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

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

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

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

Instead, the court argued as follows:

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

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

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

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

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

<sup>185</sup> *Idaho Gold Dredging Co. v. Balderston* 78 P.2d 105 (1938)

<sup>186</sup> *Oklahoma Edcn. Assoc. Inc. v. Nigh*, 642 P.2d 230 (1982), at 237.

<sup>187</sup> *Id.*, at 236.

<sup>188</sup> *Id.*, at 230.

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

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

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

The Department in this case was carrying out its statutorily imposed fiduciary duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands. The Department also had to carry out duties imposed by MEPA. This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to the Department, not the courts.<sup>1,2</sup>

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

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

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

190 *Supra*, n 92.

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

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

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

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

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

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

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

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St. George, Utah.

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

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

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

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

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<sup>195</sup> *Id.*, at 236.

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

<sup>197</sup> *Oklahoma Edu. Assoc. Inc. v. Nigh*, *supra*, n. 10, at 236.

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

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

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

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

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199 Thorpe, VII, 4320.

200 Thorpe, V, 2968.

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

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

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

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

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

<sup>203</sup> Nigh, supra, n. 10, at 236.

<sup>204</sup> Thorpe, VII, 4320.

<sup>205</sup> Article XI, § 6, cited in Nigh, at 238, n. 13.

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

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

### Changing the Trust

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

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

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

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

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

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

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<sup>207</sup> *Boice v. Campbell* 248 P. 34 (Az.1926).

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

The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."<sup>209</sup>

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

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

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

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

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

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

<sup>210</sup> Oregon Revised Statutes (O.R.S.) §530.490.

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

<sup>212</sup> *Waggener supra*, n. 16, at 8. We shall return to this in detail in the next section.

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

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

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

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

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

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

<sup>215</sup> Bogert, *supra*, n. 131, at 524-26.

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

<sup>217</sup> Restatement, Second, Trusts, §176.

<sup>218</sup> See discussion below, n. 243 ff. regarding who is trustee,

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

<sup>220</sup> *Supra*, n. 33.

<sup>221</sup> See *Deer Valley*, *supra*, n. 41.

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

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

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

### 3. What is the Trust Property?

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

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<sup>222</sup> Bogert, *supra*, n. 131, at 526-27 and Chester, *supra*, n. 216; see also Scott, "Deviation from the Terms of a Trust," XLIV *Harvard L. Rev.* 1025 (1931) on general flexibility in trusts;

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

<sup>224</sup> *United States v. New Mexico* 536 F.2d 1324, 1326 (1976).

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

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

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

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

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

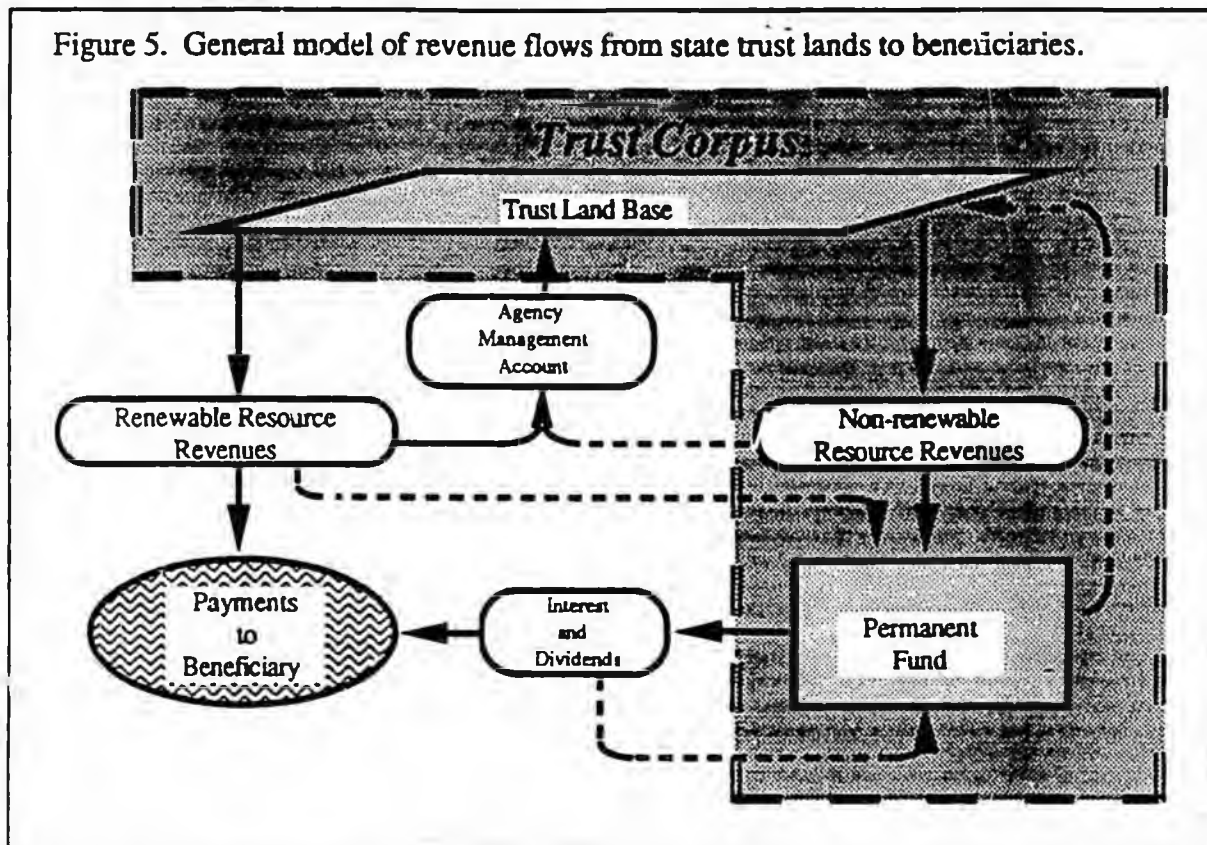
It is important to note that exact paths through which moneys travel before reaching the beneficiaries varies in different states according to three factors: (1) the source of the revenues, (2) the beneficiary of the lands which produced the revenues, and (3) the deduction for managerial expenses which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

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

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

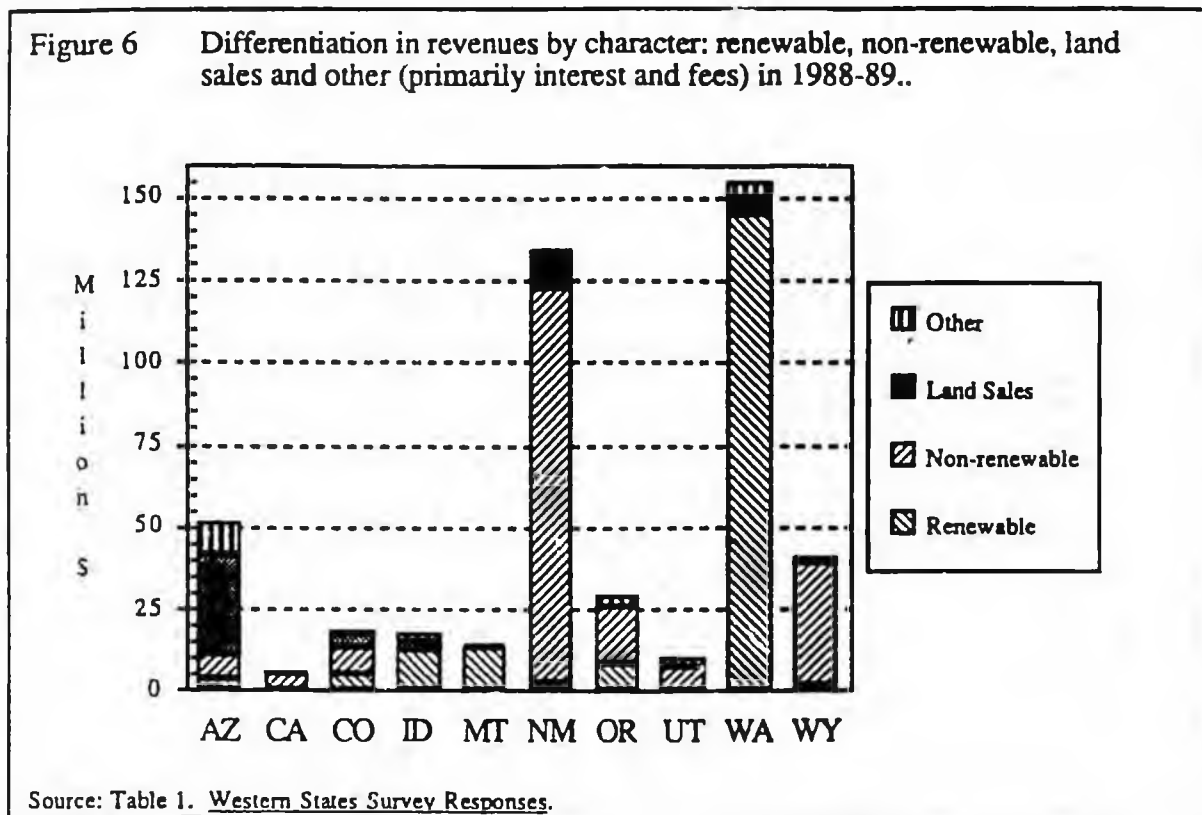
Figure 5. General model of revenue flows from state trust lands to beneficiaries.



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

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

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



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

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

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

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

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

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

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

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

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

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

<sup>231</sup> Montana Constitution Article X, §5.

<sup>232</sup> See above, n. 50 and text accompanying.

Table 1. Division of revenues between direct disbursement to beneficiaries (net of land office expenses, if applicable) or placement in beneficiaries' permanent fund. (B=Disbursable to Beneficiary; PF=Permanent Fund; OT=Other; LB=Land Bank; ?=Unknown). <u>Western States Survey Responses and state statutes.</u>										
Revenue Source	AZ <sup>a</sup>	CA <sup>b</sup>	CO <sup>c</sup>	ID <sup>d</sup>	MT <sup>e</sup>	NM <sup>f</sup>	OR	UT	WA	WY
<b>Renewable</b>										
Agriculture	B	B	B	B	B	B	PF	B	B	B
Grazing	B	B	B	B	B	B	PF	B	B	B
Timber	PF	B	B	B,OT	PF	B	PF	B	B	B
Water	PF	B	?	?	?	?	PF	?	?	B,PF
Commercial	?	B	B	?	B	B	PF	B	B	B
Other Noncommodity	?	B	B	?	?	B	PF	B	B	B
<b>Non-renewable</b>										
<u>Minerals</u>										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	?	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
<u>Oil and Gas</u>										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	PF	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
<u>Coal</u>										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	B	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
<u>Geothermal</u>										
Surface Rental	?	B,OT	?	?	B	B	PF	PF	?	B
Royalties	?	B,OT	?	?	PF	PF	PF	PF	PF	PF
<u>Other Commodities</u>										
Surface Rentals	?	B	B	PF	B	B	PF	PF	?	B
Royalties	?	B	PF	PF	PF	PF	PF	PF	PF	PF
<b>Lands &amp; Misc.</b>										
Right-of-Way	B, PF	B	PF	PF	?	?	PF	PF	PF	PF
<u>Land Sales</u>										
Interest	B	LB	PF	?	?	?	PF	PF	LB	B
Income	PF	LB	PF	PF	PF	PF	PF	PF	LB	PF
Fees and Permits	B	B	?	B, PF	?	?	PF	B	B	OT
<p>a. A.R.S.A. §37-521 for receipt placement into permanent fund.</p> <p>b. California no longer has a permanent fund. California P.R.C. §6417.5 for the use of school and in-lieu lands, §6417.7 for the sale of school and in-lieu lands. Geothermal revenues are divided differently with 50% net going to income fund and 50% into the Renewable Resources Development Account which is divided into three categories: 30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions; and 40% to the county where the revenues were generated.</p> <p>c. Based on C.R.S. §36-1-116. C.R.S. §36-7-202 says that 75% of timber revenues go to the income fund and 25% go to the county school fund for lands within designated state forests.</p> <p>d. L.C.A. §58-503 for distribution of timber receipts on acquired lands: 50% net to general fund and 50% to county school fund.</p> <p>e. M.C.A. §77-3-106 for metallic minerals receipts distribution; §77-3-318 for coal receipts; §77-3-436 for oil and gas receipts; §77-4-127 for geothermal receipts distribution. Note that only 95% of disbursable and 95% of permanent fund interest is distributed, the remaining 5% in each category goes back into the permanent fund by Article X§5 of the Montana Constitution.</p> <p>f. N.M.S.A. §19-1-18.</p>										

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>238</sup> Thorpe, VII, Article XVIII, at 4147.

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

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

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<sup>241</sup> Thorpe, VII, Article XVIII, at 4147.

<sup>242</sup> Discussed below, at n. 293, ff.

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

maximum economic returns, been willing to to entertain the notion.<sup>244</sup>

##### 5. What is a Trustee

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

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

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

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

<sup>246</sup> Souder and Fairfax, *Western States Survey Response*, supra, n. 40

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

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

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

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

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

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

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

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

<sup>249</sup> *Jeppson*, *supra*, n. 242, at 433-34.

<sup>250</sup> *Id.*, 433. My italics. Compare *North Fork Pres. v. Dept of State Lands*, *supra*, n. 192.

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

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

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

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

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<sup>252</sup> *People ex rel. Miller v. Higgins*, 168 Pac. 740 (Colo. 1917).

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

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

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

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

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

#### IV. MANAGEMENT ON THE GROUND

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

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

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

#### Management Context

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

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

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<sup>255</sup> These are tax forfeited lands not granted lands. See below, .

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

<sup>257</sup> See Levesque, A Chronicle of the Tillamook County Forest Trust Lands (1985).

<sup>258</sup> Souder and Fairfax, Western States Survey Responses, *supra*, n. 40.

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

### 1. Forest Land Base

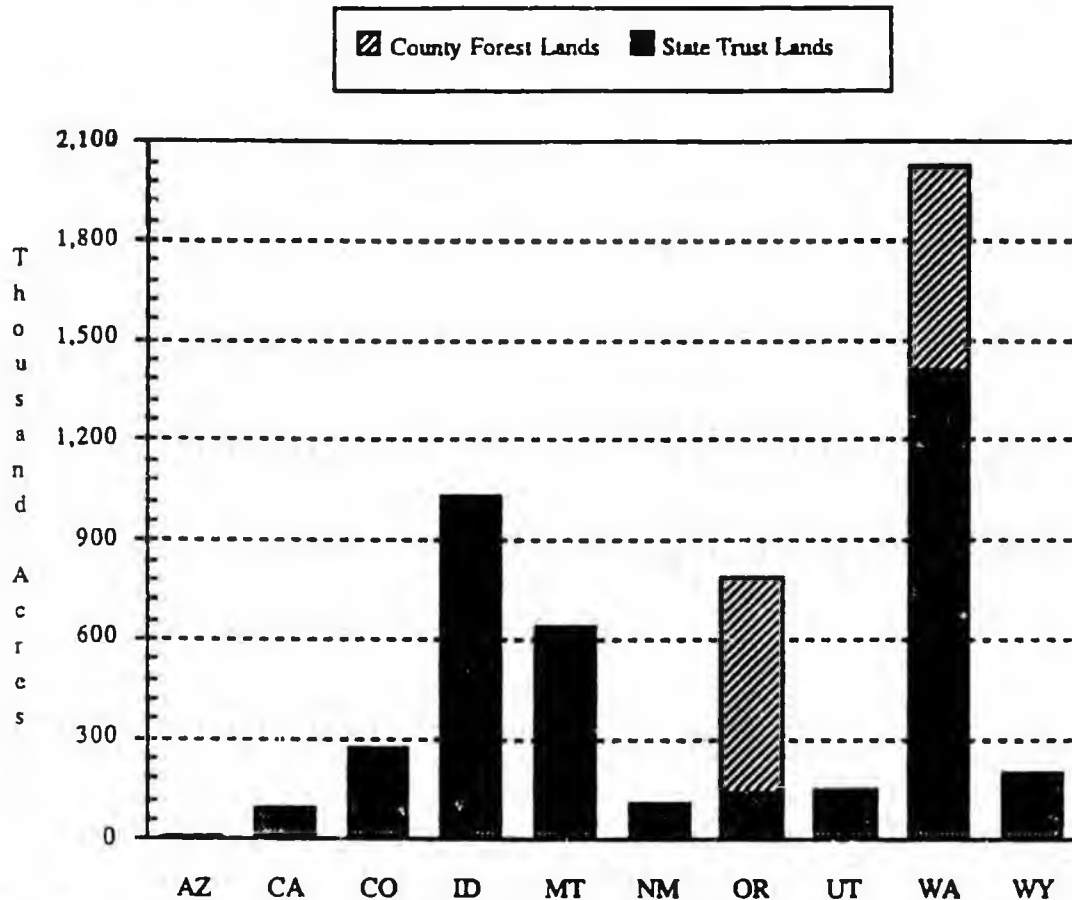
Forested lands and timber revenues form a significant part of state trust lands management in some states. Timberlands are defined as those lands that are producing, or are capable of producing twenty cubic feet per year per acre of industrial wood, and that are not withdrawn from timber production by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

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

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

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



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

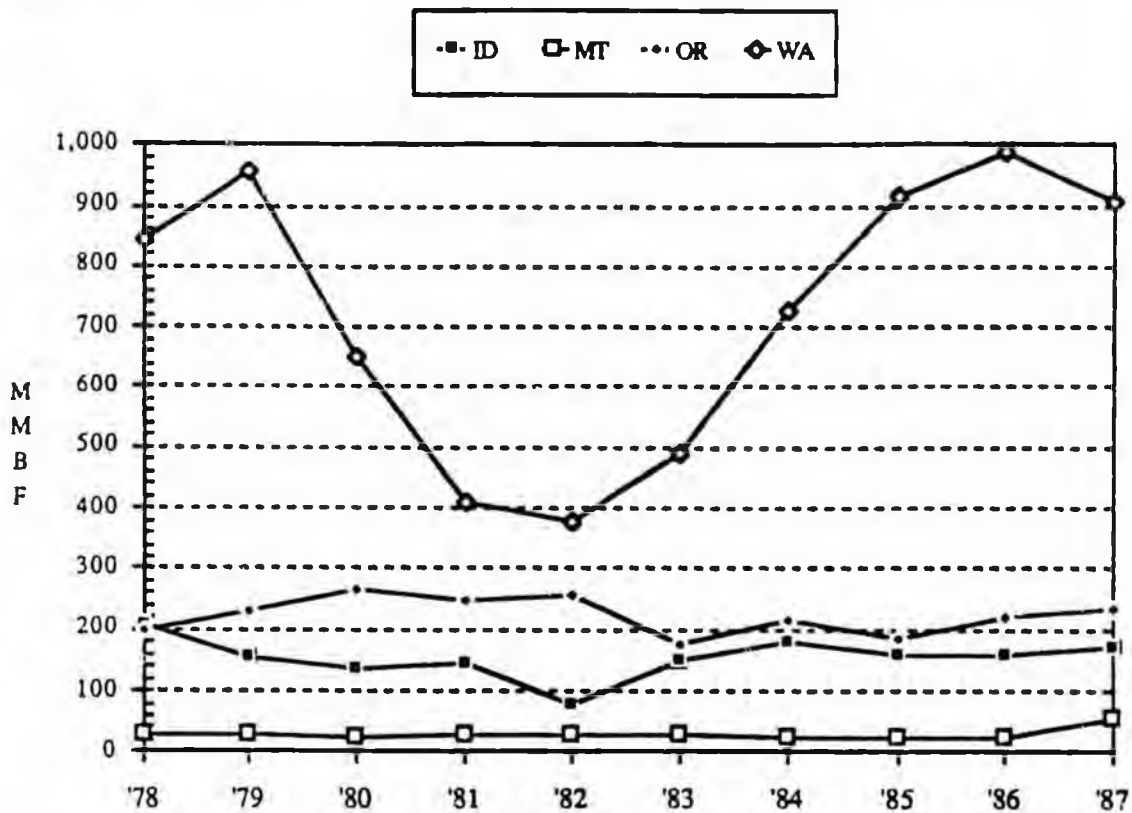
The land base for both the state trust lands and the county forest lands, while not fixed in place, is not expected to be reduced. Washington has specific legislation allowing the state to sell lands, place the proceeds in a land bank, and use these bank funds to purchase other lands with natural resource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

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

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

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

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



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

<sup>262</sup> *Western States Survey Responses*, supra, n. 40, at 49, 50.

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

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

<sup>265</sup> *Id.*, at 50, 58, and 59.

## 2. Institutional Structures for Forest Management

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

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

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

## 3. Revenues Distribution and Management Funding Mechanisms

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

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

<sup>267</sup> William R. Cook, Assistant Attorney General, Oregon, pers. comm., \_\_\_\_\_, 1990.

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

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

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

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

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

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

271 O. R. S. §530.110.

272 O. R. S. §530.210 et seq.

273 R. C. W. §76.12.

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

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

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

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

278 *Id.*, at 28.

from sales of Washington county forest lands are used to buy replacement lands.<sup>279</sup>

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

#### Trust Responsibilities

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

##### 1. Maintenance of Trust Land Base

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

<sup>279</sup> R. C. W. §76.12.

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

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

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

<sup>283</sup> M.C.A. §77-5-100 et seq.

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

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

## 2. Management for Benefit of Trust

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

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<sup>285</sup> See supra n. 23.

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

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

<sup>288</sup> Levesque, supra, n. 250, at 580, ff.

<sup>289</sup> I. C. A. §58.133.

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

<sup>291</sup> M. C. A. §77-2-203.

<sup>292</sup> M. C. A. §77-2-201.

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

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

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

The language in the Washington Constitution is practically identical.<sup>295</sup>

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

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

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

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

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

<sup>294</sup> Montana Constitution, Article X, §11.

<sup>295</sup> Washington Constitution, Article XVI, §1.

<sup>296</sup> 25 Idaho 654, 139 P. 557 (1914).

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

type of product being grown, or because of the environmental consequences of timber harvesting.

Recent modification of the Oregon state constitution noted above<sup>298</sup> directs management of the forest resource under sound techniques of multiple use land management for the whole population of the state.<sup>299</sup> This has led to some differentiation in the trusteeship terms between the lands granted to the state in their Enabling Acts and those lands which reverted to the counties through tax forfeiture. In the case of the federal grants, the trust responsibility is defined in the state's Constitution and perhaps in its Enabling Act. In contrast, Oregon's county forest land trust responsibility results from state legislation. However, once the county land is accepted by the state, general trust principles apply.

### 3. Long-term Sustained Yield

Both state and local communities are concerned with sustainability and fluctuations in log supplies from trust lands forestry.<sup>300</sup> The sustained yield issue reflects concern for continuing revenues for the trust beneficiaries ( and incidentally the state land office management accounts). The even flow of logs effects timber-dependent sawmills and local employment.<sup>301</sup>

The Multiple Use Act of 1974 (R.C.W. §79.68) in Washington directs the Department to manage its lands capable of growing forest crops on a sustained yield basis which is defined as "management of the forest to provide harvesting on a continuing basis without prolonged curtailment or cessation of harvest, insofar as this is compatible with other statutory directives."<sup>302</sup> However, the implication is that this is only on a volume basis, without specifying grade, size, or species of timber.

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6. Institute of Forest Products. College of Forest Resources. University of Washington.] (1969), at 8.

<sup>298</sup> Oregon Constitution, Article VIII, §5(2). Amended by HJR No. 7, 1967 and adopted by the people May 28, 1968.

<sup>299</sup> Oregon Revised Statutes (O.R.S.) §530.490. Both the Department of Forestry and the State Land Board manage their lands under this policy. However, the application of this principal to state trust lands has never been tested in court, thus its validity remains in doubt. These provisions do not apply to the county forest lands, which are managed solely for the benefit of the county where the land is located, subject to the police power provisions of the Oregon Forest Practices Act. William R. Cook, Assistant Attorney General, Oregon, pers.comm., \_\_\_\_\_, 1990.

<sup>300</sup> Ibid. See also Washington Department of Natural Resources, "Timberlands Acquisition Plan: Commissioner of Public Lands Brian Boyle - DNR request legislation - SB 65536 and HB 2804." Press release, n.d.(1989 - 90) and "Free trade, the forests and the future: A position paper on log exports by Washington Commissioner of Public Lands Brian Boyle," Washington Department of Natural Resources.(September, 1989).

<sup>301</sup> Id.

<sup>302</sup> Washington Department of Natural Resources. Forest Land Management Program 1984 - 1993. Proposed. (November, 1983). Codified as R.C.W. §79.68.030 and §79.68.040.

In *Jerke v. Department of State Lands*,<sup>303</sup> the Montana Supreme Court upheld state legislation which provides that "full market value shall encompass the concept of sustained yield." Sustained yield, it is believed in Montana, plays an important role in educational finance, resource stability and in the state's economy.<sup>304</sup> Accepting less than maximum income is allowed in the management of the state lands if the action will maintain the long-term productivity of the land and guarantee income to the beneficiaries in the long run.<sup>305</sup>

Sustained yield is not legislated in the Idaho statutes or constitution. The constitution states that the endowment trust lands will be managed "... in such a manner as will secure the maximum long term financial return to the institution to which granted."<sup>306</sup> A state forest management plan for one of Idaho's seven regions does mention sustained yield, however, when discussing achievement of harvest potential.<sup>307</sup>

Both Oregon's county forest land and state trust land forests are managed on a sustained yield basis according to Department policy, although without direct statutory provision.<sup>308</sup> Beyond this, the timber harvest is constrained to prevent significant declines in future harvest levels when determining the maximum sustained yield from the trust forests.<sup>309</sup>

#### 4. Management for Multiple Use

Management for multiple uses on state trust lands varies from the common conception of multiple use as it's applied to federal lands. In the states' case, multiple uses must either contribute to the overall generation of revenues for the trust, must be revenue neutral, or must be funded by other sources. Comparing the states' language with the federal government's multiple use language provides an interesting contrast since the concepts are frequently

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<sup>303</sup> Western States Survey Responses, supra, n. 40 at 81. *Jerke v. Department of State Lands* 597 P.2d 49 (1979).

<sup>304</sup> Jackson, Economic returns and the management of Montana's forest resources. [Prepared at the request of the Joint Interim Subcommittee No. 2 of the Montana Legislature] (December, 1983).

<sup>305</sup> Montana Department of State Lands. Forest Management Standards and Guidelines. [Forestry Division] (March, 1988) at 1-3.

<sup>306</sup> Article IX, §8 of the Idaho Constitution, cited in Idaho Forestry Opportunities, 1980 - 1990. Note however that the version of the Idaho constitution included with the annotated code does not have the phrase "long term" included in § 8.

<sup>307</sup> *Id.*, at 10. See also Gruenhagen, Seymour, and Parker, Pavette Lakes Area Forest Inventory Report, 1987 Remeasurement. [Idaho Department of Lands] (May 1989).

<sup>308</sup> See for example Long Range Timber Management Plan, Southern Oregon Region State Forests. Report 3-0-2-220. [Oregon State Forestry Department]. (August, 1987) at 10.

<sup>309</sup> *Id.*, at 10, 11.

confused. The federal Multiple Use Sustained Yield Act of 1940, the basis for all subsequent multiple use management in federal legislation and regulations, defines multiple use as:

"... the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people ... and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."<sup>310</sup>

Contrast this definition with the mandate of the Washington Multiple Use Act:

"The legislature hereby directs that a multiple use concept be utilized by the department of natural resources in the management and administration of state-owned lands under its jurisdiction of the department where such a concept is in the best interests of the state and the general welfare of the citizens thereof, and is consistent with the applicable trust provisions of the various lands involved."<sup>311</sup>

Multiple use in Washington is based much more on revenue production than is the comparable federal legislation, being defined as:

"The management and administration of state-owned lands under jurisdiction of the department of natural resources to provide for several uses simultaneously on a single tract and/or planned rotation of one or more uses on and between specific portions of the total ownership consistent with the provisions of RCW 79.68.010."<sup>312</sup>

Similar language is found in the Oregon statutes, where fish and wildlife environment, landscape expanse, protection against flood and erosion, recreation, and production and protection of water supplies are allowed, again as long as these uses are not detrimental to the trust purposes.<sup>313</sup>

How then are these concepts applied in practice? Washington trust lands are open for hunting and fishing use unless posted with the approval of the department.<sup>314</sup> Another eleven uses are also identified as being compatible with the obligations of the department to fulfill its trusteeship obligations; uses, including those listed, must be conducted without financial impact unless compensation is provided.<sup>315</sup> In Oregon public access to state trust lands is assured; and there is also a requirement in statutes to give consideration to multiple values in the sale, exchange, and leasing of state trust lands.<sup>316</sup> However lands cannot be dedicated to

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<sup>310</sup> 74 Stat 215; 16 U.S.C. 528-531. Emphasis added.

<sup>311</sup> R. C. W. §79.68.010. Emphasis added.

<sup>312</sup> R. C. W. §79.68.020.

<sup>313</sup> O. R. S. §530.500

<sup>314</sup> R. C. W. §79.01.244.

<sup>315</sup> R. C. W. §79.68.050.

<sup>316</sup> O. R. S. §273.051(2)(b). These requirements do not carry over to county forest lands.

uses which preclude income generation.<sup>317</sup> Multiple use management is allowed in Montana,<sup>318</sup> which includes grizzly bear habitat in its multiple use management.<sup>319</sup>

Idaho, of the four states, is the only one without a multiple use statute.<sup>320</sup> It has, however, reserved from sale "all state-owned lands chiefly valuable for forestry, reforestation, recreation, and watershed protection..." as state forests.<sup>321</sup> Within the Department of Lands' policies, the objectives for state forested lands "... shall be ... to improve timber productive capacity and assure maximum long-term financial returns to the endowment trusts without permanently diminishing other uses such as watershed, forage, recreation, wildlife habitat and enjoyment of the aesthetic quality."<sup>322</sup>

The trust responsibility with respect to the forest lands is bi-directional: non-revenue producing uses are not allowed if they are deleterious to revenue producing uses. On the other hand, as seen in the Idaho policies cited above, and similarly interpreted in the other three states, revenue production is not allowed to generate negative externalities for other uses, including amenity values. This illustrates the longer term the relationship between revenues and protection of the trust corpus, i.e. that one component will not be carried out to the detriment of the other component of the trust responsibility.

## V. CONCLUSIONS

Revenue production for the beneficiaries is, we have taken some trouble to emphasize, just one aspect of granted land and permanent fund management. Beneficiaries are likely to look with increasing interest at these resources in times of budget crises and fiscal constraint. There is ample justification for this. Trust principles have, in the last half century, emerged as a

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<sup>317</sup> Western States Survey Responses, supra, n. 40, at 63, regarding differentiation between state trust and county forest lands.

<sup>318</sup> M. C. A. §77-1-203. Recommendations for enhanced multiple-use management are found in Performance Audit: State-owned and Leased Land. Report 82P-17. State of Montana, Office of the Legislative Auditor.(June, 1983).

<sup>319</sup> Montana Department of State Lands. Interim Grizzly Bear management Standards and Guidelines. Forestry Division. (December, 1988).

<sup>320</sup> Western States Survey Responses, supra, n. 40 at 63. op cit.

<sup>321</sup> I. C. A. §58-133.

<sup>322</sup> Idaho Department of Lands Operation Manual O.M. 901. Cited in Gruenhagen, D.J., P. Seymour, and J. Parker, supra, n. 302, at 46. The Operation Manual provides internal operational policies for staff direction. The Idaho Forest Practices Act (I.C.A., Title 38, Ch. 13), applicable to state as well as private land, states that its policy is to maintain and enhance trees, soil, air, water, wildlife and aquatic habitat by regulating forest practices. Stefanie Balzarini, Deputy Attorney General, State of Idaho, personal communication, March, 1991.

dominant theme in trust land case law, and beneficiaries have been increasingly active and successful in pressing their claims in state courts. However it is clear that the current emphasis on maximum economic returns is not an accurate or viable interpretation, of either trust principles or of the trust documents. We have found the trust documents, not in a federal-state compact, but in state decisions and state commitments. That, and a proper emphasis on the trustee's duty to protect the trust property, have led us to argue that there is more flexibility in trust land management mandate than might first appear. And, we have found a considerable degree of flexibility on the ground, in the management of trust timber resources in four states.

This discussion leads to a number of conclusions relating to the relationship between the trust lands and resources and the beneficiaries. Moreover, it suggests that the time may be ripe to exhume the state trust lands from their obscure place in history and their invisible place in contemporary public resource management and consider what they have to teach us.

The principal conclusion is that in making management decisions, the state land office must think clearly about who is the beneficiary of their particular trust, and of their actions. There is enormous variation in the definition of beneficiaries in state documents which gives the state considerable room for defining a variety of management regimes and priorities.

Second, lest those of the environmentalist persuasion be put off by the duty to make the trust productive, it is important to note that management for revenue generation within the trust principle typically leads—and is required to lead—to conservative decisions, especially in regard to long-term rather than short-term management because of the requirement to protect the corpus of the trust. Further, revenue generation does not require and has not led exclusively to profit maximizing behavior on the part of the state trustees. Social benefits are allowed to be incorporated in management decisions as long as they can be shown to meet beneficiary needs.

Environmentalists may be concerned that amenity dominated management of lands "better suited for preservation" is precluded by the trust notion. But, even here there is room for balance. The is the same situation that leads states to maneuver their trust holdings from marginal to highly productive lands, as long as the costs of these transactions is less than the increased revenues in the long term. The trust concept gives states a basis for repositioning their holdings. Moreover, the state trust land manager's vision of a portfolio as opposed to specific acres suggests a meaningful option. They do not hold onto those lands, especially at the cost of alternative management expenditures for higher producing lands. The trust concept suggests that they should not hold lands that are not producing benefits for the beneficiaries. It leads to a conclusion that the appropriate disposition of those lands that are not producing

benefits, economic or otherwise, is to sell or exchange them with other state, federal or private land managers.

Similarly, the trust notion mandates that costs of management decisions are fully accounted for. Benefits of management actions are not apportioned or shifted to other users that don't pay for them. This prevents the creation of, for example, below-cost timber sales where recreational benefits are included. This means that there is a basis for arguing against the cross subsidization of outputs that plagues multiple use management on federal lands.

The trust resources, their peculiar and instructive mandate, ought to be studied and appreciated, for their rich and wonderful history, the benefits their diverse management produces, and the lessons that comparative analysis can teach us about public resources and resource management.

**SEPTEMBER 23, 1994**

**ADDENDUM TO**

**“Original Mental Health Land To Be Designated  
As Mental Health Trust Land, April 28, 1994”**

REVISIONS TO  
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
CRM-0022	C028S053E13	HANS	36.860	SKGB4	Add
CRM-0023	C028S053E14	HANS	17.100	SKGB4	Add
CRM-0028	C028S053E14	HANS	0.290	SKGB4	Add
CRM-0029	C028S053E14	HANS	11.350	SKGB4	Add
CRM-0036	C028S053E24	HANS	28.360	SKGB4	Add
CRM-0197-02	C028S055E28	HANS	20.000	SKGB3	Add
CRM-0198-02	C028S055E28	HANS	20.000	SKGB3	Add
CRM-0199-02	C028S055E28	HANS	20.000	SKGB3	Add
CRM-0206-02	C028S055E28	HANS	25.000	SKGB3	Add
CRM-0259	C028S056E30	HANS	12.080	SKGB3	Add
CRM-0377	C029S057E10	HANS	3.330	SKGB3	Add
CRM-0393-02	C029S057E15	HANS	40.000	SKGB3	Add
CRM-0571	C030S058E14	HANS	17.380	SKGB2	Add
CRM-0572	C030S058E14	HANS	19.340	SKGB2	Add
CRM-0605-B	C030S059E27	HANS	40.000	SKGA2	Add
CRM-0704	C031S059E13	HANS	11.370	SKGA2	Add
CRM-0723-01	C031S059E24	HANS	7.500	SKGA2	Add
CRM-0923	C039S064E25	JNO	386.200	JUNB3	Add
CRM-1138-03	C040S065E07	JNO	16.124	JUNB3	Add
CRM-1227	C040S066E33	JNO	1.050	JUNB2	Add
CRM-1229	C040S066E33	JNO	1.250	JUNB2	Add
CRM-1246	C040S066E33	JNO	1.250	JUNB2	Add
CRM-1247	C040S066E33	JNO	1.300	JUNB2	Add
CRM-2086	C058S079E35	PTBG	2.150	PETD3	Add
CRM-2617-01	C074S089E12	KTN	157.000	KETB6	Add
CRM-2950	C074S090E29	KTN	20.550	KETB6	Add
CRM-3129-02A	C075S090E08	KTN	140.000	KETB6	Add
CRM-3157-02A	C075S091E19	KTN	138.000	KETB5	Add
CRM-3158-01	C075S091E28	KTN	473.340	KETB5	Add
CRM-3171	C075S091E35	KTN	3.670	KETB5	Add
CRM-3392-01	C076S091E11	KTN	1.310	KETB5	Add
CRM-3392-02	C076S091E11	KTN	3.390	KETB5	Add
FM-0138-01	F003N008E29	CHNA	3.500	CIRA5	Add
FM-0138-02	F003N008E29	CHNA	4.460	CIRA5	Add
FM-0160-01	F003N008E30	CHNA	132.600	CIRA5	Add
FM-0160-03	F003N008E30	CHNA	0.360	CIRA5	Add
FM-0202-01	F003N008E31	CHNA	34.750	CIRA5	Add
FM-0221-01	F003N008E31	CHNA	2.500	CIRA5	Add
FM-0221-03	F003N008E31	CHNA	56.700	CIRA5	Add
FM-0221-04	F003N008E31	CHNA	0.450	CIRA5	Add
FM-0231-Z01	F003N008E21	CHNA	16.800	CIRA5	Add
FM-0231-Z02	F003N008E22	CHNA	15.000	CIRA5	Add
FM-0231-Z04	F003N008E26	CHNA	10.330	CIRA5	Add
FM-0389-02	F001N002W35	FBKS	0.010	FAID2	Add
FM-0429-02	F001N003W17	FBKS	7.000	FAID3	Add
FM-0429-03	F001N003W17	FBKS	2.000	FAID3	Add
FM-0439-01	F001N003W36	FBKS	112.545	FAID3	Add
FM-0691-G01	F005S004E16	SLCA	14.000	XBDB6	Add
FM-0691-G03	F005S004E21	SLCA	95.000	XBDB6	Add

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REVISIONS TO  
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
FM-0706-01	F005S004E35	SLCA	238.000	XBDB6	Add
FM-0718-01	F005S004E35	SLCA	1.340	XBDB6	Add
FM-0719-01	F005S004E35	SLCA	0.150	XBDB6	Add
FM-0749-A	F006S004E04	SLCA	200.000	XBDB6	Add
FM-0824-02	F007S006E18	SLCA	9.960	XBDB6	Add
FM-0952-A01	F001S003W29	FBKS	566.750	FAID3	Add
FM-1008-02	F001S003W32	FBKS	7.800	FAID3	Add
FM-1080	F004S007W18	NENA	9.550	FAIC5	Add
FM-1175-01	F004S008W02	NENA	33.000	FAIC5	Add
FM-1175-02	F004S008W02	NENA	119.230	FAIC5	Add
FM-1179	F004S008W02	NENA	17.910	FAIC5	Add
FM-1204	F004S008W05	NENA	40.380	FAIC5	Add
FM-1415-01	F004S008W32	NENA	19.100	FAIC5	Add
FM-1553-02	F011S024W22	LMIN	24.000	MMKD5	Add
FM-1605	F011S024W26	LMIN	3.000	MMKD5	Add
FM-1663-02	F012S006W03	HLV	7.200	HEAD4	Add
FM-5003	F003N008E29	CHNA	2.400	CIRA5	Add
SM-0018	S016N002E07	MOA	315.480	ANCB6	Add
SM-0243-02	S020N006E13	MTSU	14.650	ANCD4	Add
SM-0315-01	S006S014W02	HOMR	5.000	SELC5	Add
SM-0342	S007S013W01	HOMR	0.220	SELC4	Add
SM-0476	S003N011W30	KSOL	19.950	KENB4	Add
SM-0484	S003N012W33	KSOL	27.080	KENB4	Add
SM-0494-A	S005N008W01	KSOL	10.000	KENC2	Add
SM-0699	S005N009W12	KSOL	2.470	KENC3	Add
SM-0700	S005N009W12	KSOL	2.700	KENC3	Add
SM-0702	S005N009W12	KSOL	3.550	KENC3	Add
SM-1420	S008N011W32	KSOL	80.000	KENC4	Add
SM-2004	S017N004W13	MTSU	5.000	ANCC8	Add
SM-2007	S017N004W13	MTSU	1.010	ANCC8	Add
SM-2503	S026N004W06	TALK	16.360	TALB1	Add
SM-5007	S016N003W03	MTSU	9.760	ANCC8	Add
SM-5012	S008S013W20	HOMR	4.610	SELB5	Add
SM-5013	S016N002E01	MOA	229.710	ANCC6	Add
SM-5014	S016N002E06	MOA	10.000	ANCC6	Add
SM-5016	S026N004W06	TALK	1.938	TALB1	Add
SM-5025	S008S013W21	HOMR	1.230	SELB4	Add
Total Parcels	86	Total Acres	4245.047		

Add means this parcel is to be added to the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate', list dated April 28, 1994.

REVISIONS TO  
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
*FEE ESTATE*

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
CRM-0505	C030S057E04	HANS	57.290	SKGB3	Delete
CRM-1038	C040S059E06	GTVS	22.950	JUNB6	Delete
CRM-1594	C055S063E34	STKA	0.180	SITA5	Delete
CRM-2617	C074S089E12	KTN	200.370	KETB6	Delete
CRM-3129-02	C075S090E08	KTN	1500.880	KETB6	Delete
CRM-3157-02	C075S091E19	KTN	152.000	KETB5	Delete
CRM-3166	C075S091E35	KTN	3.580	KETB5	Delete
CRM-3392-03	C076S091E11	KTN	0.300	KETB5	Delete
CRM-5029	C040S064S01	JNO	101.540	JUNB3	Delete
FM-0138	F003N008E29	CHNA	7.000	CIRA5	Delete
FM-0160	F003N008E30	CHNA	132.960	CIRA5	Delete
FM-0202	F003N008E31	CHNA	34.750	CIRA5	Delete
FM-0221	F003N008E31	CHNA	57.150	CIRA5	Delete
FM-0429	F001N003W17	FBKS	10.000	FAID3	Delete
FM-0439	F001N003W36	FBKS	112.550	FAID3	Delete
FM-0540	F001S004E11	CHNA	6.500	XBDD6	Delete
FM-0690-B	F005S004E17	SLCA	2.210	XBDB6	Delete
FM-0691-G	F005S004E16	SLCA	127.000	XBDB6	Delete
FM-0706	F005S004E35	SLCA	238.500	XBDB6	Delete
FM-0718	F005S004E35	SLCA	1.490	XBDB6	Delete
FM-0719	F005S004E35	SLCA	1.500	XBDB6	Delete
FM-0788	F007S005E12	SLCA	6.250	XBDB6	Delete
FM-0824	F007S006E18	SLCA	9.960	XBDB6	Delete
FM-0952-A	F001S003W29	FBKS	567.760	FAID3	Delete
FM-1175	F004S008W02	NENA	119.230	FAIC5	Delete
FM-1176	F004S008W02	NENA	3.330	FAIC5	Delete
FM-1415	F004S008W32	NENA	8.750	FAIC5	Delete
FM-1560	F011S024W33	LMIN	5.000	MMKD5	Delete
SM-0475	S003N011W30	KSOL	27.280	KENB4	Delete
SM-2191	S017N004W24	MTCU	5.000	ANCC8	Delete
Total Parcels	30	Total Acres	3523.260		

Delete means this parcel is to be deleted from the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate', list dated April 28, 1994.

REVISIONS TO  
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
MINERAL ESTATE - HYDROCARBON ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-0997-B	S006N011W29	KSOL	120.000	KENC3	Add
SM-1624	S014N004W04	MTSU	0.450	ANCB8	Add
SM-1625	S014N004W04	MTSU	1.270	ANCB8	Add
SM-1626	S014N004W04	MTSU	2.910	ANCB8	Add
SM-1627	S014N004W04	MTSU	3.510	ANCB8	Add
SM-1628	S014N004W04	MTSU	4.890	ANCB8	Add
SM-1831	S015N004W20	MTSU	3.326	TYOB1	Add
SM-1845	S015N004W19	MTSU	475.800	TYOB1	Add
SM-1848	S015N004W30	MTSU	598.870	TYOB1	Add
SM-1860	S015N005W24	MTSU	297.040	TYOB1	Add
Total Parcels	10	Total Acres	1508.066		

Add means this parcel is to be added to the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate, Mineral Estate - Hydrocarbon Only', list dated April 28, 1994.

REVISIONS TO  
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
MINERAL ESTATE - HYDROCARBON ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-0494-A	S005N008W01	KSOL	10.000	KENC2	Delete
SM-0699	S005N009W12	KSOL	2.470	KENC3	Delete
SM-0700	S005N009W12	KSOL	2.700	KENC3	Delete
SM-0702	S005N009W12	KSOL	3.550	KENC3	Delete
SM-1420	S008N011W32	KSOL	80.000	KENC4	Delete
SM-2004	S017N004W13	MTSU	5.000	ANCC8	Delete
SM-2007	S017N004W13	MTSU	1.010	ANCC8	Delete
Total Parcels	7	Total Acres	104.730		

Delete means this parcel is to be deleted from the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate, Mineral Estate - Hydrocarbon Only', list dated April 28, 1994.

REVISIONS TO  
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
MINERAL ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-0279-A	S020N006E30	MTSU	24.000	ANCD4	Delete
SM-0280-A	S020N006E30	MTSU	32.500	ANCD4	Delete
Total Parcels	2	Total Acres	56.500		

Delete means this parcel is to be deleted from the 'Original Mental Health Land To Be Designated as Mental Health Trust Land Mineral Estate' list dated April 28, 1994.

ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND  
Coal, Oil and Gas ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-5500	S007N011W06	KSOL	40.000	KENC4	Add
SM-5501	S007N011W06	KSOL	39.180	KENC4	Add
SM-5502	S007N011W07	KSOL	29.610	KENC4	Add
SM-5503	S007N011W07	KSOL	37.930	KENC4	Add
SM-5504	S007N011W14	KSOL	20.750	KENC4	Add
SM-5505	S007N011W14	KSOL	37.180	KENC4	Add
SM-5506	S007N011W14	KSOL	14.980	KENC4	Add
SM-5507	S007N011W14	KSOL	80.000	KENC4	Add
SM-5508	S007N011W21	KSOL	25.170	KENC4	Add
SM-5509	S007N011W21	KSOL	80.000	KENC4	Add
SM-5510	S007N011W22	KSOL	37.610	KENC4	Add
SM-5511	S007N011W22	KSOL	27.930	KENC4	Add
SM-5512	S007N011W27	KSOL	39.870	KENC4	Add
SM-5513	S007N011W27	KSOL	40.000	KENC4	Add
SM-5514	S007N011W28	KSOL	80.000	KENC4	Add
SM-5515	S007N011W28	KSOL	26.650	KENC4	Add
SM-5516	S007N011W28	KSOL	30.560	KENC4	Add
Total Parcels	17	Total Acres	687.420		

Add means this parcel is to be added to the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Coal, Oil and Gas Only' list dated April 28, 1994.

**SEPTEMBER 23, 1994**

**ADDENDUM TO**

**“Other State Land To Be Designated as Mental  
Health Trust Land, April 28, 1994”**

REVISIONS TO  
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND  
MINERAL ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
F82863-R	F001S010E	Salcha	184320.00	XBD	Add
F82863-R	F001S011E	Salcha	0.000	XBD	Add
F82863-R	F001S012E	Salcha	0.000	XBD	Add
F82863-R	F001S013E	Salcha	0.000	XBD	Add
F82863-R	F001S014E	Salcha	0.000	XBD	Add
F82863-R	F002S010E	Salcha	0.000	XBD	Add
F82863-R	F002S011E	Salcha	0.000	XBD	Add
F82863-R	F002S012E	Salcha	0.000	XBD	Add
Total Acres			184320.000		

The Salcha Mineral Estate Tract (F82863-R) is subject to existing federal mining claims, as follows:

Federal Mining Claims

F001S010E	12
F001S011E	136
F001S012E	0
F001S013E	0
F001S014E	0
F002S010E	84
F002S011E	43
F002S012E	0

Add means this parcel is to be added to the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate' list, April 28, 1994.

REVISIONS TO  
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND  
MINERAL ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
F82863	F001S004E	Salcha	116745.30	XBD	Delete
F82863	F001S005E	Salcha	0.000	XBD	Delete
F82863	F001S006E	Salcha	0.000	XBD	Delete
F82863	F002S004E	Salcha	0.000	XBD	Delete
F82863	F002S005E	Salcha	0.000	XBD	Delete
F82863	F002S006E	Salcha	0.000	XBD	Delete
F82863	F002S007E	Salcha	0.000	XBD	Delete
Total Acres			116745.300		

Delete means this parcel is to be deleted from the 'Other State Land To Be Designated As Mental Health Trust Land Mineral Estate' list, dated April 28, 1994.

REVISIONS TO  
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND  
MINERAL ESTATE - HYDROCARBON ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
S50219	S006N011W29	Kena	160.000	KENC4	Add
Total Parcels	1	Total Acres	160.000		

Add means this parcel is to be added to the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate, Mineral Estate - Hydrocarbon Only' list, dated April 28, 1994.

REVISIONS TO  
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND

*FEE ESTATE*

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
C20571	C055S063E17	STKA	2.318	SITA5	Add
C20797	C067S081E36	KTN	1.290	PETA3	Add
C20798	C067S081E36	KTN	1.380	PETA3	Add
C20799	C067S081E36	KTN	1.530	PETA3	Add
C20800	C067S081E36	KTN	1.110	PETA3	Add
C20817	C068S076E23	KTN	14.000	CRGD5	Add
C70925	C073S084E34	KTN	13.000	CRGB2	Add
Total Parcels 7		Total Acres		34.628	

Add means this parcel is to be added to the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate' list, dated April 28, 1994.

REVISIONS TO  
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND

*FEE ESTATE*

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
F20284	F002N001E16	FBKS	240.000	LIVA2	Delete
F20285	F002N001E16	FBKS	80.000	FAID2	Delete
F20312	F002N001W36	FBKS	320.000	FAID2	Delete
F20444	F003N001W36	FBKS	80.000	LIVA2	Delete
F20445	F003N001W36	FBKS	4.636	LIVA2	Delete
F20446	F003N001W36	FBKS	5.146	LIVA2	Delete
F20447	F003N001W36	FBKS	4.686	LIVA2	Delete
F20448	F003N001W36	FBKS	4.636	LIVA2	Delete
F20449	F003N001W36	FBKS	4.636	LIVA2	Delete
F20450	F003N001W36	FBKS	3.774	LIVA2	Delete
F20451	F003N001W36	FBKS	13.865	LIVA2	Delete
F20452	F003N001W36	FBKS	6.795	LIVA2	Delete
F20453	F003N001W36	FBKS	5.305	LIVA2	Delete
F20454	F003N001W36	FBKS	5.000	LIVA2	Delete
F20455	F003N001W36	FBKS	5.000	LIVA2	Delete
F20456	F003N001W36	FBKS	5.027	LIVA2	Delete
F20457	F003N001W36	FBKS	4.128	LIVA2	Delete
F20458	F003N001W36	FBKS	4.578	LIVA2	Delete
F20459	F003N001W36	FBKS	5.252	LIVA2	Delete
F20460	F003N001W36	FBKS	5.033	LIVA2	Delete
F20461	F003N001W36	FBKS	5.125	LIVA2	Delete
F20530.001	F007S006E16	SLCA	19.460	XBDB6	Delete
F20530.002	F007S006E16	SLCA	3.200	XBDB6	Delete
F20530.003	F007S006E16	SLCA	400.000	XBDB6	Delete
F20692	F011S007W16	HLY	640.000	HEAD4	Delete
F20698	F012S007W16	HLY	640.000	HEAD4	Delete
S20012	S001N001W36	SWRD	120.000	SEWA7	Delete
S20077	S003S015W36	HOMR	120.000	SELD5	Delete
S20535	S017N002W16	MISU	40.000	ANCC8	Delete
S20537	S017N002W36	MTSU	0.710	ANCC7	Delete
S20538	S017N002W36	MTSU	0.707	ANCC7	Delete
S20539	S017N002W36	MTSU	0.793	ANCC7	Delete
S20540	S017N002W36	MTSU	0.850	ANCC7	Delete
S20541	S017N002W36	MTSU	0.772	ANCC7	Delete
S20542	S017N002W36	MTSU	0.913	ANCC7	Delete
S20543	S017N002W36	MTSU	1.007	ANCC7	Delete
S20544	S017N002W36	MTSU	0.625	ANCC7	Delete
S20545	S017N002W36	MTSU	0.611	ANCC7	Delete
S20546	S017N002W36	MTSU	0.785	ANCC7	Delete

REVISIONS TO  
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND

*FEE ESTATE*

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
S20547	S017N002W36	MTSU	0.845	ANCC7	Delete
S20548	S017N002W36	MTSU	0.973	ANCC7	Delete
S20567	S018N001W36	MTSU	320.000	ANCC7	Delete
S20569	S019N002E36	MTSU	15.000	ANCC6	Delete
F70015	F003N001E36	FBKS	640.000	LIVAl	Delete
F70015	Tract A, ASC 930010, and Tracts C-1 and C-4 ASC 930008	FBKS	5137.280	LIVAl FAID1	Delete

Total Parcels    45

Total Acres    8917.153

Delete means this parcel is to be deleted from the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate' list, dated April 28, 1994.


**MEMORANDUM**  
**Department of Natural Resources****State of Alaska**  
**Office of the Commissioner**

TO: All Legislators

DATE: September 21, 1994

FILE NO:

TELEPHONE NO: 762-2483

FROM:  Harry A. Nash  
CommissionerSUBJECT: Special Session  
Draft Legislation

Attached are final draft copies of the two bills to be considered during the upcoming special session intended to assure resolution of the mental health lands litigation. Although the concepts in the final drafts have been discussed with you previously, we wanted to provide you this opportunity to consider the specific language prior to the Governors' transmittal of the final bill.

Please call either myself or Jerry Gallagher at 762-2483 on Thursday if you have any questions or comments.

\_\_\_\_\_ BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SPECIAL SESSION

BY THE \_\_\_\_\_ RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act making and amending appropriations relating to the mental health trust  
2 fund and the mental health trust income account; and providing for an effective  
3 date."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 \* Section 1. Section 1(a), ch. 6, FSSLA 1994, is amended to read:

6 (a) The sum of \$200,000,000 is appropriated to the mental health trust fund  
7 (AS 37.14.031), added by sec. 11, ch. 66, SLA 1991, from the following sources, in  
8 the amounts listed, to capitalize the mental health trust fund:

9	SOURCE	APPROPRIATION
10	<u>(1)</u> Mental health trust income account (AS 37.14.011) [BALANCE ON JUNE 30, 1995]	\$33,000,000
13	<u>(2)</u> Department of Natural Resources - mental health trust income in the	11,700,000

1                                    general fund

2            (3)    Proceeds from sale of Department of                                    25,000,000

3                                    Natural Resources land sale

4                                    contract portfolio

5            (4)    Budget reserve fund (art. IX, sec. 17(c),                                    130,300,000

6                                    Constitution of the State of Alaska)

7    \* Sec. 2. Section 1(b), ch 6, FSSLA 1994 is amended to read:

8                                    (b) The appropriations made by (a), (f), and (g) of this section are contingent

9                                    upon

10                                    (1) the enactment into law of a bill passed by the Eighteenth Alaska

11                                    State Legislature that amends ch. 66, SLA 1991, and contains other provisions relating

12                                    to the mental health land trust and mental health land trust litigation (Weiss v. State,

13                                    4FA-82-2208 Civil); and

14                                    (2) not later than December 15, 1994,

15                                    (A) the superior court of the State of Alaska having made a

16                                    final determination that the state has satisfied its obligation to reconstitute the

17                                    mental health trust under State v. Weiss, 706 P.2d 681 (Alaska 1985); and

18                                    (B) the superior court having entered an [A FINAL] order

19                                    dismissing Weiss v. State, 4FA-82-2208 Civil; AND

20                                    (C) THE TIME FOR APPEALS OF THAT DETERMINATION

21                                    AND THAT ORDER HAVING EXPIRED WITH NO APPEALS HAVING

22                                    BEEN TAKEN AS OF THAT DATE OR ANY APPEALS TAKEN HAVING

23                                    BEEN FINALLY RESOLVED AND THE ORDER DISMISSING WEISS V.

24                                    STATE, 4FA-82-2208 CIVIL, HAVING BEEN AFFIRMED ON APPEAL.]

25    \* Sec. 3. Section 1(e), ch. 6, FSSLA 1994 is amended to read:

26                                    (e) The appropriations made by (a), (f), and (g) of this section are for the

27                                    capitalization of funds and do not lapse.

28    \* Sec. 4. Section 1, ch. 6, FSSLA 1994 is amended by adding new subsections to read:

29                                    (f) If the money available for appropriation from a funding source identified

30                                    in (a)(1), (3), or (4) of this section is less than the amount appropriated by any of those

31                                    paragraphs, then the amount necessary to cover the shortfall is appropriated from the

1 unappropriated balance of mental health trust income deposited in the general fund.

2 (g) If the money available for appropriation from a funding source identified  
3 in (a)(2), (a)(3), (a)(4), or (f) of this section is less than the amount necessary to  
4 entirely fund any of the appropriations made by (a)(2), (a)(3), (a)(4), or (f) of this  
5 section, then an amount equal to the shortfall, remaining after the appropriation under  
6 (f) of this section is made, is appropriated from the unappropriated money in the  
7 mental health trust income account (AS 37.14.011).

8 \* **Sec. 5.** If the amount in the mental health trust income account (AS 37.14.011) is  
9 insufficient to fund appropriations from that account passed by the Eighteenth Alaska  
10 Legislature or a previous legislature, and enacted into law, the amount necessary to fund those  
11 appropriations is appropriated from the general fund to the mental health trust income account  
12 (AS 37.14.011).

13 \* **Sec. 6.** (a) On the date that AS 37.14.011(a) is repealed, the balance of the mental  
14 health trust income account (AS 37.14.011) is transferred to the general fund.

15 (b) The unexpended, unobligated, and unencumbered balances of appropriations from  
16 the mental health trust income account (AS 37.14.011) that lapse after the repeal of  
17 AS 37.14.011(a) lapse into the general fund.

18 \* **Sec. 7.** Expenditures, made in accordance with law, from the mental health trust income  
19 account (AS 37.14.011) on or after June 24, 1994, and before the effective date of this section,  
20 are ratified.

21 \* **Sec. 8.** (a) The sum of \$200,000,000 and an amount equivalent to the amount deposited  
22 in the mental health trust fund (AS 37.14.031) that is attributable to inflation proofing  
23 \$200,000,000 of the principal of that fund, determined as of the date of the repeal of AS  
24 37.14.031, is appropriated from that fund to the general fund.

25 (b) The unexpended and unobligated balance remaining in the mental health trust fund  
26 (AS 37.14.031) after the appropriation made by (a) of this section is appropriated to the  
27 mental health trust income and proceeds account (AS 37.14.013).

28 \* **Sec. 9.** The unexpended and unobligated balance in the mental health trust settlement  
29 income account (AS 37.14.036) on the date of the repeal of AS 37.14.036 is appropriated to  
30 the mental health trust income and proceeds account (AS 37.14.013).

31 \* **Sec. 10.** Sections 8 and 9 of this Act take effect only if a dismissal of *Weiss v. State*,

1 4FA-82-2208 Civil, by the superior court is reversed on appeal, including a petition for  
2 certiorari to the United States Supreme Court.

3 \* **Sec. 11.** Section (1)(c), ch. 6, FSSLA 1994, is repealed.

4 \* **Sec. 12.** Sections 1 - 7 and 11 are retroactive to June 24, 1994.

5 \* **Sec. 13.** If they take effect under sec. 10 of this Act, secs. 8 and 9 of this Act take effect  
6 on the date that an order of dismissal entered by the superior court of Weiss v. State, 4FA-82-  
7 2208 Civil, is reversed on appeal, including a petition for certiorari to the United States  
8 Supreme Court. The attorney general shall certify that date to the lieutenant governor and the  
9 revisor of statutes.

10 \* **Sec. 14.** Except as provided in sec. 13 of this Act, this Act takes effect immediately  
11 under AS 01.10.070(c).

\_\_\_\_\_ BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SPECIAL SESSION

BY THE \_\_\_\_\_ RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

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

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 \* Section 1. AS 37.14.036(a), as added by sec. 11, ch. 66, SLA 1991 and  
7 amended by sec. 15, ch. 5, FSSLA 1994, is further amended to read:

8 (a) The mental health trust settlement income account is established  
9 as a separate account of the Alaska Mental Health Trust Authority. The  
10 mental health trust settlement income account consists of

11 (1) fees, charges, income earned on assets, and other money  
12 received by the trust that is not attributable to the principal of the trust

1 under AS 37.14.031(d): and

2 (2) money deposited in the account in accordance with  
3 appropriations or allocations made by law.

4 \* Sec. 2. Section 58, ch. 66, SLA 1991, as repealed and reenacted by sec. 37, ch. 5,  
5 FSSLA 1994, is amended to read:

6 Sec. 58 (a) This Act takes effect only if, not later than December 15, 1994,

7 (1) the superior court of the State of Alaska has made a  
8 [FINAL] determination that the state has satisfied its obligation to reconstitute the  
9 mental health trust under State v. Weiss, 706 P.2d 681 (Alaska 1985); and

10 (2) the superior court has entered an [A FINAL] order  
11 dismissing Weiss v. State, 4FA-82-2208 Civil [; AND

12 (3) THE TIME FOR APPEALS OF THAT DETERMINATION  
13 AND THAT ORDER HAS EXPIRED WITH NO APPEALS HAVING BEEN TAKEN  
14 OR ANY APPEALS TAKEN HAVE BEEN FINALLY RESOLVED AND THE  
15 ORDER DISMISSING WEISS V. STATE, 4FA-82-2208 CIVIL, HAS BEEN  
16 AFFIRMED ON APPEAL].

17 (b) The attorney general shall advise the lieutenant governor and the revisor  
18 of statutes whether the determination required by (a)(1) of this section has been made  
19 and[.] whether the [FINAL] order required by (a)(2) of this section has been entered  
20 [, AND WHETHER, AS REQUIRED BY (a)(3) OF THIS SECTION, THE TIME  
21 FOR APPEALS OF THAT DETERMINATION AND THAT ORDER HAS EXPIRED  
22 WITH NO APPEALS HAVING BEEN TAKEN AS OF THAT DATE OR ANY  
23 APPEALS TAKEN HAVE BEEN FINALLY RESOLVED AND THE ORDER  
24 DISMISSING WEISS V. STATE, 4FA-82-2208 CIVIL, HAS BEEN AFFIRMED ON  
25 APPEAL].

26 \* Sec. 3. (a) Section 39, ch. 5, FSSLA 1994, is amended to read:

27 \* Sec. 39. AS 37.14.009(b), 37.14.011(b), 37.14.011(c) [37.14.011], 37.14.021,  
28 37.14.036(c); AS 38.05.800; AS 47.30.031(b)(2); secs. 1, 2, 4, and 5, ch. 132, SLA  
29 1986; secs. 7 - 10, ch. 48, SLA 1987; and secs. 49, 50, 53 - 57, ch. 66, SLA 1991, are  
30 repealed.

1 (b) The amendment made by (a) of this section is intended to revive AS 37.14.011(a),  
2 establishing the mental health trust income account in the general fund. This subsection  
3 provides the expression of intent to revive required by AS 01.10.100(c).

4 \* **Sec. 4.** Section 40(a), ch. 5, FSSLA 1994, is amended to read:

5 (a) For the purpose of reconstituting the mental health trust established under  
6 the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956), as required  
7 by the Alaska Supreme Court's decision in State v. Weiss [WEISS V. STATE], 706  
8 P.2d 681 (Alaska 1985), the following land is designated as mental health trust land:

9 (1) the original mental health land listed in "Original Mental Health  
10 Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended  
11 by the additions and deletions listed in the September 23, 1994 addendum to the  
12 April 28, 1994 list described in this paragraph, both of which are located in the  
13 office of the director of the division of lands, Department of Natural Resources, in  
14 Anchorage, Alaska; and

15 (2) the state land listed in "Other State Land To Be Designated as  
16 Mental Health Trust Land, April 28, 1994," as amended by the additions and  
17 deletions listed in the September 23, 1994 addendum to the April 28, 1994 list  
18 described in this paragraph, both of which are located in the office of the director  
19 of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

20 \* **Sec. 5.** Section 40(b), ch. 5, FSSLA 1994, is amended to read:

21 (b) All land designated as mental health trust land under this section remains  
22 subject to all encumbrances or interests of record, noted on records maintained by the  
23 Department of Natural Resources, or otherwise existing on the date that the land is  
24 designated as mental health trust land [EFFECTIVE DATE OF THIS SECTION].

25 \* **Sec. 6.** Section 41(a), ch. 5, FSSLA 1994, is amended to read:

26 (a) Except for the land described in sec. 40 of this Act,

27 (1) the conversion to general grant land by sec. 3(a), ch. 181, SLA  
28 1978, and sec. 1(a), ch. 182, SLA 1978, of all land obtained by the state under the  
29 Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956), and not listed  
30 in "Original Mental Health Land To Be Designated as Mental Health Trust Land,  
31 April 28, 1994," as amended by the additions and deletions listed in the

1 September 23, 1994 addendum to the April 28, 1994 list described in this  
2 paragraph, both of which are located in the office of the director of the division of  
3 lands, Department of Natural Resources, in Anchorage, Alaska, is confirmed and  
4 ratified; and

5 (2) land patented to or approved for patent to the state under the  
6 Alaska Mental Health Enabling Act after July 1, 1978, and not listed in "Original  
7 Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994,"  
8 as amended by the additions and deletions listed in the September 23, 1994  
9 addendum to the April 28, 1994 list described in this paragraph, both of which  
10 are located in the office of the director of the division of lands, Department of Natural  
11 Resources, in Anchorage, Alaska, is redesignated as general grant land if it was not  
12 converted to general grant land by sec. 3(a), ch. 181, SLA 1978, and sec. 1(r), ch. 182,  
13 SLA 1978.

14 \* Sec. 7. Section 41(b), ch. 5, FSSLA 1994, is amended to read:

15 (b) The land affected by this section includes the land listed in "Original  
16 Mental Health Land Not To Be Returned to Mental Health Trust Status, April 28,  
17 1994," as amended by the additions and deletions listed in the September 23, 1994  
18 addendum to "Original Mental Health Land To Be Designated as Mental Health  
19 Trust Land, April 28, 1994," all of which are located in the office of the director  
20 of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

21 \* Sec. 8. Section 48, ch. 5, FSSLA 1994, is amended to read:

22 \* Sec. 48. If the conditions of sec. 58, ch. 66, SLA 1991, as amended by sec.  
23 37 of this Act, are not met on or before December 15, 1994, [OR ON A DATE  
24 DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS ACT,] then ch.  
25 66, SLA 1991, is repealed and secs. 3 - 9, 12 -16, 19 - 21, 23 - 30, 33 - 36, 43, and  
26 46 of this Act do not take effect.

27 \* Sec. 9. Section 49, ch. 5, FSSLA 1994, is amended to read:

28 \* Sec. 49. If the conditions of sec. 58, ch. 66, SLA 1991, as amended by sec.  
29 37 of this Act, are met on or before December 15, 1994, [OR ON A DATE  
30 DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS ACT,] then AS  
31 37.14.013, added by sec. 10 of this Act, AS 37.14.023, added by sec. 11 of this Act,

1 AS 47.30.546, and sec. 44 of this Act are repealed.

2 \* **Sec. 10.** Section 50, ch. 5, FSSLA 1994, is amended to read:

3 \* **Sec. 50.** Subject to sec. 48 of this Act, secs. 3 - 9, 12 - 16, 19 - 21, 23 - 30,  
4 33 - 36, 43, and 46 of this Act take effect December 16, 1994 [, OR ON A DATE  
5 DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS ACT].

6 \* **Sec. 11.** Section 51, ch. 5, FSSLA 1994, is amended to read:

7 \* **Sec. 51.** Sections 48 and 49 of this Act take effect December 16, 1994 [, OR  
8 ON A DATE DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS  
9 ACT].

10 \* **Sec. 12.** AS 37.14.011(a) is repealed on the date that the director of the office of  
11 management and budget, Office of the Governor, certifies to the revisor of statutes that the  
12 mental health trust income account (AS 37.14.011) is no longer needed to finance  
13 appropriations enacted by law.

14 \* **Sec. 13.** Section 47, ch. 5, FSSLA 1994 is repealed.

15 \* **Sec. 14.** (a) The benefits conferred on the beneficiaries of the mental health trust under  
16 ch. 66, SLA 1991, chs. 5 and 6, FSSLA 1994, a bill enacted by the Second Special Session  
17 of the Alaska State Legislature that amends ch. 6, FSSLA 1994 and becomes law, and this  
18 Act, are intended as part of a comprehensive settlement of the mental health trust land  
19 litigation, Weiss v. State, 4FA-82-2208 Civil, and related cases.

20 (b) Sections 3 - 9, 12 - 16, 19 - 21, 23 - 30, 33 - 36, 43, and 46, ch. 5, FSSLA 1994  
21 and ch. 66, SLA 1991, as amended by ch. 5, FSSLA 1994 and this Act, are repealed on the  
22 date that an order of dismissal entered by the superior court of Weiss v. State, 4FA-82-2208  
23 Civil, is reversed on appeal including a petition for certiorari to the United States Supreme  
24 Court. The attorney general shall certify that date to the lieutenant governor and the revisor  
25 of statutes.

26 \* **Sec. 15.** (a) If ch. 66, SLA 1991 and secs. 3 - 9, 12 - 16, 19 - 21, 23 - 30, 33 - 36, 43,  
27 and 46, ch. 5, FSSLA 1994 are repealed under sec. 14 of this Act, provisions of the Alaska  
28 Statutes that were

29 (1) enacted by ch. 66, SLA 1991 and those sections of ch. 5, FSSLA  
30 1994 are repealed;

31 (2) amended by ch. 66, SLA 1991 and those sections of ch. 5, FSSLA

1 1994 are amended to read as they did on the day before the effective date of the amendments  
2 made by the repealed laws; however, unless inconsistent with this Act, amendments to those  
3 provisions that were made after the enactment of ch. 66, SLA 1991 and before the effective  
4 date of this section are not affected by this Act; and

5 (3) repealed by ch. 66, SLA 1991 and those sections of ch. 5, FSSLA  
6 1994 are revived to read as they did on the day before the effective date of the repeal;  
7 however, a provision that was repealed by ch. 66, SLA 1991 and has been repealed by other  
8 legislation enacted after ch. 66, SLA 1991 and prior to the effective date of this section or that  
9 was repealed by ch. 5, FSSLA 1994 and has been repealed by other legislation enacted after  
10 ch. 5, FSSLA 1994 and prior to the effective date of this section is not revived.

11 (b) AS 37.14.013 and 37.14.023, enacted by secs. 10 and 11, ch. 5, FSSLA 1994, and  
12 repealed by sec. 49, ch. 5, FSSLA 1994, are revived.

13 (c) The effective date of a repeal, amendment, or revival described in (a) and (b) of  
14 this section is the date that the attorney general certifies to the lieutenant governor and the  
15 revisor of statutes under sec. 14(b) of this Act.

16 (d) The provisions of (a)(3) and (b) of this section provide the expression of intent  
17 to revive required by AS 01.10.100(c).

18 \* **Sec. 16.** If ch. 66, SLA 1991 and secs. 3 - 9, 12 - 16, 19 - 21, 23 - 30, 33 - 36, 43, and  
19 46, ch. 5, FSSLA 1994 are repealed under sec. 14 of this Act, all grants made and contracts  
20 entered into by the Alaska Mental Health Trust Authority prior to the effective date of the  
21 repeal are ratified and responsibility for the administration of all grants and contracts of the  
22 authority is transferred to the Department of Health and Social Services.

23 \* **Sec. 17.** In ch. 66, SLA 1991 and ch. 5, FSSLA 1994, the revisor of statutes shall change  
24 references to the "mental health trust income account," as established by AS 37.14.036, to the  
25 "mental health trust settlement income account."

26 \* **Sec. 18.** Section 3 of this Act is retroactive to June 24, 1994.

27 \* **Sec. 19.** Sections 1 and 17 of this Act take effect December 16, 1994.

28 \* **Sec. 20.** Except as provided in sec. 19, this Act takes effect immediately under  
29 AS 01.10.070(c).

LAW OFFICES  
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9/29/94  
Joint  
HFC/SFC  
MIT  
Walker/Bohstain

September 20, 1994

Julian L. Mason III  
Ashburn and Mason  
1130 West Sixth Avenue, Suite 100  
Anchorage, Alaska 99501

Re: Weiss et al., v. State

Dear Julian:

We understand the State is preparing legislation to correct deficiencies in the proposed settlement -- the Salcha land exchange, other corrections to the land lists, and the availability of funds to complete the cash portion of the State's commitment. This is our proposal. If it is accepted we will recommend the settlement to our clients without further change.

**1. Land Lists.**

Yesterday we provided the State with the list of Substitute Lands that were included on the list that made up the valuation used in the State's Exhibit A, but are not on the HB 201 lists. The total value of such omitted land is \$6.3 million<sup>1</sup>, bringing the estimated total omitted lands to \$86.2 million. The remaining category to resolve from our perspective is parcels that have been reduced from what they were when they were used on your Exhibit A. The omitted parcels need to be added to the to be conveyed lists in the Special Session.

**2. Proposed Amendments**

Enclosed are proposed amendments (redline and clean versions) to the proposed settlement that incorporate the representations we understood the State to make at the preliminary approval hearing and address the other items we need resolved before we will recommend the settlement for approval.

---

<sup>1</sup> The Substitute Land list takes into account the "technical corrections" we have been provided by the State.

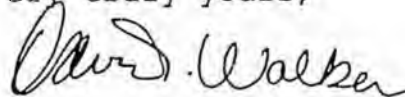
Julian I. Mason III  
September 20, 1994  
Page 2

3. Original Trust Coal.

Original Trust Coal, as we have previously stated, should not be removed from the Trust. We recognize the coal lessees' interest in ensuring that they will be able to mine coal at a fair profit. We remain interested in accomplishing this.

Time is short. We are prepared to do what it takes to attempt to reach an agreement that will allow us to finally put this matter to rest.

Very truly yours,



David T. Walker



James B. Gottstein

cc: Vern T. Weiss  
Alaska Mental Health Association  
Bruce Botelho  
G. Thomas Koester  
Tom Waldo/Eric Jorgenson

Jim Gottstein  
Philip Volland  
Mark Davis  
Rick Johannsen  
Jeff Jessee

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Proposed HB 201 Settlement Amendments

David Walker  
Jim Gottstein  
September 19, 1994

A. HB 201, Section 9(a)(2).<sup>[1]</sup>

\*Sec. 9. AS 37.14.009(a)(2), added by sec. 10, ch. 66 SLA 1991 is amended to read:

(a) The Alaska Mental Health Trust Authority

\* \* \*

(2) shall contract with the Department of Natural Resources to manage the land assets of the trust; the contract must provide for the recording of at least one conveyance to the authority by quitclaim deed of mental health trust land in each recording district in the state in which mental health trust land is located and, without charge to the Trust, for a boundary survey of mental health trust land parcels that do not have such a survey \* \* \*.

B. HB 201, Section 16, AS 37.14.039(a)<sup>[2]</sup>

Sec. 37.14.039. TRUST INCOME ACCOUNT ADMINISTRATION. (a) The mental health trust income account shall be administered by the Alaska Mental Health Trust Authority. Expenditure of funds by the Alaska Mental Health Trust Authority under AS 37.14.041 (a)(1) through (5) may be made without, and free of legislative appropriation.

C. HB 201, Section 49<sup>[3]</sup>

Sec. 49. If the conditions of sec. 58, ch. 66 SLA 1991, as amended by sec. 37 of this Act, are met on or before December 15, 1994, or on a date determined by the governor under sec. 47 of this Act, then Secs. 1, 10, 11, 40<sup>4</sup>(c), 42, and 44 of this Act, AS 37.14.013, added by sec. 10 of this Act, AS 37.14.023, added by sec. 11 of this Act, AS 47.30.546, and sec. 44 of this Act are repealed.

Add. 41  
Sec. 41

D. Settlement Agreement, Section IV. 1.<sup>[4]</sup>

1. Transfer of Land by Quitclaim Deed and Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated

as mental health lands pursuant to Section 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority, without charge to the Trust, to

(a) complete the preparation of recordable deeds for delivery to the Authority,

(b) complete the identification of encumbrances and interests of record pertaining to the parcels to be conveyed to the Trust Authority as provided in Part V of "MH/work plan 7/28/94" for delivery to the Authority, and

(c) accomplish a boundary survey for parcels that do not have such a survey

as soon as practicable after dismissal. With respect to "(c)," such surveys may take as long as ten years and the State will work with the Trust Authority to prioritize surveying in accord with the Authority's desires.

#### E. Settlement Agreement, Section V. 6.<sup>151</sup>

6. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, including without limitation, the amount of reimbursement to DNR under AS 37.14.041(a)(4)(B) to be added by section 16 of HB 201, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201 and reflect that the Trust Authority is the client of DNR. DNR and the Trust Authority will provide for the management of Trust Lands for the maximum benefit of the beneficiaries and in a manner that achieves fair market value for use of Trust Land. The parties recognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. Subject to the foregoing, the parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with

a transition team of representatives from the beneficiary community to advise and deliberate with DNR and the affected state agencies.

**F. Settlement Agreement, Section VI.5<sup>(6)</sup>**

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, ~~and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985).~~ The provisions of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and are incorporated herein by reference ~~acknowledged that the trust is reconstituted.~~ If the Legislature materially alters or repeals any of those provisions, the plaintiffs' shall have the right to reinstate all the claims that they had after the 1978 redesignation, including without limitation, all of their claims to all of the land granted under the Alaska Mental Health Enabling Act of 1956, sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a) or (b), 41, 43, 46, 47, 49, 50 or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof, the State hereby agrees that the beneficiaries have the right to reinstate all of their original claims that the Trust has been broken or improperly taken apart free from the impact of HB 201 or any subsequent legislation and hereby waives any argument to the contrary. In light of the dismissal of each parties' claims and in light of this being a class action, no modification of the agreement may be made except in writing signed by all the parties and approved by the court after notice to the class. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

**G. Settlement Agreement, Section VI.6(c).<sup>(7)</sup>**

6. Settlement and Dismissal.

\* \* \*

(c) Subject to the beneficiaries' right to reinstatement of all of their original claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 and Sections 1 and 2 of HB 371, or any combination of these sections, dismissing with prejudice all

class claims, including without limitation those of plaintiffs and plaintiffs-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act.

\* \* \*

(g) Expunging the Renotice of Lis Pendens, subject to the plaintiffs right to reinstatement of all claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof.

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Page: 1

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"1" All Original Trust Land has such a boundary survey or will be surveyed prior to patent. Under the current settlement proposal, some of the parcels conveyed to the Trust Authority will not be surveyed. This will mean that it will not be possible to tell on the ground what the location is of some of these parcels. This will be a significant hindrance to economic utilization of the property. The Trust Authority can theoretically use the Trust's income or require users to survey the ground, but this will prove to be an obstacle to the development of the property. The Trust Authority's using the Trust's income is likely to draw objection from those who think the money should be used for the mental health program instead even if spending the money on survey will increase the Trust's income. Until the land is surveyed, some potential users may not be interested in pursuing the option of using Trust land. In addition, just having the built in delay factor of not having a survey will cost the Trust income. Basically, fairness dictates that the State provide boundary surveys. The related proposed amendment to the settlement agreement, Section IV. 1 makes clear that the surveys can take 10 years and that DNR and the Trust Authority will coordinate in which order surveys should occur.

Page: 1

~~Page: 1~~

"2" This amendment is to make clear that it is the legislature's intent that the Trust Authority is authorized to spend the Trust's income free of further legislative appropriation (ie., other than the initial appropriation of the \$200 million and conveyance of the land to the Trust).

Page: 1

~~Page: 1~~

"3" This change repeals the "cram-down" or "non-settlement" portions of HB 201 if the settlement is approved. Unless this is done, it would appear that the State is reserving the right to argue that HB 201 prevents the beneficiaries from re-asserting their claims to all Original Trust Land. The court found the right of the beneficiaries to re-assert their claims was a deterrent against the Legislature changing the HB 201 settlement and this was critical to the court granting preliminary approval.

Page: 1

~~Page: 1~~

"4" The amendments to this section (a) conforms the survey requirement to the amendment to HB 201 above, and (b) puts into the settlement agreement that DNR will deliver the title information it is already developing to the Trust Authority.

Page: 2

~~Page: 2~~

"5) The amendments to this section conform the settlement agreement to the testimony of Commissioner Noah at the July 1994 court hearing about how the Trust's land is to be managed.

Page: 3

~~Page: 3~~

"6) The changes to this section conform the settlement agreement to the representations made by the State's attorney to the court at the July 1994 hearing regarding the beneficiaries' right to reassert their claims in the event the Legislature changes the HB 201 settlement's terms..

Page: 3

~~Page: 3~~

"7) These are other technical changes to the Settlement Agreement to conform it to the State's representations to the court regarding the beneficiaries' right to reassert their claims in the event the Legislature changes the HB 201 settlement's terms.

Proposed HB 201 Settlement Amendments

David Walker  
Jim Gottstein  
September 19, 1994

A. HB 201, Section 9(a)(2).

\*Sec. 9. AS 37.14.009(a)(2), added by sec. 10, ch. 66 SLA 1991 is amended to read:

(a) The Alaska Mental Health Trust Authority

\* \* \*

(2) shall contract with the Department of Natural Resources to manage the land assets of the trust; the contract must provide for the recording of at least one conveyance to the authority by quitclaim deed of mental health trust land in each recording district in the state in which mental health trust land is located and, without charge to the Trust, for a boundary survey of mental health trust land parcels that do not have such a survey \* \* \*.

B. HB 201, Section 16, AS 37.14.039(a)<sup>[2]</sup>

Sec. 37.14.039. TRUST INCOME ACCOUNT ADMINISTRATION. (a) The mental health trust income account shall be administered by the Alaska Mental Health Trust Authority. Expenditure of funds by the Alaska Mental Health Trust Authority under AS 37.14.041 (a)(1) through (5) may be made without, and free of legislative appropriation.

C. HB 201, Section 49

Sec. 49. If the conditions of sec. 58, ch. 66 SLA 1991, as amended by sec. 37 of this Act, are met on or before December 15, 1994, or on a date determined by the governor under sec. 47 of this Act, then Secs. 1, 10, 11, 40(c), 42, and 44 of this Act, are repealed.

D. Settlement Agreement, Section IV. 1.

1. Transfer of Land by Quitclaim Deed and Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Section 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this

action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority, without charge to the Trust, to

- (a) complete the preparation of recordable deeds for delivery to the Authority,
- (b) complete the identification of encumbrances and interests of record pertaining to the parcels to be conveyed to the Trust Authority as provided in Part V of "MH/work plan 7/28/94" for delivery to the Authority, and
- (c) accomplish a boundary survey for parcels that do not have such a survey

as soon as practicable after dismissal. With respect to "(c)," such surveys may take as long as ten years and the State will work with the Trust Authority to prioritize surveying in accord with the Authority's desires.

#### **E. Settlement Agreement, Section V. 6.**

6. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, including without limitation, the amount of reimbursement to DNR under AS 37.14.041(a)(4)(B) to be added by section 16 of HB 201, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201 and reflect that the Trust Authority is the client of DNR. DNR and the Trust Authority will provide for the management of Trust Lands for the maximum benefit of the beneficiaries and in a manner that achieves fair market value for use of Trust Land. The parties recognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. Subject to the foregoing, the parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with a transition team of representatives from the beneficiary community to advise and deliberate with DNR and the affected

state agencies.

**F. Settlement Agreement, Section VI.5**

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses. The provisions of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and are incorporated herein by reference. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' shall have the right to reinstitute all the claims that they had after the 1978 redesignation, including without limitation, all of their claims to all of the land granted under the Alaska Mental Health Enabling Act of 1956. In the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a) or (b), 41, 43, 46, 47, 49, 50 or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof, the State hereby agrees that the beneficiaries have the right to reinstate all of their original claims that the Trust has been broken or improperly taken apart free from the impact of HB 201 or any subsequent legislation and hereby waives any argument to the contrary. In light of the dismissal of each parties' claims and in light of this being a class action, no modification of the agreement may be made except in writing signed by all the parties and approved by the court after notice to the class. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

**G. Settlement Agreement, Section VI.6(c).**

6. Settlement and Dismissal.

\* \* \*

(c) Subject to the beneficiaries' right to reinstatement of all of their original claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 and Sections 1 and 2 of HB 371, or any combination of these sections, dismissing all class claims, including without limitation those of plaintiffs and plaintiffs-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by

the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act.

\* \* \*

(g) Expunging the Renotice of Lis Pendens, subject to the plaintiffs right to reinstatement of all claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof.

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4/21/94 RECONSTITUTION PROPOSAL  
(STATE/VOLLAND)

9/20/94  
Joint  
HFC-SFC  
MHT  
Gottstein

Third Party Purchases (oil and gas estate only)	5.9
muni ent. and <fmv sales (mineral & oil and gas estates only)	79.4
Long term leases	4.3
Ag tracts-good standing (oil and gas estates only)	1.6
Ag tracts-not in good standing (oil and gas estates only)	4.9
Mat Valley Moose Range (mineral & coal estates only)	19.1
Su Flats (oil and gas estate only)	17.7
Unleased sub parcels Healy	146.8
Unleased sub parcels Beluga	26.0
MRTL encumbered with mining 25% of NSR value	32.6
Undisputed MRTLS	495.5
Returned from Munis	18.0
State agency use-unoccupied	14.7
Healy coal leases under current rules	42.2
Beluga coal leases under current rules	13.7
Thorne Bay	2.3
Uncontested PSLs (SCLDF less state objections)	83.4
New subdivision PSLs from DNR (at \$1500/acre)	3.6
New PSLs oil and gas estate only from DNR	10.4
New PSLs from munis	1.0
New mineral estate only areas	80.5
Cash	200.0
Ft. Knox	8.2
Plaintiffs Total	1,311.8

Document: STATE'S EXHIBIT "A"

Used as: EXHIBIT, PRELIMINARY  
APPROVAL HEARING HB 201

Date: JULY 1994