Trust Lands in the American West:

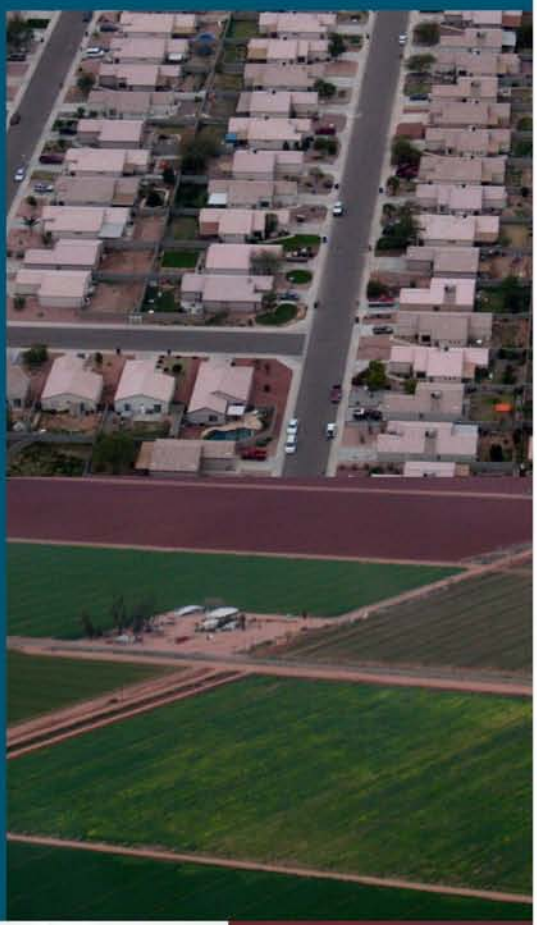
A Legal Overview and Policy Assessment

Peter W. Culp, Diane B. Conradi & Cynthia C. Tuell

LINCOLN INSTITUTE OF LAND POLICY

SONORAN INSTITUTE

A Policy Assessment Report of the
Lincoln Institute of Land Policy/Sonoran Institute
Joint Venture on State Trust Lands



Particular thanks is owed to Jon Souder, who engaged in a comprehensive review of the final draft of the report; his comments were essential to finalizing the report, completing the legal analysis, and helping to restore the vision of the overall project. We are also indebted to Dr. Jay O'Laughlin of the University of Idaho, who provided invaluable and detailed comments to complete the legal analysis; thanks also to Professor Mary Wood of the University of Oregon School of Law in this regard. Andy Laurenzi, Director of the State Trust Lands Program for the Sonoran Institute, also provided invaluable review and guidance from the preparation and throughout the various drafts of the report.

Finally, a deep debt of gratitude is owed to Jennifer A. Barefoot of the Sonoran Institute's Phoenix office, who spent countless hours reviewing and editing this report to bring it into its final form.

About the Authors

Peter W. Culp is the Project Manager for the State Trust Lands Program and Attorney for Programs for the Sonoran Institute, where he works on a variety of issues related to land and water policy. He is the author of four published articles and several unpublished reports on environmental policy in the Colorado and Columbia River basins. He holds a J.D. from the University of Arizona (*summa cum laude*, 2001) and a B.A. in politics from the University of California, Santa Cruz (*with honors*, 1994). He is a member of the State Bar of Arizona and the American Bar Association.

Diane B. Conradi is the Montana Project Manager for the Sonoran Institute's State Trust Lands Program, where she manages a variety of policy efforts related to the administration and management of state trust lands in Montana. She holds a J.D. from the University of Oregon (1991) and a B.A. in English from University of South Carolina Honors College (*with honors,* 1986). She is a member of the Oregon State Bar and the State Bar of Montana.

Cynthia C. Tuell is a second year law student at the James E. Rogers College of Law, University of Arizona, and is Senior Intern for the Sonoran Institute, where she conducts research on a variety of issues related to the administration and management of state trust lands. She holds a B.S. in Ecology and Evolutionary Biology from the University of Arizona (*cum laude*, 2002).

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I. Introduction

If you look at a map of public land ownership in almost any Western state, amongst the great blocks of green (usually national forests and national parks), orange (usually Indian reservations), yellow (usually Bureau of Land Management lands), and white (usually private lands), you will find some light blue: the color traditionally reserved by mapmakers for state trust lands. In total, these lands comprise approximately forty-six million acres of land spread across twenty-four states, primarily located to the west of the Mississippi River. Despite their abundance, they are one of the most frequently ignored and least understood categories of land ownership in the American West.

State trust lands date back to the first decades after the American Revolutionary War. In the General Land Ordinance of 1785 and the Northwest Ordinance of 1787, Congress established a policy of granting lands to states to support public education and other important public institutions. This practice was continued – and expanded – throughout the process of state accession. Although many of the states that received these grants sold all or most of their granted lands within a few decades of statehood, many of the Western states – generally admitted to the Union later than their Eastern counterparts – retained a significant percentage of their original trust land grants, mirroring the development of federal approaches to the disposition and retention of public lands.

These lands, which often play vital roles in the natural and cultural heritage of Western communities, encompass a diverse range of landscapes: from the forests and mountain ranges of the Inter-Mountain West and the Pacific Northwest, to the grasslands and rich farmlands of the Midwest, to the arid deserts of the Southwest. Unlike other categories of public lands, the vast majority of state trust lands are held in a perpetual, intergenerational trust to support a variety of beneficiaries, including public schools (the principal beneficiary of most grants), universities, penitentiaries, and hospitals. To fulfill this mandate, these lands are actively managed for a diverse range of uses, including: timber, grazing, mining for oil and gas and other minerals, agriculture, commercial and residential development, conservation, and recreational uses such as hunting and fishing. These land holdings are normally accompanied by large permanent funds – some of which now total in the billions of dollars – that generally hold the proceeds from the permanent disposal of these lands or the extraction of their non-renewable natural resources (e.g. minerals, oil, and gas). These funds, and the interest payments derived from them, are used for many purposes, including guaranteeing school bonds and loans, funding construction, providing land for public institutions, and paying teacher's salaries.

At the time of statehood, and continuing through the early twentieth century, the economies of most Western states focused primarily on feeding the economic engines of the East via natural resource extraction, including hard rock mining, timber harvesting, grazing, agriculture, and, later on, mining for coal, oil, and natural gas. As such, revenue generation from state trust land has focused on the leasing and sale of natural products. Even in the present day, many Western states continue to obtain significant financial benefits from specific natural resource management activities on trust lands – particularly subsurface uses. Oil, gas, coal, and other mineral extraction continues to provide the bulk of the revenues derived from trust lands for states such as Colorado, New Mexico, Texas, Utah, and Wyoming, and will likely continue to do so in the future. Timber management also continues to provide significant revenues in states such as Idaho, Minnesota, Montana, Oregon, and Washington.

At the same time, a growing number of Western communities are rapidly transforming as a result of urbanization and an ongoing shift in the United States towards more diversified, knowledge-based economies. This transformation has diminished the role of natural resource extraction in many regional economies, even as it has elevated cultural, environmental, recreational, and location-based amenities to ever-increasing prominence.[1] As a result of these changes, certain key Western natural

[1] *See* Ray Rasker, et. al., *Prosperity in the Twenty-First Century West*, SONORAN INSTITUTE (2004). This is not to suggest that this is the only future for Western communities; some research suggests that it is possible to balance natural resource extraction with the protection of environmental amenities. *See* Chuck Harris, et al., *Forest Resource-Based Economic Development in Idaho: Analysis of Concepts, Resource Management Policies, and Community Effects*, UNIVERSITY OF IDAHO (2003).

resource industries – particularly agriculture, ranching, and timber production – are in decline. In many communities, the engine of the West's new economy is increasingly driven by location and lifestyle choices, a rapid rise in retirement and investment income, and the attractiveness of living in proximity to protected public lands for an increasingly mobile and professional population.[2]

As the twenty-first century dawns, Western states are struggling to reconcile changing environmental and economic realities and ongoing population growth with resource extraction and development. Although the extent of this transition varies from state to state and from community to community, in many parts of the West, these developments have led trust managers to diversify trust portfolios, particularly as school funding shortfalls and rapid growth rates continue to place pressure on trust managers to maintain or increase trust revenues. For example, the decline in natural resource industries and the explosive growth in many Western communities have led some trust managers to explore opportunities for lucrative residential and commercial development on trust lands.

On a parallel track, in many communities state trust lands are increasingly viewed as public assets that have value for open space, watershed protection, fish and wildlife, and recreation – values that should be given equal or greater weight than traditional economic uses. This change in viewpoint has brought traditional natural resource production activities – particularly grazing and timber – under increasing scrutiny regarding their impact on conservation values, their real contributions to local economic growth, and their long-term value to trust beneficiaries. It has also required many trust managers to balance their fiduciary responsibilities with public values associated with the preservation of healthy landscapes, urban open space, and better planning for growth.

In 2003, the Lincoln Institute of Land Policy and the Sonoran Institute established their Joint Venture on State Trust Lands to assist diverse audiences in improving state trust land administration in the American West. The goals of the Joint Venture are to ensure that trust land stewardship, collaborative land use planning, and efficient and effective asset management on behalf of state trust land beneficiaries are integral elements of how these lands are managed in the West. The Joint Venture seeks to utilize the core competencies of each organization to broaden the range of information and policy options available to improve state trust land management.

This report was developed to support the work of the Joint Venture. It explores the historical background and legal framework of trust land management in the American West, recent developments in key Western states, and opportunities for focused investments in research and policy analysis to improve trust management in the West. The intent of this report is to provide a starting point for discussion about trust land management within and among Western states.

Part II of this report provides a history of the conceptual origins of state trust lands and the practice of granting federal public domain lands to states. Part III explores the legal concepts that underlie the common law of trusts, and examines the nature of the fiduciary responsibilities that have traditionally been understood to apply to trust managers. Part IV of this report analyzes the nature of the trusts that apply to state trust lands, the legal development of state trust doctrine, and the differences between state trusts and traditional common law trusts, arguing that state trust doctrine may incorporate a greater degree of flexibility than has traditionally been presumed. Part V focuses on a selected group of nine Western states, providing an overview of trust grants, trust requirements, governance and trust management strategies, and highlights some recent developments and innovations in trust land management in those states. Finally, Part VI of this report identifies a series of research questions and policy analysis investment opportunities that may assist trust managers in improving asset management strategies and developing mechanisms to balance a wider array of public values with their fiduciary responsibilities.

[2] *See generally* Rasker, *supra* note 1.

II. History of the Trust Land Grants

The end of the American Revolutionary War opened the floodgates on a vast and virtually inexorable stream of settlement across the Appalachian Mountains and into the American West. Over the next 140 years, the European, Asian, and African settlers of the American continent witnessed the transformation of the lands that they had claimed from a vast, alien world of aboriginal civilizations and uncharted wilderness into a settled and conquered frontier of newly-organized states and rapidly-growing cities, towns, and settlements, each neatly divided into townships, sections, and quarter-sections by federal survey crews.

At one time or another, the federal government held title to more than 80 percent of the land in the United States. Today less than 30 percent of the land in the United States still remains in federal ownership, with the vast remainder of this land transferred to private entities and state institutions as a part of the settlement of the American frontier.[3] Among the millions of acres that passed out of federal ownership during this period were more than eighty million acres of "state trust lands" – lands that were granted to the newly-organized states in support of public education.[4] These land grants to the new states – and the purposes that inspired them – were intimately tied to the early history of the relentless westward expansion that became the American era of "Manifest Destiny."[5]

A. Education, Cession, and Expansion

Beyond managing and financing the Revolutionary War effort, one of the first tasks facing the new American Continental Congress after issuing the Declaration of Independence was to begin to cope with rampant land speculation in the western territories and the westward expansion of white settlements.[6] Without a system in place for regularizing the process of land claims and organizing territorial governments, each new settlement increased the possibility that some or all of the relocating populations would eventually break off to form independent states outside the control of the Union. While rapid expansion into the West was viewed as essential to secure the new nation's claims to its Western frontier, Congress was growing increasingly concerned with how to police the growing settled territories, how to finance the governments that would inevitably be necessary in the territories, and – most importantly – how to ensure that the new territories would hold to the democratic values for which the Revolutionary War was being waged.[7] These concerns had become acute by the time the Revolutionary War drew to a close in September of 1783, as the Continental Congress faced a massive war debt that significantly limited the new nation's financial means.[8]

There was a strong sentiment among America's revolutionary leadership that providing for public education in the territories would be an essential element to ensure a democratic future for the

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[3] Jay O'Laughlin, *Idaho's Endowment Lands: A Matter of Sacred Trust*, UNIVERSITY OF IDAHO (1990).

[4] JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT AND SUSTAINABLE USE, 20-21 (1996). These figures exclude lands in Alaska and Hawaii, which were admitted to the Union in the mid-twentieth century.

[5] Sean O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?* 8 NYU ENVTL. L. J. 176, 174 (1999). *See generally* Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands,* 43 UCLA L. REV. 77, 95-97 (1995).

[6] In exchange for military support during the French and Indian War, the British crown signed a series of agreements with powerful tribal land empires in which the British agreed to contain white settlements from spreading west of the Appalachian mountains; this containment policy, formalized in the Proclamation of 1763, was financed with the passage of the Stamp Act, which imposed a direct tax on the colonies to pay for the troops and forts necessary to secure the western frontier. The passage of the Stamp Act met with furious colonial opposition and rioting, and threatened the ruin of many powerful families who were heavily invested in land speculation activities in the western lands. The subsequent repeal of the Stamp Act by the British Parliament in 1766 triggered an uncontrolled land rush in which colonial land speculators rushed to survey and purchase huge tracts of land from tribal governments in the Indian-controlled western lands, with hopes of vesting rights that the crown would later be persuaded (or forced) to ratify. *See* ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 225, 227-286 (1990). This situation only worsened after the dawn of the American Revolution due to uncertainty regarding the status of the vast land claims held by the original thirteen colonies, many of whom had claims that extended as far west as the Pacific Ocean. With the British authority gone and no single body having clear authority over these areas, land speculators thrived in a legal gray area. *Id*. at 292-305.

[7] *See* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE, xix, 2, 4 (1987) (noting that Congress saw future sales of western lands as an "amazing resource" for paying off the nation's Revolutionary War debts).

[8] O'Day, *supra* note 5, at 173-174. *See also* SWIFT, HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1795-1905, 124 (1911).

expanding nation. At the time of the Revolution, educational opportunities were still largely restricted to the wealthy;[9] however, the concept of public education had been a theme in the settlement of the American colonies from the beginning. More than a few of the colonies had passed laws requiring the education of all children in a government-run public education system as early as the 1600's, and some of the first state constitutions had provisions that required the public education of all citizens.[10] This theme was adopted with great fervor by the American revolutionaries, who believed that a well-educated citizenry would be essential to protect liberty and ensure that the citizens of the Republic would be prepared to exercise the basic freedoms of religion, press, assembly, due process of law, and trial by jury.

The early federal programs that would eventually lead to the creation of state trust lands essentially descended from the tension generated by the belief in the need for (or at least the inevitability of) Westward expansion, and the belief that a free people would by necessity have to be an "educated people."[11] Thomas Jefferson, as one of the period's leading political and popular figures, was a strong proponent of this belief; indeed, his frequently-cited concept of "agrarian democracy" was one of a society that would draw its strength from well-educated farmers, whose commitment to the land would provide the foundation for both equality and freedom.[12] Many revolutionaries – Jefferson among them – believed it equally essential that this educational system be operated by the government to control sectarian influence. However, they saw a limited role for the new federal government, in that they clearly believed that education was best placed under local – not national – control.[13]

While the Eastern states had an established land and property base that could provide the tax revenues necessary to fund public education, the territorial areas simply lacked these resources. For the growing communities in the territories, it was up to the new state governments or the new federal government to subsidize basic public services until a sufficiently large population and economic base was established. Moreover, until lands were settled or otherwise passed out of the federal public domain, they would be exempt from taxation by the new states.[14] This highlighted another central concern of the post-revolutionary era – the principle that new states should be joined to the Union on an "equal footing" with those that had come before them. Without some assurance of an appropriate degree of equality and independence, early leaders felt that there would be a risk of internal rebellions or changes in allegiance within the territorial settlements that would fragment the nation.[15]

A solution to the problems of debt, speculation, expansion, education, and equal footing finally appeared when the Continental Congress negotiated the cession of the colonies' western land claims to the federal government. In 1784, Congress brokered a compromise under which Virginia ceded its massive land claims (the largest claims of any of the original colonies) to the federal government.[16] With the cession of the western lands, Congress not only put an end to the chaotic land speculation in the West, but also guaranteed that despite the wars, recessions, and other burdens on public finances that would arise over the next century, the federal government would always have one resource in abundance – land. The administration of this land would provide the solution to the organization of settlement and the formation of new states, the provision of public education and other essential services for their citizens, and the repayment of the burgeoning national debt. Over the next three years, Congress proceeded to adopt the General Land Ordinance of 1785 and the Northwest Ordinance of 1787, which established the policies that would govern the disposal of the public domain and the creation of new states. These laws also initiated the system of granting lands for the support of public education and other essential public institutions to the new states.

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[9] *See* Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?* 12 NAT. RESOURCES & ENV'T 39, 40 (1997); *See also* ROBERT M. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION, 178-179 (1970).
[10] Hager, *supra* note 9, at 40.
[11] HEALEY, *supra* note 9, at 178-79.
[12] *Id.*
[13] *Id.*
[14] Andrus v. Utah, 446 U.S. 500, 522 (1979) (Justice Powell, dissenting).
[15] O'Day, *supra* note 5, at 174-175.
[16] SOUDER & FAIRFAX, supra note 4, at 18, 303 n. 3. *See also* ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936 (1942).

The practice of granting land to support public education was not a new concept; in fact, this practice was already well established in the colonies by 1785. Land grants to educational institutions were a practice inherited from Europe, traceable as far back as the Roman Empire, ancient Greece, and even the kingdoms of Egypt.[17] Scholars have traced land grants for the purposes of supporting public education to at least the reign of King Henry V in England,[18] and during the 1600's and 1700's, the American colonies had established land endowments for a variety of institutions, ranging from colleges to elementary schools.[19] Many of these states also used the sale or lease of public lands as a funding source for public education. Although there were no federal land grants for public education in the original thirteen colonies, the colonial governments, and later the early state governments of Connecticut, Massachusetts, New York, New Hampshire, New Jersey, Pennsylvania, North Carolina, and Georgia all made substantial land grants in support of public education. These early land grants established a variety of permanent school funds that were financed from the sale or lease of public lands, reserved state lands in each township to support schools, or granted land to support specific educational institutions.[20] Given this history, the innovation of the General Land Ordinance and Northwest Ordinance was not the concept of supporting public education with land grants, but rather the systematization of this practice on a massive scale.

B. The General Land Ordinance and Northwest Ordinance

The General Land Ordinance of 1785[21] established the rectangular survey system. This system was the foundation for the process of the survey and sale of land by the federal government; the Ordinance also established a process for recording land patents and the related records necessary to establish a chain of title for public domain lands. The Ordinance additionally provided for the first reservations of lands for new states, providing that section sixteen in every township (one square mile of land, adjoining the center of each thirty-six-square mile township) would be reserved "for the maintenance of public schools within the said township."[22]

The rectangular survey system, combined with the reservation of a centrally-located section for the support of schools, was a concept that was strongly informed by the governance systems of the original colonies and the revolutionary sentiments related to public education, enlightenment-era rationalism, and the concept of agrarian democracy. This system of organizing land and education envisioned the township as the most basic unit of government, with populations oriented around small, agrarian communities that would provide for the democratic education of their citizens, with these communities rationally distributed across the countryside under the logical, mathematical system of rectangular survey. In the words of the United States Supreme Court, by reserving a centrally-located section within each township, Congress could

> consecrate the same central section of every township of every State which might be added to the federal system, to the promotion 'of good government and the happiness of mankind,' by the spread of 'religion, morality, and knowledge,' and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modeled.[23]

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[17] Fairfax, Souder, and Goldenman, *The School Trust Lands: A Fresh Look At Conventional Wisdom,* 22 ENVTL. L. 797, 803 (1992).
[18] *See* O'Day, *supra* note 5, at 172.
[19] Fairfax, et al., *supra* note 17, at 803.
[20] SOUDER & FAIRFAX, *supra* note 4, at 20-21.
[21] The General Land Ordinance of 1785, 1 Laws of the United States 565 (1815).
[22] *Id.*
[23] Cooper v. Roberts, 59 U.S. 173, 178 (1855).

The Northwest Ordinance,[24] passed two years later, created a system of territorial governments and a process for transitioning territories into new states.[25] The Northwest Ordinance also carried through on the vision of cheap land, state equality, and public education that were considered critical to the success of the western settlements;[26] Article III of the Northwest Ordinance announced that "Religion, Morality, and Knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged," and Article V provided that Congress should admit every new state on an "equal footing" with the existing states.[27]

Under the terms of the Ordinance, after the survey and settlement of new regions, these regions would be organized by an act of Congress into U.S. Territories, with a territorial government that was appointed by the President. Once the population of a territory reached five thousand adult males, the territory could elect a legislature and send a non-voting delegate to Congress, and once the population reached sixty thousand, the territory could petition Congress for admission to the Union. If the petition was granted, Congress would then pass an enabling act authorizing a constitutional convention in the new state, with the constitution subject to a popular referendum in the territory. If successful, the constitution would be sent to Congress for ratification, and the state would be admitted.[28] At the time of admission, the state would also receive land grants giving title to its reserved school lands, as well as additional land grants to support other public institutions.

C. Emergence of the School Land Grants

The state admission process established in the Northwest Ordinance was never strictly followed by Congress. This was particularly true in the years leading up to and continuing through the Civil War, when the admission of new states was a process that was politically charged with conflicts over slavery and the desire of both North and South to maintain an approximately equal balance between free and slave states.[29] Prior to 1803, sixteen states had entered the union, including the thirteen original colonies, as well as three other states – Vermont, Tennessee, and Kentucky – that were carved out of the colonies' land cessions through varying mechanisms.[30] Because there were no "public domain" lands in these states, none of them received federal land grants (although they later received land grants to support colleges under the Morrill Acts).[31]

Ohio (1803) was the first "public domain" state admitted to the Union, and the first state to receive a land grant in support of schools (the section sixteen reservation provided by the General Land Ordinance).[32] After Ohio, virtually every state admitted to the Union received substantial grants of reserved lands at admission. There were only three exceptions: the State of Maine, which was created out of lands ceded by Massachusetts as a part of the Missouri Compromise of 1820 (which traded Maine's admission as a free state in exchange for Missouri's admission as a slave state); the State of Texas, which was annexed as an existing sovereign government in 1848 after its successful war for independence with Mexico (and therefore had its own sovereign state lands);[33] and West Virginia, which was carved out of the existing State of Virginia and admitted as a free state in the midst of the Civil War.

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[24] Northwest Ordinance, 1 Stat. 51 (1787).
[25] The Northwest Ordinance also prohibited the introduction of slavery into the Northwest land areas, bounded by the Ohio and Mississippi Rivers. *See also* Fairfax et al, *supra* note 17, at 806.
[26] *See* HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 GI BILL 19-25 (1986).
[27] *See* Northwest Ordinance, *supra* note 24.
[28] SOUDER & FAIRFAX, *supra* note 4, at 25.
[29] *See generally* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987).
[30] Hager, *supra* note 9, at 39.
[31] Morrill Act of 1862, 7 U.S.C. §303; Morrill Act of 1890, 7 U.S.C. §322 et. seq. The Morrill Act of 1862 granted the states who had remained loyal to the Union during the Civil War 30,000 acres of land for each member of their Congressional delegation, to fund the establishment of colleges for engineering, agriculture, and military science. The Morrill Act of 1890 later provided the same grants to the sixteen southern states who had been denied lands under the 1862 grant.
[32] SOUDER & FAIRFAX, *supra* note 4, at 27-29.
[33] However, it should be noted that Texas also reserved Section sixteen lands when it was an independent Republic. Mineral royalties (often derived from these original reservations) have provided the vast majority of the permanent fund held by the State of Texas. *See generally* THOMAS LLOYD MILLER, THE PUBLIC LANDS OF TEXAS, 1519 – 1970 (1972).

1. Consolidation of State Authority Over School Grants

While Congress maintained consistent support for the practice of granting lands to states, the doctrines under which this occurred evolved significantly over time. For example, although we now refer to the lands that were granted to the states as "state trust lands," under the original concept of the General Land Ordinance and Northwest Ordinance, the section sixteen lands in each township would be reserved to maintain the schools in that township, consistent with the Jeffersonian model of agrarian communities administering locally-controlled schools.[34] This concept was rejected by Congress during the admission of Ohio (Congress vested control of Ohio's grant lands in the Ohio state legislature).[35] However, in the years that followed, Congress returned to its original idea, reserving lands to support schools in that township.

As the accession process continued, the impracticability of this concept – driven in large part by the limitations of the rectangular survey system itself – became increasingly manifest. Although the rectangular system had mathematical appeal for purposes of surveys and administering the chain of title, population centers in the western lands tended to develop around natural, economic, and military features – rivers and waterways, arable lands, mountain passages, roads, trails, railways, army and cavalry forts, and friendly native governments – without regard for the artificial township boundaries. As such, there were not always local governments associated with each township to manage the grant lands, and when these governments did exist, they frequently lacked the resources to administer the granted lands.[36]

Moreover, while some of the granted lands could be leased for farming or other valuable uses, many of the lands were not located in proximity to existing population centers. As a result, most of these lands could not provide meaningful support for schools in a given township, and in some cases, the lands were simply granted to teachers in lieu of a salary until sufficient tax revenues could be gathered to pay them.[37] In response, Congress gradually shifted away from township-centered land administration, by first granting lands to benefit schools in the township and to be managed by the county governments,[38] and later by centralizing management of the lands in the state government, and reserving the benefits of the lands to the corresponding townships.[39] Finally, in the Michigan grant in 1836, Congress simply granted the lands "to the State for the use of schools."[40] By the middle of the nineteenth century, Congress had abandoned the township reservation concept altogether and, like its grant to the State of Michigan, simply granted the lands to the state, to be administered by the state for the support of schools statewide.[41]

2. Expanding Trust Grants

The size of the trust grants also increased significantly over time. From 1803 to 1858, Congress admitted fourteen states to the Union, each of which received the regular section sixteen reservation.[42] However, beginning with the admission of California in 1850 and the admission of Oregon in 1859, Congress began to grant two sections out of each township to the states (sections sixteen and thirty-six).[43] With the admission of Utah, Congress once again increased the grant allocation, this time to four sections (two, sixteen, thirty-two, and thirty-six). Congress continued this policy with the admission of Arizona and New Mexico in 1910, granting both states four sections of land.[44] Table II-1 shows the chronology, character, and relative sizes of the trust grants.

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[34] *See* HOWARD CROMWELL TAYLOR, THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND ORDINANCES, 25-29 (1922).
[35] Fairfax et al., *supra* note 17, at 817.
[36] *See* TAYLOR, *supra* note 34, at 85.
[37] *Id.*
[38] SOUDER & FAIRFAX, *supra* note 4, at 30.
[39] *Id.*
[40] *See* Papasan v. Allain, 478 U.S. 265, 270 (1986).
[41] *Id. See also* Fairfax, et al., *supra* note 17, at 817-818.
[42] SOUDER & FAIRFAX, *supra* note 4, at 20-21.
[43] *Id.*
[44] *Id.*

The reasoning behind the increasingly large grants of land appears to have been a practical one. With the early state admissions – primarily in the American Midwest and the South – states primarily utilized their grant lands by selling or leasing these lands for agriculture.[45] However, as state admissions proceeded west of the 100th Meridian, the character of the granted lands changed significantly – moving from the flat, rich farmlands that predominated in the East to the steeper, arid lands of the West. As such, the majority of these lands had little value for agriculture, and the organized ranching, mineral, and timber industries that would eventually be able to utilize at least some portion of these lands had not yet come into flower. It was therefore recognized that the states west of the 100th Meridian would require a larger quantity of land in order to produce the necessary revenues to support schools and other public institutions.[46] An estimate by the first Washington Land Commissioner, for example, estimated that the average value of a section of trust land was around $800; assuming the land could be sold, the investment income from the proceeds of the sale would produce only about $48 per year, or about one month's salary for an average teacher.[47]

The original reservation grants for common schools were also accompanied by increasingly generous "block" grants for the support of other public institutions. For example, the 1841 Preemption Act granted five hundred thousand acres of land to every public land state for a variety of public purposes;[48] later, the Agricultural College Act of 1862 granted lands to all of the states that were not in active rebellion against the Union to endow agricultural and mechanical colleges (when the war ended, this grant was extended to the southern states as well).[49] Other grant programs transferred lands to states to finance internal improvements, such as railroads.[50]

These grants grew larger and larger over time. By the time New Mexico and Arizona were admitted in 1910, they received enormous grants on top of their four reserved sections for a laundry list of public purposes: 200,000 acres for university purposes; 100,000 acres for public buildings; 100,000 acres for insane asylums; 100,000 acres for schools and asylums for the deaf, dumb, and blind; 50,000 acres for disabled miners' hospitals; 200,000 acres for normal schools; 100,000 acres for penitentiaries and reform institutions; 150,000 acres for agricultural and mechanical colleges; 150,000 acres for schools of mines; 100,000 acres for military institutes; and one million acres for the payment of county bonds (with any remainder going to the benefit of the common schools).[51] Many states received other land grants in advance of their statehood to support the functions of territorial governments. Congress also made a number of grants to states post-statehood such as the Morrill Act grants for colleges, which were applied not just to the new western states, but also the existing eastern states.[52]

Beyond these additional grants, Congress also took up the practice of allowing states to select *in lieu* lands from elsewhere in the public domain when their reserved lands in a given township were already occupied by private homesteaders, railroad grantees, or various federal reservations. These *in lieu* selections initially excluded federally reserved lands. For example, the 1889 "Omnibus" Enabling Act for North Dakota, South Dakota, Montana, and Washington and the 1896 Utah Enabling Act did not provide for *in lieu* selections to offset the federal land reservations. For states that were admitted in the later history of the accession process, this policy cost the states a significant amount of acreage due to previous federal commitments of millions of acres

[45] O'Day, *supra* note 5, at 173-174.
[46] *See* Hager, *supra* note 9, at 40.
[47] *See generally* THOMAS BIBB, HISTORY OF EARLY COMMON SCHOOL EDUCATION IN WASHINGTON (1929).
[48] Preemption Act of 1841, ch. 16, 5 Stat. 455.
[49] Agricultural College Act of 1862, ch. 130, 12 Stat. 503.
[50] Fairfax et al., *supra* note 17, at 815.
[51] New Mexico-Arizona Enabling Act, 36 Stat. 572 (1910).
[52] *C.f.* PAUL W. GATES, THE WISCONSIN PINE LANDS OF CORNELL UNIVERSITY: A STUDY IN LAND POLICY AND ABSENTEE OWNERSHIP (1943). For a discussion of the Morrill Acts, *see* note 31, *supra*.

Table II(C): History of State Land Grants in the United States

Year of State-hood	State	Sections Granted	Common Schools (acres)*	All Public Institutions (acres)**	All Land Grants (acres)***
1803	Ohio	16	724,266	1,447,602	2,758,862
1812	Louisiana	16	807,271	1,063,351	11,441,032
1816	Indiana	16	668,578	1,127,698	4,040,518
1817	Mississippi	16	824,213	1,104,586	6,097,064
1818	Illinois	16	996,320	1,645,989	6,234,655
1819	Alabama	16	911,627	1,318,628	5,007,088
1821	Missouri	16	1,221,813	1,646,533	7,417,022
1836	Arkansas	16	933,778	1,186,538	11,936,834
1837	Michigan	16	1,021,867	1,357,227	12,143,846
1845	Florida	16	975,307	1,162,587	24,208,000
1846	Iowa	16	1,000,679	1,336,039	8,061,262
1848	Wisconsin	16	982,329	1,320,889	10,179,804
1850	California	16	5,534,293	5,736,773	8,852,140
1858	Minnesota	16	2,874,951	3,167,983	16,422,051
1859	Oregon	16, 36	3,399,360	3,715,244	7,032,847
1861	Kansas	16, 36	2,907,520	3,106,783	7,794,669
1864	Nevada	16, 36	2,061,967	2,223,647	2,725,666
1867	Nebraska	16, 36	2,730,951	2,958,711	3,458,711
1876	Colorado	16, 36	3,685,618	3,933,378	4,471,604
1889	N. Dakota	16, 36	2,495,396	3,163,476	3,163,552
1889	S. Dakota	16, 36	2,733,084	3,432,604	3,435,373
1889	Montana	16, 36	5,198,258	6,029,458	6,029,458[53]
1889	Washington	16, 36	2,376,391	3,044,471	3,044,471
1890	Idaho	16, 36	2,963,698	3,663,965	4,254,448
1890	Wyoming	16, 36	3,472,872	4,248,432	4,345,383
1896	Utah	2, 16, 32, 36	5,844,196	7,414,276	7,507,729
1907	Oklahoma	16, 36	2,044,000	3,095,760	3,095,760
1912	New Mexico	2, 16, 32, 36	8,711,324	12,446,026	12,794,718
1912	Arizona	2, 16, 32, 36	8,093,156	10,489,156	10,543,931

* Figures include acreage derived from the reservation of sections in each township for common schools.
** Figures include all grants of lands for schools, universities, penitentiaries, schools for the deaf and blind, public buildings, repayment of county bonds, and similar public institutions and purposes. (Hereafter referred to as "state trust lands" in this report.)
*** Figures include all lands granted to states, including grants for re-granting to railroads, lands for roads, wagon trails, canal and river improvements, and swamplands grants.

Source: Paul W. Gates *History of Public Land Law Development*, Appendix C (1968).

[53] There is a discrepancy in the source between the total land grants to the states and the total of the figures provided in the table for each of the individual grants. The total of the figures provided for the individual grants was used.

to Indian reservations, military reservations, and other federal uses. However, by the end of the grant process, Congress provided for *in lieu* selections even where lands were reserved for federal purposes. Oklahoma received *in lieu* selections for lands previously reserved for the state's numerous Indian reservations, and both Arizona and New Mexico received *in lieu* selections for all federal lands within the states.[54]

At least initially, these *in lieu* selections were not always the panacea that the states had hoped for. In Washington, for example, territorial officials had apparently anticipated being able to generate large amounts of sales revenue by participating in the frenzied land speculation that dominated the early history of the state.[55] However, their hopes were somewhat dimmed by the fact that the state selections occurred last.

> Mill companies, land speculators, prospectors, settlers, and the Northern Pacific Railroad had already done their best to lock up the most valuable acreage. In locating an exact route from the Columbia to Puget Sound, [Northern Pacific Railroad] engineers tried to lay track through the most heavily timbered areas, so that valuable timberland would be included in the land grant. Out of all the individuals and companies claiming land, the state institutions picked last. Even other public entities stood closer to the head of the line.[56]

As a result, much of the *in lieu* land that Washington acquired was too far from navigable water or railroad to be feasible for logging or farming in the short term, and the granted lands thus provided very little money for the educational and institutional needs of the state in the early years of the grant. The state quickly sold off most of its marketable land, essentially grinding state land sales to a halt within a few years of statehood and leaving only leasing and timber sales on the accessible portions of the trust property as the major revenue generating activities for Washington's state trust lands.[57]

For the states that continue to hold their trust lands in the present day, these less-than-optimal *in lieu* selections have paid significant dividends, because they allowed the states to acquire large, contiguous parcels of lands instead of the scattered one, two, or four sections per township that the states received where *in lieu* selection opportunities were limited. Additionally, these present day lands are generally no longer as remote or inaccessible as they once were. In Arizona, for example, the state was left with enormous *in lieu* selections due to the predominance of federal land holdings and existing railroad grants in the state. Although these selections were not always as well positioned as the lands they were supposed to replace, the selection process allowed the state to acquire enormous blocks of lands throughout the state that have been far more practical to manage over the long term than scattered tracts. As the state has grown, these once remote lands have become an invaluable resource. The Arizona State Land Department now controls more than 30 percent of the available urban development land in Maricopa County – the fastest growing area of the state – and holds much of it in large, contiguous blocks that are ideal for master-planned community developments as well as urban open space. One off-the-cuff estimate indicates that a single twenty thousand acre tract in north Phoenix may be worth as much as $40 billion in lease and sale revenues to the trust over the next one hundred years.[58]

Congress' increasingly expansionist approach to state land grants culminated with the grant of the mineral rights in the previously granted lands. Congress specifically exempted mineral lands from the grant process in 1889 with the Omnibus Enabling Act providing for *in lieu* selections to

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[54] Congress was not consistent in applying this policy retroactively, however. For example, the State of Mississippi lost significant quantities of its section sixteen lands in the northern third of the state due to the creation of the Chickasaw Indian Reservation; even when the federal government later revoked the status of this area as a reservation, the state was not compensated for the section sixteen lands in this area.

[55] Daniel Chasan, *A Trust for All the People: Rethinking the Management of Washington's State Forests*, 24 SEATTLE UNIVERSITY L. R. 1 (2000).

[56] *Id.* at 5.

[57] *Id.* at 6.

[58] Personal Communication with Ron Ruiska, Asset Management Division Director, Arizona State Land Department 9/22/2004.

replace these lands.[59] A later U.S. Supreme Court decision, interpreting the Utah Enabling Act, determined that Congress had reserved mineral rights in all state land grants;[60] however, the Jones Act of 1927 reversed the Supreme Court decision, and granted states the mineral rights in all granted lands.[61]

3. Changing Rules for the Administration and Disposition of Trust Lands

The rules and restrictions applicable to the grants of trust lands also changed significantly over time. In the initial grants of lands to states, Congress had presumed that school lands would be leased to generate revenues rather than being sold.[62] However, the experience of the early states with leasing proved to be a failure. In 1827, Ohio requested authority to sell its granted lands; Congress subsequently passed legislation retroactively granting this authority to all states, and included sale authority in all new grants.[63] Following this initial foray into restricting the management of trust lands, Congress' subsequent land grants contained little or no guidance, leaving it to the states to decide how best to manage their lands.[64]

As one commentator has noted,[65] Indiana serves as an excellent example of many of the early trust grants. Indiana's Enabling Act, passed in 1816, contains only one provision related to school trust lands:

> That the section numbered sixteen, in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.[66]

Noticeably absent from this provision are any requirements regarding the sale or disposal of the lands, fiduciary obligations, or other principles commonly associated with state trust lands; although Section six of Indiana's Enabling Act makes a series of additional grants for the support of other public institutions, these grants were similarly unrestricted.[67] Most early trust grants closely mirror this provision.[68]

The majority of early states rushed to sell their granted lands in the frenzy of frontier land disposals to support the early school systems.[69] As a result, "much of the land and its potential benefit were lost due to incompetence, indirection, and corruption,"[70] providing few lasting benefits for schools.[71] Regardless, by the 1830's, states were becoming increasingly concerned with the sustainability of this approach to the management of their trust lands.

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[59] Omnibus Enabling Act, 25 Stat. 676, § 19 (1889).
[60] United States v. Sweet, 245 U.S. 563, 572-74 (1918).
[61] Jones Act of 1927, ch. 57, 44 Stat. 1026.
[62] Fairfax et al., *supra* note 17, at 820.
[63] O'Day, *supra* note 5, at 181.
[64] *Id.* at 181-182.
[65] Fairfax et al., *supra* note 17, at 809.
[66] Indiana Enabling Act § 6, 3 Stat. 290 (1816).
[67] *Id.*
[68] Fairfax et al., *supra* note 17, at 809-810.
[69] O'Day, *supra* note 5, at 182.
[70] Fairfax et al., *supra* note 17, at 807.
[71] Many abuses involved fraudulent deals executed under the auspices of territorial or state officials; for example, in the Territory of Washington, lands that had been set aside for the establishment of a territorial university were sold to timber companies in a series of land deals that allowed purchasers to cherry-pick lands from government holdings for a fixed price of $1.50 an acre. The overly friendly relationships between the public officials involved in the sales and the timber and mill companies indicated to most observers that the arrangement was essentially a conspiracy to defraud the territorial government. However, the political influence of the timber operators was great enough to avoid a federal investigation and any invalidation of the transactions. Other abuses were simply related to the inability of early land managers to police their own lands; for example, shortly after Washington was granted admission to the Union, the new Washington Land Commissioner observed that railroad lines were frequently being sited over state lands without obtaining the rights to do so, that valuable timber was being destroyed or removed without permission, and that appraisals of state lands, which had been delegated to county commissioners, were regularly made too low for the benefit of special interests. Chasan, *supra* note 55, at 30-31.

One of the early innovations to address this problem appeared with the admission of Michigan to the Union in 1837. Although previous land grants indicated that these lands were for the support of public education, Michigan's Constitution adopted specific restrictions on the use of revenues from these lands, requiring the state to place proceeds from the sale of trust lands into a permanent fund.[72] The accrued sale proceeds in the fund would then be invested; the interest from these investments, combined with rental revenues from trust lands, would then be used to fund school activities.[73] This served both to discourage fire sales of trust lands to achieve short term benefits – since only the interest from these sales, and not the proceeds would be immediately available – and to ensure that when lands were sold, the state would continue to benefit from the investment of those proceeds in perpetuity. After Michigan, nearly all subsequent states adopted constitutional language that mirrored Michigan's permanent fund concept; Louisiana, which was admitted twenty-five years earlier, amended its Constitution to create a permanent fund.[74] As noted below, Congress eventually followed suit, incorporating the requirement for a permanent fund into the Enabling Act for the State of Colorado and all subsequent grants.[75]

This innovation was soon complemented with increasingly complex restrictions on the sale and lease of trust lands in state constitutions that developed out of experience with questionable land transactions and the efforts of a growing public school lobby that sought to protect the trust grants.[76] Many states began to impose provisions requiring minimum land sale prices, fair market value for all sales, and that all dispositions occur at public auctions. However, as some observers have noted, the states' increasingly conservative approach to the management of trust lands also mirrored a larger shift in the nation's attitude towards the public domain.[77] As the nineteenth century progressed, Congressional policy towards the public domain began to transform from a policy of rapid disposal to encourage and underwrite "manifest destiny," towards a policy of retention and long-term management of the public domain for multiple uses, public benefits, and federal purposes. With this transformation, Congress took steps towards the closure of the frontier by reserving vast tracts of public lands for forests, parks, and other public uses. The restrictions on trust management in state constitutions and statutes took on a similar character, with restrictions to limit or even prohibit the sale of state lands, and an emphasis on leases and licenses for timber, grazing, agriculture, and similar "sustainable" uses.[78]

Regardless, it is important to note that the evolution of these restrictions was largely driven by the states themselves. As one commentator notes, "[a] bouncing ball pattern is apparent in the evolution of sales restrictions provisions: a state adopts a restriction in its constitution; variations show up in subsequent state constitutions and occasionally in enabling acts; a subsequent state adopts variations on those conditions with further elaborations."[79] After the mid-nineteenth century, state constitutional restrictions on trust lands were typically far more restrictive than the requirements imposed by Congress in state enabling acts.[80] A common misperception is that Congress developed these restrictions to protect its trust grants from misuse by untrustworthy states; in fact, these restrictions first originated within the states to ensure that they received the full benefits from their land grants – even as Congress generously increased the size and scope of land grants over time.[81] Indeed, even the concept that the granted lands were to be held in "trust" was originally developed by states. For example, although the Omnibus Enabling Act contained no language with regard to the granted lands being held in trust, Montana, Idaho, South Dakota, and Washington each adopted constitutional language to that effect.[82]

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[72] MICH. CONST. Art. X § 2 (1835).
[73] SOUDER & FAIRFAX, *supra* note 4, at 31-32.
[74] *Id*. at 32.
[75] *See* Branson School District RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998).
[76] Sally K. Fairfax & Andrea Issod, *Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases,* 33 ENVTL. LAW 341, 348 (2003).
[77] O'Day, *supra* note 5, at 181.
[78] *Id.*
[79] Fairfax et al., *supra* note 17, at 821-822.
[80] *Id.*
[81] O'Day, *supra* note 5, at 178-179.
[82] IDAHO CONST., Art. IX, § 8; MONT. CONST., Art. X § 11; S.D. CONST., Art. VIII §7; WASH. CONST., Art XVI § 1.

As a result, the first significant restrictions in state enabling acts did not begin to appear until the passage of the Colorado Enabling Act in 1875, which contained provisions requiring the establishment of a state permanent fund, the sale of trust lands at public auction, and a minimum price for all land sales.[83] Virtually all of the states that entered the Union after Colorado were subject to similar requirements.

However, even these restrictions did not prevent many Western states from continuing with rapid land disposal schemes. In Oregon, for example, the state disposed of the vast majority of its trust grant under a liquidation policy based on the theory that once this property was in private hands, the lands would generate more revenue for the state in property taxes than it would in public ownership. This policy was discontinued after the discovery of widespread corruption and fraud in a series of investigations from 1872 to 1913, which ultimately led to the conviction of twenty-one high level state and federal officials.[84] As one commentator notes, however, the extent of the early mismanagement of trust lands can sometimes be overplayed:

> Viewed from the perspective of the current value of the land and resources, it is reasonable to think that it would have been preferable to rent a given section rather than to give it in salary to the school teacher. Nonetheless, many of the policies that might have been more beneficial to current students would have probably deprived the earliest generations of school children of much of the benefit of the grants.[85]

The development of the land grant process culminated in the grants contained in the New Mexico-Arizona Enabling Act,[86] admitting the last two states in the continental U.S. to the Union. Unlike the enabling acts that came before it, the New Mexico-Arizona Enabling Act provided detailed provisions for the management and disposition of trust lands and the management of the revenues derived from them; New Mexico's Enabling Act is so detailed that the state found it unnecessary to supplement its provisions with its own constitutional restrictions.[87] The Enabling Act included provisions requiring that lands be sold or leased at public auction, a series of enumerated auction exceptions for short-term leasing and mineral leasing, requirements for the establishment of a permanent fund, and a number of other limitations derived from previous state constitutions.[88] Most significantly, the Act provided that the granted lands were to be held

> in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.[89]

The Act also provided that any disposition of the lands that violated these requirements would be void, with the terms of the grant enforceable by the U.S. Attorney General.[90]

The admission of Arizona and New Mexico as the forty seventh and forty eighth states in 1910 essentially drew the era of state trust lands to a close. The "state-making" process then went on hiatus until the admission of Hawaii and Alaska in the 1950's. Hawaii, as a previously independent sovereign, had no "public domain" from which the federal government could reserve lands. Instead, Hawaii's statehood act ratified an existing trust established on royal lands to support schools (based on the Great Mahale of 1848). The federal government also returned all of the lands held by the U.S. to Hawaii at the time of statehood.[91] Alaska, by contrast, was given the largest land grants of any state

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[83] 161 F.3d at 633-34.
[84] *Administrative Overview*, Oregon Department of State Lands, *available at:* http://www.oregonstatelands.us/adminoverview.htm. *See also* STEPHEN A. DOUGLAS PUTER, LOOTERS OF THE PUBLIC DOMAIN (1908).
[85] Fairfax et al., *supra* note 17, at 807.
[86] New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910).
[87] SOUDER & FAIRFAX, *supra* note 4, at 26.
[88] New Mexico-Arizona Enabling Act, 36 Stat. 557, § 10 (1910).
[89] *Id.* at §§ 10, 28.
[90] Fairfax et al, *supra* note 17, at 829.
[91] SOUDER & FAIRFAX, *supra* note 4, at 23-24.

– over 110 million acres. However, unlike previous land grants, the vast majority of Alaska's massive land grants were given to the state without any special restrictions on the revenue uses. As a result, of the 110 million acres granted to the state, only 1.2 million acres were specifically dedicated for school purposes, with an additional one million acres dedicated to support mental health services in the state.[92]

4. Lessons from the History of State Land Grants

Due to the accumulative process that characterized the development of the federal program of granting lands to the states, there are substantial differences among the states with regard to the requirements and approaches to trust management. These differences range from requirements as to whether lands must be sold or leased at public auction to more subtle variations in language, the implications of which may not yet have been tested in the courts. For example, there are many variations in the descriptions that were used to identify the purpose of state land grants that may have subtle implications for how trust lands should be managed or who should benefit from them. Ohio's Enabling Act granted state lands "for the use of schools."[93] By contrast, Oklahoma's Enabling Act indicates that lands are for "the use and benefit of common schools,"[94] while Colorado's Enabling Act indicates that the grant is for "the support of common schools,"[95] a phrase also shared by the Montana, Washington, North Dakota, and South Dakota grants.[96]

These differences frequently relate more to what Congress did not specify than to what it did, as the lack of guidance provided by the majority of state enabling acts left states free to improvise in developing trust asset management approaches. For example, no state enabling act ever specified a method by which trust lands should be administered, although many states adopted a pattern (first developed in Oregon) in which lands were administered by a "land commission" or similar body composed of high-level state officials; Colorado, South Dakota, Montana, Idaho, Wyoming, and Oklahoma all followed in this vein.[97] Other states utilized commissions composed of appointed officials (Utah), executive agencies headed by an elected official (New Mexico), or an unelected appointee (Arizona).[98] These differences developed despite the fact that a number of these states – including Arizona and New Mexico, and South Dakota, North Dakota, Montana, and Washington – entered the Union under the same enabling acts.[99]

These differences in state enabling acts and state constitutions have translated into a remarkable diversity in trust land management programs that makes it difficult, and perhaps irresponsible, to generalize about the management of state trust lands in the West. Nevertheless, as the history of these land grants demonstrates, trust lands share a common origin and thus share many common themes. Perhaps the most important of these common themes is the concept of the trust responsibility itself.

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[92] Alaska Mental Health Enabling Act of 1956, § 101 et seq., 70 Stat.709. For discussion of federally granted lands in Alaska, s*ee State of Alaska v. University of Alaska*, 624 P.2d 807 (Alaska 1981).
[93] Ohio Enabling Act, 2 Stat. 173, § 7 (1802).
[94] Oklahoma Enabling Act, 34 Stat 267, § 7 (1906).
[95] Colorado Enabling Act, 18 Stat. 474, § 7 (1875).
[96] Omnibus Enabling Act, 25 Stat. 557, § 10 (1889).
[97] Fairfax et al., *supra* note 17, at 826.
[98] *See* UTAH CODE ANN. § 53C-1-201; N.M. STAT. ANN. § 19-1-5; ARIZ. REV. STAT. § 37-131(B).
[99] New Mexico-Arizona Enabling Act, 36 Stat 557 (1910), Omnibus Enabling Act, 25 Stat 676 (1889).

III. Trusts and Trust Responsibilities

A. What is a Trust?

The legal concept of trusts dates back to the earliest history of European legal theory.[100] In its simplest form, a trust is a legal relationship in which one party holds property for the benefit of another – in legal terms, a relationship in which the owner of the legal title does not hold the equitable title. There are three participants in every trust relationship: a "settlor" or "trustor" who establishes the trust and provides the property to be held in trust; a "trustee," who is charged by the settlor with the responsibility of managing the trust in keeping with the settlor's instructions; and a "beneficiary," who receives the benefits from the property held in trust.[101]

In order to establish a trust, three elements are necessary: first, there must be a manifestation of intent to create a trust by the settlor; second, there must be property that is held by the trustee (the trust "corpus" or trust "res"); and, third, there must be an identified beneficiary or charitable public purpose for which the property is held in trust.[102] Perhaps the most critical of these requirements is the manifestation of intent to create a trust – or, stated differently, the intent to create a relationship that encompasses the essential elements of a trust. Courts will generally not recognize the existence of a trust unless the settlor's intent to create a trust was "clear and unequivocal" or "definite and particular"[103] – in other words, that the language used in the documents or conveyance that create the trust (known as the trust instrument) must indicate the settlor's intent to create the relationship to some reasonable level of certainty.[104]

However, courts will recognize a manifestation of intent if this intent can be inferred from the language, even if the trust instrument does not expressly indicate that a trust relationship is intended. In making this determination, courts will also look to the surrounding circumstances, the parties' conduct, the purpose of the transaction, the scheme of distribution provided by the trust instrument, and the relationship between the parties.[105] In essence, if there is any ambiguity in the language used by the settlor, the court will attempt to place itself in the position of the settlor at the time of the grant to discern the settlor's purpose and intent.[106]

B. Fiduciary Duties of the Trustee

Under the common law, trustees are charged with a series of fiduciary duties – duties which can be either express or implied – to the beneficiary of the trust.[107] The most important of these are, (1) to manage the trust in accordance with the instructions of the settlor; (2) a duty of good faith, which requires the trustee to put the best interests of the trust ahead of his own; (3) a duty of prudence, which requires the trustee to manage the trust property with the same degree of skill that a prudent person would exercise in his or her own affairs; and (4) a duty to preserve and protect the trust assets, or trust corpus, to satisfy both present and future claims against the trust.[108]

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[100] Trust doctrine dates back at least to the Middle Ages, and is found both in early Christian and Muslim theological concepts. Its origin in Christianity relates to mechanism established within the Catholic church to insure that payments made to "purchase" heavenly afterlife were actually used for that purpose. *See* Souder & Fairfax, *In Lands We Trusted, State Trust Lands As An Alternative Theory of Public Lands Ownership, in* C. GEISLER AND G. DANEKER, PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP (2000).
[101] RESTATEMENT 2D, TRUSTS §§ 2,3.
[102] *Id.* at § 74.
[103] *C.f.* De Mello v. Home Escrow, Inc,. 659 P.2d 759 (Haw. 1983).
[104] Hoyle v. Dickinson, 746 P.2d 18 (Ariz. App. 1987); McGhee v. Bank of America (1st Dist) 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 (1976).
[105] Shumway v. Shumway, 44 P.2d 247 (Kan. 1935); Lambrecht v. Lee, 249 NW 490 (Mich. 1933).
[106] Thomas v. Reynolds, 174 So. 753 (Ala. 1937); Farmers Trust Co. v. Bashore, 445 A.2d 492 (Penn. 1982).
[107] RESTATEMENT 2D, TRUSTS § 3.
[108] *Id.* at § 170.

1. The Duty to Follow the Settlor's Instructions

The trustee is normally required to follow the instructions of the settlor in administering the assets of a trust; as a general matter, no trust can exist where the trustee has absolute and unqualified discretion in managing the trust assets.[109] However, depending on the level of detail associated with the restrictions established by the settlor, the trustee may have broad discretion in the trust's administration and may enjoy great flexibility in the management of trust assets – as long as this discretion is exercised in furtherance of the purposes of the trust.[110]

An associated requirement is that after a trust has been established, the settlor, the trustee, and any beneficiaries deemed to have a vested interest must consent to any change in the terms of the trust.[111] However, courts will authorize changes to trusts under limited circumstances. For example, under the doctrine of "equitable deviation," courts will authorize the trustee to deviate from the express instructions of the settlor in administration of the trust where compliance with the directions becomes illegal, impracticable, or would no longer affect the purpose of the trust due to new information or changed conditions – as long as the deviation will further and not alter the purpose of the trust.[112]

2. The Duty of Good Faith

The trustee's duty of good faith requires that the trustee act honestly and with undivided loyalty to the interests of the trust and its beneficiar(ies). In essence, this means that the trustee cannot put his own interests (frequently referred to as self-dealing), or the interests of third parties, ahead of the interests of the trust. Common examples of violations of the duty of loyalty are where the trustee attempts to secure a material advantage to himself, to a relation, or to a third party in a transaction on behalf of the trust.[113]

3. The Duty of Prudence

The trustee's duty of prudence descends in part from the duty of good faith, requiring that the trustee act with due care, diligence, and skill in managing the trust. Although there are various formulations of this duty, most are similar to the following:

> [T]he standard or measure of care, diligence, and skill required of a trustee in the administration of a trust is that of an ordinarily prudent person in the conduct of his or her private affairs under similar circumstances, and with a similar object in view.[114]

This duty applies to both affirmative and negative conduct on the part of the trustee, including the timing of management decisions.[115] For example, in the context of a sale of real estate that is held in trust, the trustee must make the sale for the best price and on the best terms that are reasonably attainable.[116] Where there is a significant opportunity to benefit the trust through the disposition of trust property, the trustee can be held liable if she negligently fails to consider the opportunity or waits too long to dispose of trust property, leaving the trust with de-valued property. However, the trustee could also breach his duty of prudence by selling trust property prematurely (such as where the property would have earned greater returns in the future through an alternative use, or where it had significant potential for appreciation).

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[109] *Id.* at § 125.
[110] 76 AM. JUR. 2D *Trusts* § 58. *C.f. In re* Trust of Brooke, 697 N.E. 2d 191 (Ohio 1998) (trustee's discretion limited by terms of the trust).
[111] Garrott v. McConnell, 256 SW 14 (Ky. 1923); Kendrick v. Ray, 53 NE 823 (Mass. 1899).
[112] 15 AM. JUR. 2D *Charities* § 155.
[113] GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES, 235-241 (2nd ed. 1978); *C.f. Re* Hubbard's Will, 97 N.E.2d 888 (N.Y. 1959) (trustee must subordinate his interest or resign in case of irreconcilable self-interest).
[114] RESTATEMENT 2D, TRUSTS § 227(a).
[115] 76 AM. JUR. 2D *Trusts* § 390.
[116] *Id.* at § 562.

A similar "prudent investor" rule applies to the trustee with regard to the investment of trust assets.[117] The Third Restatement of Trusts provides the most recent formulation of this rule under common law, providing that the trustee has a "duty … to invest and manage the funds of the trust as a prudent investor would," exercising reasonable care, skill, and caution "in light of the purposes, terms, distribution requirements, and other circumstances of the trust," and balancing risks and returns in a manner suited to these circumstances.[118]

Significantly, the Restatement provides that this standard should be "applied to investments not in isolation but in the context of the trust portfolio."[119] This portfolio approach represents a significant departure from older trust management rules that considered most aggressive forms of investment to be "speculation" and instead placed the greatest emphasis on caution and the preservation of the trust corpus in every investment, requiring the trustee to make conservative investment decisions.[120] However, it is also very different than a simplistic, short-term "revenue maximization" philosophy. By evaluating investments in the context of an overall portfolio, trustees are empowered to construct a balanced portfolio of diversified investments that meet the trust's long-term management objectives. Because these investments are evaluated as a part of an overall portfolio of balanced risk and return, these may include investments that involve more risk than would be permitted under the old "prudent man" rule. [121] This, however, should not be understood as insulating the trustee from responsibility for imprudent investments even if the overall portfolio shows a gain; each investment should still be "prudent" when viewed in the context of the strategy for the overall portfolio and the balancing of risks and returns.[122]

Analyzed more closely, the trustee's duty of prudence involves a number of interrelated components. First, it requires the trustee to bring the appropriate level of expertise to the administration of the trust asset. [123] At the most basic level, this requires the trustee to exercise the care and skill of an ordinary prudent person – even if the trustee lacks the competency so to do.[124] Where the trustee lacks the knowledge or skill to manage the asset appropriately may require the trustee to retain experts to assist with this management. More importantly, however, where the trustee has greater skill than an ordinary prudent person with regard to the management of the trust assets, the trustee's performance will be judged according to a standard based on the expectations that would apply to others with such special skills.[125]

Second, the duty of prudence is generally understood to imply a requirement that the trustee distribute the risks of loss through a reasonable diversification in the trust portfolio – a requirement that is closely related to the trustee's duty to preserve the corpus of the trust by not putting "all one's eggs in one basket."[126] This requirement of diversification is generally understood to apply unless it

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[117] This rule has its American common law origins in the case of *Harvard College v. Amory*, 26 Mass. 446 (1830) ("all that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how individuals of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.")

[118] RESTATEMENT 3D, TRUSTS § 227.

[119] *Id.*

[120] Jesse Dukeminier & James Krier, *The Rise of Perpetual Trusts,* 50 UCLA L. Rev. 1303, 1336-1337 (2003). *See also* 76 AM. JUR. 2D *Trusts*, § 534.

[121] *See* Haskell, *The Prudent Person Rule For Trustee Investment and Modern Portfolio Theory*, 69 N.C. L. Rev. 87 (1990).

[122] *C.f. Re* Bank of New York, 35 NY2d 512 (1974).

[123] *See* Jon A. Souder, *The Importance of Being Prudent: What Pension Funds, Junk Bonds, and the 1980's Real Estate Bust can Teach Us About Managing for Ecosystem Sustainability and Restoration* (unpublished, on file with author).

[124] Finley v. Exchange Trust Co., 80 P.2d 296 (Okla. 1938) (trustee bound to exercise knowledge skill and care of ordinary person regardless of whether trustee actually possesses skill).

[125] *C.f. In re* Estate of Killey, 326 A2d 372 (Pa. 1974); Estate of Beach, 542 P2d 994 (Cal. 1975), *cert. denied,* 434 U.S. 1046 (1978).

[126] 76 AM. JUR. 2D *Trusts* § 542; *C.f.* Dowsett v. Hawaiian Trust Co., 393 P2d 89 (Haw. 1964); First Nat. Bank v. Hyde, 363 SW2d 647 (Mo. 1963); *Re* Trust of Mueller, 135 NW2d 854 (Wis. 1965).

would be imprudent to do so, or unless the trust instrument directs otherwise.[127] The duty applies both to the retention of existing investments as well as to participation in new investments.[128]

Third, this duty can be understood to require the trustee to arrive at a decision using an appropriate process. Rather than evaluating the trustee solely on the outcome of management decisions, the rule focuses primarily on the prudence of the trustee's conduct at the time that management decisions were made, and the process followed to reach those decisions. As such, the requirement on the trustee when making management decisions is to utilize the proper level of care, precaution, attentiveness, and judgment; investigate and evaluate alternatives; assess risks and rewards; and then make the best choice in light of this information.[129] As a result, it is entirely within the fiduciary duty of a trustee to take some level of risk where the likelihood of success and failure is analyzed; conversely, the doctrine also allows for trade-offs between short-term and long-term returns, with the trustee authorized to accept lower returns from trust assets if the trustee's analysis suggests that this will result in better outcomes over the long term.

Finally, the duty of prudence implies a requirement to constantly monitor and re-assess trust-related decisions over time. A trustee generally cannot be held liable for trust losses resulting from decisions which, although they seemed prudent at the time given the available information, later turned out to be poor investments that did not achieve investment goals, or were frustrated due to unforeseeable events (such as market downturns or natural catastrophes). However, the trustee is expected to ensure that trust management strategies continue to be based on correct facts and assumptions and if they are not achieving the desired objectives, to change course.[130] Although not often discussed in the trust lands context, the prudent investor rule thus explicitly recognizes that not all management decisions will result in successful outcomes; however, there is a requirement that the trustee demonstrate that he or she has learned from these mistakes.

4. The Duty to Preserve the Trust

The duty to preserve and protect the assets of the trust is closely related to the duty of prudence; in essence, it requires the trustee to manage the corpus of the trust in a manner that takes a long-term perspective, and ensures that the trust can satisfy both the present and future needs of the trust beneficiary in accordance with the instructions of the settlor. In the context of a perpetual trust, this generally requires the trustee to manage the trust corpus in a manner that will ensure that the trust will remain undiminished to serve the needs of future beneficiaries in perpetuity.[131]

C. Private Trusts, Charitable Trusts, and the Public Trust Doctrine

There are dozens of different types of trusts recognized under American law. Each involves variations on traditional trust doctrines that are based on the character of transaction that creates them, the intentions and instructions of the settlor, the nature of the beneficiary, and other variables. These include concepts ranging from business trusts, which operate businesses in a manner similar to a corporation; constructive trusts, which are created by operation of law to prevent frauds; one-party trusts, in which the settlor is also the trustee; spendthrift trusts, which are used to protect property interests from being alienated by a beneficiary; and others.[132]

As discussed further below, state trust doctrine does not fit neatly into any of these categories, although it inherits many of its principles from common law trust doctrine. The unique nature of the settlor (Congress), the trustee (the state), the beneficiaries of these trusts (e.g., public schools), and the perpetual nature of this relationship place state trust lands in a category of their

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[127] RESTATEMENT 3D, TRUSTS § 227.
[128] 76 AM. JUR. 2D *Trusts* § 537; *see also Re* Trust of Mueller, 135 NW2d 854 (Wis. 1965); Stevens v. National City Bank, 544 NE2d 612 (Ohio 1989).
[129] *See* Souder, *supra* note 123.
[130] *Id.*
[131] 76 AM. JUR. 2D, TRUSTS § 404; Branson School District. RE-82 v. Romer, 161 F.3d 619, 637 (10th Cir. 1998) (common law trust doctrines require that a trustee must take steps to preserve the trust property from loss, damage, or diminution in value).
[132] For more types of trusts, *see* 76 AM. JUR. 2D, TRUSTS § 11.

own. However, two principal types of trust relationships are particularly relevant in relation to state trust lands: private trusts and charitable trusts.

1. Private Trusts

Private trusts are the form of trust that people most commonly associate with the term "trust." Private trusts generally involve relationships between private individuals or entities in which one person or entity puts property or money in trust for the benefit of another. A typical example is a trust established by parents for the benefit of their children (or even multiple generations of descendants) to provide for education, health care, or maintenance payments, with a specified person (such as a lawyer, banker, or family member) serving as the trustee.

The private trust is probably the "purest" form of the trust relationship, in which the settlor, trustee, and beneficiaries can be easily (and specifically) identified, even if some beneficiaries are not yet born. This has particular significance with regard to who can enforce the terms of the trust, because where there are specific individuals who are the identified beneficiaries (who hold the "equitable" interest in the trust property), only those beneficiaries automatically have the right to enforce the terms of the trust and ensure that the trustee is observing her duties and providing the anticipated benefit.[133] The trustee's duties are owed to that beneficiary, and no other person (aside from the settlor) has standing to contest the management of the trust.[134]

Private trusts are also generally limited in duration, having a purpose that will be achieved within some identifiable period of time, after which the trust terminates.[135] Although courts have generally permitted multi-generational trusts, until very recently, the courts were unwilling to recognize private trusts that had no limitation on their duration. Where the duration of a private trust was not explicitly stated or was not otherwise implicit in the purpose for which the trust was created, courts generally found that the trust was invalid under the Rule Against Perpetuities, a common-law rule that prohibits certain types of permanent restrictions on the use of property under the theory that such restrictions are socially undesirable.[136] Although most American jurisdictions have recently adopted rules allowing for the existence of private trusts with unlimited duration, these so-called "dynasty trusts" are controversial, as they can permanently devote significant amounts of property to the benefit of a few private individuals.[137]

2. Charitable Trusts

A charitable trust, in the simplest terms, is a trust in which the beneficiary is some portion of the public. The term "charity," in this context, has a broad meaning embracing any trust that serves a public purpose and benefits an indefinite number of persons,

> either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burden of government.[138]

Traditionally, it was the charitable purpose of the trust that provided the necessary justification for property dedication to a single purpose in perpetuity; as such, a purpose is charitable if "its accomplishment is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity."[139]

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[133] Mary Blasko, Curt Crossley & David Lloyd, *Standing to Sue in the Charitable Sector,* 28 U.S.F. L. REV. 37, 59 (1993).
[134] *Id.*
[135] 76 AM. JUR. 2D, TRUSTS § 92; *C.f.* Hills v Travelers Bank & Trust Co., 7 A2d 652 (Conn. 1939); Copenhaver v. Pendleton, 155 SE 802 (Va. 1930).
[136] 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 67.
[137] *See generally* Dukeminier & Krier, *supra* note 120.
[138] Scarney v. Clarke, 275 N.W. 765, 767 (Mich. 1937) *citing* Jackson v Phillips, 14 Allen 539, 536 (Mass. 1867).
[139] WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 368 (4th ed. 1987).

Charitable trusts can include relationships in which the trust property is set aside for the benefit of a specific public purpose (i.e., supporting public education or cancer research), for the benefit of a specific class (i.e., a college scholarship or a fund to support homeless children), for the benefit of a charitable institution that serves a public purpose (i.e., a school or hospital), or where property is otherwise set aside for some public use (i.e., land to be used for a school building or a public park).[140] As such, a primary distinction between a charitable trust and a private trust is that in a private trust, the "equitable interest" in the trust property is devoted to the benefit of an identifiable person or persons (such as a family) or a specific institution (unless the beneficiary is itself a charitable institution); whereas in a charitable trust the beneficiary is less "definite" because the benefits of the trust accrue to some portion of the public or to the community at large, and thus not all trust beneficiaries can be definitely ascertained.[141] However, it is also critical to distinguish charitable trusts from merely "honorary" trusts – trusts without a beneficiary that also lack a charitable purpose. Honorary trusts are generally considered unenforceable in the absence of a statute allowing for their enforcement.[142]

Unlike the traditional doctrine governing private trusts, charitable trusts are permitted to be "perpetual trusts" (i.e. indefinite in duration), since the public purposes for which they are granted are frequently not limited in time. For example, a charitable trust might provide for the continuing grant of scholarships to qualified students at a public university, a purpose that will endure as long as there are qualified students attending the university; by contrast, a private trust might provide college tuition only for one or more generations of a single family. Similarly, where the beneficiary of a charitable trust is an identifiable entity, the entity is generally an "immortal" entity such as a non-profit corporation or a public institution.[143] The courts have thus held charitable trusts to be exceptions to the rule against perpetuities.[144]

Because of the broader public purposes for which charitable trusts are granted, courts will also allow greater leeway than is generally allowed in the administration of private trusts in modifying the requirements for trust administration to effectuate the charitable purposes of the trust or account for changed conditions.[145] Courts will ordinarily permit deviation from the express terms of a charitable trust where compliance with the terms of the trust becomes illegal or impractical, or where continued compliance with the terms of the trust will frustrate or impair the purpose that the trust was intended to achieve.[146] This change can be accomplished under two doctrines: the doctrine of equitable deviation, which applies broadly to all trusts (discussed above), or the doctrine of *cy pres,* which applies only to charitable trusts.[147] The primary difference between the two is that under the doctrine of equitable deviation, a change to the rules for the administration of the trust will be allowed, but not a change in its purpose, whereas *cy pres* allows an alteration of the charitable purpose of the trust.[148]

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[140] The latter type of charitable trust is to be distinguished from a public dedication, in which a private landowner devotes land to a particular public use; dedications of land do not create a trust relationship unless the relationship is intended by the grantor. As such, although lands dedicated to public use must generally conform to the grantor's intent, the terms of dedication are construed strictly against the dedicator and in favor of public use, such that a given use will not be held to violate the terms of dedication unless it is patently inconsistent with or would defeat this intent. For example, land that was dedicated for a road that was in excess of what was needed for the road could be used for a park unless this use was expressly prohibited. Where land is dedicated by one public body to another, this discretion is even greater; the legislative body of the receiving public entity is generally entitled to change the use of the land at will. *See* 23 AM. JUR. 2D, DEDICATIONS § 1. For example, courts have generally interpreted the terms of federal land grants to states and local governments less strictly than where a private dedication is involved, recognizing the importance of allowing society to put lands to its best use in response to changing circumstances. *C.f.* Choctaw and Chickasaw Nations v. Board of County Comm'rs of Love County, 361 F.2d 932, 935 (10th Cir. 1966).

[141] *See* RESTATEMENT 2D, TRUSTS § 348; *see also* WILLIAM MCGOVERN, JR., SHELDON KURTZ, AND JAN REIN, WILLS, TRUSTS, AND ESTATES, 322-324 (1988); City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613 (4th Dist. 1999) (gift can be made to governmental entity for a charitable purpose for indefinite class of people.).

[142] Blacks Law Dictionary, 1511 (6th Ed. 1990).

[143] 76 AM. JUR. 2D *Trusts* § 19.

[144] RESTATEMENT 2D TRUSTS § 365. *C.f.* Fordyce & McKee v. Woman's Christian Nat. Library Ass'n, 96 S.W. 155 (Ark. 1906); *In re* McKenzie's Estate, 227 Cal. App. 2d 167 (1964); Haggin v. International Trust Co., 169 P. 138 (Colo. 1917); Regents of University System v. Trust Co. of Ga., 198 S.E. 345 (Ga. 1938); Nelson v. Kring, 592 P.2d 438 (Kan. 1979).

[145] *C.f.* Matter of Hill, 509 N.W.2d 168 (Minn. Ct. App. 1993).

[146] 15 AM. JUR. 2D *Charities* § 148.

[147] RESTATEMENT 2D TRUSTS § 399, comment (a).

[148] 15 AM. JUR. 2D *Charities* § 155

The doctrine of *cy pres* takes its name from the Norman French phrase "*cy pres comme possible*," or "so nearly as may be."[149] The doctrine permits a charitable trust that can no longer fulfill the particular purpose directed by the settlor to be reformed to serve another purpose that is in accord with the settlor's underlying charitable intent.[150] The doctrine can be applied so long as, (1) the trust is a charitable trust; (2) the express terms of the trust are now impossible, impracticable, or illegal, or changed circumstances otherwise mean that the terms would "defeat or substantially impair the accomplishment of the purposes of the trust,"[151] and (3) the settlor expressed a general intention to devote the trust property to charitable purposes (and not just to a specifically named beneficiary).[152] Most courts have interpreted "impracticability" or "impossibility" narrowly, requiring that a modification be truly necessary and not merely convenient or practical.[153]

Perhaps the most important difference between private and charitable trusts, however, is with regard to trust enforcement. As noted above, the enforcement of private trusts is a matter entirely between the trustee and the trust beneficiary; the trustee's duties are to the named beneficiary and no other person has standing to enforce the terms of the trust. By contrast, charitable trusts can be enforced more broadly due to the fact that the "beneficiary" of the trust is in some sense the public as a whole. As a general rule, courts recognize that the state attorney general, in his capacity as a representative of the state and the public, can sue to enforce the terms of a charitable trust against the trustee.[154]

As noted by some commentators, this mechanism of enforcement is not always effective, since the attorney general may lack the requisite interest or awareness in the subject of the trust to serve as an effective beneficiary representative, or may lack the resources to effectively enforce the trust due to his or her larger public responsibilities.[155] However, decisions holding that this is the only available method of trust enforcement are few in number.[156] Although the attorney general is always an appropriate party to a suit to enforce a charitable trust as the defender of the interests of the public, there is no general rule against allowing other appropriate individuals and entities to enforce a charitable trust, intervene in an enforcement action, or appeal a decision that is adverse to their interests (whether or not the attorney general does so).[157]

Charitable trusts are normally subject to enforcement by their beneficiaries to the extent that these beneficiaries are sufficiently identified or identifiable. Although the rules vary from jurisdiction to jurisdiction,[158] a member of the general public generally cannot maintain a suit to enforce the terms of a charitable trust, even if that person is a potential future beneficiary of the trust (since the attorney general is the most appropriate representative of the unnamed beneficiaries of a charitable trust).[159] Similarly, taken in isolation, membership in a charity is generally insufficient to provide standing,[160] nor a merely "sentimental" interest in seeing the purpose of a charitable trust achieved.[161]

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[149] *In re* Bishop College, 81 Ed. Law Rep. 829 (Bankr. N.D. Tex. 1993); Estate of Jackson, 92 Cal. App. 3d 486 (2d Dist. 1979); Simmons v. Parsons College, 256 N.W.2d 225 (Iowa 1977); Nelson v. Kring, 592 P.2d 438 (Kan. 1979).
[150] RESTATEMENT 2D TRUSTS § 399. *C.f.* Arman v. Bank of America, N.T. & S.A., 74 Cal. App. 4th 697 (2d Dist. 1999); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281 (Ind. 1945); Simmons v. Parsons College, 256 N.W.2d 225 (Iowa 1977); *In re* Kay's Estate, 317 A.2d 193 (Pa. 1974).
[151] RESTATEMENT 2D TRUSTS § 381.
[152] 15 AM. JUR. 2D *Charities* § 149; *see also* Ilana Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. Pa. L. Rev. 1747 (2003).
[153] See discussion in Eisenstein, *supra*; *see also* Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action,* 46 Clev. St. L. Rev. 471, 479 (1998).
[154] RESTATEMENT 2D, TRUSTS § 391. *C.f.* Murphey v. Dalton, 314 S.W.2d 726 (Mo. 1958) (Attorney General represents public in matters pertaining for public charity).
[155] Fairfax & Issod, *supra* note 76, *at* 374-375; Blasko et al., *supra* note 133, at 48.
[156] *C.f.* Amundson v. Kletzing-McLaughlin Memorial Foundation College, 73 N.W.2d 114 (Iowa 1955); Dickey v. Volker, 11 S.W.2d 278 (Mo. 1928), cert. denied, 279 U.S. 839 (1929); Samuel and Jessie Kenney Presbyterian Home v. State, 24 P.2d 403 (Wash. 1933).
[157] 15 AM. JUR. 2D *Charities* § 137.
[158] Blasko et al., *supra* note 133, at 59-61.
[159] RESTATEMENT 2D TRUSTS § 391, comment (d).
[160] 15 AM. JUR. 2D *Charities* § 135. *C.f.* Weaver v. Wood, 680 N.E.2d 918 (Mass. 1997), *cert. denied,* 522 U.S. 1049 (1998).
[161] *C.f.* Amundson v. Kletzing-McLaughlin Memorial Foundation College, 73 N.W.2d 114 (Iowa 1955).

Nevertheless, courts will generally permit any person that has a "special interest" in a charitable trust to enforce its terms against the trustee;[162] where this special interest is shown, the person will have the same rights and enforcement abilities as the beneficiary of a private trust.[163] As a general matter, a person will be deemed to have the requisite special interest where they can assert an interest in the trust (or the organization supported by it) that is distinct from those of the general public,[164] or they are entitled to benefit from the trust in a manner that is different from the public at large.[165] This can include a showing that the person is entitled to a preference in receiving benefits under the trust,[166] which will normally include any designated or ascertained beneficiaries.[167] For example, where the beneficiary of a charitable trust is a specific institution, the institution will have standing to enforce the terms of the trust in the manner of a private trust beneficiary.[168] Similarly, citizens who have directly enjoyed the benefits of a charitable trust may have standing to preserve their interests in that trust.[169] Charitable trusts may also be enforced by one trustee, or a former trustee, against another trustee.[170]

One commentator has noted that, in addition to the special interest requirements, there appear to be four other factual elements that will typically influence a court's willingness to concede standing to enforce a charitable trust.[171] These include:

> (a) The nature of the complaint and the remedy sought. Courts have normally refused to allow charitable beneficiaries to seek monetary damages against trustees, but have tended to grant standing to seek limited remedies (such as a court order or declaratory judgment) where a significant violation of the purpose of the trust is alleged.[172]
>
> (b) The presence of fraud or misconduct. Although not expressly stated as a cause for granting standing, courts appear to be more likely to grant standing where there are allegations of fraud and abuse, as a matter of ensuring that the public interest in a particular charitable institution is adequately protected.[173]
>
> (c) The presence or absence of the attorney general as an effective enforcer. Courts will also consider the nature and the degree of the attorney general's involvement in determining whether or not to grant standing. Where the attorney general is not available or is unlikely to effectively defend the interests of the trust, standing is more likely.[174]

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[162] RESTATEMENT 2D TRUSTS § 391; *see also* David Villar Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform,* 11 U. Fla. J. L. & Pub. Pol'y 131 (2000). C.f. Hardman v. Feinstein, 195 Cal. App. 3d 157 (1st Dist. 1987); Young Men's Christian Ass'n of City of Washington v. Covington, 484 A.2d 589 (D.C. 1984); Kania v. Chatham, 254 S.E.2d 528 (N.C. 1979); *also* Valley Forge Historical Soc'y v. Wash. Mem'l Chapel, 426 A.2d 1123, 1127 (Pa. 1981) ("An action for the enforcement of a charitable trust can be maintained by the Attorney General, a member of the charitable organization or someone having a special interest in the trust.")
[163] Blasko et al., *supra* note 133, at 59.
[164] 15 AM. JUR. 2D *Charities* § 142. *C.f.* Weaver v. Wood, 680 N.E.2d 918 (Mass. 1997), *cert. denied,* 522 U.S. 1049 (1998).
[165] Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 Haw. L. Rev. 393, 410 (1999). Some states have more liberal policies on special interest standing than others; a few states extend this standing well beyond the class of beneficiaries that are addressed by the trust. *See discussion in* Jennifer Komoroski, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 Wm. & Mary L. Rev. 1769 (2004).
[166] RESTATEMENT 2D TRUSTS § 391, comment (c).
[167] 15 AM. JUR. 2D *Charities* § 142.
[168] 38 AM. JUR. 2D *Gifts* § 68; 76 AM. JUR. 2D *Trusts* § 135.
[169] *C.f.* Parsons v. Walker, 328 N.E.2d 920 (Ill. App. 1975).
[170] Blasko, et al., *supra* note 133, at 60. *C.f.* Takabuki v. Ching, 695 P.2d 319 (Haw. 1985).
[171] Blasko, et al., supra note 133, at 61.
[172] *Id.* at 61-64.
[173] *Id.* at 64-67.
[174] *Id.* at 67-70.

(d) The social desirability of the suit. Where the suit would serve a broader public purpose, either by defending an important charitable institution or enumerating important principles, courts also appear to be more likely to grant standing.[175]

Aside from these basic differences in the nature of charitable trusts, however, the responsibilities of the trustee of a charitable trust are essentially identical to those of a private trustee.[176] As with a private trustee, the charitable trustee is bound to follow the terms and conditions of the trust, is subject to a duty of loyalty to the trust purposes and its beneficiaries, must act with reasonable care, diligence, and skill in the management of the trust assets, and must preserve and protect the corpus of the trust.[177] As such, the charitable trustee is subject to the same "prudent investor" rules that apply to private trust managers.[178]

3. The Public Trust Doctrine

One trust-related concept that is frequently confused with the state trust land doctrine is the "public trust doctrine." Public trust doctrine is a common-law doctrine, traceable to Roman civil law, which provided that running water, the seas, and the shores of the sea were "held in common by all men," and thus could not be held as property to the exclusion of the public. This doctrine survived into the English common law, which recognized the public's interest in navigable waters and waterways and recognized them as property held by the King in trust for the public. This concept survived in American common law after the Revolutionary War, with the Thirteen Colonies held to have inherited the King's public trust property when they became independent sovereigns. As new states were admitted into the Union, they were admitted on an equal footing with those who came before, and thus took title to the beds of navigable streams and seashores upon their admission to the Union to hold "in trust" for the public.[179]

The public trust doctrine requires the states, as the trustees of the lands underlying navigable waters, to preserve these lands for the benefit of the public for navigation, fishing, recreation, and other uses, and to protect the right of the public to use the lands for these purposes. Under the doctrine, while the state can permit private uses to occur on those lands, the state is prohibited from alienating public trust resources or from allowing their value to the public to be degraded.[180]

This doctrine has evolved significantly over the past few decades in response to changing concepts relating to the ownership and protection of important natural and cultural resources. With these changes, the suite of public resources that are considered subject to the doctrine has also been expanding, with many courts (and many more advocates) finding that the doctrine should require the protection of not just the "navigable waters" to which it has traditionally applied, but also to the ecological systems that are connected to and maintain the integrity of those waters. Modern conceptions of the doctrine thus impose obligations to consider and protect public trust resources and connected natural systems when allocating public trust resources.[181] Although this doctrine has application to some of the lands managed by trust management agencies (such as navigable waterways and tidelines), this doctrine is conceptually distinct from that applied to state trust lands.[182]

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[175] *Id.* at 74-76.
[176] 76 AM. JUR. 2D *Trusts* § 93; RESTATEMENT 2D, TRUSTS § 379 (1959); RESTATEMENT 3D, TRUSTS § 379 (1992); FRATCHER, *supra* note 139, § 379.
[177] 76 AM. JUR. 2D *Trusts* § 93.
[178] *Id.* at § 100.
[179] *See generally* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law,* 14 U.C. DAVIS L. REV. 269 (1980).
[180] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L .REV. 471 (1970).
[181] *See generally* Wilkinson, *supra* note 179; Sax, *supra* note 180. A contemporary (mid-1990's) survey of how states were implementing the public trust can be found in David Slade, *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine To Lands, Waters, and Living Resources of the Coastal States,* COASTAL STATES ORGANIZATION (2nd Ed. 1997).
[182] *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 919 (Utah 1993) (the public trust doctrine is "limited to sovereign lands and perhaps other state lands that are not subject to specific trusts").

IV. The State Trust Doctrine

The vast majority of Western states whose courts have considered the issue have found that trust relationships were created by their individual enabling act grants, or at least by the state constitutional provisions that control the management of the granted lands.[183] Today, only two Western states – California and Wyoming – have found that neither their Enabling Acts nor their Constitutions impose any trust responsibilities on the state,[184] and Wyoming nevertheless holds its lands in trust pursuant to the direction of the state legislature.[185]

However, the concept of a trust responsibility as applied to state trust lands is a relatively recent concept. As noted elsewhere, the term "trust" did not expressly enter into state constitutional requirements until a handful of states – such as Washington, Idaho, South Dakota, and Montana – recognized a trust responsibility associated with their land grants in their Constitutions. The New Mexico-Arizona Enabling Act was the first in which Congress imposed detailed restrictions and specified that the states were to hold the granted lands "in trust" for the benefit of various public purposes and institutions.[186] Additionally, the major decisions of the U.S. Supreme Court that interpreted the New Mexico-Arizona Act and firmly established the doctrine of the state trust responsibility in modern jurisprudence were not decided until 1919 and 1968, respectively.

As a result, it was ultimately interpretations of federal enabling acts and state constitutional requirements for the various state and federal courts that formally introduced the "trust" concept into the management of trust lands in the West. Following the Supreme Court's logic, many state courts found that their constitutions required lands to be held in trust, and although Congress had not expressly stated in any of the grants prior to Arizona and New Mexico's grant that school lands were to be held "in trust," many courts subsequently found that the terms of previous enabling grants contained sufficient evidence that Congress had intended to obligate the states to manage the lands in a fiduciary capacity.[187]

The precise contours of the trust responsibilities that govern the administration of state trust lands vary substantially depending on the specific enabling act, constitutional, and statutory requirements that apply to each state. This doctrine is also continuing to evolve in common law as courts consider challenges to the decisions of trust managers through litigation by lessees, trust beneficiaries, and other stakeholders (most notably conservation groups), and as states adopt new statutory and constitutional requirements in response to changing conditions. The overall result is that several common themes apply to most of the states that hold trust lands west of the Mississippi River: first, these lands are held in trust by the state; second, the state, as the trustee, has a fiduciary duty to manage the lands for the benefit of the "beneficiaries" of the trust grant; third, this fiduciary duty operates as a constraint on the discretion of the state and requires that lands be managed in a manner consistent with the best interests of the trust. However, although the nature of the fiduciary duties imposed on the state as a trustee are quite similar to those imposed on the trustees of other common law trusts, there are nevertheless a number of differences between state trusts and the common law trusts discussed in section III that should not be overlooked.

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[183] *See* State v. University of Alaska, 624 P.2d 807, 813 (Alaska 1981); Gladden Farms, Inc. v. State, 633 P.2d 325, 329-30 (Ariz. 1981); Idaho Watershed Project v. State Bd. of Land Comm'rs, 918 P.2d 1206, 1211 (Idaho 1996); Department of State Lands v. Pettibone, 702 P.2d 948, 953-54 (Mont. 1985); State Bd. of Educ. Lands & Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985); Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 235-36 (Okla. 1982); Kanaly v. State, 368 N.W.2d. 819, 822-24 (S.D. 1985); National Parks and Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 920-21 (Utah 1993); County of Skamania v. State, 685 P.2d 576, 583 (Wash. 1984). Attorneys general in two states where courts have not addressed the issue have reached the same conclusions. *See* 1990 Op. N.D. Att'y Gen. 94 (1990); 46 Op. Or. Att'y Gen. 468 (1992).
[184] *See* 41 Op. Cal. Att'y Gen. 202 (1963).
[185] Riedel v. Anderson, 70 P.3d 223 (Wyo. 2003).
[186] *See* discussion in Section II, *supra*.
[187] *See* discussion in Section III(A), *infra*.

A. Evolution of the State Trust Doctrine

In decisions that have considered the status of lands granted to the states in the early days of the state accession process, the courts have consistently taken the position that although these grants were clearly intended by Congress to support public education, the grants did not create any binding obligations on the states. For example, in *Cooper v. Roberts*,[188] the U.S. Supreme Court considered a challenge to the sale of Michigan's sixteenth section lands. Although the sale of the land was not permitted by the terms of the state's Enabling Act, the Court characterized the grant of the sixteenth section lands as being "to the State directly, without limitation of its power."[189] Although the Court concluded that the grant "for the use of schools" constituted a "sacred obligation imposed on its public faith," the limitation was not enforceable against the state.[190] Similarly, in *State of Alabama v. Schmidt*,[191] the U.S. Supreme Court considered the validity of a state statute that allowed private parties to adversely possess[192] school lands. The Court ultimately concluded that the statute was valid. Although the land grant had required that the lands be used for school purposes, the grant to the state was absolute and thus gave the state essentially unrestricted authority over the administration of the lands. The court once again indicated that the terms of the grant imposed a "sacred obligation on the public faith," but concluded that this obligation was ultimately "honorary" in nature.[193] Similar results were reached in other cases interpreting the early grants of lands to the states.[194]

As noted above, the New Mexico-Arizona Enabling Act of 1910 was the first enabling act to clearly specify that the lands granted to the states were to be held "in trust" (although several states had previously adopted similar provisions in their constitutions). However, the implications of this provision remained unclear until the U.S. Supreme Court interpreted its meaning in two cases: *Ervien v. United States*[195] and *Lassen v. Arizona*. [196] These two rulings by the U.S. Supreme Court have exerted a powerful influence on the state land trust doctrine.[197]

1. The Ervien and Lassen Decisions

Ervien v. United States considered the validity of a program under which the New Mexico Land Commissioner proposed to utilize funds derived from school lands to advertise the state to prospective residents. The stated rationale for this proposal was that this advertising would ultimately benefit the schools by increasing demand for trust lands, thus increasing revenues from the sale and lease of trust land.

The federal government brought suit to enjoin the advertising program as a violation of the state's Enabling Act. Although a federal district court initially concluded that the advertising program was a legitimate use of trust assets under general trust principles, the Eighth Circuit Court of Appeals disagreed. The appeals court noted that the Enabling Act required the state to hold the lands "in

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188 59 U.S. 173 (1855).
189 59 U.S. at 182.
190 *Id.*
191 232 U.S. 168 (1914).
192 Adverse possession is a doctrine which allows one party, by occupying lands in an open and "hostile" manner without the permission of the owner for an established period of time (typically five years) to obtain the legal title to those lands.
193 232 U.S. at 173.
194 Even before these cases were considered by the U.S. Supreme Court, state courts had reached similar conclusions. The Supreme Court of Illinois, considering a challenge to the management of sixteenth section lands, rejected the notion that the lands were held in trust, finding that the lands were best understood as the consideration for the state's agreement to forfeit part of its inherent sovereignty as a part of joining the Union (forgoing the taxation of other federal lands as well as nonresidents of the state). S*ee Bradley v. Case,* 4 Ill. 585 (1842). A number of other courts interpreting early trust grants have reached similar conclusions; *c.f Lipscomb v. Columbus Mun. Separate School Dist,,* 269 F.3d 494 (C.A.5 Miss. 2001) (federal trust applicable to Mississippi section 16 lands "merely honorary"); *Louisiana v. William T. Joyce Co.*, 261 F. 128, 130, 133 (5th Cir.1919) (Louisiana's lands subject to "merely honorary trust"); *Special School Dist. No. 5 of Mississippi County v. State,* 213 S.W. 961, 963 (Ark. 1919) (Arkansas' school lands granted unreservedly, and legislature has full discretion to manage or dispose the lands as they see fit).
195 251 U.S. 41 (1919).
196 385 U.S. 458 (1967).
197 O'Laughlin, s*upra* note 3, at 11.

trust," had specified that funds derived from those lands were to support specific public institutions, and that any use of the lands or the revenues derived from them in a manner other than those specified in the Act would constitute a "breach of trust."[198] The court found that the advertising program would take funds intended for these specific purposes to benefit the state as a whole, while providing only incidental benefits to the trusts, each of which held only a small fraction of the land in the state. The court found that this was inconsistent with the direction of the Act, which had dedicated the land and its proceeds "to a particular object to the exclusion of all others."[199] As such, the Eighth Circuit concluded that the advertising program did not comport with the requirements of the Enabling Act and constituted a "breach of trust" that could be enjoined by the U.S. Attorney General.[200]

In *Ervien*, the Supreme Court upheld this interpretation, finding that the Act contained "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of other purposes."[201] However, in discussing the significance of the term "breach of trust" in its opinion, the Court noted, somewhat cryptically, that it meant "no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact performance of the conditions."[202] Although the decision established that the conditions and purposes specified in the New Mexico Enabling Act were binding on the state, it did not explain the characteristics of the "trust" to which the state was bound.

The Court's next opportunity to consider this issue was nearly fifty years later, when it decided *Lassen v. Arizona ex rel. Ariz. Highway Dep't*.[203] Lassen was concerned with the validity of Arizona's long-standing practice of granting rights-of-way to the State Highway Department free of charge (despite a requirement in the state Enabling Act providing that lands could only be sold or leased at public auction to the highest and best bidder).[204] After the Arizona Land Commissioner adopted a rule in 1964 that required the Highway Department to compensate the trust for these rights-of-way, the Highway Department successfully challenged the rule. The Arizona Supreme Court held that the highways built on trust lands would always enhance the value of the trust lands across which they were built in an amount at least equal to the value of the right-of-way, such that compensation to the trust was not required.[205]

Noting that it had decided to hear the case due to the "importance of the issues presented both to the United States and to the State which have received [trust] lands,"[206] in *Lassen* the U.S. Supreme Court reversed the decision of the Arizona Supreme Court, finding that the Land Commissioner was required to obtain compensation for the grant of all right-of-ways.[207] The Court noted that under its previous holding in *Ervien*, the state was required to manage the school lands in a manner consistent with the purposes and requirements specified in the Enabling Act. The practice of granting rights-of-way to the Highway Department violated these requirements by disposing of these lands for compensation less than their true value (the Act specifically requires that lands cannot be sold for less than their true value).[208]

Interestingly, the Court found that despite the public auction requirement, the state was not required to dispose of state highway rights-of-ways at public auction.[209] Based on the legislative history of the Act, the Court found that this provision had been included by Congress with the intent of preventing fraudulent dispositions to private parties (a problem in New Mexico prior to statehood). Since dispositions to the state for fair market value did not seem to fall within the category of dispositions that the provision was intended to protect against, and since the State Highway

[198] U.S. v. Ervien, 246 F. 277, 278-279 (8th Cir. 1917).
[199] *Id*. at 279.
[200] *Id*. at 280.
[201] 251 U.S. at 47.
[202] *Id*. at 48.
[203] 385 U.S. 458 (1967).
[204] *Id.* at 465.
[205] *Id.* at 459-460.
[206] *Id.* at 461.
[207] *Id.* at 470.
[208] *Id.* at 469-470.
[209] *Id.* at 465.

Department could condemn land purchased at auction by any potential alternative bidder (which would effectively chill the auction), the Court concluded that the auction requirement was unnecessary for dispositions of this type as long as the trust obtained the fair market value.[210]

However, the Court expressly rejected the rationale offered by the Arizona Supreme Court to justify dispositions free of charge, or even – as advocated by the United States in the case – to allow the Land Commissioner to discount the costs of the right-of-way by the anticipated enhancement of value to the trust parcel. The Court found that the Act required that the beneficiaries receive the "full benefit" from the disposal of trust land, finding that the laundry list of restrictions contained in the Enabling Act "indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust."[211] Because a discount for "enhanced value" would require the state to make an inherently uncertain estimate of the value of the enhancement, the Court found that this would risk diverting a portion of the benefits derived from the trust lands to the Highway Department and away from trust beneficiaries.[212]

Lassen was not the first decision to find a trust responsibility associated with the lands that were granted to the states at statehood. As noted elsewhere, a number of states had included provisions in their state constitutions indicating that the lands were to be held "in trust."[213] As a result, a number of previous decisions in state courts had found the existence of a legally binding trust that restricted the states' discretion in managing and disposing of trust lands and the revenues derived from them.[214] However, as the first Supreme Court decision to address the nature of the land grants to the Western states, the *Lassen* decision proved to be extremely influential, prompting a flood of trust-related litigation over the decades that followed, and resulting in a series of similar decisions by other state and federal courts.

2. State Adoption and Adherence to the Trust Doctrine

The U.S. Supreme Court did not specify the intended scope of the principles that it announced in *Lassen*. Although the decision clearly found that Congressional grants could create a continuing trust obligation that was binding on the states, and that a trust was created by the express provisions of the New Mexico-Arizona Enabling Act, the implications of this decision for enabling acts of other states with less restrictive language was not discussed by the Court. However, the Court subsequently made clear that the determination of whether a trust existed in a given state required a case-by-case analysis of the terms of each state's enabling act and constitution.

For example, in a 1986 case, *Papasan v. Allain*,[215] the Court considered a challenge by local school officials and schoolchildren to improper dispositions of Mississippi's school trust lands on the grounds that the dispositions were a breach of trust. Although the Court decided the case on other grounds and declined to rule on whether or not the State of Mississippi was subject to a trust responsibility, its decision noted that the character of the trust grants differed significantly from state to state. The court also noted that while the New Mexico-Arizona grants imposed a trust responsibility, other earlier land grants had been found to impose only "honorary" restrictions; as such, the existence of a trust in Mississippi was not a foregone conclusion.[216] In reviewing the history of its earlier decisions as to whether specific enabling acts had created binding trusts, the Court noted that its interpretations of the New Mexico-Arizona Enabling Act in *Ervien* and *Lassen* had found the existence of an express trust, but the Court seemed to harbor some questions as to whether these decisions were truly consistent with one another. In discussing a petitioner's argument that none of the enabling act grants had been intended to create enforceable trusts, the court made the following "observation" in a footnote:

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[210] *Id.* at 463-465.
[211] *Id.* at 467.
[212] *Id.* at 469.
[213] *See* note 82, *supra*.
[214] *C.f.* State ex rel. Hellar v. Young, 58 P. 220 (Wash. 1899); State ex rel. Ebke v. Board of Educ. Lands & Funds, 47 N.W.2d 520 (Neb. 1951).
[215] 478 U.S. 265 (1986).
[216] *Id.* at 279-280.

> it could be that the earlier grants did give the grantee States absolute fee interests, while the later grants created actual enforceable trusts. On the other hand, it may be that the petitioners are correct in asserting that the substance of all of these grants is the same.[217]

The Court cited to congressional records discussing the New Mexico-Arizona Enabling Act that had referred to the express trust provisions in the Act as "nothing new in principle," and noting that "[f]or many years it has been the custom to specify the purposes for which grants of lands are made to incoming states and to place express restrictions upon the mode of disposing of them."[218] Without reaching any conclusion, the Court also observed that yet another view of the relationship could be as a contract between the states and the federal government, noting that "perhaps, then, the conditions of the grants are still enforceable by the United States, although possibly not by third parties."[219]

Regardless, since the U.S. Supreme Court decisions in *Ervien* and *Lassen*, virtually all of the Western states whose courts have considered the issue have found that trust relationships were created by their individual enabling act grants.[220] Attorneys general in states whose courts have not directly addressed the issue have reached the same conclusions.[221] Today, only two Western states – California and Wyoming – have found that neither their Enabling Acts nor their Constitutions impose any trust responsibilities on the state, and only California has found that their state land managers are not subject to any form of trust responsibility whatsoever.[222]

A number of commentators have argued that in many cases, state and federal court decisions that have found the existence of a trust in various states were essentially adopted in a sort of "rote" adherence to the *Lassen* and *Ervien* decisions.[223] These commentators have typically pointed to decisions in states such as Alaska, Montana, Oklahoma, Utah, and Washington,[224] as well as state attorney general opinions that have relied on *Lassen* to conclude that trust responsibilities exist.[225] Many of these decisions seem to ignore the fact that the decisions in both *Lassen* and *Ervien* were based on an interpretation of the strict New Mexico-Arizona Enabling Act, and simply adopted the *Lassen* trust logic without independently construing the requirements of that state's constitution and enabling act. These commentators generally argue that, because the New Mexico-Arizona Enabling Act of 1910 is the only act that specified that granted state lands were to be held "in trust," the negative implication is that Congress had not intended to create a trust in the previous grants.[226]

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[217] *Id.* at 292 n.18.
[218] *Id.*, *citing to* S. Rep. No. 454, 61st Cong., 2d Sess., 18-20 (1910).
[219] *Id.* at 292 n.18.
[220] *See* State v. University of Alaska, 624 P.2d 807, 813 (Alaska 1981); Gladden Farms, Inc. v. State, 633 P.2d 325, 329-30 (Ariz. 1981); Idaho Watershed Project v. State Bd. of Land Comm'rs, 918 P.2d 1206, 1211 (Idaho 1996); Department of State Lands v. Pettibone, 702 P.2d 948, 953-54 (Mont. 1985); State Bd. of Educ. Lands & Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985); Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 235-36 (Okla. 1982); Kanaly v. State, 368 N.W.2d. 819, 822-24 (S.D. 1985); National Parks and Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 920-21 (Utah 1993); County of Skamania v. State, 685 P.2d 576, 583 (Wash. 1984).
[221] *See* 1990 Op. N.D. Att'y Gen. 94 (1990); 46 Op. Or. Att'y Gen. 468 (1992).
[222] *See* 41 Op. Cal. Att'y Gen. 202 (1963); *see also* Riedel v. Anderson, 70 P.3d 223 (Wyo. 2003).
[223] John B. Arum, *Old-growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151, 160 (1990); *see also* Kedric A. Bassett, *Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act*, 9 J. ENERGY L. & POL'Y 195 (1989); Tacy Bowlin, *Rethinking the ABCs of Utah's School Trust Lands*, 1994 UTAH L. REV. 923 (1994); Wade R. Budge, *Changing the Focus: Managing State Trust Lands in the Twenty-First Century*, 19 J. LAND RESOURCES & ENVTL. L. 223 (1999).
[224] For list of cases discussing the application of common law trust principles to the school trust, *see* note 220.
[225] O'Day, *supra* note 5, at 169. Some commentators have also suggested that states have been too quick to conclude that the lands are included in the trust, i.e., the trust responsibility might only apply to the revenues generated by those lands. The Utah Supreme Court, which was the first court to consider the issue, rejected this notion. *See* National Parks and Conservation Association v. Board of State Lands, 869 P.2d 909 (Utah 1993) (discussed further below). However, the Wyoming Supreme Court later found that while its permanent fund was held in trust pursuant to the state Constitution, the lands were held in trust only pursuant to the will of the Wyoming legislature, which lends at least some credence to this notion. *See* Riedel v. Anderson, 70 P.3d 223 (2003) (discussed further below).
[226] *See* Arum, *supra* note 223; *see also* Bassett, *supra* note 223; Bowlin, *supra* note 223; Budge, *supra* note 223.

However, a review of the caselaw suggests that in many states, the development of the trust doctrine has been more nuanced than a simple acceptance and application of *Ervien* and *Lassen* without regard to individual state history and grant requirements. For example, although both Washington and Utah have been criticized for finding that their Enabling Acts created a binding trust relationship between the state and Congress, the full history of their trust caselaw suggests that this conclusion was based on an independent analysis of their respective Enabling Acts and Constitutions.

When Washington entered the Union in 1889, Congress granted the state sections sixteen and thirty-six for "the support of common schools," as well as other lands for the support of an agricultural college, a scientific school, normal schools, public buildings at the State capital, and various charitable, educational, penal, and reformatory institutions.[227] In the Act, Congress laid down clear rules for the disposal of state lands and the handling of sale proceeds derived from those lands. These included requirements that school lands could only be disposed at public auction (except for leases of five years or less), that lands must be sold for a minimum price of $10 per acre, and that all land sale proceeds be credited to a Permanent School Fund, with the interest from the fund used for the support of common schools.[228] The Washington Constitution affirmed these restrictions and indicated that the lands were to be "held in trust for all the people." The Constitution also added requirements that the land must be sold for at least its appraised value, and set disposition restrictions that limited the state to selling no more than one-quarter of the school lands by 1895, and not more than one-half by 1905. These restrictions were perhaps not surprising in light of the state's poor experience with fraudulent land transactions under the territorial government.

The Washington state courts concluded as early as 1899 that the state's permanent fund constituted a trust.[229] It should be noted that this decision was reached a full two decades prior to the U.S. Supreme Court's ruling in *Ervien*, although the Washington courts did not immediately rule on whether the lands themselves were held in trust or what specific requirements were associated with those trust responsibilities. However, in 1968, a Washington federal district court ruling finally addressed this issue in *U.S. v. 112 Acres of Land*,[230] a case in which the U.S. Bureau of Reclamation took a parcel of trust lands under eminent domain and claimed that, pursuant to a Washington statute that allowed donations of easements for federal irrigation projects, it was not required to pay compensation to the state trust.

Although this statute was inconsistent with the requirements of the state's Enabling Act (which requires the state to obtain full market value for any disposal of trust lands), the Bureau argued that Congress had not intended this provision to apply when disposals were made to the federal government, citing precedents involving other types of conditional federal land grants.[231] However, the court noted that the Enabling Act contained several provisions that were inconsistent with allowing a taking without compensation. First, the court noted that the Act announced a principle of indemnity that ensured the state would receive the full benefit of the trust land grant. Under this provision, Congress allowed the state to select *in lieu* lands in the event that any of the granted section sixteen and thirty-six lands were reserved or disposed by the federal government between the date of the state's admission and the time that these sections were identified by survey.[232] Secondly, the court noted that the express terms of the Enabling Act did not provide for any federal exception to the full market value requirement.[233] Finally, the court noted that the Washington Constitution, in accepting the terms of the grant, required that in no event should trust lands "be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."[234] After reviewing the history of this provision, the court read the latter part of the phrase as

[227] Omnibus Enabling Act, 25 Stat. 676 (1889).
[228] *Id.*
[229] *C.f.* State ex rel. Hellar v. Young, 58 P.2d 220 (Wash. 1899) (based on the express language of the Washington Constitution, the fund was "in the nature of a trust fund" and that, pursuant to private trust principles, the state was obligated to repay any monies that were improperly invested).
[230] 293 F. Supp 1042 (D.C. Wash. 1968).
[231] *Id.* at 1045.
[232] *Id.* at 1045-1046.
[233] *Id.* at 1046.
[234] *Id.*

conjunctive with the former, i.e., the consent of the United States was not in itself sufficient to free the land from the constitutional requirement of full compensation, and moreover, that the consent required was that of Congress, not of a federal agency.[235]

Taken together, the court found that the provisions of the Enabling Act and the Constitution constituted a "declaration of trust," which had interposed the equitable interest of the public school system between the federal government, as the grantee of the lands, and the state as the recipient.[236] Although the court noted that *Schmidt* had suggested that all requirements in federal land grants to the states had been merely "honorary," *Lassen* had "dispelled these intimations," and the court thus concluded that "this trust is real."[237] The Washington Supreme Court subsequently approved this determination in *County of Skamania v. State*,[238] striking down a statute that attempted to extend a subsidy to companies that held timber contracts on state lands (suffering due to a price downturn in the timber market) to extend or terminate those contracts without penalty. Finding that the lands were held in trust under the logic of *U.S. v. 112 Acres of Land*, the court noted, "a trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests.... [and] may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be."[239]

It thus seems clear that the Washington courts did not simply "follow" *Lassen*. Rather, they found sufficient evidence of intent to create a trust in the bargain struck between Congress and the State in the Enabling Act and the State Constitution. This evidence included requirements that the trustee could not dispose of the lands except by receiving the full market value, with the proceeds credited to an identified beneficiary; that after the grant was made, the grantor would replace any property that was inadvertently disposed to ensure that the beneficiary remained whole and received the full benefit of the grant; and that the terms of the grant could only be modified upon the consent of both the granting and receiving party. All of these terms are entirely consistent with the creation of a trust under common law principles.[240]

In analyzing the provisions of the Utah Enabling Act and State Constitution, the Supreme Court of Utah considered a similar series of factors in reaching its conclusion that the state's granted lands were held in trust. In *Duchesne County v. State Tax Commission*,[241] the Utah Supreme Court considered whether lands that were acquired through foreclosure of a mortgage that secured funds loaned from the state's permanent fund were held in trust, and thus exempt from taxation. In reviewing the requirements of the state's Enabling Act, the court noted that all of the elements of an express trust were present: first, the legal title to the fund was vested in the state; second, the terms of the Enabling Act established that the fund was perpetual, with the interest to be used for a specified purpose (the support of schools); third, that the fund was to be guaranteed by the state against any loss or diversion.[242] The court noted that

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[235] *Id.* at 1047.
[236] *Id.* at 1049.
[237] *Id.*
[238] 685 P.2d 576, 578-579 (Wash. 1984).
[239] *Id.* at 581-82. In 1982, in response to collapse in timber prices precipitated by falling housing starts, the Washington Legislature passed the Forest Products Industry Recovery Act, which enabled timber companies to either extend timber contracts on state lands at no cost or to terminate contracts, essentially without penalty. The Act contained language indicating that by helping the timber companies, it would ultimately benefit the trust beneficiaries, noting that if the companies went bankrupt, there would be no buyers for state timber in the future. *Id.* at 578-579. Skamania County ultimately sued the state, arguing that the grant of lands to the state constituted a trust, and the Forest Products Industry Recovery Act violated the state's fiduciary duties as a trustee of state lands (the County was joined in the suit by the State Board of Education and the Board of Regents for the University of Washington). The court ultimately agreed, holding that the grant of lands to the state in fact constituted a trust. Because the Act provided "direct, tangible benefits to the contract purchasers [and the state economy], at the expense of the trust beneficiaries," the state's actions violated its undivided duty of loyalty as a trustee. *Id.* at 581-82. One critic has noted that the state (and Congress) have been inconsistent in defending this principle, however, noting that a few years later (in 1990), Congress passed a law that prohibited the export of timber from public lands (including state trust lands) in the Pacific Northwest; this decision ultimately cost beneficiaries approximately $90 million a year in lost revenues for the benefit of small sawmills that had been impacted by injunctions against the cutting of old growth trees of federal lands. Chasan, *supra* note 55, at 19.
[240] *See* discussion of common law trusts in section III, *supra*.
[241] 140 P.2d 335 (Utah 1943).
[242] *Id.* at 337-338.

> this embraces all the elements of an express trust, with the state the trustee, holding title only for the purpose of executing the trust; and is made the guarantor of the trust estate against loss... It implies two interests, one legal, and the other equitable; the trustee holding the legal title or interest; and the cestui que trust or beneficiary holding the equitable title or interest. This being a charitable trust, or a public trust, it is not necessary that the cestui que trust be a definite or ascertainable being... The trust estate is definite, the trustee is certain, and the purpose of the trust and use of the fund is definite, certain and particularly characterized. This is sufficient...[243]

The court concluded that the only logical result was that the state held the permanent funds as the trustee of an express trust, with the funds limited in the amounts and purposes for which it could be expended.[244]

Although *Duchesne County* concluded that the permanent fund (including lands acquired via investment of the permanent fund) was held in trust, the court arguably left open to question whether trust lands that were originally granted to the state were also held in trust. The Utah Supreme Court revisited this question approximately fifty years later in *National Parks and Conservation Association v. Board of State Lands*,[245] during a challenge to a land exchange involving county-owned land and state trust lands within the boundaries of Capitol Reef National Park. In challenging the land exchange, the National Parks and Conservation Association (NPCA) argued that, (1) while the permanent fund was held in trust for the support of schools, the granted lands were not necessarily held in the same trust; (2) that the school trust lands should be subject to the public trust doctrine; and (3) that the state should have prioritized considerations related to the scenic, aesthetic, and environmental values of the trust lands over economic and financial considerations in considering the exchange.[246]

The Utah Supreme Court rejected these arguments, finding that state trust lands were held in trust for the benefit of public schools. The court found that the trust which applied to the state's permanent fund must by necessity apply to the lands as well, since a "distinction between trust duties owed during possession of the land and trust duties owed on disposition of the land is essentially an argument that a trustee can use the trust corpus for its own purposes during possession and that the trust obligations attach only on disposition of trust assets or realization of proceeds therefrom."[247] Since the Enabling Act did not explicitly distinguish between the trust land and the revenues derived from that land, the management of the school trust land was therefore subject to the same trust obligations as the proceeds derived from the lands.[248] Similarly, the court found that NPCA's argument that the school lands were subject to public trust doctrine

> confuses the public trust that applies to sovereign lands with school trust land. The "public trust" doctrine, discussed in *Colman v. Utah State Land Board,* 795 P.2d 622, 635-36 (Utah 1990), protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large. The public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts.[249]

The court found that the Enabling Act clearly specified a narrower set of intended public beneficiaries (i.e., schools) than the public at large, and thus the purposes of the school trust and the requirements of the public trust were necessarily different. Noting that the express purpose of the school trust was to produce revenues for the support of public schools, the court rejected the idea that the state had

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[243] *Id.* at 338.
[244] *Id.*
[245] 869 P.2d 909 (Utah 1993).
[246] *Id.*
[247] *Id.* at 920 n7.
[248] *Id.*
[249] *Id.* at 919.

breached its trust responsibilities by failing to prioritize public scenic, aesthetic, and environmental values over financial considerations in making the exchange.[250]

3. Revisiting the Trust Doctrine

Criticisms that the courts have been too quick to assume the existence of a trust have not fallen entirely on deaf ears. In recent years, several courts – including courts in Colorado, Utah, and Wyoming – have revisited the issue of whether or not their Enabling Acts were explicit enough in their restrictions to create a trust, with varying results. In *Branson Sch. Dist. RE-82 v. Romer,*[251] the Tenth Circuit Court of Appeals addressed the issue of whether Colorado's state trust lands were held in trust. In reviewing the history of Colorado's Enabling Act, the court noted that the Act fell, both chronologically and substantively, somewhere in between the Michigan and Alabama Acts with their "honorary" restrictions and the New Mexico-Arizona Act with its express trust obligations. As such, the court reasoned that the existence or non-existence of a trust depended on whether Congress had sufficiently manifested the intent to create a fiduciary relationship via a sufficient "enumeration of duties" that "would justify a conclusion that Congress intended to create a trust relationship."[252]

The court noted that the granting language contained in the Act, which provided that the school lands "are hereby granted to the said State for the support of the common schools,"[253] was insufficient to create a trust in isolation, since it was no more specific than the language of the Michigan and Alabama grants that had been interpreted to create only "honorary" obligations on the part of the states.[254] However, the court noted that this language was supplemented by a series of specific restrictions on how the school lands could be managed and disposed, and that the Colorado Enabling Act was the first to contain such restrictions.[255] These included requirements that the lands could be disposed only at public sale, that they must be sold at a price of not less than $2.50 per acre, and that the proceeds of the sales must be placed in a permanent fund to benefit the common schools.[256] The court held that these additional restrictions were sufficient evidence of intent to create a trust, since they identified specific duties that were clearly imposed to ensure that the lands would be used to further Congress' goal of providing perpetual, financially sound support for Colorado's common schools.[257]

Following the decision in *Branson*, the Tenth Circuit also had occasion to revisit the boundaries of Utah's trust doctrine in *District 22 United Mine Workers of America v. Utah*.[258] Building on its analysis in *Branson*, the court examined the Utah Enabling Act's grant of fifty thousand acres for the state miners' hospital under a similar set of principles. Like the Colorado Enabling Act, the court noted that the Utah Enabling Act simply provided that the fifty thousand acres was granted "for the purpose[ ] indicated, namely: ... [F]or a miner's hospital for disabled miners...";[259] taken alone, the court once again held that this language was insufficient to create a trust based on the previous interpretations of the Michigan and Alabama grants.[260]

The court also found that, unlike the Colorado Enabling Act, the Utah Enabling Act did not place any explicit restrictions on the manner in which the granted lands were to be managed or disposed; instead, the Utah Enabling Act merely provided that "the lands... shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature may provide." As such, the court found that the Utah Enabling Act had explicitly given the legislature full discretion as to how these lands were to be managed or disposed, and under general trust principles,

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[250] *Id.* at 920-921.
[251] 161 F.3d 619 (10th Cir.1998).
[252] *Id.* at 634.
[253] Colorado Enabling Act, 18 Stat. at 475 § 7.
[254] 161 F.3d at 634.
[255] *Id.*
[256] Colorado Enabling Act, 18 Stat. at 476 § 14.
[257] 161 F.3d at 634.
[258] 229 F.3d 982 (10th Cir. 2000).
[259] *Id.* at 989.
[260] *Id.* at 990.

this discretion "militates against the creation of a trust."[261] However, in reviewing the requirements of the Utah Constitution and the interpretations of those requirements by the Utah Supreme Court in several previous cases, including *National Parks & Conservation Ass'n v. Board of State Lands,*[262] and *Duchesne County v. State Tax Comm'n,*[263] the court held that the explicit trust language contained in the Utah Constitution was sufficient to conclude that the lands were "held in trust pursuant to the Utah Constitution."[264] Although Utah is the only Western state in which this conclusion has been reached, the concept of a constitutional trust is not unique; Mississippi courts have also found that Mississippi's trust lands are held in trust pursuant to its State Constitution; by contrast, the requirements of its federal Enabling Act are merely honorary.[265]

The Wyoming Supreme Court recently made a similar finding with regard to the requirements of the 1890 Wyoming Admission Act in *Riedel v. Anderson*,[266] which considered a challenge to a state statute that granted the holder of an agricultural lease on state trust lands a preferential right to renew the lease by matching any competing bid. Reviewing the evolution of the Wyoming Admission Act in light of the Tenth Circuit's decisions in *Branson* and *Dist. 22 United Mine Workers*, the court noted that Wyoming's Enabling Act, while similar to Colorado's, was different in two important respects: first, it did not specify any minimum sales price for state trust lands, and secondly, it expressly authorized the leasing of trust lands in "any manner the state legislature provides."[267] On balance, the Wyoming Supreme Court found that, as was the case in Utah, the broad latitude extended to the Wyoming legislature by this provision "militates against the creation of an express trust."[268]

The court reached the same conclusion after reviewing the requirements associated with the Wyoming Constitution. After comparing Wyoming's Constitution to other state constitutions that had been found to create a trust, either alone (such as in Utah) or in combination with the requirements of state enabling acts (such as in Colorado, South Dakota, and Oklahoma), the court concluded that the Wyoming Constitution did not contain sufficient evidence of intent to create a trust. The court noted that the Wyoming Constitution indicated that the lands were accepted for educational purposes, provided that lands could only be sold at public auction for at least ¾ of their appraised value, and that the lands could be leased in any manner that the legislature should provide, and that the proceeds from the sale and lease "shall constitute a permanent trust fund, with only the income used for educational purposes." Unlike many other state constitutions, the court also noted that although Wyoming's Constitution stated that the permanent funds were to be held in trust,[269] the Constitution contained no express declaration that the state trust lands themselves were held in trust.[270] The court noted that the more specific trust language that had been used in other state constitutions, such as Colorado, Oklahoma, Idaho, and Washington, had been available to the drafters of the Wyoming Constitution, and that Wyoming's draft constitution was also available to Congress prior to Wyoming's Admission Act. As such, the court assumed that this distinction was deliberate.[271] Given the "express latitude given the legislature, [and the] limitation of the express trust language to the *proceeds* from the lands," the court concluded that there was also no constitutionally-mandated trust responsibility.[272]

However, the court did find that Wyoming's state trust lands were held in trust pursuant to Wyoming statutes. Combined with the fact that the legislature had repeatedly referred to these lands

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[261] *Id.*
[262] 869 P.2d 909, 917-20, and n. 7.
[263] 140 P.2d 335, 338 (Utah 1943).
[264] 229 F.3d at 990.
[265] Lipscomb v. Columbus Mun. Separate School Dist., 269 F.3d 494 (C.A. 5 Miss. 2001).
[266] 70 P.3d 223 (2003).
[267] See Wyo. Act of Admission § 5, 26 Stat. at 22-23.
[268] 70 P.3d at 231.
[269] WYO. CONST. Art. 7, §§ 2, 6.
[270] 70 P.3d at 232.
[271] The Wyoming Supreme Court's finding that this language was deliberately chosen was its only answer the state's argument, derived from *National Parks & Cons. Ass'n v. Bd. of State Lands,* 869 P.2d 909 (Utah 1993), that it was "irrational" to distinguish between the lands and the proceeds of those lands in identifying the corpus of a constitutionally declared trust.
[272] 70 P.3d at 232.

as “trust lands,” the court also noted that recent legislation amending the state’s leasing provisions had provided that trust lands should be managed under a total asset management policy, that the trust was intergenerational and the corpus should be protected for the long term, that trust assets should not be sold to maximize revenues in the short term, that all leases of trust land should be made for full market value, and that the permanent fund should be invested in a manner that would protect it from inflation. The court also noted that the same legislation had directed that trust lands be leased "in such manner and to such parties as shall inure to the greatest benefit to the state land trust beneficiaries."[273] The court held that the use of “such explicit trust language” indicated the legislature’s intention that the lands were to be held in trust.

The distinction between a federal, constitutional, or statutory trust is of great significance, since in the latter case, the legislature can unilaterally alter the terms of the trust. The *Riedel* court, reaching the issue of the validity of the preference statute, found that “the statutes [regarding trust lands] incorporate all of the trustee’s duties,” and as such it was neither necessary nor appropriate for the court to look to trust principles to define the state legislature’s obligations towards the management of the trust lands; rather, the legislature was free to define the boundaries of the trust within the minimal limitations defined in the Constitution (requiring lands to be sold at public auction, etc.). Noting that the Constitution permitted the lease of lands in any manner prescribed by the legislature, the court found that the principles that applied to “the leasing of the trust lands … are governed by the statutes and not by common law trust principles… The legislature will not be presumed to have created the trust and violated it at the same time.”[274] Thus, in Wyoming, the “trust responsibility” binds only the agency that administers the trust lands.

Despite these recent decisions in Utah and Wyoming, it seems doubtful that other Western states will be likely to revisit their adoption of the trust doctrine with regard to the administration of their state trust lands. As one commentator notes, the notion of the trust is now “thoroughly embedded in state constitutions, case law, and management philosophy,”[275] and as noted above, virtually all of the Western states have found that trust relationships were created by their individual enabling act grants, with only California finding that its lands are not subject to any trust whatsoever. The Wyoming and Utah Enabling Acts and Constitutions, which aside from California present the weakest case for the existence of a trust – are relatively unique among the Western states; indeed, of the states that entered the Union after Colorado, only Utah was not subject to any specific limits on its authority to dispose of trust lands.[276] In any event, both Wyoming and Utah ultimately concluded that the lands were nevertheless subject to a trust. As such, the vast majority of state trust lands in the West are likely to remain subject to the trust responsibility for the foreseeable future. However, the trust doctrine is not necessarily as restrictive – or as monolithic – as many trust managers, beneficiaries, and critics are often heard to suggest.

[273] *Id.* at 232-233.
[274] *Id.* at 233.
[275] O’Day, *supra* note 5, at 194.
[276] *See* Fairfax, et al., *supra* note 17, at 821.

B. Distinguishing State Trusts from Common Law Trusts

1. State Trusts as a Form of Charitable Trust?

A number of courts that have considered the nature of the state trusts in light of the history of state trust grants have analogized the trusts to a bilateral "contract" between the federal government and the states, formed as a part of the bargaining process between an incoming state and the federal government. For example, in *Andrus v. Utah,*[277] the United States Supreme Court noted that under this "solemn agreement," the federal government "agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry."[278] This view was once again suggested by the Court in *Papasain v. Allain*, noting that the state grants "perhaps… are all properly viewed as being in the nature of a 'solemn agreement' which in some ways may be analogized to a contract between private parties."[279]

The *Andrus* Court noted that this view of the trust provides a convincing rationale for the "indemnity lands" selection process, in which the "the State's right to select indemnity lands may be viewed as the remedy stipulated by the parties for the federal government's failure to perform entirely its promise to grant the specific numbered sections… Thus, as is typical of private contract remedies, the purpose of the right to make indemnity selections was to give the State the benefit of the bargain."[280] This "contract" logic has been followed by a number of state courts as well.[281]

As the federal district court noted in *Branson School District RE-82 v. Romer*,[282] under this theory of the trust relationship, the terms of the "contract" would be defined by reference to the enabling act and the state constitution. As the court noted, this view would seem to raise some question as to whether the conditions of the land grants could be enforced by third parties.[283] However, because the grant and the corresponding constitutional provisions clearly express the intent that the state would "act as trustee of school lands for the benefit of the public schools," this would nevertheless place the "beneficiaries" of the land grants in the position of "archetypal third-party beneficiaries of the contract"[284] who were entitled to enforce the terms of the contract under the fiduciary requirements imposed by the federal enabling act and state constitution.[285]

Regardless of the source of the states' fiduciary obligations, the overwhelming weight of authority in the Western states is that – by contract or otherwise – these grants created a relationship that can be characterized as a "trust."[286] In seeking to uncover the character of these trusts, however, a review of the laws and judicial opinions with regard to the administration of state trust lands makes clear that these state trusts are clearly *not* akin to private trusts. If anything, these trusts are probably most similar to common law charitable trusts.[287] Notably, grants for the benefit of "common schools" embrace a purpose that is among the most basic of the charitable purposes recognized under the common law; grants for hospitals, schools for the deaf and blind, and public buildings are also traditional "charitable" purposes.

Similarly, all of the grants benefit either (a) an indefinite class of beneficiaries (such as the "common schools," or (b) specific public institutions that provide benefits to the broader community and are properly the subject of a charitable trust. As such, they do not benefit a discrete individual or

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[277] 446 U.S. 500 (1980).
[278] *Id.* at 507.
[279] Papasan v. Allain, 478 U.S. 265, 292 n.18 (1986), *quoting* Andrus v. Utah, *supra*.
[280] *Id.* at 507-508.
[281] *See* Oklahoma Educ. Ass'n, Inc. v. Nigh, 642 P.2d 230, 235 (Okla.1982) (referring to the land grants as an "irrevocable compact"; State v. Platte Valley Pub. Power & Irrigation Dist., 23 N.W.2d 300, 306 (Neb. 1946) (referring to the terms of the grant as a "contract" between the accepting state and the United States); Newton v. State Board of Land Commissioners, 219 P. 1053 (Idaho 1923) (same).
[282] 958 F.Supp. 1501 (D.Colo. 1997).
[283] *Id.* at 1516.
[284] *Id.*
[285] *Id.*
[286] *See* cases listed in note 220, *supra*.
[287] *See* Bowlin, supra note 223, at 945-946.

group of individuals that are effectively separated from the larger public in the manner of a private trust. Finally, the grants establish the trusts in perpetuity, as they do not specify a limitation on the existence of the trust and embrace purposes that will continue from generation to generation without a foreseeable end.

This interpretation appears to be consistent with the few court decisions that have squarely addressed this issue.[288] These include two of the early decisions of the U.S. Supreme Court that addressed Indiana's trust lands, *Trustees of Vincennes University v. State of Indiana*[289] (a challenge to a sale of lands that had been reserved for a seminary under Indiana's Enabling Act), and *Springfield Township v. Quick*[290] (a challenge to a state practice of counting revenues from sixteenth section lands towards the state contribution to public education costs in each township). In those cases, the United States Supreme Court held that Indiana's Enabling Act had created a trust similar to a private charitable trust, and that this trust should be strictly construed under fiduciary principles.

A similar finding has been reached by the few state courts that have directly considered this issue. For example, in *Forest Guardians v. Powell*,[291] a New Mexico court noted that "the primary differences between a charitable trust and other private trusts are that a charitable trust may be perpetual, the denominated recipients of the trust income may be indefinite, and the intended beneficiary is the community itself."[292] The court then noted that

> the trusts created by the Enabling Act are perpetual…[and] the recipients of the trust income, the "common schools," are indefinite… Finally, when the grants to support the common schools are read in the context of grants made to other Enabling Act land recipients, such as government buildings and a miners' hospital, we conclude that the intended beneficiary of the federal land grants is the general citizenry of the State, and that the purpose of the grants was to insure a source of funding to support the construction and maintenance of essential social institutions.[293]

The Supreme Court of Utah followed similar logic in interpreting the nature of its state trust. In *Duchesne County v. State Tax Commission*,[294] the Utah Supreme Court found that the trust constituted a "charitable trust" or "public trust," with a definite trust estate, definite trustee, identified purpose for the use of the trust fund, and a beneficiary that was not a "definite or ascertainable being."[295] An identical result was reached by the Montana Supreme Court in *Department of State Lands v. Pettibone*,[296] with the court citing the early decisions of the U.S. Supreme Court in *Trustees of Vincennes University* and *Springfield Township* in support of this conclusion.[297]

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[288] A number of court decisions that have found that a state trust exists without identifying the nature of this trust. For example, in *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886 (Colo. 2001), the Colorado Supreme Court followed the 10th Circuit's determination in *Branson School District* that Colorado's Enabling Act had created a trust, and also found that the intended beneficiaries of that trust were narrower than the general public – the "common schools." Because the rules applicable to trusts only allow a beneficiary or one suing on a beneficiary's behalf to enforce the terms of the trust, the court concluded that a ranching company, as a member of the general public that was unrelated to the public school system, lacked the ability to enforce the terms of the trust. 31 P.3d at 894-895. However, the court did not specifically consider whether or not the trust was charitable in nature, despite the fact that *Branson* had allowed standing to school children as "beneficiaries" of the trust for "common schools" – a holding that is more consistent with a finding of charitable trust than a finding that the trust was created for the benefit of specific institutions. *See Branson School District RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998).
[289] 55 U.S. 268 (1852).
[290] 63 U.S. 56 (1859).
[291] 130 N.M. 368 (N.M. App. 2001).
[292] *Id.* at 373, citing Restatement (Second) of Trusts § 364-65 (1959).
[293] *Id.*
[294] 140 P.2d 335 (Utah 1943).
[295] *Id.* at 338.
[296] 216 Mont. 361 (1985).
[297] *See also* Cinque Bambini Partnership v. State, 491 So.2d 508, 511-512 (Miss. 1986) (Supreme Court of Mississippi stated that Congressional grants of tidelands and sixteenth section lands created "two great public trusts" in which state took title to lands to hold for benefit of the public, following previous decisions in which the Court made clear that the beneficiaries of the school lands trust were the inhabitants of the townships in which the lands were granted); Turney v. Marion County Bd. of Educ., 481 So.2d 770, 777 (Miss. 1985); Jones v. Madison County, 72 Miss. 777 (Miss. 1895); *see also* East Lake Ranch LLP v. Brotman, 998 P.2d 46 (Colo. App. 1999) (members of the public at large, through the institution of the public schools, are the intended beneficiaries of the state school land trust).

As discussed below, the fiduciary duties imposed on the state as a trustee are essentially similar to those imposed on the trustees of other common law trusts. However, there are nevertheless significant – if subtle – differences between state trusts and common law trusts that should not be overlooked. Many of these differences essentially relate to the status of the parties to this trust relationship as not just settlor and trustee, but also government bodies with a broader set of powers and responsibilities. As noted above, under the common law trust doctrine, the trustee owes a strict duty of loyalty to the beneficiary (whether private or charitable) and must elevate the beneficiary's interests over all other considerations. However, as public bodies, both Congress (as settlor) and the state (as trustee) have public obligations that extend far beyond the normal duties of a private settlor or trustee. As described in the sections that follow, this has several implications for state trusts.

2. Fiduciary Duties of the State Trustee

As noted in section III (C), the trustee of a charitable trust is subject to the same fiduciary duties as a private trustee. Decisions interpreting the requirements of state trusts have applied a variety of common-law fiduciary principles to trust managers.[298] A typical case is *State ex rel. Ebke v. Board of Educ. Lands and Funds*,[299] which relied on trust principles to overturn a Nebraska statute that eliminated competitive bidding for leases of state trust land in favor of automatic renewal where the lessee complied with the terms of the lease and took appropriate care of the property. This statute caused the state to turn down a number of competing lease applications, even where the prospective lessees had offered to pay more than the existing lessees.

In *Ebke*, the Supreme Court of Nebraska found that the school lands were held in trust, and that as the administrator of those lands, the state stood in the position of a trustee and was subject to a series of common law trust principles, including:

- Trust lands are required to be administered under rules of law applicable to trustees acting in a fiduciary capacity, and laws adopted by the legislature that govern the activities of trust managers must be consistent with the duties and functions of a trustee.

- The state owes a duty of undivided loyalty and good faith to the trust beneficiaries, and lands must be administered in the interest of those beneficiaries; as such, laws affecting trust property violate trust responsibilities where they "substantially benefit[] a special class of persons at the expense of the trust estate."

- The state has a duty to obtain a maximum return to the trust estate from the trust property under its control, subject to its duty to preserve the trust estate; as such, any law which fixes the value of trust lands without regard to fair market value or disposes of them in a manner that conveys special benefits on third parties at the expense of the trust violates this trust responsibility.

- The state must balance its duty to protect the corpus of the trust in a manner that bears a reasonable relationship to the risk of loss; the state cannot permit an unreasonable loss in income to the trust in the name of protecting the trust corpus where the loss is out of proportion to the risk that is sought to be avoided.[300]

These or similar requirements are typically understood to apply to most state trust managers. However, it is critical to note that despite these generally common fiduciary obligations, there are nevertheless significant variations in the goals, terms, and restrictions on trust managers as a result of the varied history and substance of the states' diverse trust grants. Just as a particularized, state-

[298] *C.f.* Oklahoma Ed. Ass'n, Inc. v. Nigh, 642 P.2d 230, 236 (Okl. 1982) (express designation of the school lands and funds as a "sacred trust" has the effect of irrevocably incorporating into the Enabling Act, Oklahoma Constitution, and conditions of the grant, all of the rules of law and duties governing the administration of trusts).
[299] 47 N.W.2d 520 (Neb. 1951).
[300] *Id.*

by-state analysis is required to understand whether a trust was created by a particular enabling act or state constitution, the differences between these documents can have significant implications for interpreting trust mandates. Unlike a private trust that is created by a singular "trust instrument," the trust instrument in the case of a state trust may consist of multi-layered requirements contained in enabling act provisions, state constitutions, state legislation, and administrative rules. Many of these documents may contain provisions that significantly alter – or at least influence – the commonly-understood "mandate" for state trusts.

For example, although Idaho and Washington were admitted to the Union within a year of each other and both states adopted provisions in their Constitutions that have been interpreted to create a binding trust, Idaho's Constitution contains provisions that require the state to obtain the "maximum long term financial return" from trust assets and the "maximum amount possible" from dispositions of trust lands.[301] This requirement does not appear in the Washington Constitution. However, unlike Idaho, Washington's Constitution contains a provision which states that "[a]ll the public lands granted to the state are held in trust for all the people."[302] To date, the courts have not definitively ruled on the meaning of this provision, which some commentators suggest could be interpreted to subject state trust lands to a constitutional public trust that underlies the express federal trust relationship established by the State's Enabling Act.[303]

Even where state constitutional provisions simply mirror the requirements of the state's enabling act, courts may ultimately adopt different interpretations of the same provisions. For example, in *Deer Valley Unified School District v. Superior Court*,[304] the Arizona Supreme Court interpreted the Arizona Constitution to prevent the state and its local jurisdictions from condemning state trust lands. Although the U.S. Supreme Court had liberally interpreted identical language in the state's Enabling Act *not* to restrain condemnations, the Arizona Supreme Court adopted a strict construction of the same language, holding that "[t]he Enabling Act, as interpreted in *Lassen*, merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more."[305] The Arizona Supreme Court subsequently used the same logic to prohibit exchanges of state trust lands in *Fain Land & Cattle Co. v. Hassell*,[306] concluding that exchanges would constitute a sale without public auction in violation of the Arizona Constitution – despite the fact that the Enabling Act expressly allows exchanges and provides that exchanges are *not* sales for purposes of the Act. As such, the fiduciary obligations of state trustees can differ substantially from state to state.

3. The Trustee's Additional Obligations as a Public Entity

As noted above, trustees are normally subject to a duty of undivided loyalty to the interests of the trust. However, the status of states as sovereign governments that are responsible for passing and enforcing laws and protecting the public welfare complicates this picture. Although a private trustee would be held liable for virtually any action that derogates the interests of the trust as a violation of this duty of loyalty, the state trustee is not bound by this restriction insofar as the laws it adopts are laws of general applicability – even where those laws modify the management of trust assets in a manner that benefits third parties, or even the general public, in derogation of the interests of the trust.

For example, in *Colorado State Board of Land Commissioners v. Colorado Mined Land Reclamation Board*,[307] the Colorado Supreme Court held that trust lands were subject to state laws that conditioned mining permits upon compliance with local zoning and subdivision regulations. As such, permits could be denied when they were inconsistent with county zoning regulations even if this

[301] IDAHO CONST. Art IX, § 8.
[302] WASH. CONST. Art. XVI.
[303] Chasan, *supra* note 55, at 42.
[304] 760 P.2d 537 (Ariz. 1988).
[305] *Id.* at 541.
[306] 790 P.2d 242 (Ariz. 1990).
[307] 809 P.2d 974 (Colo. 1991).

caused a direct loss to the trust. Although these state laws (which were passed by the trustee) served to disadvantage the interests of the trust, they were a legitimate exercise of the state's police powers.

This freedom similarly extends to the federal government as the settlor of the trust. Under normal principles of charitable trusts, the settlor would be unable to alter the terms under which the trust is managed; however, under principles of federal supremacy, Congress is free to pass laws that regulate the use of trust assets. In *Case v. Bowles*,[308] the U.S. Supreme Court considered the validity of federal legislation that established price controls as applied to timber sales on Washington's trust lands; the state argued that the imposition would prevent the state from receiving the maximum revenues from those sales in violation of the trust that Congress had established (and committed to) in its Enabling Act. The Supreme Court concluded that Congress was not bound by the trust relationship when enacting laws of general applicability, noting that "[n]o part of all the history concerning these grants... indicates a purpose on the part of Congress to enter into a permanent agreement with the States under which States would be free to use the lands in a matter which would conflict with valid legislation enacted by Congress in the national interest."[309]

Courts have long recognized that all trusts – whether private or charitable – are subject to both federal and state laws of general application regardless of whether those laws are in derogation of the trust. As such, this may not seem like a particularly significant deviation from normal trust doctrine. What is significant, however, is the fact that the state, even as a trustee, can pass laws that regulate its own behavior – and these laws may require the state to behave in a manner that would not be required of a private trustee under the same circumstances.

One obvious example of this are state environmental laws, which frequently hold trust managers, as state agencies, to a higher standard than a private trustee under the same circumstances. These include state statutes that require analysis of state actions along the lines of that required of federal agencies by the National Environmental Policy Act, or holding state agencies to a higher standard with regard to actions that would impact threatened or endangered species. For example, in *Noel v. Coel*,[310] Washington's Supreme Court held that trust managers were obligated to follow the requirements of the state's Environmental Policy Act when making decisions to sell timber, and thus were required to prepare an environmental impact statement even where this limited their ability to sell timber or imposed significant additional costs on the trust. Because the environmental impact statement requirement applied only to state agencies, this placed the state trust at a distinct disadvantage with respect to privately managed timberlands. Similarly, in *Ravalli County Fish and Game Association v. Montana Department of State Lands*,[311] the Montana Supreme Court held that trust managers were required to follow the requirements of the Montana Environmental Policy Act when approving a modification to a grazing lease. Another excellent example can be found in Colorado's recent requirement on state trust managers to conduct a fiscal impact analysis that considers impacts on local communities before approving the development of state land – a requirement that does not apply to the private sector when contemplating development.[312]

Other examples of such provisions are requirements on state trustees to give public notice of their decisions, to hold public hearings and accept public comment, to maintain all materials related to trust administration as public records subject to inspection by members of the public (or even by economic competitors), to produce annual reports in a standardized format that may disclose (or fail to disclose) information that might or might not be present in a private trust report, and even to conduct trust-related management activities in compliance with executive budgets subject to legislative appropriation (which may or may not reflect an allocation of resources and staff that is conducive to the optimal management of trust resources). In each case, the trustee is permitted to adopt substantive or procedural requirements that unilaterally alter the administration of trust lands in a manner that may work against or even affirmatively harm the interests of trust beneficiaries –

[308] 327 U.S. 92 (1946).
[309] *Id.* at 100.
[310] 655 P.2d 245 (Wash. 1982).
[311] 903 P.2d 1362 (Mont. 1995).
[312] See discussion of this requirement in section V(C), *infra*.

regardless of whether these same requirements will apply to private trusts and trustees.[313] Obviously, given that most of these decisions will be made in a public, politically charged context, these requirements may not be adopted with the best interests of the trust in mind, and may direct trust assets and resources to serve public purposes other than those originally specified in the trust grant.

The federal government (as settlor) and the state (as trustee) may also have broader authority to modify the terms of the trust than would normally exist in a private context. As noted in section III (C), absent express terms to the contrary, charitable trusts are generally only modified pursuant to the doctrines of equitable deviation and *cy pres*. With regard to the doctrine of equitable deviation, however, most enabling acts and state constitutions contain only minimal restrictions on trust managers (such as requiring the trustee to obtain "fair market value," sell lands at "public auction," or "maximize revenues"). Given the general nature of these restrictions, it seems unlikely that a convincing case could be made for a significant deviation from these principles based on unforeseen circumstances.

Similarly, the purposes for which the vast majority of lands were granted – support of common schools or universities, support of penal institutions, or support of public buildings – are continuing, legitimate public purposes that are unlikely to disappear in the foreseeable future of our society and would thus not support the application of *cy pres*. As such, although the occasional case might be made for allowing deviation from the terms of a state's trust responsibility to promote more efficient management, or for changing the purpose of a minor trust where the intended beneficiary no longer exists, these doctrines would be unlikely to provide any significant flexibility for trust managers to modify either the terms of trust management or the purposes for which the lands were granted. Indeed, these doctrines have been mentioned only once in the history of the trust caselaw, and appear never to have been expressly relied upon in interpreting the permissible limits of state trust management.[314]

As sovereign governments, Congress and/or the affected state can nevertheless modify the terms of the trust with or without the permission of the courts[315] – a kind of flexibility that is denied to private trustees.[316] In the long history of the trust doctrine, there are numerous examples where Congress and the various states have modified the terms of the original trust grants.[317]

4. Enforcing the Trust Against the Public Trustee

Another significant distinction between state trusts and other forms of private trusts are associated with the enforcement of the legal duties of the trust manager. [318] As noted in section III (C), even in the broader enforcement context of a common law charitable trust, the enforcement of the trustee's responsibilities is essentially limited to the state attorney general (who may or may not take the appropriate level of interest) and those individuals or entities that can evince a "special interest" in the charitable trust. As such, the enforcement of trust responsibilities against the trustee is normally reliant on the vigilance of those beneficiaries who are in a position to enforce these legal

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[313] SOUDER & FAIRFAX, *supra* note 4, at 163.
[314] *See* Fairfax, et al., supra note 17, at 867-877.
[315] *C.f.* Boice v. Campbell, 248 P. 34, 35 (Ariz. 1926).
[316] Fairfax, et al., *supra* note 17, at 867-877 ("changing the trust appears less complex than one might have predicted. The idea of a compact does not 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 acts. Moreover, trust principles restricting changes to the trust have not 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 mentioned by the courts.").
[317] These changes have embraced everything from sweeping changes to minor amendments to the terms of trust management. For example, as noted in the discussion in Section II, *infra*, in the mid 1800's Congress acted to retroactively authorize the sale of trust lands in states whose Enabling Acts had initially forbidden their sale – an extremely significant modification to say the least. In Arizona, by contrast, Congress once made a minor amendment to the Enabling Act to allow the state to extend the permissible term of grazing leases from five years to ten years. *See Kadish v. Arizona State Land Dept.* 747 P.2d 1183, 1189 (Ariz., 1987).
[318] State trusts are unique in this regard, since U.S. Supreme Court decisions addressing the enforcement of conditions on most other types of federal grants have held that "Congress alone has the power to enforce the conditions" of Congressional grants. *Emigrant Co. v. County of Adams*, 100 U.S. 61, 69 (1879).

requirements. (Because the trust relationship in such cases is created by a private transaction involving only the settlor, trustee, and trust beneficiaries, the only persons in a position to enforce the terms of the trust are the participants themselves; no outside party could have standing to challenge the actions or decisions of the trustee.) As a result, where these beneficiaries of a trust are disinterested or absent – or alternatively, where a beneficiary and a trustee have a mutual interest in avoiding the terms of the trust – there is a significant risk that the terms of a trust will not be honored.

By contrast, where the trustee is a public agency, the number of interested parties that can seek to enforce the trustee's legal responsibilities – and the range of available enforcement tools – can alternatively be significantly expanded or significantly limited in comparison to private trusts. This relates to the fact that the right of a party to sue a public agency is governed by the laws and judicial doctrines that establish the requirements for standing to contest government decisions, as well as principles related to the separation of powers and resulting judicial deference to executive fact-finding, the exercise of discretionary powers, and decisions on matters of policy. Similarly, unlike a normal private or charitable trust, the terms of state trusts are the result of a transaction defined in federal law, constitutional provisions, and state statutes and regulations.[319]

As such, the standards under which interpretations of the trust requirements will be reviewed are governed by judicial doctrines that extend varying degrees of deference to state legislatures and state agencies in their interpretations of federal laws, state constitutional provisions, and state statutes. These laws and doctrines effectively supplement or supplant traditional trust doctrines, such that the trust doctrine's primary role with regard to trust lands is to define a background of fiduciary principles that inform the interpretive framework for the various provisions of federal, state, and constitutional law within which an agency's decisions will be evaluated – if standing is proper and to the extent that the court will not grant deference to the decision.[320]

Principles of judicial standing to contest the decision of a state agency are generally related to whether or not a party has suffered a redressable, legally-cognizable injury (or injury-in-fact). However, special requirements for standing may also apply depending on the type of entit(ies) that are party to the suit. For example, if a school district sues to enforce the trust responsibilities of a state agency in federal court, the district will have to satisfy the special requirements for "political subdivision standing" (a doctrine that regulates the ability of political subdivisions to sue their state creators; although suits based on controlling federal law are allowed, suits under state law or on the basis of individual rights are generally barred).[321]

When state courts are involved, the precise contours of the standing doctrine and the associated requirements to demonstrate standing will vary somewhat from state to state, but they are generally similar to the requirements for a suit brought in federal court (such as a challenge to a state action under a federal trust responsibility) under Article III of the federal Constitution. To show such standing, a plaintiff must allege an "injury-in-fact," a causal connection between the injury and defendant's actions, and that the injury can be redressed by judicial action.[322] An "injury-in-fact" will exist where the plaintiff shows "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[323]

Where a plaintiff relies on a constitutional or statutory "right" as the basis for this legally cognizable interest, courts will generally employ a "zone of interests" test to determine whether or not the plaintiff has a legally protected interest under the constitutional or statutory provision in question.

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[319] *C.f.* Bartels v. Lutjeharms, 464 N.W. 2d 321, 324 (Neb. 1991) (the state's duties as trustee are defined by the state constitution, and a violation of those duties is thus a violation of the constitution itself).
[320] Fairfax, et al., *supra* note 17, at 888. As noted by Fairfax, et al, "[b]ecause the courts give themselves enormous latitude to take hard looks, or not, at administrative discretion, and use a wide range of 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." *Id.*
[321] *C.f.* Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 628 (10th Cir. 1998) (upholding the standing of a school district to sue the State of Colorado, as trustee, since the trust in question was based on federal law).
[322] *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103(1998).
[323] Bennett v. Spear, 520 U.S. 154, 167 (1997).

Under this test, plaintiffs can show standing under a statutory right where they are in the "zone of interests" that were intended to be protected by the statute – in other words, whether they appear to fall in the category of persons that were meant to be protected or regulated by a particular statute or constitutional guaranty.[324]

A party that can show a sufficient "special interest" would clearly meet these requirements in most circumstances.[325] Similarly, as the trustee, the state will always have standing to enforce the terms of the trust.[326] However, a much wider range of interests will also potentially have standing to contest an agency decision, at least to the extent that they could show that they were directly affected by that decision. Because the terms of the trust are a matter of state and federal law, a party with standing is also in a position to challenge a violation of a fiduciary duty on the basis that the decision was illegal – irrespective of whether that party would have had standing in a private context (as a person with a "special interest") to challenge a violation of the trustee's fiduciary duty.

For example, in *Forest Guardians v. Wells*,[327] the Arizona Supreme Court considered a challenge by an environmental group to the rejection of a competitive bid for a grazing lease by the Arizona State Land Department. The group clearly would not have qualified as a party with a "special interest" in the trust; rather, the standing for its challenge was based on the direct harm suffered by the group due to the Land Department's failure to consider its lease application. Nevertheless, the Supreme Court decided the case based on fiduciary principles, finding that because the Department's interpretation of its responsibilities as a trustee with regard to the leasing program represented an interpretation of law, it was subject to de novo review by the Court – the least deferential standard of review. The Court ultimately concluded that the Department's failure to consider the lease application represented a breach of its trust responsibilities.[328] At the opposite end of the spectrum of interests, the Alaska Supreme Court also granted standing to a timber company that sought to bid on a timber contract.[329]

It should be noted that under the "zone of interests" test, this will not always be the case. For example, in *Director of Office of State Lands & Investments v. Merbanco,*[330] the Wyoming Supreme Court denied standing to a corporation that had proposed to buy state trust lands to challenge a state statute permitting the state to exchange lands without a public auction, since the public auction requirement was intended to protect interests of the permanent fund and the beneficiaries, not those who wished to purchase state lands. The court thus denied standing to the corporation as a plaintiff, although it allowed standing to a state educational association, parents of schoolchildren, and school children since they fell within the "zone of interests" protected by the statute.[331] Similarly, in *Brotman v. East Lake Creek Ranch, L.L.P.*,[332] the Colorado Supreme Court denied standing to an adjacent landowner seeking to contest a sale of land, on the grounds that an adjacent landowner was not within the "zone of interests" sought to be protected under the constitutional and statutory provisions governing land sales.[333]

As the decision in *Forest Guardians v. Wells* suggests, courts generally extend little or no deference to state agencies in their interpretations of law.[334] As a result, parties who do not qualify as

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[324] 2 AM. JUR. 2D *Administrative Law* §430.
[325] *C.f.* Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 631 (10th Cir. 1998) (Court found that as beneficiaries of the state trust, plaintiff school districts and school children necessarily have a "legally cognizable interest in the undivided loyalty of the school lands trustees").
[326] *C.f.* Hill v. Thompson, 564 So.2d 1 (Miss. 1989).
[327] 201 Ariz. 255 (2001).
[328] *Id*. at 262.
[329] *C.f.* Aloha Lumber Corp. v. University of Alaska, 994 P.2d 991, 999 (Alaska 1999) (granting standing to a lumber company, as a citizen-taxpayer, to sue to enforce the terms of the state trust governing university lands and challenge an administrative decision, as the company was (1) one of the parties most likely to actually enforce the trust by virtue of its position, (2) the issues raised in the suit were of substantial statewide importance, (3) the company had a sufficient economic interest in enforcement that it would not be a "sham" plaintiff).
[330] 70 P.3d 241, (Wyo. 2003).
[331] *Id.* at 248-249.
[332] 31 P.3d 886 (Colo. 2001).
[333] *Id.* at 890-891.
[334] 2 AM. JUR. 2D *Administrative Law* § 489.

having a "special interest" may nevertheless be able to obtain very strict review of an agency's interpretation of its responsibilities as a trustee. In other situations, however, the state may be entitled to a higher level of deference in its decision-making than would normally be afforded to a private trustee. For example, when the state acts to guide trust decision-making through its state legislature – even where the legislature is interpreting and applying constitutional provisions that govern the behavior of trust managers – the legislature is entitled to a significant level of deference from the courts. Under the rules governing statutory interpretation, courts generally extend a presumption of constitutionality to state statutes, upholding legislative actions against constitutional challenge if there is "any reasonable interpretation" of the statute that would be consistent with the state constitution,[335] or requiring that a plaintiff engaged in a facial challenge to a statute prove that it is unconstitutional beyond a reasonable doubt.[336]

For example, in *Skyline Sportsmen's Association v. Board of Land Commissioners*,[337] the Montana Supreme Court considered the validity of Montana statutes that acted to prohibit a proposed land exchange that would have resulted in significant benefits to the trust. The Court concluded that the Board of Land Commissioners' discretion as a trustee was properly constrained by the laws passed by the legislature that regulated the conduct of land exchanges. The Court noted that it was bound by doctrines governing judicial interpretation to "presume that the Montana Legislature understood the effect of its action in passing [the statute] ... which may constrict the Board's discretion in managing state trust land... '[t]he legislature is presumed to act, so far as mere questions of policy are concerned, with full knowledge of the facts upon which its legislation is based, and its conclusions on matters of policy are beyond judicial consideration'."[338] Of course, this does not mean that a challenge to a legislative interpretation of a constitutional trust requirement is doomed to failure; there are numerous examples where courts have found that legislatures have erred in their interpretations of constitutional requirements.[339]

Similarly, although state administrative agencies are generally not entitled to deference in their interpretations of law, they are entitled to significant levels of deference when it comes to conclusions of fact.[340] As a state agency, as long as the agency complies with the letter of the law, the agency's actual decisions are normally entitled to significant deference and can only be overturned if the decisions are "arbitrary" or "capricious," or are unsupported by substantial evidence in the record.[341] Where a discretionary decision of an agency is implicated (such as a decision with regard to whether or not to grant a lease, whether or not to sell land, and so forth) courts will apply a similar "abuse of discretion" standard.[342] As noted by the Supreme Court of Montana, an abuse of discretion involves:

> "not merely an error in judgment, but perversity of will, prejudice, passion, or moral delinquency [citations omitted], but it does not necessarily imply wrong-doing or a

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[335] *See* Communications Workers of America v. Beck, 487 U.S. 735 (1988). *See also* Branson School District RE-82 v. Romer, 958 F.Supp. 1501 (D. Colo. 1997).
[336] *See* National R.R. Passenger Corp. v. Atchison, Topeka, and Santa Fe Ry. Co., 470 U.S. 451, 472 (1985). *See also* Villanueva v. Carere, 873 F.Supp. 434, 447 (D. Colo. 1994), *aff'd,* 85 F.3d 481 (10th Cir. 1996).
[337] 951 P.2d 29 (Mont.1997).
[338] *Id.* at 32-33, *quoting* Rider v. Cooney 23 P.2d 261, 264 (Mont. 1933).
[339] *C.f.* Fain Land & Cattle Co. v. Hassell, 790 P.2d 242 (Ariz. 1990) (court held that statutory scheme interpreting constitution to allow land exchanges without public auction was invalid; Arizona Constitution intended that exchanges constituted "sales," and thus must be conducted at public auction); State v. Cooley, 56 N.W.2d 129 (Neb. 1952) (legislature's statutes defining the terms under which school lands are leased are subject to and limited by the obligation to preserve the trust); State ex rel. Ebke v. Board of Educ. Lands and Funds, 47 N.W.2d 520 (Neb. 1951) (legislative act that fixed the value of school lands without regard to fair market value violated the duties of the state as trustee by conferring benefits on third parties to the detriment of beneficiaries).
[340] Forest Guardians v. Wells, 34 P.3d 364, 367-368 (Ariz. 2001) (state land commissioner has considerable discretion with regard to trust administration decisions that involve questions of fact).
[341] 2 AM. JUR. 2D *Administrative Law* § 488. This question is well-settled with regard to federal agency actions, but state courts are also in general agreement on this point. *See id.* at § 489. Where questions of law and fact are mixed, courts will generally interpret the law independently of the agency's determination, but then apply this to the facts as found by the agency. *See id.* at § 496.
[342] *C.f.* Foster v. Anable, 19 P.3d 630, 633 (Ariz. App. Div. 1 2001) (Land Commissioner had broad discretion in dispositions of trust land, and would not be overturned absent abuse of discretion or illegal action). *See also* Campana v. Arizona State Lands Dept, 860 P.2d 1341 (Ariz. App. Div 1 1993); Thompson v. Conwell, 363 P.2d 927 (Wyo. 1961).

> breach of trust, or import bad faith [citations omitted]; it conveys, rather, the idea of acting beyond the limit of discretion [citations omitted]; the disregard of the evidence adduced [citation omitted]; the basing a decision upon incompetent or insufficient evidence [citation omitted]; an exercise of discretion to an end or purpose not justified by, and clearly against, reason and evidence [citations omitted]; a clear error in law in the circumstances [citations omitted.]"[343]

This standard thus provides significant deference to the decisions of state agencies.

On the other hand, courts may apply different standards for review of trust decision-making depending on who is challenging the decision. Thus, although the court might review a specific factual decision not to renew a lease under a relatively deferential standard where this decision was challenged by a lessee, it might apply a much less deferential standard under trust principles (such as the "prudent investor" rule) to the extent the decision is challenged by a beneficiary. As a result the judicial standard for reviewing trust managers' decisions can differ depending on whether the person challenging the decision qualifies as a beneficiary of the trust.[344]

To an important extent, the availability of third-party standing will also be driven by the kind of agency decision that is being challenged. Standing to contest individual decisions – such as the leasing decision challenged in *Forest Guardians v. Wells* – will generally lie in the parties affected by those specific decisions, and these challenges can embrace enforcement of trust principles insofar as the plaintiff can demonstrate that an action taken by the agency was contrary to the agency's trust responsibilities. However, standing to challenge a broader set of agency decisions, a pattern or policy of decision-making, or a strategic framework for trust asset management may only lie in an entity that can demonstrate the requisite level of "special interest" in the trust to show harm from that decision.

For example, a previous case filed in New Mexico came to a very different result when the same environmental group attempted to challenge the state's system of extending preference rights to lessees for the renewal of grazing lessees on trust lands. In *Forest Guardians v. Powell*,[345] the New Mexico Court of Appeals denied standing to a group of plaintiffs composed of schoolchildren, parents, and environmental groups. Noting that New Mexico's trust was properly viewed as a charitable trust, the court held that only the attorney general or a person with a demonstrable "special interest" could enforce its terms. Because New Mexico's trust revenues are disbursed according to the state's complex budgeting process, no specific public school could be said to receive income directly from the trust; as such, none of the schoolchildren (or their parents) could demonstrate that they had "a special and definite interest in the trust or are entitled to receive a benefit."[346] Similarly, the Court found that the conservation groups were not within the "zone of interests" intended to be protected by the Enabling Act.[347] The Court also found that none of the plaintiffs had alleged injuries sufficient to invoke the "great public importance doctrine."[348] As a result, while the court noted that the environmental groups might have standing to pursue an administrative appeal of a specific leasing decision, it denied any of the plaintiffs standing to challenge the merits of the leasing program as a whole.

In other cases, however, even a position as an ostensible beneficiary has not been enough. In *ASARCO, Inc. v. Kadish,*[349] the United States Supreme Court held that the Arizona Education Association, a non-profit association representing state public school teachers, lacked standing to challenge the validity of a statute regulating mineral leases on school lands. The Court noted that because state trust revenues were bundled with other state support for schools, even if a challenge

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[343] Jeppeson v. State, Dept. of State Lands, 667 P.2d 428 (Mont. 1983), *quoting* Taylor v. County Comm'rs 270 P.2d 994, 999 (Mont. 1954), *quoting* Grant v. Michaels, 23 P.2d 266, 269 (Mont. 1933).
[344] Kenneth B. Davis, *Judicial Review of Fiduciary Decisionmaking - Some Theoretical Perspectives*, 80 N.W.U. L. REV. 1, 168 (1985).
[345] Forest Guardians v. Powell, 24 P.3d 803, 808 (N.M. Ct. App. 2001).
[346] *Id.* at 808.
[347] *Id.* at 810-811.
[348] *Id.* at 814-815.
[349] 490 U.S. 605 (1989).

was successful and resulted in more money being dedicated to education, the state might thereafter reduce its supplement from the general fund such that the money available to schools could be unchanged.[350]

The judicial doctrines governing standing helps to explain why state and federal courts have been somewhat inconsistent in their recognition of "special interest" standing in state trust "beneficiaries." In various cases, courts have recognized standing in "beneficiaries" as varied as school districts and schoolchildren;[351] state educational organizations;[352] teachers and parents of school children;[353] and county governments;[354] even as other courts have denied standing to these same types of individuals and entities under seemingly similar circumstances.[355]

It is notable that under the logic of the *Forest Guardians v. Powell* decision, "special interest" standing is related to the distribution scheme for trust benefits – and changes in the distribution strategies for trust revenues may create standing in individuals or entities who would not otherwise qualify to enforce the terms of the trust. [356] For example, a recent change in Arizona's school funding system that has dedicated trust revenues to specific purposes such as teachers' salaries, classroom size reduction, and so forth[357] may have the result of allowing teachers and students to challenge trust management decisions to the extent that they can now show a direct benefit or harm from changes in trust management activities – a change that might have resulted in a different decision in *ASARCO*.

Regardless of the various doctrines governing judicial enforcement, the waters of state trust enforcement are greatly muddied by the fact that many individuals and entities that perceive themselves either as trust "beneficiaries" (such as school boards, school administrators, teachers' unions, and other school advocates) or trust "stakeholders" (such as lessees, development interests, and conservationists), are to a greater or lesser extent represented in the legislative and administrative processes that govern trust management decisions. As a result, trust managers may (or may not) be answerable to trust beneficiaries or various user groups in a manner that would be inappropriate or at least unusual in the context of a private trust. In the public context, there will usually not be a clean separation between the roles of the state as a trustee, as a public agency, and as a lawmaking and rulemaking body. As noted above, this has consequences for the manner in which trust lands may be regulated compared to similarly-situated private lands, since the state can adopt standards and procedures for the management of trust lands that do not apply in private contexts and may disadvantage the trust. However, it also has consequence for the manner in which the terms of the trust can be enforced, since much of the actual "enforcement" (or lack thereof) may occur extra-judicially, and political tradeoffs, incentives, and realities may strongly influence the behavior of the public agencies and legislative bodies that are responsible for trust management – regardless of their theoretical duties as "trustees."

More than one commentator has suggested that, in light of the political and legal realities surrounding trust enforcement, a strong role for beneficiaries in the enforcement of trust doctrine may lead to better trust management practices over the long term. For example, litigation brought by beneficiaries in Nebraska and Oklahoma (in *Ebke* and *Oklahoma Education Association*) led to the implementation of what is generally recognized as best practices of a competitive leasing system for grazing and agricultural lands. Similarly, as one commentator has pointed out, the Skamania litigation

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[350] *Id.* at 614-15.
[351] Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 631 (10th Cir. 1998).
[352] Oklahoma Educ. Ass'n, Inc. v. Nigh, 642 P.2d 230 (Okla.1982).
[353] Bartells v. Lutjeharms, 464 N.W.2d 321, 322 (Neb. 1991).
[354] County of Skamania v. State, 685 P.2d 576, 583 (Wash. 1984).
[355] *See* Essling v. Brubaker, 55 F.R.D. 360 (D. Minn. 1971) (denying standing to schoolchildren on the basis that only schools, not schoolchildren, were properly beneficiaries of the trust); *see also* Selkirk-Priest Basin Association, Inc. v. State, 899 P.2d 949 (Idaho 1995) (denying standing to school children, parents, and environmental groups because they were not beneficiaries of the trust).
[356] For example, in *Branson School Dist. v. Romer*, 958 F.Supp. 1501 (D. Colo 1997), the district court found that the school district and school children plaintiffs had shown a concrete injury sufficient to provide standing due to the fact that revenues from school lands were not commingled in the general fund.
[357] *See discussion* in section V(B)(6), *infra*.

in Washington set the stage for Washington's current sustainable timber management program, which is generally thought to have made better management choices than many public forest programs.[358]

Over the past few years, there have been increasing levels of attention paid by interest groups that are traditionally thought of as trust "beneficiaries" to the management of state trust lands and trust land revenues. One organization, the Children's Land Alliance Supporting Schools (CLASS),[359] has been extremely active in promoting the interests of trust beneficiaries with regard to trust management. After only a few years, CLASS has made significant headway in establishing relationships with trust managers, going so far as to schedule their annual conference to overlap with the summer conference of the Western States Land Commissioner's Association (the state trust land managers' professional association).

5. Beyond Revenue Maximization: the Implications of Perpetual Trusts

The differences in state trust doctrine – both within and among states and between state trusts and common law trusts – may have particularly significant implications for the interpretation of the common requirement that trust lands be managed for the exclusive benefit of the trust beneficiaries. As one commentator has noted, some trust managers seem to have interpreted this obligation as a requirement to pursue the highest monetary returns possible for trust beneficiaries, regardless of other considerations.[360]

Modern trust doctrine does not necessarily bear out this interpretation, embracing a much more flexible theory of "portfolio management" that incorporates concepts of balanced risk and return and management for long-term sustainability. This modern doctrine is much more in line with the standards applied for asset management in the private sector; maximum financial return "is barely tolerated as the controlling notion, and is rarely practiced, even on lands privately held by corporations."[361] As such, some trust managers may be proceeding under a set of assumed management restrictions that are actually far narrower than those that are commonly applied in the private trust sector.

These restrictions may be particularly inappropriate in the context of a perpetual trust, where the obligation of the trustee must run not just to current beneficiaries, but to all future generations as well. As the district court noted in *Branson School District RE-82 v. Romer*,[362] "as this trust was clearly intended to benefit the public schools in perpetuity, Colorado, as trustee, is under no obligation to maximize the benefit of the trust to the current public schools… long-range planning is prudent, and so long as decisions are made with the sole purpose of benefiting the common schools both now and for generations to come, [no trust violation occurs]."[363] Although trust managers may well owe an undivided duty of loyalty to manage trust assets for the benefit of public schools, absent an express direction in an enabling act provision or state constitution, this duty will not necessarily be to maximize revenues.

Regardless, even if the requirement to achieve "maximum financial return" were a proper element of the modern trust mandate, the perpetual nature of state trusts also sets them apart from private trusts. Unlike most private trusts, state trusts are intended to endure essentially in perpetuity. By necessity, this requires trust managers to look beyond revenue maximization, and – at least in theory – obligates trust managers to embrace notions of intergenerational equity by investing portfolios in sustainable management strategies or preservation-oriented leasing programs that will maintain a healthy trust corpus for future generations.[364]

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[358] *See* Jon A. Souder & Sally K. Fairfax, *Arbitrary Adminstrators, Capricious Bureaucrats and Prudent Trustees: Does it Matter in the Review of Timber Salvage Sales,* Pub. Land and Res. L. Rev. Vol. 18, 165-212 (1997).
[359] *See* CLASS's website at http://www.childrenslandalliance.com.
[360] *See* Fairfax et al., *supra* note 17, at 799.
[361] *Id.*
[362] 958 F.Supp 1501 (D. Colo 1997).
[363] *Id.* at 1517.
[364] *See* discussion in O'Day, *supra* note 5, at 198-199.

In addition, recent court decisions have indicated that although trust managers must manage trust resources to meet the financial objectives of the trust, the perpetual nature of the state trusts and the larger public significance of these lands requires trust managers to consider a variety of non-monetary values that are associated with trust lands. For example, in *National Parks and Conservation Association v. Board of State Lands*,[365] the Utah Supreme Court found that despite the duty of the state to maximize monetary returns, the perpetual nature of the trust requires the state, as trustee, to consider and preserve a much broader range of "values" associated with its trust lands.

> Located on some state school lands are unique scenic, archeological, and paleontological sites. Such treasures are legacies of past millennia whose true value could never be expressed in monetary terms. The question is, can such treasures be preserved without violating the terms of the school trust? We think so... Although the primary objective of the school land trust is to maximize the economic value of school trust lands, that does not mean that school lands should be administered to maximize economic return in the short run. The beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run... Certainly it would be as much a violation of the state's fiduciary obligations to immediately sell all state school lands as it would be to use the proceeds from the lands for a nontrust purpose.
>
> The Division should recognize that some school lands have unique scenic, paleontological, and archeological values that would have little economic value on the open market. In some cases, it would be unconscionable not to preserve and protect those values. It may be possible for the Division to protect and preserve those values without diminishing the economic value of the land. For example, with appropriate restrictions it may be possible for livestock grazing and perhaps even mineral extraction to occur on a school section without damaging archaeological and paleontological sites.[366]

The court recognized that in some cases, financial exploitation of trust lands might be incompatible with the preservation of non-monetary values. In this case, the court suggested the state may have to consider exchanging trust lands or purchasing these lands from the trust "so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized."[367] Although to a certain extent the court seems to blur the distinction between financial or monetary values and economic values, the message is clear enough: managers need to consider how they can obtain revenues for trust beneficiaries without diminishing the non-monetary values on those lands.

The flexibility in the trust mandate that can exist as a result of the increased latitude that the states are afforded as trustees, as well as the differences in enabling act requirements from state to state, is perhaps most clearly demonstrated in a recent Tenth Circuit decision, *Branson School District v. Romer*,[368] that considered the validity of a recent amendment to the Colorado Constitution under the Colorado Enabling Act. Amendment Sixteen, which was approved by the voters in 1996, significantly altered the terms of Colorado's trust mandate, declaring that "the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations." The school district that brought the challenge to the amendment argued that this revised mandate conflicted with the state's fiduciary duty to maximize revenues for the beneficiaries. After reviewing the history and substance of the Colorado Enabling Act, the Tenth Circuit found that although the Act had created a binding trust, the trust responsibility did not require the state to manage lands for the maximization of revenues. As such, the court found that the revised mandate was not in conflict with the state's duties as a trustee:

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[365] 869 P.2d 909 (Utah 1993).
[366] *Id.* at 920-21.
[367] *Id*.
[368] 161 F.3d 619 (10th Cir. 1998).

> we believe that the "sound stewardship" principle merely announces a new management approach for the land trust. The additional requirement to consider beauty, nature, open space, and wildlife habitat as part of the whole panoply of land management considerations simply indicates a change in the state's chosen mechanism for achieving its continuing obligation to manage the school lands for the support of the common schools. A trustee is expected to use his or her skill and expertise in managing a trust, and it is certainly fairly possible for a trustee to conclude that protecting and enhancing the aesthetic value of a property will increase its long-term economic potential and productivity. The trust obligation, after all, is unlimited in time and a long-range vision of how best to preserve the value and productivity of the trust assets may very well include attention to preserving the beauty and natural values of the property.[369]

As a result, the court upheld the constitutionality of the amendment.

Under similar logic, the court also upheld a provision in the amendment that created a "Stewardship Trust," in which between two hundred ninety-five thousand and three hundred thousand acres of trust land must be managed to permit only uses that "will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof."[370] Once placed in the trust, lands can only be removed from protection by a four to one vote of the land commission, and if removed, are required to be replaced by an equal amount of land. The court noted that this amounts to essentially "permanent" protection of these lands for conservation purposes. Although the court considered this provision to be the "most troubling" of all of the provisions in Amendment Sixteen, the court ultimately upheld the provision, reasoning that the Board could still exchange lands out of stewardship status and could continue to receive revenues from the lands in the interim by leasing them for compatible uses; assuming that Colorado continued to hold trust land outside of the land in the Stewardship Trust, the court found that it could avoid a conflict of interest between the stewardship principle and the interests of the beneficiaries. Applying general principles of statutory construction, the court held that the provision did not violate the Enabling Act, noting that "because it is *possible* to construe the provisions of the Stewardship Trust as not imposing a conflict with the state's fiduciary duties, we must."[371]

C. Towards a More Flexible View of Trust Management

In many parts of the West, trust managers are also under increasing pressure to account for the larger social, economic, and environmental costs and benefits associated with management decisions within the framework of traditional trust doctrines and priorities. The degree to which trust managers recognize this flexibility has important implications for their ability to adapt to changing economic conditions, and political and social priorities that have brought less traditional uses – such as conservation, recreation, and residential and commercial development – into the realm of trust management.

Many interest groups have recently turned to the trust doctrine in an effort to shape trust decision-making so that it better aligns with these emerging priorities. As one commentator has noted, "…trust principles are enjoying a moment in the sun as a reasonable organizational template somewhere between the inefficiencies of government bureaucracy and the rapaciousness of global capitalism."[372] For example, in at least five states (Arizona, Idaho, New Mexico, Oregon, and Montana) environmental groups have attempted to use trustees' revenue maximization obligations to force trust managers to eliminate apparent "subsidies" in the form of low-cost, generally uncompetitive leases by bidding competitively for these leases and forcing trust managers to lease lands for conservation purposes instead of grazing. These efforts have led to a great deal of litigation – and legislation to

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[369] *Id.* at 638.
[370] COLO. CONST. (Amendment 16), § 10(1)(b)(1).
[371] [emphasis added]. Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 639-640 (10th Cir. 1998).
[372] Fairfax & Issod, supra note 76, at 341.

undo the threats caused by litigation – with mixed results for both participants and the integrity of trust principles.[373]

As a result of these and other conflicts over the management of state trust lands, it is becoming increasingly clear that in some cases, traditional trust management techniques may be placing undue burdens on efforts to protect natural resources that are vital to local and state economies, and that traditional views of trust management obligations may be impeding the adoption of more flexible land management techniques.[374] As the economies of Western states continue to diversify, the flexibility that may be inherent in the trust doctrine may enable trust managers to take advantage of new opportunities – and to meet new responsibilities – within the limits of their fiduciary responsibilities.

In this regard, even the more conservative state constitutions are not as hidebound as conventional wisdom might suggest. Even in states with mandates for revenue maximization and obtaining "full market value," these notions are porous, allowing flexibility in the methods of revenue generation to accommodate concepts of sustainability and the consideration of ancillary values that may be associated with state lands. In addition, long-term uncertainties with regard to the factors that may affect land productivity (and thus returns to trust assets) may require consideration of various non-market values, including environmental effects, political realities, and social considerations.[375] In other cases, the management of lands for multiple benefits may produce higher value for trust beneficiaries (such as the improved management of lands leased for grazing to preserve fish, game, and recreational values that can be marketed to other users).

Policy decisions that guide trust land managers have been, and likely will continue to be, a balancing of financial, environmental, and social concerns.[376] Although in some cases there may be unavoidable tensions between obtaining financial returns for the beneficiary and achieving general public benefits – including those that do not produce revenues – as state agencies and trustees, trust managers have a considerable amount of discretion in choosing how and on what terms to maximize revenues, and satisfying general public needs and benefits need not be incompatible with trust responsibilities.[377]

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[373] Id. at 345-346. For example, Fairfax & Issod provide a detailed discussion of the grazing lease litigation in *Idaho Watersheds Project v. State Board of Land Commissioners*, 918 P.2d 1206 (Idaho 1996) and its progeny in both lawsuits and legislation. After an environmental group successfully bid for a grazing lease application, the State Board of Land Commissioners (SBLC) awarded the lease to a rancher anyway – despite the fact that he had not bid for the lease at all. After the environmental group successfully appealed the decision, a second auction was held in which the environmental group outbid the rancher by a factor of 200. Nevertheless, the SBLC awarded the lease to the rancher. A similar result was reached in a case involving another environmental group, with SBLC going out of its way to lease the land to a rancher, extending deadlines, encouraging the rancher to apply for the lease, and then combining the lease with another parcel shortly thereafter to prevent the environmental group from bidding. After both environmental groups filed suit to contest SBLC's decisions, the legislature then revised the statutes governing grazing lease applications to stack the deck in favor of livestock lessees, and then attempted to amend the state constitution to eliminate the auction requirement for grazing leases. After a series of bloody battles in the courts, the environmental groups emerged victorious, but the issue is far from settled. *See* Fairfax & Issod at 360-369.

[374] *See generally* O'Day, note 5.

[375] *Id.*

[376] Jay O'Laughlin & Philip S. Cook, *Endowment Reform and Idaho's State Lands: Evaluating Financial Performance of Forest and Rangeland Assets*, UNIVERSITY OF IDAHO, 4 (2001).

[377] In Idaho, for example, trust managers have made policy decisions to protect important viewsheds from timber harvests, and have let more than 1.8 million acres of grazing leases at rates below fair market value. *Id.* at 92.

State Trust Lands in the Western United States

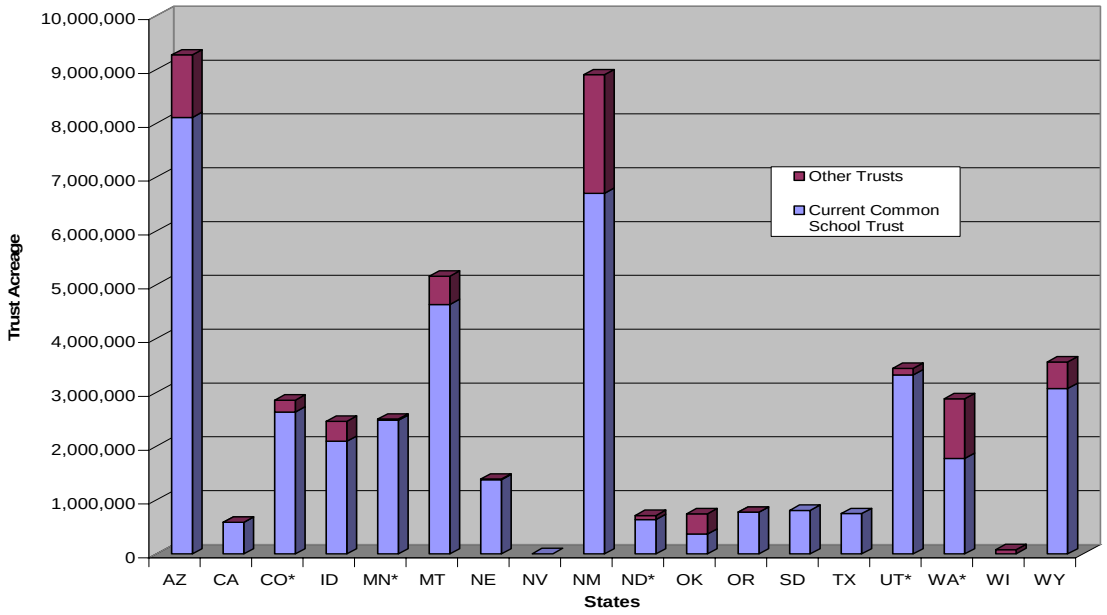
V. Trust Lands Management Across the West

Twenty-three states continue to hold some quantity of their original state trust land grants: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Louisiana, Minnesota, Mississippi, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. Several of these states have retained only a tiny fraction of the original grant lands; Nevada, for example, retains only around 3,000 acres of its original 2.7 million acre grant. By contrast, Alaska, Arizona, Montana, and Wyoming have each retained between 85 and 90 percent of their original state trust land grants.

A. State-by-State Comparisons

In the lower forty-eight states, Arizona and New Mexico have by far the largest holdings of state trust lands, with approximately 9.3 million and 9 million acres, respectively; Montana has the third-largest holdings with 5.1 million acres. These three states together hold approximately half of the trust lands in the lower forty-eight states. In fact, nine of the eleven Western states – Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming – hold nearly 85 percent, or almost 40 million acres, of the remaining trust lands in the lower forty-eight states. Figure V(A)-1 shows the relative holdings of trust lands between various states that continue to own trust lands.

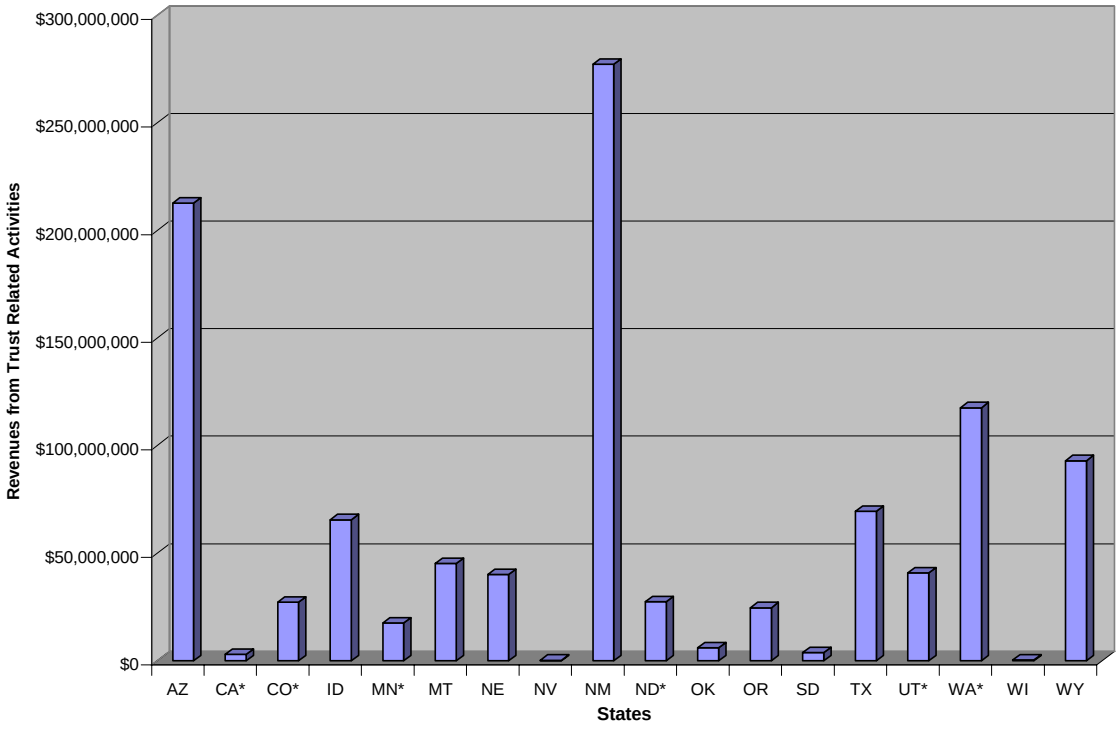
Figure V(A)-1: State Trust Land (Surface Acreage) Holdings, 2004



* All data were derived from the applicable state's 2004 annual report, except as follows: Data for Colorado were derived from Souder and Fairfax, *supra* note 99. Minnesota and North Dakota land holdings were last reported in their respective 2003 Biennial Reports. Utah's land holdings were last reported in SITLA's 2003 Financial Report. Washington's current holdings are derived from its Draft 2003 Annual Report, which was not yet completed at the time of publication.

Today, state trust lands are actively managed for a diverse range of uses, including timbering, grazing, mining, agriculture, oil and gas, residential and commercial developments, conservation, and recreational uses such as hiking, fishing and hunting. Figure V(A)-2 shows the revenues derived from trust land management activities in fiscal year 2003-2004 (unless otherwise provided).

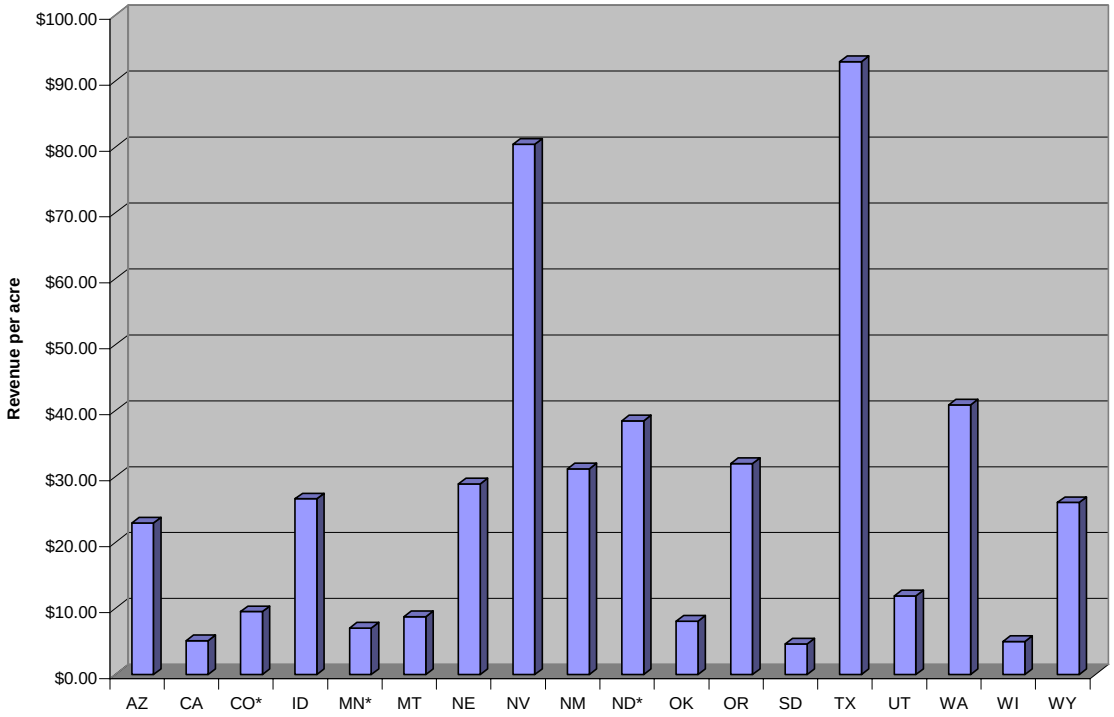
Figure V(A)-2: Gross Revenues from State Trust Lands, 2003-2004



*All data were derived from the applicable state's 2004 annual report, except as follows: California's data are an estimate based on communications with agency staff. Colorado's data are derived from the 2003 Annual Report. Minnesota and North Dakota's data are derived from their respective 2003 Biennial Reports. Utah's data are derived from SITLA's 2003 Financial Report. Washington's data are taken from the Draft 2003 Annual Report, which had not been completed at the time of publication.

As Figure V(A)-2 above suggests, the largest holdings of trust land do not necessarily correlate with the largest revenues. Although states generally do not report revenues on a per-acre basis, Figure V(A)-3 below provides a rough estimate of per-acre revenues.

Figure V(A)-3: Estimated Revenue per Acre from State Trust Lands



* All data were derived from the applicable state's 2004 annual report, except as follows: Colorado's data are derived from the 2003 Annual Report. Minnesota and North Dakota's data are derived from their respective 2003 Biennial Reports. Estimates are derived by dividing gross revenues by total land holdings.

Notably, two of the states with the least land holdings – Nevada and Texas – return the highest revenue per acre of any state as a result of the fact that rich mineral, oil, and gas reserves are located on those lands. Most states that are generating significant revenue from trust lands return the majority of this revenue from a relatively small percentage of their overall portfolio. These include lands that contain high-value timber (Idaho, Montana, Oregon, and Washington), oil and gas reserves (Montana, New Mexico, Texas, Utah, and Wyoming), coal and other mineral deposits (Colorado, Montana, New Mexico, and Utah), or lands with significant potential for commercial and residential development (Arizona and Utah).

For example, Arizona generates nearly 95 percent of its annual revenue from the sale and lease of land for commercial and residential development, although virtually all of this revenue comes from a tiny fraction of its overall land portfolio – in fiscal year 2003 - 2004, Arizona sold only 1,900 acres of its 9.3 million acre portfolio. By contrast, Arizona's next door neighbor, New Mexico, derived just over 95 percent of its revenue from oil and gas, generating practically nothing from commercial and residential uses.

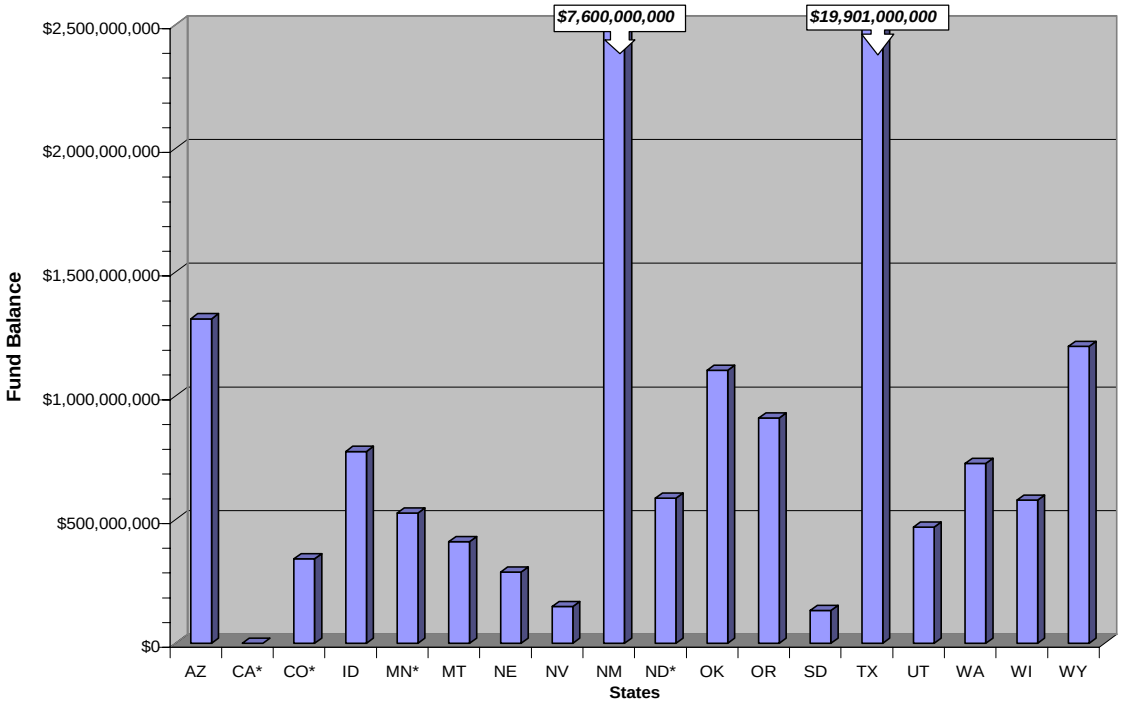
Management in many states is also challenged by land distribution patterns. Although a few states hold large quantities of consolidated lands due to *in lieu* selection programs (such as Arizona, New Mexico, Idaho, and Washington), the vast majority of state trust lands consist of scattered, checkerboard sections distributed across the landscape of the state (such as Wyoming, Montana, Utah, and Colorado). Because of the management challenges associated with these scattered land holdings and the limited utility of many of these parcels, in most states the vast majority of trust lands are used primarily for grazing or agricultural leasing, and do not return significant revenues.

Virtually all of the states that continue to hold trust lands utilize some sort of "permanent fund" mechanism to retain the proceeds from permanent disposals of trust lands or their non-

renewable natural resources (such as oil, gas, and minerals) and thus protect the "corpus" of their trusts. These funds are generally invested in some combination of "safe," interest-bearing securities, although a few states allow a percentage of their funds to be invested in much more lucrative (and risky) equity-based securities (such as corporate stocks). In some states, a portion of these funds are also used to guarantee school bonds, loans, and other beneficiary-related public debts.

Some of these fund balances are now in the billions of dollars. Texas and New Mexico, which each earn hundreds of millions of dollars annually from oil and gas royalties, have the largest permanent funds of any Western state – New Mexico's fund is now worth more than $7.6 billion, while Texas's fund totals over $20 billion. Of the non-oil and gas producing states, Arizona has the largest permanent fund, which currently totals over $1.3 billion, and is rising quickly due to recent, high-value land sales transactions.

Figure V(A)-4: Permanent Fund Balances, 2004

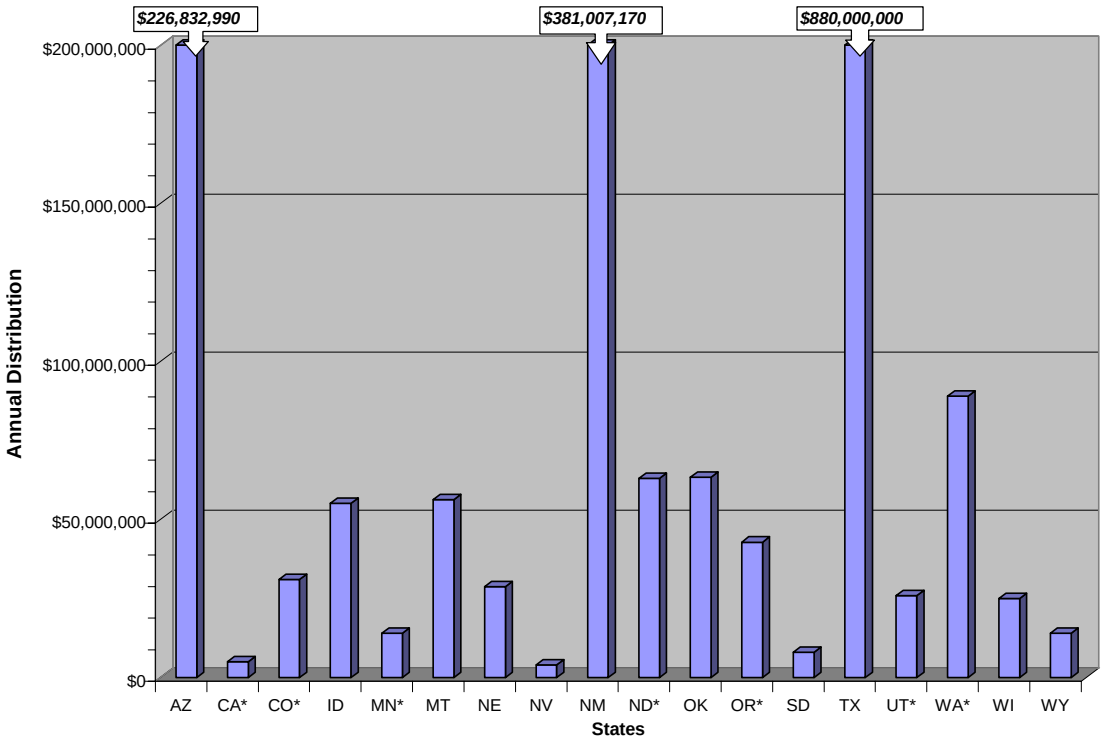


* All data were derived from the applicable state's 2004 annual report, except as follows: California's permanent fund data is based on an estimate derived from conversations with agency staff. Colorado last reported permanent fund holdings in its 2003 Annual Report, while Minnesota and North Dakota reported permanent fund holdings in their respective 2003 Biennial Reports.

The interest derived from these funds is generally combined with the "expendable revenues" generated by trust land administration (revenues derived from leasing, permitting, and other "renewable" activities on trust lands) for distribution to the trust beneficiaries. Although in many states – particularly those with minimal land holdings – these distributions do not represent a particularly significant portion of institutional budgets, in a few states they reach into the hundreds of millions of dollars annually.

Figure V(A)-5 shows the total distributions to beneficiaries for fiscal year 2004 (unless otherwise provided).

Figure V(A)-5: Annual Distributions to Beneficiaries



* All data were derived from the applicable 2004 annual reports, except as follows: California's data are an estimate based on conversations with agency staff. Colorado's data are derived from its 2003 Annual Report, while Minnesota, North Dakota, and Oregon's data are taken from their 2003 Biennial Reports. Utah's data is derived from SITLA's 2003 Financial Report. Washington data is taken from its Draft 2003 Annual Report, which was not yet completed at the time of publication.

It is worth noting in many states, these revenues are not significantly contributing to overall funding for public education (the largest beneficiary of state trust lands in every state). Table V(A) (following page) presents the total trust distributions to *all* trust beneficiaries in each state in comparison to those states' reported K-12 school budgets. Because obtaining detailed information from many states to break out trust contributions to school funding versus other beneficiaries is difficult, this chart tends to over-report trust contributions to public education (since the distribution figures include revenues distributed to beneficiaries other than the common schools). The figure nevertheless provides a rough sense of how significant (or insignificant) these revenues may be to common school budgets in each state.

Table V(A): Distributions (all Beneficiaries) vs. Common School Budgets

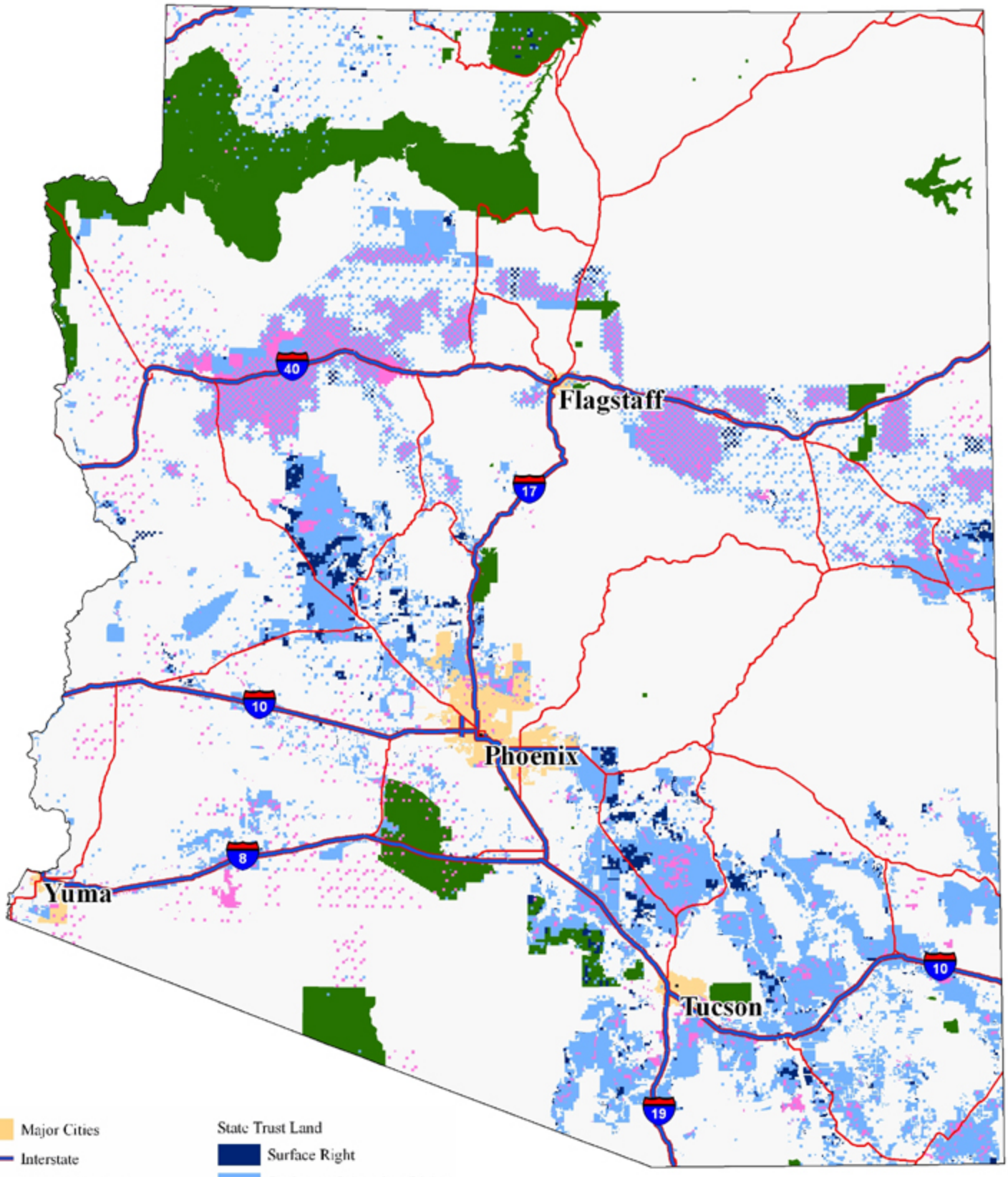
	Annual Distribution to Trust Beneficiaries (Approximate)	Annual K-12 School budget**	Percentage of distributed trust dollars to overall school budget
AZ	$226,382,990	$6,210,287,000	3.65%
CA*	$5,000,000	$57,409,629,000	0.01%
CO*	$31,000,000	$6,644,305,000	0.47%
ID	$55,100,000	$1,726,941,000	3.19%
MN*	$14,000,000	$8,662,366,000	0.16%
MT	$56,262,861	$1,208,058,000	4.66%
NE	$28,730,430	$2,594,892,000	1.11%
NV	$3,937,227	$3,008,639,000	0.13%
NM	$381,007,170	$2,658,140,000	14.33%
ND*	$62,991,376	$839,780,000	7.50%
OK	$63,299,796	$4,371,189,000	1.45%
OR*	$42,790,208	$4,960,253,000	0.86%
SD	$7,909,091	$982,450,000	0.81%
TX	$880,000,000	$37,207,366,000	2.37%
UT*	$25,829,389	$2,957,874,000	0.87%
WA*	$89,000,000	$8,778,224,000	1.01%
WI	$25,000,000	$9,039,211,000	0.28%
WY	$14,010,146	$910,319,000	1.54%

* Beneficiary distribution figures were derived from the applicable 2004 annual reports, except as follows: California's data are an estimate based on conversations with agency staff. Colorado's data are derived from its 2003 Annual Report, while Minnesota, North Dakota, and Oregon's data are taken from their 2003 Biennial Reports. Utah's data is derived from SITLA's 2003 Financial Report. Washington data is taken from its Draft 2003 Annual Report, which was not yet completed at the time of publication.
** Data on annual K-12 school budgets are derived from the *Annual Survey of Local Government Finances 2002-2003, Summary of Public School System Finances for Elementary-Secondary Education by State*, U.S. CENSUS BUREAU (2005), *available at:* http://www.census.gov.

As noted above, nine of the eleven Western states – Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Washington, and Wyoming – hold approximately 85 percent of the remaining trust lands in the lower forty-eight states. For purposes of this report, these states have been selected to provide the focus for a comprehensive report on trust land management frameworks in the Western United States. Although these states are all located in the West, they provide a reasonably representative cross section of trust characteristics, land distribution patterns, policy issues, management strategies, and management challenges that have broader relevance to trust managers elsewhere in the United States.

The sections that follow provide, for each of these states: (1) a description of the land grants received by each state; (2) a description of the nature of the state trust and associated legal restrictions; (3) a description of the administrative structure for trust land governance; (4) an overview of the state's trust management strategies, including surface leasing, subsurface activities, land sales and other non-lease surface uses, and revenue breakdowns from each of these uses; (5) an overview of the mechanisms for revenue distributions to trust beneficiaries; and (6) highlights of recent developments and emerging issues for trust land managers in the state.

State Trust Lands in Arizona



B. Trust Land Management in Arizona

Arizona has approximately 9.28 million surface acres and 9 million subsurface acres of trust lands.[378] These lands are enormously diverse in character, ranging from arid scrubland, desert grasslands, and riparian areas in the southern half of the state, to the mountains, forests, and meadows of Northern Arizona. While the majority of these lands are located in rural areas of the state, more than one million acres of Arizona's trust lands are located adjacent to or within rapidly urbanizing areas. In addition, although some 2.3 million acres of Arizona's trust lands are held in a checkerboard pattern, the majority of these lands are held in larger, contiguous parcels, some approaching hundreds of square miles in size.[379]

1. Arizona's Land Grant

At statehood, Arizona received sections two, sixteen, thirty-two, and thirty-six in every township "for the support of common schools."[380] In addition to this common school grant, the state also received specific grants for a variety of other public institutions, including: 200,000 acres for university purposes; 100,000 acres for legislative, executive, and judicial public buildings; 100,000 acres for penitentiaries; 100,000 acres for insane asylums; 100,000 acres for schools and asylums for the deaf, dumb and blind; 50,000 acres for miners' hospitals; 200,000 acres for "normal schools," 100,000 acres for charitable, penal, and reformatory institutions; 150,000 acres for agricultural and mechanical colleges; 150,000 acres for a school of mines; 100,000 acres for military institutes; and 1,000,000 acres for the payment of county bonds (after these bonds were repaid, the majority of this latter grant passed to the Arizona common schools trust).[381] Arizona currently retains approximately 87 percent of its original land grant of 10.5 million acres.

2. Enabling Act and Constitutional Requirements

As discussed in section II(C)(3), due to their late entry into the Union, Arizona and New Mexico have the most restrictive Enabling Acts of the Western states with regard to the administration of trust lands. Most importantly, Arizona and New Mexico were the first states in which Congress expressly indicated that the granted lands were to be held "in trust," to be "disposed of in whole or in part only in the manner as herein provided," and providing that any disposition of trust lands or the monies and resources derived therefrom in a manner contrary to the provisions of the Enabling Act "shall be deemed a breach of trust."[382]

Arizona's Enabling Act (and the subsequent amendments to the Act in 1936 and 1951) identifies a series of detailed restrictions on trust land dispositions. Most significantly, the Enabling Act prohibits any mortgage or encumbrance of trust lands, and requires that trust lands and the natural products of trust lands may only be sold or leased "to the highest and best bidder at a public action," with a few enumerated exceptions for leases of ten years or less and mineral/hydrocarbon leases. The Act also specifies that before being offered, all lands and leases must be appraised at their "true value," and cannot be disposed for less than the appraised value. Finally, the Act establishes minimum standards for the conduct of auctions, including minimum notice, advertising, and locational

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[378] ARIZONA STATE LAND DEPARTMENT 2003 ANNUAL REPORT, 20 (2004).

[379] The reason for the relatively contiguous nature of Arizona trust ownership is related to the predominance of federal land ownership in the state and the relatively late entry of Arizona into the Union. As noted elsewhere above, where identified sections in the trust land grant were previously occupied or reserved, the federal government generally provided states with *in lieu* lands that were to be selected out of the unreserved sections of the public domain. Nearly 69% of Arizona's total land area is held in one or another type of federal ownership, with the substantial majority in reserved ownership categories such as national forests, national parks, military reservations, and federal Indian reservations. In addition, by the time that Arizona achieved statehood, an enormous quantity of public domain land had been granted to the Southern Pacific Railroad, largely as a checkerboard pattern across the northern half of the state. As a result, Arizona took only a small amount of its overall grant in the form of reserved sections; the majority was taken as *in lieu* selections that allowed the state to aggregate its holdings in larger, contiguous parcels.

[380] New Mexico-Arizona Enabling Act, 36 Stat. 557, § 24 (1910).

[381] *Id.* at § 25.

[382] *Id.* at § 28.

requirements.[383] Arizona's Constitution contains even more detailed provisions, reiterating the requirements of the Enabling Act but also imposing additional restrictions, such as a prohibition against land exchanges.[384]

3. Arizona's Trust Responsibility

The specificity of Arizona's Enabling Act and Constitutional requirements has been interpreted by the courts to impose a strict trust responsibility that is the most restrictive among all the Western states. Based on this trust responsibility, the courts have held, among other things, that:

- An Arizona school district could not acquire a parcel of school trust land for its fair market value (by condemnation) because the trust would not benefit from any additional profit that might come from competitive bidding at advertised public auction.[385]

- Public auctions and competitive bidding are required for all sales of land, even when the purchaser is a governmental entity such as a city[386] or a state agency.[387]

- Lease provisions allowing for future decreases in rental rates if real estate conditions rendered the lease "uneconomic" violated requirements that the state land department must sell or lease state trust land to "highest" bidder.[388]

- Exchanges of trust lands, although permitted in Arizona's Enabling Act and Arizona statutes, constituted "sales" without public auction for purposes of Arizona's Constitution and were therefore unconstitutional.[389]

- The State Land Commissioner cannot reject a conservation group's application to lease grazing lands for conservation and restoration purposes without considering whether the offer is in the best interests of the trust;[390] in addition, the "best interest of the trust" does not require blind adherence to the goal of maximizing revenue at the expense of stewardship or the cost of contracting with an irresponsible lessee.[391]

- The state is under no obligation to renew any existing lease of trust lands, as the state is required to grant leases in accordance with the best interest of the trust.[392]

- Leases or sales of mineral resources, however incidental, cannot be disposed for less than their true value as determined by appraisal,[393] and the maximum value of these resources cannot be established by statute.[394]

- The state land department must receive the true value for any right-of-way across trust lands, and the actual monetary compensation for the right-of-way cannot be diminished by the amount of any enhancement in value that the right-of-way may bring to the remaining trust lands.[395]

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[383] *Id.* at § 28.
[384] *C.f.* ARIZ. CONST. Art. X § 3 (interpreted to prohibit exchanges without public auction in *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242 (Ariz. 1990).
[385] Deer Valley Unified School Dist. No. 97 of Maricopa County v. Superior Court, 760 P.2d 537 (Ariz. 1988).
[386] Arizona State Land Dept. v. Superior Court In and For Cochise, 633 P.2d 330 (Ariz. 1981); City of Sierra Vista v. Babbitt, 633 P.2d 333 (Ariz. 1981).
[387] Gladden Farms, Inc. v. State, 633 P.2d 325 (Ariz. 1981).
[388] Campana v. Arizona State Land Dept., 860 P.2d 1341 (Ariz. 1993).
[389] Fain Land & Cattle Co. v. Hassell, 790 P.2d 242 (Ariz. 1990).
[390] Forest Guardians v. Wells, 34 P.3d 364 (Ariz. 2001).
[391] Jeffries v. Hassell, 3 P.3d 1071 (Ariz. 1999).
[392] Havasu Heights Ranch and Development Corp. v. Desert Valley Wood, 807 P.2d 1119 (Ariz. 1990).
[393] Kadish v. Arizona State Land Dept., 747 P.2d 1183 (Ariz. 1988).
[394] State Land Dept. v. Tucson Rock & Sand Co., 469 P.2d 85 (Ariz. App. 1970).
[395] Lassen v. Arizona ex rel. Arizona Highway Dept., 385 U.S. 458 (1967).

4. Governance of Trust Lands in Arizona

Arizona's trust lands are managed by the Arizona State Land Department, under the direction of the State Land Commissioner (Commissioner). The Commissioner is appointed by and serves at the pleasure of the Governor.

The Land Department has the administration of state trust lands as its central focus, although it also manages state sovereign lands, state forestry programs and wildfire programs, in addition to other ancillary responsibilities. The Department is organized into six major divisions: Natural Resources, Real Estate, Assets Management, Land Information Title and Transfer, Forestry, and Administrative and Resource Analysis. Nearly 75 percent of the Land Department budget, which is appropriated by the legislature from general funds, is dedicated to the administration of trust lands.

The Commissioner has essentially complete authority over the administration of trust lands. The only exceptions are with regard to (1) *in lieu* land selection, which is governed by a state Selection Board comprised of the State Treasurer, Governor, and Attorney General; and (2) land sales and commercial leases, which must be approved by the Board of Appeals (which also hears appeals from certain Land Department decisions). The five members of the Board of Appeals are selected by the Governor and confirmed by the Senate for six-year terms. Three members represent the state's fifteen counties, which are divided into three districts, with two members holding at large positions. Additionally, in administering urban trust lands, the Commissioner cooperates with two advisory committees that provide advice on urban planning and conservation matters under Arizona's general and comprehensive planning scheme and an urban open space program.

5. Trust Land Management in Arizona

The Land Department identifies its mission as follows:

> To manage State Trust lands and resources to enhance value and optimize economic return for the Trust beneficiaries, consistent with sound stewardship, conservation, and business management principles supporting socioeconomic goals for citizens here today and generations to come. To manage and provide support for resource conservation programs for the well-being of the public and the State's natural environment.

Arizona's trust management activities can be roughly divided into three types of activities: (a) surface uses, (b) subsurface uses, and (c) trust land sales and other uses. Unlike many states, Arizona currently receives a majority of its total trust income from permanent trust land dispositions, including sales of trust lands, rights-of-ways, commercial payments, and interest payments.

a. Surface Uses

The vast majority of Arizona's surface use acreage and revenues are associated with grazing, agricultural, commercial, and right-of-way uses; Arizona also administers a special use permit system for certain activities on trust lands. Pursuant to the state's Enabling Act, trust lands can generally only be leased to the "highest and best bidder" at a public auction.[396] However, most leases that are issued in Arizona take advantage of several enumerated exceptions to these strict public auction requirements, allowing leases of ten years or less for grazing, agricultural, commercial, and domestic purposes without public auction; leases of twenty years or less for mineral purposes without public auction; and leases of twenty years or less for oil, gas, and hydrocarbon development without public auction, bidding, or appraisement.

Grazing and agricultural leases in Arizona are almost universally administered under a short term, ten-year lease program. Short-term leases are available from the land department upon application, and can be granted without a public auction. Only expiring grazing leases are

[396] New Mexico-Arizona Enabling Act 36 Stat. 557, § 28 (1910).

advertised.[397] Within a specified time frame prior to the expiration of a short term lease, an applicant may conflict the renewal of a lease. After considering any and all applications for a short term lease, the department awards the lease to the party that the department deems to have the "best right and equity to the lease." Existing lessees who are in good standing with their leases are also eligible for a "preference right," which allows them to secure a new short-term lease by matching the highest bid. Another exception in the Enabling Act allows for provisions that protect lessees' rights to improvements that require payments by purchasers or subsequent lessees for those improvements. As a result of these protections and a number of other practical considerations, these short-term leases have typically not been awarded on a competitive basis. Some commercial leases are also administered under a similar short-term leasing program.

Commercial leases[398] are also issued for ten to ninety-nine year terms; however, these leases must be issued at public auction to the "highest and best bidder." Lease rates are generally required to be the fair market rental value of the land, subject to annual (or for long-term leases, periodic) adjustment; however, for grazing leases, the market value of the lease is established by the state's Grazing Land Valuation Commission, which develops a lease value based on a set formula.

Grazing leases generate the least revenue per acre of all trust activities, returning an average of $0.25 per acre on the nearly 8.4 million trust acres utilized for that purpose – Arizona also has the lowest returns from grazing uses of any Western state. This compares with an average of $7.31 per acre for use permits, an average of $18.46 per acre for agricultural uses, and an average of $170.20 per acre for commercial leases.

b. Subsurface Uses

The State Land Department issues leases for three general types of mineral commodities: leaseable minerals (primarily base and precious metals, but includes industrial minerals that are unique and distinct); common variety minerals (also referred to as "salable minerals" or "mineral materials," which include construction materials, landscaping materials, and other minerals commonly used as aggregate or fill); and energy minerals (primarily oil, gas, and geothermal resources).[399] The agency also issues prospecting permits designed to encourage exploration; however, where the resource is discovered by the lessee, the lessee is entitled to a non-competitive lease.[400]

State land mineral leases (except energy resources) and exploration permits are awarded at public auction for terms up to twenty years, and generally require the payment of royalties to the department.[401] Common variety mineral leases are awarded for terms of ten to twenty years.

Leases for energy resources differ depending on the type of potential resource. For lands within an area with known oil and gas fields, leases are awarded based on a noticed, competitive sealed bid process for a primary term of five years.[402] For leases in areas that are not known to contain oil and gas resources, leases are awarded on a noncompetitive basis by application and are subject to a royalty payment of 12.5 percent.[403] Geothermal leases, by contrast, are awarded to the highest and best bidder, based on the highest bonus that will be paid to the department.[404]

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[397] ARIZ. REV. STAT. § 37-281.01.
[398] Commercial leases in Arizona function as a "catch-all" category for uses that do not fall within the specified land-use categories (agriculture, grazing, home-site, minerals, etc.).
[399] Arizona Department of State Lands, Mineral Leasing Program, *available at:* http://www.land.state.az.us/programs/natural/mineral_leasing.htm (as of November 30, 2004).
[400] ARIZ. REV. STAT. § 37-272.
[401] *Id.* at § 37-235.
[402] *Id.* at § 37-556.
[403] *Id.* at § 37-555.
[404] *Id.* at § 37-760.

c. Land Sales and Other

As noted elsewhere, Arizona's Enabling Act imposes a series of strict requirements on sales of trust lands, requiring that trust lands and the products of trust lands be sold "to the highest and best bidder at a public auction." These restrictions are replicated in Arizona's Constitution and statutes, requiring that these auctions be held at the county seat where the lands are located, and that public notice be provided for not less than ten weeks in a newspaper of general circulation at the state capitol and in whatever newspaper is published nearest the lands that are the subject of the auction. The Arizona Enabling Act also provides that no sale or disposal of trust lands can be made for less than the "true value" of those lands as determined by appraisal, and provides that legal title cannot pass until this consideration is paid. The Act also requires "ample security" for any sales on credit. Similar requirements apply to sales of rights-of-way, easements, participation agreements, sales of natural products, and other permanent dispositions of trust resources.

When trust lands are sold for development, trust lands are typically disposed under more complex disposition rules provided in Arizona's Urban Lands Act and its Growing Smarter legislation. These guidelines provide for a land planning process, administered by the Land Department, in which trust lands can be "conceptually planned" – a plan that corresponds roughly to the local general and comprehensive planning process administered by cities and counties – and can later be planned in greater detail for development, obtain zoning, and be brought to auction for lease or sale. The identification of lands as suitable for development prior to the development planning process requires the Land Department to consider a series of factors relevant to the planning of urban trust lands, such as water and infrastructure availability, proximity to existing development, and so forth. The Department is also required to consult with an advisory committee when planning trust lands for urban development.

Arizona currently generates the majority of trust revenues from land sales and other permanent dispositions. Due to the rapid growth of Arizona's urban areas, more than one million acres of undeveloped trust lands are now contained within or adjacent to urban areas. In fiscal year 2003, revenues from land sales and other permanent land dispositions accounted for nearly $120 million of the $145 million in revenues generated by trust activities, more than 82 percent of the total.

Arizona's State Land Department is currently constitutionally prohibited from engaging in land exchanges – a management tool that is available to many other states. In addition, as discussed below, the Land Department is currently significantly constrained in its ability to dispose of trust lands for conservation purposes. Both of these issues may potentially be addressed as a part of Arizona's ongoing trust land reform efforts.

Table V(B): FY 2004 Revenues – Arizona State Land Department

Source	% of Revenue	Receipts
Surface		
Agriculture	1.7%	$3,630,218
Commercial	7.0%	$14,932,591
Grazing	1.2%	$2,168,628
Homesite	0.0%	$23,213
Other	0.2%	$398,865
Rights-of-way	0.9%	$2,005,762
School Leases	2.8%	$5,993,468
Use Permits	0.9%	$1,955,194
Total Surface	**14.8%**	**$31,107,939**
Subsurface		
Coal		
Oil and gas	0.2%	$482,648
Other	0.2%	$335,272
Total Subsurface	**0.0%**	**$817,920**
Sales and Other		
Land Sales*	65.0%	$138,319,546
Sales interest	11.8%	$25,042,150
Penalty and interest	0.1%	$126,414
Commercial prepayments	0.9%	$1,988,978
Royalty	2.0%	$4,162,779
Rights of way	3.2%	$6,823,523
Other	2.0%	$4,344,614
Total Sales and Other	**85.0%**	**$180,808,004**
Grand Total	**100%**	**$212,733,863**
Agency Budget		**$13,544,300**

* Arizona sold 1,875 acres of trust land in FY 2004, for a total sales price of $310,647,731 (a 245% increase over the previous fiscal year). However, some principal payments are deferred; this figure reflects payments actually received in FY 2004 from sales and deferred principal payments arising from sales in previous fiscal years.

Source: Arizona Land Department FY 2004 Annual Report

6. Trust Revenue Distribution in Arizona

There are fourteen beneficiaries who receive revenues from trust activities in Arizona. These beneficiaries include: (1) the state's common schools; (2) Legislative, Executive, and Judicial Buildings; (3) the Arizona State Hospital; (4,5) two Miners' Hospitals; (6) State Charitable, Penal, and Reformatory Institutions; (7) the State Penitentiaries; (8) the state Normal Schools; (9) the state Agricultural and Mechanical Colleges; (10) the state Military Institutes; (11) the School of Mines; (12) the University Land Code; (13) the University of Arizona; (14) and the School for the Deaf and Blind. Although these trusts are administered separately, the revenues from multiple trusts may go to single institutional beneficiaries. For example, the Arizona Board of Regents receives the revenues from the Normal Schools, Agricultural and Mechanical Colleges, Military Institutes, School of Mines, University Land Code, and University of Arizona trusts, for distribution to Arizona's various universities; similarly, the revenues from the Miners' Hospitals trusts and half of the Charitable, Penal, and Reformatory Institutions trust go to support the Arizona Pioneer's Home. Of these beneficiaries, the common schools are by far the largest, credited with approximately 8.1 million acres of the 9.28 million acres in the trust.

The revenues generated from Arizona's trust lands are classified as either "permanent" or "expendable." Revenues derived from the sale of trust land, the sale of most natural products (such as sand, gravel, water, and fuel wood), and royalties earned from mining and other mineral extraction activities are classified as "permanent" and are deposited into a "permanent fund" for the appropriate beneficiary for long-term investment. Revenues from lease rentals, interest earned on deferred sale payments, and other "renewable" types of uses are classified as "expendable" and are immediately available for use by the trust beneficiaries.

Arizona's Constitution establishes a separate permanent fund for each trust beneficiary to manage these revenues. The State Board of Investment serves as the trustee of the permanent funds and is responsible for managing the assets of each fund; however, for investment purposes these individual funds are aggregated into a single permanent fund, with investment earnings, interest, dividends, and other realized gains and losses credited proportionately to each beneficiary. The State Treasurer, under the guidance of the State Board of Investment, invests the permanent fund in stocks, bonds, annuities, and other interest-bearing securities. At the end of each year, the Board of Investment determines the distribution from the permanent fund to each beneficiary based on a formula that provides a return equivalent to the average rate of return over the past five years on the average fund balance over that same period. Since statehood, the various beneficiaries have received distributions totaling approximately $1 billion (over $900 million of which went to the common schools). Arizona's permanent fund (aggregating the investment assets associated with each beneficiary) was valued around $1.2 billion at the end of fiscal year 2004.

Arizona recently changed its funding formula for the state's common schools – a change that has significantly influenced the state's trust management system. Beginning in 1975, Arizona had followed a relatively simple funding formula for public school operations, establishing a minimum level of funding per student, as well as an expenditure limit based on the number of students. Property taxes in each school district were levied based on a minimum tax rate, and the difference between local tax revenues and the expenditure limit was to be supplied from the state general fund. This latter arrangement was intended to ensure that the majority of state aid would go to poorer districts providing a semblance of "equity" in the funding of public schools. Under this funding formula, state trust revenues were utilized to underwrite the general fund obligations for state aid, supplanting general fund revenues on a dollar-for-dollar basis (and thus freeing up general fund monies for other purposes).

In November of 2000, Arizona voters approved Proposition 201, which changed the distribution of the trust expendable revenue. Proposition 201 capped the amount of expendable revenues that could be used for state aid at $72 million, and required that all revenues above this amount go into a new "Classroom Site Fund," which would combine any additional trust revenues with the proceeds from a sales tax increase. These combined revenues are distributed to school districts and charter schools on a pro-rata, per-student basis, to supplement basic teacher salaries (20

percent), fund teacher performance pay (40 percent), and fund classroom-based programs (40 percent). The legislature is prohibited from using these funds to supplant general fund dollars, such that the funds serve to supplement the monies derived from the state's basic school funding formula. In fiscal year 2003, total trust revenues amounted to around $71 million, including approximately $19 million from permanent fund investment and $52 million from lease and interest payments. Due to unusually poor investment returns from the permanent fund investment in fiscal year 2004 (down almost 70 percent from fiscal year 2003), the trust made no contribution to the Classroom Site Fund in 2004.

Although these contributions continue to represent only a small fraction of Arizona's total education budget – less than 1 percent of the state funding supplied to public schools by the Department of Education – the targeting of trust revenues to provide supplemental funding for the specific purposes outlined in the Classroom Site Fund has significantly increased the level of attention paid to these funds by major education stakeholders. As noted above, prior to Proposition 201, trust revenues were simply used to supplant existing general fund obligations to education; as such, the source of these funds was of little consequence to education stakeholders, since an increase in trust revenue would simply result in a corresponding decrease in general fund appropriations. Now that trust revenues are supplemental funds, increased trust revenues correspond directly to increases in the revenues available for education – and education stakeholders have taken a direct interest in improving revenue generation from trust management. This has led to the direct involvement of education interests in the ongoing efforts to reform Arizona's trust land management system.

7. Recent Developments and Emerging Issues in Arizona

a. The Arizona Preserve Initiative

As noted elsewhere, there are now more than one million acres of state trust lands located in and around Arizona's urban areas; overall, trust lands comprise more than 30 percent of the available urban development land in Maricopa County, the fastest-growing area of the state. Although these lands clearly represent a major asset for the trust due to their potential value for development, in many cases these lands also have important value for urban open space. In 1996, the Arizona Legislature passed the Arizona Preserve Initiative (API) in an attempt "to encourage the preservation of select parcels of state trust land in and around urban areas for open space to benefit future generations."

Under the API program, a state or local government, business, state land lessee, or a citizen group can petition the State Land Commissioner to reclassify state trust lands as "suitable for conservation purposes." If the land is reclassified, the Commissioner may adopt a coordination plan protecting the property's conservation values that allows the land to be withdrawn from sale or lease for three to five years to enable prospective lessees or purchasers time to raise funds; the trust lands may then be leased or sold for conservation purposes at auction.[405] To date, the Commissioner has reclassified nearly forty thousand acres of urban land as "suitable for conservation purposes," and has sold approximately three thousand acres under the program. A 1998 amendment also provided for a $220 million public-private matching grant program to assist the purchase or lease of trust lands for conservation.

However, Arizona's API program is in serious trouble due to recent challenges from program opponents who believe the program to be unconstitutional, since it does not guarantee that trust lands are sold to the "highest and best bidder" as required by the Arizona Constitution.[406] Although there has been no definitive ruling on this issue, the program is now on indefinite hold.

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[405] Conservation is defined as "protection of the natural assets of state trust land for the long-term benefit of the land, the beneficiaries, lessees, the public, and unique resources such as open space, scenic beauty, protected plants, wildlife, archaeology, and multiple use values." *Id.* at § 37-311.

[406] As discussed in section IV, although the U.S. Supreme Court held in *Lassen* that the Arizona Enabling Act did not require lands to be sold at auction when they were transferred to public bodies, the Arizona Supreme Court later interpreted identical language in the Arizona Constitution to require auctions to occur even where lands are transferred to public bodies.

b. Growing Smarter: Five-Year Disposition Planning

Arizona's 1998 Growing Smarter legislation created a statewide framework for the planning of lands in Arizona's cities and towns that requires the adoption and periodic update of general plans in each city and town and the comprehensive plans in each county. This legislation also created a corresponding framework for the planning of state trust lands, requiring the land department to prepare and periodically update "conceptual plans" for urban trust land that will be integrated into the general and comprehensive plans of cities, towns, and counties. The legislation also required the State Land Department, in consultation with city, town, and county planning authorities, to prepare five-year disposition plans that identify trust lands that will be master-planned, zoned, sold, leased, or classified for conservation purposes over the next five years.

The legislation requires the Commissioner to make a series of determinations before considering trust lands for planning and disposition, including that:

- The lands adjoin existing developed lands within or adjacent to the corporate boundaries of a city or town;
- The lands are located in areas where development is appropriate, development will be beneficial to the trust, and development of the lands will not promote urban sprawl or leapfrog development;
- The department has considered the development's proximity to and compatibility with existing developments, land uses, and local jurisdictions;
- The lands have the quality and quantity of water needed for urban development;
- The department has fully cooperated with the local planning authorities with jurisdiction over the area or areas in which the lands are located, the classification for development is consistent with local development policies, and local development policies have been taken into consideration;
- The department has considered the proximity of lands to public facilities and the impact of development on those facilities;
- The department has considered the natural and artificial features of the land, including floodplains, geologic instabilities, natural areas, wildlife habitat, airport influence zones, potentially hazardous conditions, and historic and archaeological sites and structures;
- The department has considered the timing of development, impacts to existing leases, and the available resources for planning.

With regard to disposition plans, the Commissioner is additionally required to consider, at a minimum, the market demand for the lands, anticipated transportation needs, and the availability of development infrastructure.

To meet the demands of the legislation, the State Land Department has been developing a new process to prepare disposition plans for trust lands that integrate these considerations while focusing the Department's limited staff resources for development planning on the highest-value, most suitable parcels for development. To this end, the Department has created an integrated Geographic Information Systems (GIS) database that contains a wealth of information about relative land valuation, transportation, and infrastructure availability, the physical suitability of lands for development, and other factors. This information is used to measure the relative suitability of trust land parcels for development, the regulatory and legal limitations such as endangered species presence and permitting limitations, the physical attributes such as high slopes and one hundred-year floodplains, the locational attributes such as proximity to existing transportation, water, sewer, and electric infrastructure, and the financial information related to the relative valuation of the land. Based on this information, each trust parcel receives a "ranking" based on a weighted point system that assigns different values to each attribute of the parcel based on its estimated impact on development suitability.

From this ranking, the highest-suitability parcels are re-evaluated based on market analyses and more detailed evaluations of development suitability. From this second tier, the highest-scoring

parcels are then targeted for proactive planning and disposition by the Department, with detailed master-plans for the targeted parcels prepared by the Department or by planning permittees selected through a request for proposals (RFP) process. This proactive planning and disposition approach has proved to have significant potential as a method to maximize revenues from trust dispositions. For example, the Department's Desert Ridge development, which is the product of many years of Department planning, is expected to net nearly $40 billion for the Department in commercial leases and land sale proceeds over the next one hundred years on less than twenty thousand acres of trust lands.

This approach has also created a highly defensible system for the selection of development parcels that has focused the Department's limited resources for real estate dispositions on the most valuable and most easily accomplished development opportunities in the state, rather than simply responding to development proposals from outside parties whose interests may not align with those of the trust. Under the new disposition planning system, proposals that are identified by outside parties are first screened through the Department's disposition ranking system. If the parcel identified does not rank as high as the parcels that are the focus of the Department's efforts, it will not be considered unless the outside parties can somehow increase the objective ranking high enough for it to be considered (for example, by agreeing to bring infrastructure to the parcel, or by resolving a major regulatory constraint that had lowered the ranking, etc.).

c. Challenges to Grazing Lease Preferences

Like other Western states, Arizona has recently been faced with challenges to its grazing lease program, which has traditionally incorporated a series of "preferences" for grazing lessees and has not been administered on a completely competitive basis. In 2001, the Arizona Supreme Court decided *Forest Guardians v. Wells*,[407] which upheld a challenge by an environmental group whose application for a grazing lease had been rejected.

Forest Guardians had applied to acquire an expiring grazing lease, with the stated intention of resting the property to improve the conditions of the soil and vegetation. The Department rejected the application on the basis that the group had no intention of grazing the land but instead wanted to lease the land for conservation. Since conservation leases are considered commercial leases under Department regulations, the Department argued that the group should instead seek to reclassify the land as suitable for commercial use, and then seek a commercial lease at a substantially increased rent.

The Arizona Supreme Court disagreed, finding that the use of lands for conservation was a legitimate use of grazing lands, particularly in light of the fact that many grazing lessees would fallow lands to allow soils and vegetation to regenerate. The Court found that "restoration and preservation are already and must continue to be considered legitimate uses for land that, according to the Commissioner's classification, has no higher and better use than grazing. Otherwise, grazing lessees could continue to graze stock until the land is damaged and its value destroyed."[408] Since the group had offered to pay more and increase the value of the land for grazing, the court found that the Department was required to consider whether the proposed use was in the best interests of the trust. The classification system could not provide a legitimate basis to reject an application to use lands for restorative purposes. The court thus ordered the Department to consider the Forest Guardians application to determine whether the proposed lease was in the best interests of the trust.

The Forest Guardians decision has been widely heralded as a major victory for environmental groups, and is equally disparaged by the ranching community as a threat to the continuity of land management and the interests of ranchers statewide. Although to date, the vast majority of conflicting applications have been filed by ranchers against other ranchers, and environmental groups have successfully acquired only one lease in the state (which remains in dispute), the decision has

[407] 201 Ariz. 255 (2001).
[408] *Id.* at 262.

nevertheless engendered a great deal of controversy within the ranching community, and led to pressures to limit competition in grazing leases as a part of Arizona's proposed trust land reform.

d. Exchange Authority

Of Arizona's 9.3 million acres of trust land, some 2.3 million acres are interspersed with private lands in a "checkerboard" with the trust owning every other section of land. In addition, around five hundred thousand acres of trust lands are "landlocked" within federal land holdings, including national forests, national parks, and national monuments. These ownership configurations have complicated the management of these lands as a result of access issues. Federally-landlocked parcels are unlikely to have any productive use because of limited access or because of the applicable restrictions on the surrounding lands; at the same time, the checkerboard lands are extremely difficult to manage effectively. The majority of the checkerboard lands are located within large grazing units, and as a result, the owner of the surrounding private lands may be the only viable lessee.

Historically, the Department exchanged approximately two million acres with the federal government to preserve lands for important state and federal parks, national wildlife refuges, and wilderness areas and to secure federal lands in the vicinity of Arizona cities and towns and along the Colorado River with potential for revenue generation, as well as securing land for the University of Arizona's experimental range. Although Arizona's Enabling Act and its statutes provide authority for the State Land Department to engage in land exchanges, a 1990 Arizona Supreme Court decision declared land exchanges unconstitutional (despite the fact that they are permitted by the state's Enabling Act) on the basis that they constituted a "sale" without public auction for purposes of Arizona's Constitution.[409]

Over the past decade, at least six land exchange measures have been referred to the Arizona voters and have been rejected. These measures have included limited provisions that would have allowed exchanges to occur only between public entities. Opposition to these measures has generally focused on the somewhat checkered history of federal land exchange programs throughout the West, arguing that public lands have frequently been exchanged in less-than-equitable deals that have benefited private land developers. Another land exchange measure, disguised as a "military airport preservation measure," appeared on the Arizona ballot in the fall of 2004 but once again failed to win the support of the Arizona voters.

e. Trust Land Reform

The Arizona legislature is currently in the process of considering a comprehensive reform proposal that seeks to modernize the management of state trust lands by addressing many of the limitations in Arizona's Enabling Act and Constitution. After a ballot-box showdown in 2000 in which a modest reform initiative failed due to opposition from conservationists, a group of diverse stakeholders representing educators, developers, city, town, and county representatives, ranchers, and conservation organizations explored the development of a consensus proposal for trust land reform.

After approximately three years of negotiations, the stakeholder group reached agreement on a consensus proposal that was supported by most of the participants in the process. This proposal was developed into legislation that would have amended Arizona's Constitution and many of the statutes governing the Land Department; it would also have required a subsequent amendment to Arizona's Enabling Act. In brief, the original reform proposal was intended to:

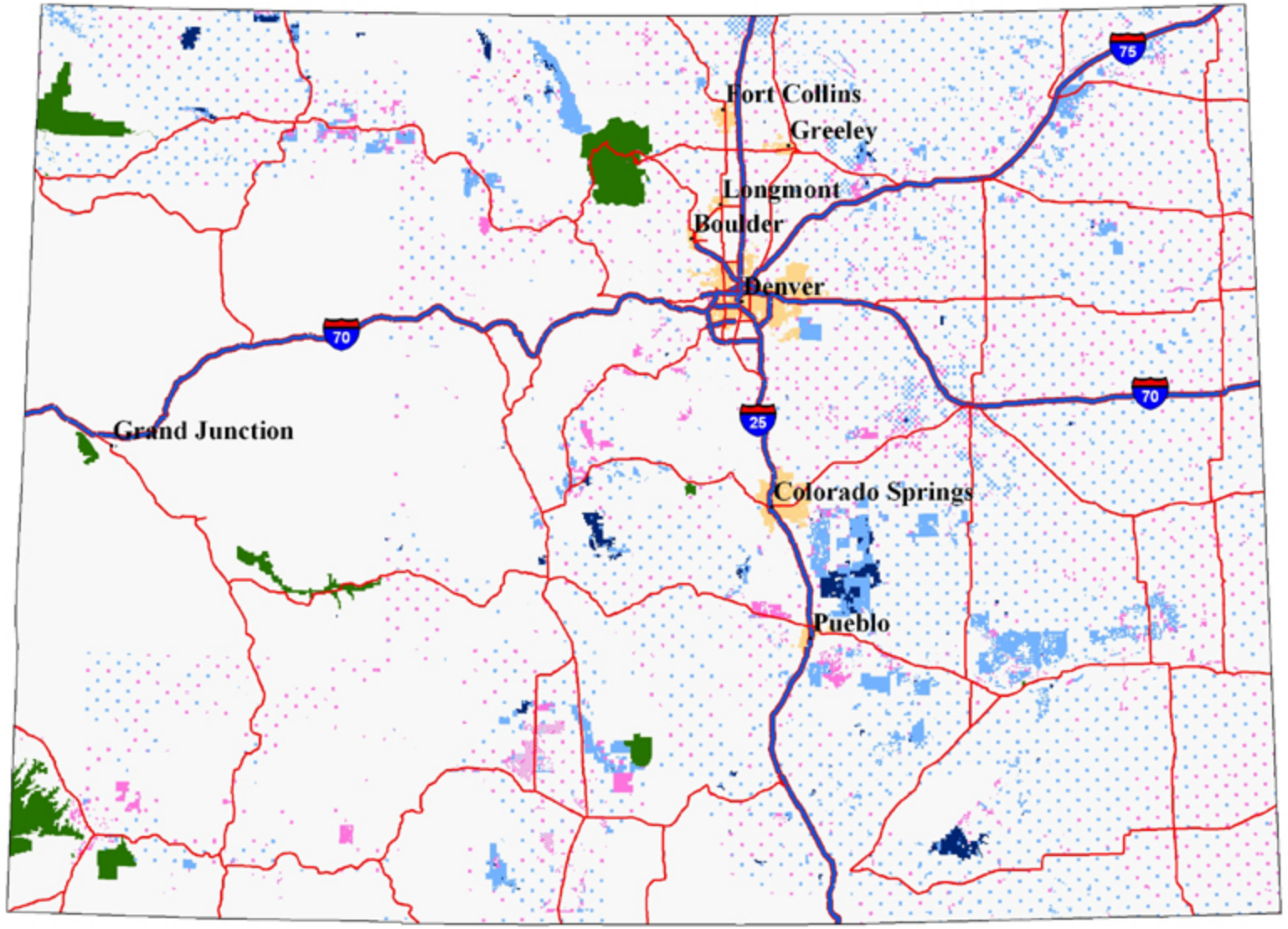
- Change the administration of trust lands by creating a Board of Trustees, composed of a majority of beneficiary representatives, who would exercise oversight over certain trust-related activities of the state land department, and improve Land Department resources by establishing market-competitive salaries for key personnel and directing a percentage of proceeds from trust land dispositions to fund trust management activities.

[409] Fain Land & Cattle Co. v. Hassell, 163 Ariz. 587 (1990).

- Require collaborative planning of trust lands in urban areas by the Land Department and local jurisdictions in a framework that allows for the disposal of lands for open space without auction if value is provided through monetary payments, density transfers, and other forms of non-monetary compensation.
- Enable modern real estate disposition tools, such as development agreements, participation agreements, and infrastructure financing mechanisms to maximize returns from the sales of trust lands, allow entitlement "trades" between the Land Department and local communities, and enable land exchanges for conservation purposes, dispositions for environmental mitigation, and sales of conservation easements without auction to protect ranch units in checkerboard ownership areas.
- Enable disposals of rights-of-way without auction and allow consideration of value increases to the benefited trust lands in setting the price for disposal.
- Reform rural land management provisions to allow for non-competitive grazing lease renewals and long-term leases where lessees follow improved range management practices, and improve reporting and inspection of range conditions.
- Permanently set aside approximately three hundred thousand acres of identified "conservation lands" to protect critical urban open space, educational and research reserves, and ecologically significant rural landscapes and state landmarks, and temporarily set aside approximately four hundred thousand acres of "conservation option lands" to allow time for public agencies and entities to compensate the trust.

The original reform proposal was submitted to the Arizona legislature by the stakeholder coalition for consideration in May of 2004. Despite several months of hearings under a special joint select legislative committee formed to consider the proposal, the reform package failed to move forward in the legislature. Further negotiations among the stakeholder coalition in an attempt to produce a package that would garner support from key legislators ultimately fell apart, and although two separate trust land reform bills were introduced into the spring 2005 legislative session, both failed. Nevertheless, trust land reform remains a priority for many of the stakeholders, and elements of the proposal will likely be pursued via legislative referendum or a ballot initiative in the 2006 elections.

State Trust Lands in Colorado



C. Trust Land Management in Colorado

Colorado has nearly three million surface acres of trust lands and an additional three million sub-surface acres of trust lands.[410] Although these lands are most heavily concentrated in the eastern grasslands, they also appear here and there in the sagebrush deserts and aspen groves of the west, and in a few larger parcels and a number of isolated sections throughout the Rocky Mountain range. The majority of Colorado's trust lands occur in a scattered, checkerboard pattern throughout the rural areas of the state, corresponding to the reserved sections of each township. However, Colorado does have a number of significant, consolidated parcels of trust land, including large areas near Denver, Colorado Springs, and Pueblo that encompass several hundred square miles, as well as substantial areas along the North Platte River in northern Colorado, areas near Sterling in northeastern Colorado, and areas near Great Sand Dunes National Monument in south-central Colorado, among others.

1. Colorado's Land Grant

Although the citizens of Colorado repeatedly petitioned Congress for statehood as early as 1858, Colorado's admission to the Union was delayed each time: first in 1859 by the collapse of the 1850's gold boom, which cut into Colorado's once growing population; then in 1864 by the Civil War, which, combined with poorly-producing mines, left the state unable to afford self-government; and then again in 1865 by the assassination of President Lincoln, which put a Democratic president in office who did not want to see another predominantly Republican state admitted to the Union.[411]

When Colorado was finally admitted to the United States in the Enabling Act of 1875 it was granted sections sixteen and thirty-six in every township "for the support of common schools," with Congress granting equivalent lands if the specified sections were unavailable.[412] Colorado was granted additional acreage for several other specific purposes, including erecting public buildings (fifty sections, or thirty-two thousand acres), penitentiaries or prisons (fifty sections, or thirty-two thousand acres), and to support a state university (seventy-two sections, or approximately forty-six thousand acres).[413] Colorado was also granted lands for the Saline Lands Trust[414] and the Internal Improvements Trust,[415] which benefit state parks; the Colorado State University Trust; and the "Hesperus Trust," which is managed for the benefit of Fort Lewis College. Currently, Colorado retains ownership of 64 percent of its original land grant of 4.8 million acres.[416]

2. Enabling Act and Constitutional Requirements

Colorado's Enabling Act does not expressly indicate that the lands granted to the state are to be held in trust. However, the Enabling Act does identify a series of restrictions on disposals of these lands, including provisions prohibiting disposals of the granted lands other than at a public sale and for not less than $2.50 per acre; provisions that require the establishment of a permanent fund to invest the proceeds from land sales; and a requirement that interest from the permanent fund be used to support the common schools. [417] These restrictions were the first such sale requirements imposed by Congress on any state; Colorado's Enabling Act was also the first to require the establishment of a Permanent School Fund. [418]

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[410] COLORADO STATE BOARD OF LAND COMMISSIONERS FY 2003 ANNUAL REPORT (2004).
[411] Rebecca Jones, *From a state of flux to statehood: Colorado overcame obstacles of territorial days*, DENVER ROCKY MOUNTAIN NEWS (July 27, 1999).
[412] Colorado Enabling Act, 18 Stat. at 475 § 7 (1875).
[413] *Id.* at §§ 8-10.
[414] *Id.* at § 11 (benefits the state parks).
[415] *Id.* at § 12; COLO. REV. STAT. § 33-10-111 (Five percent of the proceeds of the sales of agricultural public lands in Colorado sold by the federal government are credited to the parks and the outdoor recreation fund).
[416] SOUDER & FAIRFAX, *supra* note 4, at 48.
[417] Colorado Enabling Act, 18 Stat. at 475, § 14.
[418] SOUDER & FAIRFAX, *supra* note 4, at 31-32.

3. Colorado's Trust Responsibility

As discussed in section IV(A), the courts have subsequently interpreted the restrictions imposed by Congress in Colorado's Enabling Act to evidence sufficient intent to create a binding federal trust. Based on this trust responsibility, the courts have held that:

- State trust land leases are subject to county zoning regulations, even if those regulations allow the county to deny a use that is otherwise permitted by the lease.[419]

- The State Board of Land Commissioners (Board) was charged to issue leases in the best interests of the trust, and thus could issue non-exclusive leases that reserved the right of the Board to later lease mineral rights and other surface rights irrespective of the existence of a current lessee.[420]

- The state, as trustee, had the discretion to invest school trust funds in farmland loans.[421]

However, the requirements on Colorado's trust managers are significantly different from those in most other states due to the enactment of an amendment to the Colorado Constitution in 1996.

Prior to this amendment, Colorado's Constitution called for the management of trust lands to generate the maximum possible revenues for the trust. Under the amendment this mandate has been significantly changed: trust lands are to be held in a perpetual, inter-generational public trust for the support of public schools that is not to be significantly diminished over time. Sound stewardship is required for the lands to become economically productive and includes protecting and enhancing the beauty, natural values, open space, and wildlife habitat. The Board is required to manage trust lands in such a way as to produce "reasonable and consistent" income over time.[422]

The amendment also requires the Board to protect and enhance the long-term productivity of trust lands by (1) maintaining a long-term stewardship trust of up to three hundred thousand acres of land to preserve long-term returns to the state; (2) including terms in agricultural leases to encourage sound stewardship of the land and community stability; (3) managing natural resources in a manner that will conserve the long-term value of those resources. The amendment also authorizes the Board to sell or lease conservation easements, licenses, or similar interests in the land.[423] The amendment further requires the State Land Board to abide by local land use regulations and plans when considering development of lands. The Board must also consider whether the income generated from the lands will exceed the fiscal impact on local school districts prior to authorizing any lease, sale, or exchange of lands for commercial, residential, or industrial development.[424]

As discussed in section IV(B), the 1996 amendment was recently upheld by the Colorado Supreme Court and the Tenth Circuit Court of Appeals; both courts found that "the choice of the trustee to manage the lands to produce reasonable and consistent income over time is reasonable and prudent given the perpetual nature of the trust."[425] However, the Tenth Circuit issued an implicit warning, noting that the provisions were not *facially* invalid because there was at least one interpretation of the provision that indicated the amendment merely announced a new management strategy for the trust.[426] If trust managers apply this provision in the future to simply conserve trust lands for public benefit at the expense of the trust, the Tenth Circuit decision seems to suggest that this could be subject to challenge.

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[419] Colorado State Board of Land Commissioners and Wesley D. Conda, Inc., v. Colorado Mined Land Reclamation Board, 809 P.2d 974 (Colo. 1991); *see also* Wesley D. Conda, Inc. v. Colorado State Board of Land Commissioners, 782 P.2d 851 (Colo. App. 1989).
[420] Evans v. Simpson, 547 P.2d 931 (Colo. 1976).
[421] People v. Higgins, 168 P. 740 (Colo. 1917).
[422] COLO. CONST., Art. IX, § 10(1).
[423] *Id.* at Art. IX § 10(1)(b).
[424] *Id.* at Art. IX, § 10(1)(a).
[425] Branson School District RE-82 v. Romer, 958 F. Supp. 1501, 1520 (D. Colo. 1997).
[426] Branson School District RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998).

4. Governance of Trust Lands in Colorado

The administration of Colorado's trust lands is overseen by the state's Board of Land Commissioners, also known as the Colorado State Land Board (Board), which functions as a subdivision of the Colorado Department of Natural Resources. The agency is administered by the Director of the Board of Land Commissioners (Director), who is appointed by the Board.[427] Although the Board is composed of appointed officials, Colorado has a straightforward representative scheme that ensures direct representation of various stakeholder interests on the Board. The Board composition, which is defined in the state's Constitution and statutes, consists of five geographically diverse citizens,[428] appointed by the Governor with the consent of the Senate,[429] that are intended to encompass the major stakeholders for state trust lands. The membership consists of one member with substantial expertise in agriculture, one with expertise in primary or secondary education, one with local government and land use planning expertise, one with natural resource conservation expertise, and one citizen at large.[430] Each Board member is limited to two, four-year terms, and the terms are staggered so that the entire Board is not simultaneously up for reappointment.[431]

The Colorado State Land Board is composed of three major divisions: the Mineral Department, the Agriculture Department, and the Commercial Department. The Mineral Department leases property to both private and public entities, collecting rent for the use of the natural resources on the land. The Agriculture Department manages lands for grazing, crops, recreation, and other surface rights; they also provide drought relief, and manage conservation and stewardship leases. The Commercial Department, also known as the Real Estate Section, handles commercial land leases and sales to public and private entities. It also "controls income-producing properties such as parking lots and property on which businesses are located."

Goods, services, and personnel necessary to perform the duties of the Board are paid for out of the income from the school lands. The state general assembly is required to give deference to the Board's assessment of its budgetary needs, and appropriates this money from the income from the trust lands.[432] These expenses are paid from lease revenue and mineral royalty revenue rather than from the proceeds of permanent trust dispositions.[433]

5. Trust Land Management in Colorado

The Board identifies its mission as follows:

> [to] manage the assets entrusted to our care for our beneficiaries to produce a reasonable and consistent income with long-term protection of economic values, while providing responsible environmental stewardship to ensure the conservation of natural resources.

Colorado's trust management activities can be roughly divided into four types of activities: surface uses, subsurface uses, trust land sales and other uses, and conservation reserve. Colorado currently receives a majority of its total trust income from subsurface lease uses and surface leasing; revenues from trust lands sales are negligible.

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[427] COLO. REV. STAT. § 36-1-102.
[428] COLO. CONST., Art. IX, § 9(1).
[429] COLO. REV. STAT. § 36-1-101.5(1).
[430] COLO. CONST., Art. IX, § 9(2).
[431] *Id.* at Art. IX, § 9(3).
[432] *Id.* at Art. IX, § 9(4).
[433] ANNUAL REPORT, *supra* note 410, at 5.

a. Surface Uses

The vast majority of Colorado's surface lease acreage and revenues are associated with grazing, agricultural, commercial, and right-of-way uses; however, Colorado also administers a recreational leasing program, which includes leases on lands that are simultaneously leased for other purposes.

The Board is permitted to lease trust land for various purposes in a manner consistent with Article IX of the Colorado Constitution.[434] When renewing surface leases, the Board is required to consider the care and use of the land as well as any work the lessee has done to conserve and promote the productivity of the land for the benefit of the trust.[435] Non-mineral leases may be terminated if the lessee has failed to comply with lease provisions, violated any lease provision, or made any false statement in the application of the lease.[436] The Board delegates enforcement matters and lease termination authority to the director of the Board;[437] the Director also has direct authority over the administration of all commercial leases.[438]

Lands with potential for commercial development are deemed to have unique economic value for funding the public schools,[439] and the Board is given increased flexibility to manage these lands to comply with the Constitution and Enabling Act, and to prevent undue speculation, as well as protect the public's interest in these lands.[440] Commercial developments pursuant to state land leases are required meet all federal, state, and local land use regulations and lessees are encouraged to obtain the maximum economic recovery from the development of these lands.[441] In addition, taxes on commercial leases must be paid as if the land involved were privately owned.[442] The Board also has authority to subdivide trust lands into lots, blocks, or other tracts that may be sold at public auction or exchanged.[443]

Leases for grazing and agricultural purposes are generally issued for terms of ten years, unless an alternate term is agreed to,[444] for a minimum yearly rental of $250 to cover transaction and administrative costs.[445] Lease fees for grazing uses vary based on range productivity and the grazing division that the lease is assigned.

Agricultural and grazing leases are required to include provisions that will ensure sound stewardship of the land;[446] in addition, before renewing grazing or agricultural leases, the Board is required to evaluate the benefit of continuing these uses of the land to the trust by considering the lessee's record of stewardship on the land, the stability of the local community, and the revenue generated for the trust. However, current lessees generally have a preferential right to renew their leases unless the Board and lessee fail to agree on lease terms; the lessee has failed to comply with the terms of a lease; or the Board finds that the lands should be converted to other uses to secure greater benefits for the trust or that continued use for grazing or agriculture is incompatible with other purposes for which the land is to be leased. However, if state trust land is located in the path of development, the Board is granted increased flexibility in the management of these lands to protect the public's interest in these lands and to prevent speculation by third parties. [447]

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[434] COLO. REV. STAT. § 36-1-118(1)(a).
[435] *Id.* at § 36-1-118(1)(b)(I).
[436] *Id.* at § 36-1-118.
[437] Board of Land Commissioners Policy No. 01-1, Policy Concerning Termination of Leases (Non-mineral) (2001). (hereinafter "BLC Policy").
[438] BLC Policy No. 99-3, Approval of Commercial Lease Renewals and Amendments (1999).
[439] COLO. REV. STAT. § 36-1-120.5(1).
[440] *Id.*
[441] *Id.* at § 36-1-120.5(3).
[442] *Id.* at § 36-1-120.5(4).
[443] *Id.* at § 36-1-122.
[444] *Id.* at § 36-1-118(1)(a).
[445] BLC Policy No. 93-3, Minimum Agricultural Annual Lease Rental Policy (1993, rev. 1994).
[446] COLO. REV. STAT. § 36-1-118(1.5).
[447] *Id.* at § 36-1-120.5.

Private individuals or organizations are also entitled to apply for private recreational leases for a variety of purposes on most state trust lands.[448] Recreational leases are normally "stacked" on top of existing agricultural, timber, grazing, or mining leases where they do not interfere with the existing lessees activities.[449] As with other surface leases, the Board requires a minimum annual rental of $250 per application; however, recreational leases are generally issued for 1/2 the length of the agricultural lease term on a flat rate of not less than $0.25 per acre.[450]

Leases for agriculture and grazing account for approximately 16 percent of the total revenue generated by Colorado's trust lands. Rentals for purposes other than agriculture, grazing, or subsurface uses generate another 15 percent; leases for rights-of-way generate only around 2 percent of total revenues.

b. Subsurface Uses

Subsurface uses are administered under the authority of the Director of the Board, although the Director is required to seek Board review of any matter that has the potential to significantly affect the trust beneficiaries.[451] The Director is authorized to issue leases for oil, gas, and minerals, although leases are required to comply with local government regulations and cannot be issued on lands designated as unsuitable for those uses.[452] Colorado currently receives approximately 64 percent of its total trust revenues from the administration of subsurface leases, with the majority of revenues derived from royalties on oil, gas, and coal.

Oil and gas leases and are granted for five year terms at public auction, with auctions scheduled by the Board on a quarterly basis.[453] Minimum bid prices start at $1.50 per acre per year, and oil and gas royalty rates are set at 12.5 percent of production. Mineral lands are leased on an annual basis with royalty payments calculated when and if a mineral resource is discovered.[454] There are special provisions for geothermal leases, which are let through a competitive bidding process and contain provisions for royalty payments and environmental protection.[455]

c. Land Sales and Other

The Board has the authority to sell state trust land only at public auction to the highest and best bidder.[456] Auctions are required to be advertised for four consecutive weeks in the weekly paper of the county in which the land is located.[457] Colorado's land sales provisions also contain certain protections for lessees; although the Board may sell leased land at any time during the lease as though the lease had not been executed,[458] one year's notice to the lessee is required,[459] and current lessees of agricultural land or grazing lands are afforded the right to match the highest bid.[460]

Although Colorado does not have statewide land use planning, trust lands are subject to Colorado's "Land Use Planning Act," which emerged as a consequence of the rapid growth and development of the state and the resulting demands on its land resources. The Act addresses the needs of agriculture, forestry, industry, business, residential communities, and recreation in future

[448] BLC Policy No. 92-8, Multiple-use Policy (1992).
[449] BLC Policy No. 98-3, Private Recreational Leases on State Trust Lands (1998).
[450] *Id.*
[451] BLC Policy No. 2003-01, Oil & Gas and Solid Mineral Leasing (2003).
[452] Wesley D. Conda, Inc. v. Colorado State Bd. of Land Comm'rs, 782 P.2d 851, 853 (Colo. App. 1989).
[453] COLO. REV. STAT. § 36-1-118.
[454] *Id.* at § 36-1-113.
[455] *Id.* at § 36-1-147.
[456] *Id.* at § 36-5-102.
[457] *Id.* at § 36-1-124.
[458] *Id.* at § 36-1-118(4)(a).
[459] BLC Policy No. 00-04, Policy Concerning Auction of Agricultural Leases on Unleased Land (2000).
[460] COLO. REV. STAT. § 36-1-118(4)(b).

growth.[461] The Board is responsible for developing a total land use planning program for trust lands, incorporating interests from all levels of government.[462]

Colorado's trust land sales provisions also contain several unique protections for environmentally sensitive lands. If trust lands that are offered for sale are determined to have a unique economic or environmental value to the public, the Board cannot proceed with the sale unless the land is authorized for sale by Board resolution or for two years, whichever occurs first.[463] The Board is also authorized to transfer interests in state land, other than grazing or agricultural interests, to the Department of Natural Resources (DNR) when that land has "unique economic or environmental value for the public."[464] If land would be damaged or destroyed if it passed into private ownership, the executive director of the DNR may give notice in writing to the Board that the land must be disposed to DNR through eminent domain or at public sale. The Board is also authorized to sell or lease conservation easements, licenses, or other similar interests in accord with the requirements of the Colorado Constitution.[465]

Unlike a number of other Western states, the Board is permitted to grant rights-of-way across or on state trust land; however, the grant must be on terms the Board determines and the right-of-way reverts to the state when the land ceases to be used for the purpose granted.[466] The Director of the Board has authority with regard to right-of-way, easement, and road access applications.[467]

Colorado statutes also permit the Board to engage in land exchanges, provided that the lands acquired in the exchange and any resulting income are credited to the appropriate beneficiary.[468] Appraisals or established market values for the lands to be exchanged must be reviewed and accepted by the Board, and the minimum value of the lands acquired in the exchange must not be less than 100 percent of the appraised or market value of the lands being exchanged.[469] The Board is also authorized to engage in "non-simultaneous" exchanges of state trust land to reinvest in higher yield properties or to consolidate ownership. Funds resulting from a non-simultaneous exchange are placed in a temporary fund[470] and are not deposited in the permanent fund until the exchange transactions are completed; however, these exchanges are only permitted where they do not result in any loss of principal or where any loss can be offset by a gain within three fiscal years.[471]

Land sales currently comprise only a tiny fraction of Colorado's trust revenues, generating only $272,156 in 2002-03, or around 1 percent of total revenue.[472]

d. Conservation Reserve

The 1996 amendment to Colorado's Constitution established a long-term "Stewardship Trust" of between 295,000 and 300,000 acres of land "that are valuable primarily to preserve long-term returns to the state."[473] Under Colorado's implementing statutes, the lands in the Stewardship Trust are to be designated by the Board (after a public nomination process) in order to preserve the beauty, natural values, open space, and wildlife habitat of Colorado lands. Once lands have been approved for inclusion in the Stewardship Trust, only uses that will protect and enhance the beauty, natural values, open space, and wildlife habitat are permitted on the lands. This nomination and approval process began in 1998 with a first round of public nominations that encompassed approximately 620,000

[461] *Id.* at § 24-65-102.
[462] *Land Use Planning in Colorado: Smart Growth Colorado's Future,* COLORADO DEPARTMENT OF LOCAL AFFAIRS 1 (October 9, 2004).
[463] COLO. REV. STAT. § 36-1-124(3).
[464] *Id.* at § 24-33-107.
[465] *Id.* at § 36-1-150, *see also* COLO. CONST. Art. IX §§ 9,10.
[466] COLO. REV. STAT. § 36-1-136.
[467] BLC Policy No. 98-4, Policy on Approval of Right-of-way, Easement, and Road Access Applications and Assignments (1998).
[468] COLO. REV. STAT. § 36-1-141.
[469] BLC Policy No. 99-01, Policy Concerning State Trust Land Exchanges (1999).
[470] ANNUAL REPORT, *supra* note 410, at 5.
[471] COLO. REV. STAT. § 36-1-124.5.; *see also* East Lake Creek Ranch, LLP v. Brotman, 998 P.2d 46 (Colo. App. 1999), *rev'd on other grounds*, 31 P.3d 886 (Colo. 2001).
[472] ANNUAL REPORT, *supra* note 410, at 7.
[473] *See* COLO. REV. STAT. § 36-1-107.5.

acres; the Board ultimately designated 217,943 acres from the nominated lands. A second nomination process in 2000 nominated another 200,000 acres of land, of which the Board approved additional inclusions that brought the total land area in the Trust to 295,930 acres.[474]

The Director of the Board is required to conduct a baseline assessment of each parcel of Stewardship Trust land that identifies the natural values supporting the property's designation as Stewardship Trust land.[475] Before any permit or lease is granted on Stewardship Trust lands, the Director is required to review the baseline inventory and other relevant information to identify the natural values associated with the parcel. Applicants for a permit or lease are required to demonstrate that the proposed use will not significantly affect these natural values before any lease can be granted, and the terms of the lease must include language that is protective of the identified natural values. The Director is required to conduct monitoring on each parcel at least once every three years.

Similar requirements apply to the management of mineral or other subsurface uses on Stewardship Trust lands; before any lease or permit can be granted, the Board must determine whether or not the development or exploitation of subsurface resources can be conducted while protecting and enhancing the identified natural values on the property. If significant adverse impacts on the natural values of the property result, or if reclamation standards are not consistent with the identified end-use of the land, a permit or lease to develop or exploit subsurface resources may not be granted.[476]

Lands that are included in the Stewardship Trust also cannot be sold or exchanged unless the lands are first removed from the Stewardship Trust.[477] Lands can be removed from the Stewardship Trust on the affirmative vote of four of the five members of the Board; however, when lands are removed from the Stewardship Trust, the Board must designate an equal or greater amount of land to be added to the Trust.

[474] Colorado State Land Board Online, *available at:* http://www.trustlands.state.co.us/Documents/Stewardship/Nomination.pdf.
[475] BLC Policy No. 2001-02, Management of Surface Estate of Stewardship Trust Properties and Removal of Land from the Designation of Land into the Stewardship Trust (2001).
[476] BLC Policy No. 2002-03, Management of Mineral Activities on Stewardship Trust Properties (2000).
[477] COLO. REV. STAT. § 36-1-124(4).

Table V(C): FY 2003 Revenues – Colorado State Land Board

Source	% of Revenue	Receipts
Surface Uses		
Agriculture	5.0%	$1,360,779
Grazing	11.0%	$2,993,714
Other surface	1.0%	$272,156
Total Surface	**17.0%**	**$4,626,648**
Subsurface Uses		
Oil and Gas	40.0%	$10,886,232
Coal	22.0%	$5,987,427
Other	2.0%	$544,312
Total Subsurface	**64.0%**	**$17,417,971**
Sales and Other		
Land Sales	1.0%	$272,156
Other rentals	15.0%	$4,082,337
Rights of Way	2.0%	$87,090
Misc fees	1.0%	$272,156
Total Sales and Other	**19.0%**	**$4,354,493**
Grand Total	**100%**	**$27,215,579**
Agency Budget*		**$3,375,513**

* Figure reflects State Land Board's appropriation within the Department of Natural Resources budget

Source: Colorado State Board of Land Commissioners Annual Report, FY 2003; Office of State Planning and Budget, Colorado Department of Natural Resources Fact Sheet, July 2004. Colorado had not published its FY 2004 Annual Report by the time of publication.

6. Trust Revenue Distribution in Colorado

There are eight separate beneficiaries who receive revenues from trust management activities in Colorado. These beneficiaries include: (1) the School Trust (Colorado common schools); (2) the Public Building Trust; (3) the Penitentiary Trust; (4) the University of Colorado Trust; (5) the Saline Trust (benefits the State Parks, original acreage consisted of "salt springs not exceeding twelve in number with six sections of land adjoining and contiguous to each."); (6) the Internal Improvements Trust (benefits State Parks); (7) the Colorado State University Trust; and (8) the Hesperus Trust (managed for the benefit of Fort Lewis College). Of these, the School Trust is by far the largest, accounting for 91 percent of the total trust land acreage in the state. In addition, lands vested in the state as a result of foreclosure are designated "public school fund lands" and are considered an investment of the public school fund.[478]

Each parcel of state trust land is assigned to a specific trust beneficiary and a corresponding trust account associated with the state permanent fund. Revenues from the sale of trust lands and from royalties for natural resource extraction (other than timber sales) are deposited into the state permanent fund and are credited to the appropriate beneficiary.[479] By contrast, proceeds from timber sales and rental payments for surface or subsurface use are distributed directly to beneficiaries. Expendable revenues from the school trust lands are deposited into the public school fund and are distributed for use by schools as described below.[480] However, for revenues generated from the lease or rental of surface rights on trust lands located in state forests 75 percent are distributed to the public school income fund and 25 percent to the county public school fund of the county in which the lands are located.[481] Monies collected by the Board for fees and services are deposited in a Land and Water Management Fund and used for the management and improvement of state trust lands and their associated waters.[482]

The state's permanent fund is invested by the state treasurer, who is statutorily authorized to invest in a variety of types of deposits and investments, including time deposits, savings and loans, common and preferred stock, and other low risk funds.[483] The permanent funds are required to be maintained inviolate, with only the interest available for distribution to beneficiaries.[484] However, at the discretion of the Treasurer, the permanent fund may also be used to make loans directly to the school district to facilitate the provision of buildings, land, and equipment necessary for the operation of public schools, or to guarantee bonds issued by the school district where the guarantee is not in excess of three times the market value of the public school fund.[485] Colorado was one of the few states to see an increase in its permanent funds during fiscal year 2002-2003.[486] The balance of the state's permanent fund balance was $369.9 million as of June 2003 (the last date for which data was available).[487]

Interest derived from the investment of the permanent fund is generally distributed to the beneficiaries; however, starting in 2003-2004, interest from the public school fund that exceeds $19 million is automatically reinvested into the principal of the fund (which effectively caps distributions to schools from the permanent fund for the foreseeable future).[488] Interest from the School Trust portion of the permanent fund that is not reinvested is periodically transferred into the state public school fund.[489]

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[478] *Id.* at § 22-41-103.
[479] *Id.* at §§ 36-1-134; 36-1-116(1)(b).
[480] *Id.* at § 36-1-116(1)(a).
[481] *Id.* at § 36-7-202.
[482] *Id.* at § 36-1-145.
[483] *Id.* at § 22-41-104 (lawful education investments); s*ee also* Colorado State Treasurer, http://www.treasurer.state.co.us/about/investments/public_school/index.htm.
[484] COLO. REV. STAT. § 22-41-102.
[485] *Id.*
[486] ANNUAL REPORT, *supra* note 410, at 3.
[487] *Colorado State Treasurer Quarterly Report*, Colorado Public School Permanent Fund, *available at:* http://www.treasurer.state.co.us/about/investments/public_school/PubSchoolJune03.pdf.
[488] COLO. REV. STAT. § 22-41-102(3).
[489] *Id.* at § 22-41-106.

Under Colorado's "School Finance Act," school districts are to be provided a per pupil base amount that is set by the legislature each year, adjusted for costs of living, enrollment sizes, and at-risk student populations.[490] The proceeds from the state public school fund are distributed to counties on top of this per-pupil base, taking into account their per-pupil enrollment.[491] The legislature is constitutionally prohibited from substituting public school fund proceeds for monies that are appropriated by the general assembly. [492] These funds also cannot be used erecting, repairing, or furnishing school buildings, nor can they be used to purchase school lots, and are thus they are generally used for teachers' salaries.[493] Proceeds from the state public school fund are supplemented by distributions of trust proceeds that were deposited in the local county public school fund; these revenues are also dispersed on a per-pupil basis.[494]

Overall, revenues from Colorado's trust lands contribute a relatively minor amount to the overall state school budget. Trust contributions totaled approximately $50 million in 2003, including both revenues from activities and interest from the permanent fund – making up less than 1 percent of the state's $6.6 billion in K-12 expenditures.[495]

7. Recent Developments and Emerging Issues in Colorado

a. Lowry Range

The Lowry Range, also known as the Lowry Bombing and Gunnery Range, was used as a bombing training facility during World War II through to the Vietnam War.[496] The Board acquired the land through land exchanges with the Department of Defense in 1964, 1966, and 1991. The area is currently undeveloped short-grass prairie, contaminated with unexploded military ordinance, and is leased primarily for grazing and a few oil wells.

The trust currently owns 25,854 acres out of the 600,000 acre range. This trust parcel is one of the largest pieces of undeveloped metropolitan property under single ownership in the U.S.[497] There is an estimated two hundred-year water supply for one hundred thousand single-family homes at the Range.[498] The Lowry Range parcel is slated for development when ongoing clean-up efforts are completed. The state Governor has stated his hope that development on this land will become a "jewel for generations to come," and that over the next twenty or twenty-five years the area will develop into a high-quality community with "plenty of open space."[499] The Board has estimated that the completed value of the development to the trust would be in the "billions and billions of dollars."[500]

b. Multiple Use Management Policy

The Multiple-Use Management Policy was created by the Board of Land Commissioners in 1992 after more than two years of research and public input. The primary mission of the Policy is to maximize benefits to the trust while recognizing state interests and citizen concerns. The Policy requires trust assets to be managed in a manner that preserves and enhances the long-term productivity and value of *all* trust land assets, and to promote increased annual rentals by creating

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[490] *Id.* at § 22-54-101 et seq.
[491] *Id.* at § 22-54-115.
[492] COLO. CONST. Art. IX § 3.
[493] FLETCHER SWIFT, A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1798-1905, 227 (1911).
[494] COLO. REV. STAT. §22-54-113(2).
[495] *Annual Survey of Local Government Finances 2002-2003, Summary of Public School System Finances for Elementary-Secondary Education by State*, U.S. CENSUS BUREAU (2005), *available at* http://www.census.gov/govs/www/school.html.
[496] Press Release, *Former Lowry Bombing and Gunnery Range*, U.S. Army Corps of Engineers, *available at* http://www.nwo.usace.army.mil/html/pm-h/lowrywebpg.htm.
[497] John Rebchook, *Homes, Homes on the Range: Under Governor's Plan, Former Lowry Bomb-training Site Would Become Gigantic New Development Project*, ROCKY MOUNTAIN NEWS (Denver, CO) 1C (March 6, 2004).
[498] *Id.*
[499] *Id.*
[500] *Id.*

opportunities for lessees other than traditional agricultural lessees to lease state trust lands.[501] By responding to the increased demands for outdoor public recreation from growing populations and the state's $6 billion tourism industry,[502] the Board anticipates obtaining an additional $1 million per year of rental income for the trust.

The Policy is designed to be phased in over ten years, and will provide for multiple uses such as hunting, wildlife related uses, hiking, camping, and biking in a manner compatible with existing agricultural and grazing leases under Multiple-Use Management Plans (MMPs). MMPs will prescribe overall management goals, recommendations for habitat improvements, tools to achieve desired results, considerations related to the contribution of the plan to quality of life, and monitoring and evaluation mechanisms. [503] The Policy also adopts guidelines for motorized vehicle use, buildings or other capital structures, littering, camping and fires, pets, and hours of use.[504] Lessees will have the opportunity to participate as a full partner with the Board and the Division of Wildlife in building consensus on wildlife management strategies, and can serve as on-site managers for wildlife uses.

The largest single recreational lessee of trust lands in Colorado under this program is the Colorado Division of Wildlife, which leases in now excess of four hundred thousand acres of trust land for hunting, fishing, and other wildlife recreation on a non-exclusive basis under a memorandum of understanding. The cost of the lease is paid for via surcharges on hunting and fishing licenses.

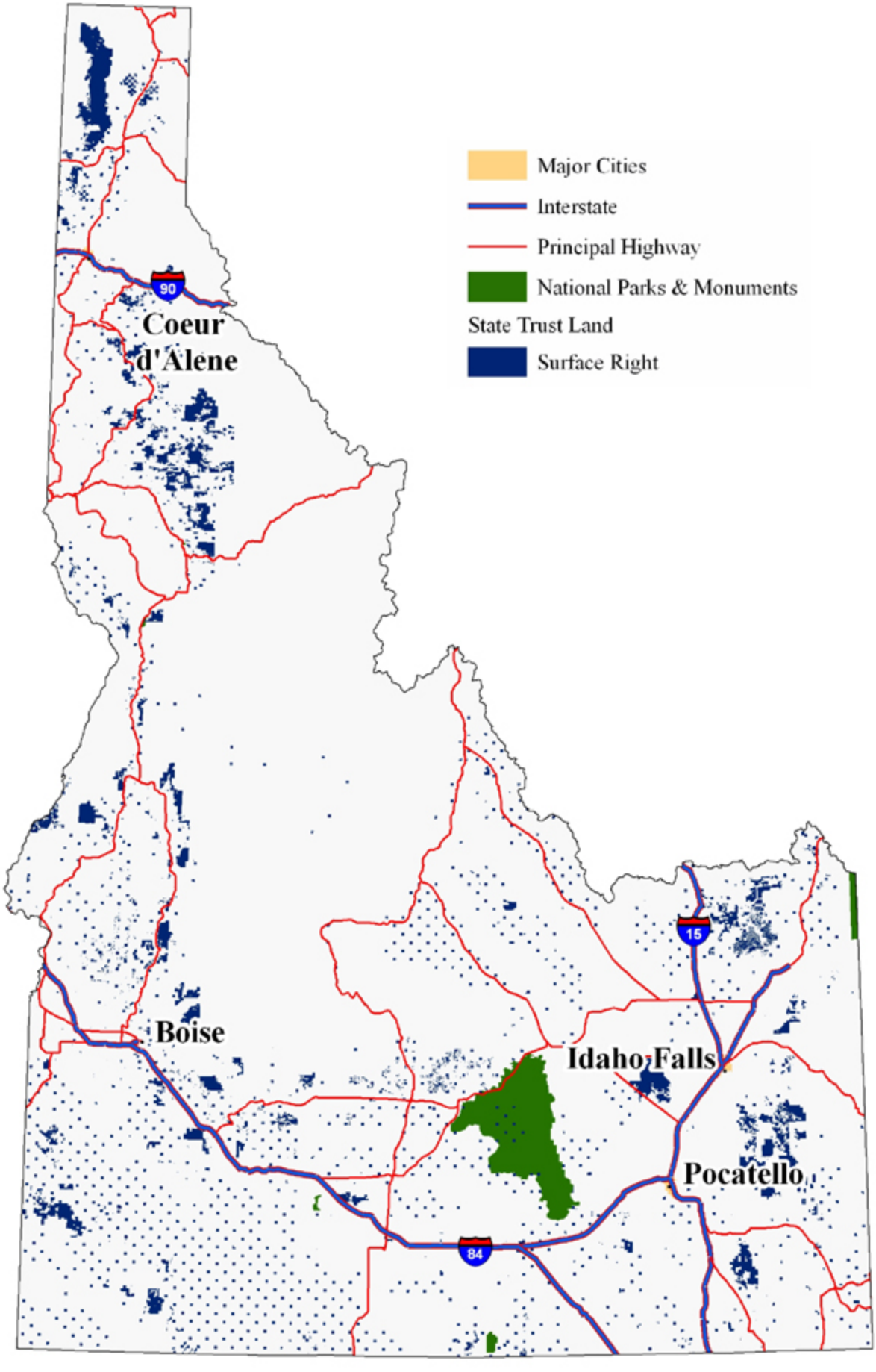
c. Fiscal Impact Study Requirements

Under the terms of Amendment Sixteen, the Colorado Board of Land Commissioners is now required to consider whether or not the income derived from the use of trust land for development will exceed the costs associated with increased student enrollment associated with that development in order to avoid detrimental impacts on local schools and state funding of education.[505] If the Board is directly involved in the development of trust property, or if the Board is indirectly involved via a development agreement, a fiscal impact study must be conducted whenever a parcel that is leased, sold, or exchanged is zoned for residential, commercial, or industrial purposes.[506]

If the benefits to the trust do not outweigh the burdens on local schools from increased enrollments, the proposed development may not proceed. For example, every child in Colorado attending public school costs the state $4,666.29 in base funding, plus a cost of living factor, an "at risk" student factor, a personnel costs factor, and the size of the school factor (larger schools have greater buying power).[507] The budget for fiscal year 2004-2005 guarantees a minimum of $5,627 per pupil. As such, a large residential development will place a significant financial burden on the state – that is, if the costs of this development are not offset by increases in property taxes and specific ownership taxes that are used to fund education in Colorado,[508] the financial demands on the school may well outweigh the increased revenues generated for the school trust.[509]

[501] BLC Policy No. 92-8, Multiple-use Policy (1992).
[502] *Id.*
[503] *Id.*, at Appendix II.
[504] *Id.*
[505] COLO. REV. STAT. § 36-1-112.5.
[506] *Id.* at § 36-1-112.5. *See also* Board of Land Commissioners Policy No. 99-02, Policy Concerning Fiscal Impact (1999).
[507] *Understanding Colorado School Finance and Categorical Program Funding*, COLORADO DEPARTMENT OF EDUCATION, PUBLIC SCHOOL FINANCE UNIT (July 2004).
[508] COLO. REV. STAT. § 22-54-103.
[509] COLO. CONST. Art. IX § 3.

State Trust Lands in Idaho



D. Endowment Land Management in Idaho

Idaho has nearly 2.5 million surface acres of trust lands and approximately 3 million acres of subsurface lands (Idaho's trust lands are generally referred to as "endowment lands").[510] Although many of these lands are spread throughout the central and southern portions of the state in a checkerboard fashion, the state also owns a large number of substantial, consolidated trust parcels. These lands cover environments that vary from the Snake River Plain in southern Idaho, with hardened lava flows and sagebrush grasslands, agriculture, and rapidly growing municipalities; to the heavy coniferous forests and meadowlands that dominate central and northern Idaho. Approximately 994,000 acres of Idaho's endowment lands are forested, with about half representing high or medium productivity lands that are managed for sustained yields of timber products.[511]

1. Idaho's Land Grant

Idaho's road to statehood was delayed by a lack of citizens. Although railroads and a state gold rush brought enough settlers to qualify the state as a territory in 1863, Idaho did not achieve statehood until 1890 when it entered the Union as the forty-third state. Prior to statehood, the territory of Idaho received approximately 240,000 acres of lands under the Morrill Acts of 1862 and 1890 for the support of the University of Idaho. At statehood, Idaho received sections sixteen and thirty-six in every township "for the support of common schools."[512] In addition to this common school grant, the state also received specific grants for a variety of other public institutions, including: 90,000 acres for an agricultural college; 100,000 acres for a scientific school; 50,000 acres for penitentiaries; 50,000 acres for insane asylums; 50,000 acres for the support of the state university; 100,000 acres for "normal schools"; 150,000 acres for charitable, educational, penal, and reformatory institutions; 150,000 acres for agricultural and mechanical colleges; and fifty sections for erecting public buildings.[513] Idaho currently retains approximately 68 percent of its original land grant of 3.7 million acres.[514]

2. Enabling Act and Constitutional Requirements

The original Idaho Enabling Act is not particularly restrictive when compared to later enabling acts and does not refer to the granted lands as a "trust." However, it does place some restrictions on the use of the land and the proceeds from such uses – endowment lands must be sold at public sale, lands must be sold for not less than $10 per acre, and the proceeds must be deposited in a permanent fund to be used exclusively for the support of the public schools or they must be "banked" and used to acquire additional school lands.[515] The Act provides for only a few exceptions to the public sale requirement, including a provision allowing for leases of five years or less.[516] A 1998 amendment to the Enabling Act altered the sale and lease provisions to allow the exchange of endowment lands where the lands are of equal value or equalization payments are made.

Idaho's Constitution requires the legislature to hold the lands in trust and imposes additional restrictions by requiring the trust manager to "secure the maximum long-term financial return" to the beneficiary, and by prohibiting the sale of lands for less than the "appraised price." It also requires public auction for the disposal of lands, prohibits the sale of more than "one hundred sections per year," limits the size of the tract sold to any one individual or entity to three hundred twenty acres, and specifically authorizes the exchange of lands.[517]

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[510] IDAHO DEPARTMENT OF LANDS FY 2004 ANNUAL REPORT (2005).
[511] O'Laughlin & Cook, *supra* note 376.
[512] Act of Admission of Idaho, 26 Stat. 215 § 4.
[513] *Id.* at §§ 10, 11.
[514] 2004 ANNUAL REPORT, *supra* note 510, at 8.
[515] Act of Admission of Idaho, 26 Stat. 215 § 5.
[516] *Id.*
[517] IDAHO CONST. Art. IX § 8.

3. Idaho's Trust Responsibility

The courts have found that Idaho's Enabling Act and Constitution operate to create a binding trust responsibility. Based on this trust responsibility, the courts have held that:

- On matters of policy, the Idaho State Board of Land Commissioners (SBLC), as "trustee or business manager acting on behalf of the state in handling the grant lands" are the "sole and exclusive judges so long as they do not run counter to the provisions of the Constitution or statute."[518]

- Local governments cannot plan or zone land in a manner that prohibits the state's permitted use of the land unless the state agrees otherwise, and state endowment lands are generally exempt from compliance with state land use planning statutes.[519]

- School children, parents of school children, and environmental groups lack standing to challenge school trust management decisions; schools, and school districts of which they are part, are the only beneficiaries which have a legally protected interest sufficient to give rise to a claim.[520]

- The state is required to award grazing leases on a competitive basis, and cannot award a lease to a current grazing lessee without competition;[521] similarly, the state may not limit grazing lease applications to certain parties to the detriment of other potential bidders who would provide larger benefits to the trust.[522]

- The SBLC may exercise discretion in carrying out its trust obligations by accepting a bid for timber less than the high bid where the bidder proposes to construct improvements or conduct other work that would enhance the value of the land in excess of the monetary difference between the two bids.[523]

4. Governance of Endowment Lands in Idaho

The Idaho State Board of Land Commissioners (SBLC) manages Idaho's endowment lands through the Idaho Department of Lands (IDL), and is responsible for determining the best uses of those lands.[524] The SBLC, created by the Idaho Constitution section seven, consists of the Governor, Superintendent of Public Instruction, Secretary of State, Attorney General, and the State Controller. The SBLC is charged with managing the endowment lands "in such manner as will secure the maximum long term financial return to the institution to which granted."[525] The legislature is directed to provide by law that the lands will be held in trust.[526]

The IDL Director, who is appointed by the SBLC, is responsible for administration of the endowment lands.[527] The Director's decisions are reviewed by the SBLC in any contested matters.[528] The Director acts as both the Secretary of the SBLC and the Idaho State Forester.[529]

The IDL is divided into two geographic divisions (Northern and Southern), and is further separated into two operational areas. The Lands, Minerals and Range Division consists of the Real

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[518] Pike v. State Board of Land Commissioners, 113 Pac. 447 (Idaho 1912).
[519] State ex rel. Kempthorne v. Blaine County, 79 P.3d 707 (Idaho 2003).
[520] Selkirk-Priest Basin Assn. v. State ex rel. Batt, 919 P.2d 1032 (Idaho 1996); Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus, 899 P.2d 949 (Idaho 1995).
[521] Idaho Watershed Project v. State Board of Land Commissioners (IWP I), 918 P.2d 1206 (Idaho 1996).
[522] Idaho Watershed Project v. State Board of Land Commissioners (IWP II), 982 P.2d 371 (Idaho 1999).
[523] Barber Lumber Co. v. Gifford, 139 P. 557 (Idaho 1914).
[524] IDAHO CODE § 58-133(1).
[525] IDAHO CONST. Art. IX § 8.
[526] *Id.*
[527] IDAHO CODE § 58-104.
[528] *Id.*
[529] *Id.*

Estate and Surface and Mineral Resources Bureaus.[530] The Forestry and Fire Division consists of the Forest Management, Forestry Assistance, and Fire Management Bureaus.[531] The Northern division, with 523,000 acres of mostly forested lands, covers the area north of the Clearwater River through seven field offices overseen by the Northern Operations Chief.[532] The Southern division consists of seven field offices and covers 1.9 million acres in the area south of the Clearwater River.[533] Both the Northern and Southern Operations are responsible for regulating forest protection on private, state, and federal lands, and for regulating forest practices on all private forest lands.[534]

Until 2001, the IDL took 10 percent of the total trust revenues to cover the costs of administering the trust. However, under recent reform legislation,[535] the Department now receives its funding through the appropriation process, with funds derived from the "Endowment Earning Reserve," comprised of all revenues from endowment lands except land sales and mining revenues.

5. Endowment Land Management in Idaho

The mission of the Idaho Department of Lands is to manage the endowment lands to "maximize long-term financial returns to the beneficiary institutions [and] provide protection to Idaho's natural resources."[536]

Idaho's endowment lands are divided into three categories: primary forest land (841,234 acres), secondary forest land (190,896 acres) that is not managed for timber production, and non-forested land (1,430,188), which is comprised primarily of rangeland but also includes 13,406 acres of cropland.[537] The sale of timber products dominates Idaho's endowment fund income. In 2003, timber sales generated $31.6 million in net revenues for the state endowment fund. In 2004, timber sales generated $47.1 million in net revenues, constituting approximately 90 percent of all the net revenues from state endowment lands in Idaho.[538]

The state's management activities on the endowment lands can be divided into three general categories: surface uses, subsurface uses, and land sales and other uses.

a. Surface Uses

The majority of Idaho's endowment land surface acreage is dedicated to timber, rangeland, and cropland leasing.[539] Surface leases are also issued for commercial property, minerals, cottage sites, and in a limited number of cases, navigable water/submerged lands;[540] however, the sale of timber products is by far the most significant source of revenue for the endowment fund. The SBLC approves an annual timber sale plan prepared by the IDL and also decides how endowment lands are to be leased and the rate of the lease.[541]

Non-mineral, non-commercial surface leases of public school endowment lands are restricted to no more than ten years unless the lessee is a federal or state agency, the federal government, county, city, school district, or political subdivision;[542] these "public purpose" leases are issued for up to twenty-five years. All rentals on leases must be for no less than fair market value;[543] however, a

[530] 2004 ANNUAL REPORT, *supra* note 510, at 4.
[531] *Id.* at 11.
[532] *Id.* at 12.
[533] *Id.* at 13.
[534] *See* Idaho Forest Practices Act, IDAHO CODE § 38-1301.
[535] *See* O'Laughlin & Cook, *supra* note 376, at 8.
[536] Idaho Department of Lands, *Overview*, *available at:* http://www2.state.id.us/lands/overview.htm.
[537] 2004 ANNUAL REPORT, *supra* note 510, at 27; O'Laughlin and Cook, *supra* note 376, at 8.
[538] 2004 ANNUAL REPORT, *supra* note 510, at 19.
[539] *Id.* at 17.
[540] *Id.*
[541] IDAHO CODE § 58-304.
[542] *Id.* at § 58-307(2).
[543] *Id.*

public auction is not required unless two or more lessees apply to lease the same land.[544] The Director may reject lease bids only for "justified reasons,"[545] and competing lessees are required to pay the existing lessee for any improvements.[546]

Timber sales may take place without advertisement if the sale is for one hundred thousand board feet or less,[547] and although the statutes permit timber sales at public auction, there is no requirement that it be sold in this manner. Timber sales over one million board feet or worth $150,000 as well as salvage sales over then thousand board feet or worth $15,000 must be sold at oral auction. Timber sale contracts provide for the term of the contract (usually from two to four years) with the statutes providing a rarely used maximum term of fifteen years.[548]

Grazing and cropland leases are issued for ten-year terms. As with other leases, competitive bidding is required only when two or more persons apply to lease the same land, known as a conflict lease.[549] Until recently, where competition between lessees occurred, Idaho allowed the Director to consider the economic impacts of losing a lease on the existing lessee, and the implications of managing the leased lands separately from adjoining private lands.[550] However, this statute was declared unconstitutional in *Idaho Watersheds Project v. State Board of Land Commissioners*.[551] Pursuant to this decision, the SBLC is required to auction leases to the highest bidder unless a bid is rejected for a "justified" reason. This effectively ended Idaho's policy of preferential bidding for existing lessees.

Although the grazing and cropland lease program covers the bulk of the state's acreage, the program operated at a loss in fiscal year 2004, generating $1.6 million,[552] with expenses of approximately $1.8 million[553] (a net loss). In fiscal year 2003, the Department generated $1.7 million on grazing leases of 1.8 million acres,[554] with expenses of approximately $1.5 million[555] (netting $0.10 per acre).

Commercial leases are issued for up to forty-nine years with any leases over ten years requiring the SBLC to consult with the county commissioner to ensure the use of the land is consistent with local zoning and planning ordinances.[556] Commercial leases longer than ten years additionally require a hearing in the county where the leased land is located. Commercial lessees may exercise a preferential right to renew their lease and the SBLC may reject any conflicting lease applications,[557] although the validity of this statute may be in question based on the decision in *Idaho Watersheds*. Commercial leases include uses for industrial purposes, retail, office buildings, commercial recreation, and residential development.[558]

Although cottage leases have been subject of conflicting lease applications in the past, the Idaho legislature recently conferred a preferential right to renew on cottage site lessees as well.[559] The legislature determined that maximum long-term benefits to the beneficiaries would be best obtained through the long-term lease, at market rent, of these sites.[560] As with the commercial leasing statute, this provision may be in question in light of the *Idaho Watersheds* decision.

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[544] *Id.* at § 58-310.
[545] *Id.*
[546] *Id.* at § 58-308.
[547] *Id.* at § 58-406(5).
[548] *Id.* at § 58-413.
[549] *Id*. at §58-310.
[550] *Id*. at §58-310(B).
[551] 982 P.2d 371 (Idaho 1999).
[552] 2004 ANNUAL REPORT, *supra* note 510, at 24.
[553] *Id.* at 21.
[554] IDAHO DEPARTMENT OF LANDS FY 2003 ANNUAL REPORT, at 13.
[555] *Id.* at 14.
[556] IDAHO CODE § 580-307(3).
[557] *Id.* at § 580-307(7).
[558] *Id.* at § 580-307(4).
[559] *Id.* at § 58-210A.
[560] *Id.* at § 58-210A.

b. Subsurface Uses

Overall, subsurface leasing, with revenues of approximately $1.3 million in 2004 (2 percent of total revenue), constitutes a relatively minor component of Idaho's trust portfolio. For Idaho's minimal oil and gas resources, leasing occurs through a competitive bidding process when more than one party is interested in the lease. Leases run for an initial ten-year term, with a provision for continuation thereafter as oil and gas is being produced in paying quantities or if the lessee is conducting operations in good faith.[561]

Mineral leases, which include leases for sand and gravel, phosphates, building stone, gemstones, and miscellaneous mineral commodities are similarly issued on a competitive basis (if there is more than one interested party), except that a lessee who discovers any mineral resource has a right of first refusal for a state lease covering the minerals.[562] Sand and gravel leases currently account for 60 percent of the revenue generated by mineral leases.[563] Idaho also issues geothermal and mineral springs leases, which may be leased simultaneously for grazing or agricultural purposes,[564] and which are leased in terms of up to fifty years.[565] However, Idaho recognizes a public right to the free use of any leased mineral springs or waters.

c. Land Sales and Other

Although both the Idaho Enabling Act and Constitution authorize the sale of endowment lands in the best interest of the state,[566] land sales are rarely used as part of the state's trust management strategy. When they do take place, proceeds from land sales are earmarked for the permanent fund unless the transaction falls under the state's land banking program. In 2004 land sales generated approximately $181,900, or only 0.3 percent of the total revenue generated.

The SBLC is authorized to sell state lands as they deem in the best interest of the state.[567] SBLC is required to give notice of the sale through advertising,[568] and must sell lands for no less than the appraised value.[569] Land sales are constitutionally limited to one hundred sections, or sixty-four thousand acres per year, and of that acreage no entity may purchase more than three hundred twenty acres.[570] In 1998, the Idaho legislature adopted a "land bank fund" program which allows the SBLC to place proceeds from the sales of lands into a segregated fund earmarked for the purpose of purchasing other lands. If after five years the funds are not used to purchase additional lands, the proceeds revert to the permanent fund of the respective institution.[571]

Easements on state owned lands may be granted for various uses. If the use requires exclusive or near exclusive use of the land, up to 100 percent of the land value plus payment for any damage or impairment of rights for the remaining property may be required.[572] If the value of the easement is expected to exceed $250, an appraisal will be required.[573] In addition being able to grant limited term easements ranging from ten to fifty-five years the state can also grant perpetual easements. Compensation depends on the type, terms, and exclusivity of the easement.[574]

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[561] IDAHO CODE § 47-801.
[562] IDAHO ADMIN. CODE § 20.03.16.085.
[563] 2004 ANNUAL REPORT, *supra* note 510, at 24.
[564] IDAHO CODE § 47-1611.
[565] *Id.* at § 58-311.
[566] *Id.* at § 58-313.
[567] *Id.* at § 58-313.
[568] *Id.*
[569] IDAHO CONST. Art. IX § 8.
[570] *Id.*
[571] IDAHO CODE § 58-133; Idaho Atty. Gen. Op. 02-01.
[572] IDAHO ADMIN. CODE § 20.03.08.020.02.
[573] *Id.* at § 20.03.08.020.03.
[574] *Id.* at § 20.03.08.020.06.

The SBLC has statutory authority to exchange full surface and mineral rights for lands of equal value to consolidate or aid in the control and management of state lands.[575] Leased lands may be exchanged if the current lessee agrees in writing. In fiscal year 2004, the SBLC acquired 705 acres and deeded 3,210 acres in two land exchanges that totaled more than $5.9 million dollars.[576]

Table V(D): FY 2004 Endowment Lands Revenues – Idaho Department of Lands

Source	% of Revenue	Receipts
Surface Uses		
Timber	86.4%	$56,619,500
Grazing/cropland	2.5%	$1,627,900
Cottage sites and other	4.8%	$3,133,200
Commercial and Misc	4.0%	$2,608,500
Total Surface	**97.6%**	**$63,989,100**
Subsurface Uses		
Subsurface leases and other	2.0%	$1,280,400
Total Subsurface	**2.0%**	**$1,280,400**
Sales and Other		
Land Sales	0.3%	$181,900
Easements	0.2%	$112,500
Total Sales and Other	**0.4%**	**$294,400**
Grand Total	**100%**	**$65,563,900**
Agency Expenditures		**$12,978,400**

Source: Idaho Department of Lands FY 2004 Annual Report

6. Trust Revenue Distribution in Idaho

There are thirteen beneficiaries that receive revenues from endowment land management activities in Idaho. These beneficiaries include:(1) public schools; (2) the agricultural college; (3-7) charitable institutions (Idaho State University, Industrial Training School, State Hospital North, Idaho Veterans Homes, and the School for the Deaf and Blind); (8, 9) the state normal schools (Idaho State University, Department of Education, and Lewis-Clark State College); (10) the state penitentiary; (11) the school of science (University of Idaho); (12) the State Hospital South; and (13) the University of

[575] IDAHO CODE § 58-138.
[576] 2004 ANNUAL REPORT, *supra* note 510, at 24.

Idaho.[577] Of these beneficiaries, the common schools are by far the largest, credited with approximately 2.1 million acres of the 2.4 million acres in the trust.[578]

The Idaho Enabling Act created a permanent fund to hold the proceeds from the sales of school lands.[579] The public school funds are kept separate from all other funds and are invested as a separate fund.[580] All other funds are pooled and invested as a block. The funds are managed by the Endowment Fund Investment Board. The Investment Board is composed of nine members appointed by the Governor with Senate confirmation.[581] The Board consists of one citizen with at least ten years experience in the field of public educational administration, one member of the Idaho Senate, one member from the House, and six members who are citizens-at-large with experience in financial matters and investments. The mission of the Board is to manage the trust funds of the endowments with a long-term, inter-generational approach.[582] The primary concern is the preservation of the corpus of the trust.[583] The Endowment Fund Investment Board has allowed a fairly dynamic investment policy, with a current asset allocation of 70 percent equity and 30 percent fixed income securities.[584] This policy has been fairly successful, resulting in the increase of the Fund from $77 million in 1968 to the current level of $600 million.

Earnings on the permanent fund are deposited into an earnings reserve fund and are periodically distributed for the support of the public schools into the state's Public School Income Fund.[585] A 1998 amendment to the Enabling Act also allows the funds to be deposited into the land bank fund[586] from which additional endowment lands may be purchased within five years.[587] The Public School Income Fund also receives monies from:

- The proceeds of all state taxes levied for public school purposes;
- Federal grants for public school purposes;
- Ninety percent of sales, royalties, bonuses, or rentals of oil, gas, and mineral lands paid by the federal government to any state agency; and
- State legislative appropriations, earnings on investment of the Public School Income Fund. [588]

Administrative costs incurred in the management of the trust assets, including real estate and monetary assets, are generally appropriated from the permanent fund earnings.[589] The earnings from the funds, minus administrative costs, are distributed to the beneficiaries or deposited in the permanent fund annually.[590]

The state endowment lands generated over $65 million in endowment revenue in fiscal year 2004,[591] while expenses totaled almost $13 million.[592] These revenues translated into a distribution of approximately $37 million for public schools, [593] or just over 2 percent of the state's $1.6 billion public school budget.

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[577] Idaho Department of Lands, *Overview*, *available at:* http://www2.state.id.us/lands/overview.htm.
[578] *Id.*
[579] Act of Admission of Idaho, 26 Stat. 215 § 5.
[580] IDAHO CONST. Art. IX § 3.
[581] IDAHO CODE § 57-718.
[582] *State of Idaho Endowment Fund Investment Board*, Endowment Fund Investment Board, *available at:* http://www.efib.state.id.us/index.htm.
[583] *Id.*
[584] *History of Endowment Fund*, Endowment Fund Investment Board, *available at:* http://www.efib.state.id.us/history.htm.
[585] IDAHO CODE § 33-903.
[586] Act of Admission of Idaho, 26 Stat. 215 §5 (amended 1998).
[587] IDAHO CODE § 58-133.
[588] *Id.*
[589] IDAHO CONST. Art. IX § 3.
[590] IDAHO CODE § 33-902(A)(2).
[591] 2004 ANNUAL REPORT, *supra* note 510, at 20.
[592] *Id.* at 14.
[593] *Id.* at 20-21. Due to poor market returns and a change in spending rules, the Endowment Fund Investment Board was unable to make the targeted distribution to public schools of $43,313,000. The actual distribution was $37,056,500, or $6,256,500 short. *Endowment Distributions,* IDAHO FISCAL FACTS 2004, 31 (2004).

7. Recent Developments and Emerging Issues in Idaho

a. Western Watersheds Project ("Idaho Watersheds Project")

As noted above, Idaho's grazing lease preference system was recently overturned as a result of litigation.[594] The conservation group that brought this challenge, now called the Western Watersheds Project (WWP), is engaged in an aggressive campaign to acquire grazing leases as a method of protecting streams and riparian areas, to allow "overgrazed" lands to rest. This program has generated intense controversy, with WWP claiming that the grazing industry is the "state's biggest welfare recipient," and ranching groups claiming that they are good stewards of the land, turning a profit on much of Idaho's arid endowment lands to generate revenues for the trust and local economies that support public schools.[595]

Net revenues produced for the endowment fund by the grazing program averaged approximately $280,000 in the three-year period from 1999 to 2001,[596] and around $193,000 in 2003. In 2004, the expenses of the grazing program exceeded revenues by $185,600.[597]

b. Educational Funding

According to the recently released U.S. Census Report, Idaho is ranked forty-eighth in the nation for per-pupil spending; this fact, combined with market losses, declining timber markets, and the negative returns on grazing and cropland leases is generating pressure on trust managers to increase revenue generation on the state endowment lands.[598] In fiscal year 2003, net timber revenues plummeted to $31 million from an average of $60 million per year from 1999-2001 due to low stumpage market values.

Although a citizens initiative that would have required Idaho to significantly increase per-pupil expenditures failed to make it onto the November 2004 ballot, there are indication that funding pressures will only increase further. The Idaho Legislature continues to struggle with educational funding issues that were exacerbated by the recent economic recession.

c. Citizens Review Committee

In 2001, Governor Dirk Kempthorne, the chair of the SBLC, convened a Citizens Ad Hoc Evaluation Committee to "recommend efficiency/effectiveness changes" to the Department of Lands, the Endowment Funds Investment, the Land Board, and the interrelationships between and management practices of these agencies. The committee, made up of eight interested citizens, was charged with making specific recommendations to the Land Board regarding organizational processes, fiscal management, investment policy, reporting metrics and monitoring indicators, strategic areas management (e.g. human resources management, change management, etc.) and a framework for resolving conflicts.

In July 2001, the committee released its report, the full text of which is available on the SBLC's website. [599] The committee developed a list of recommendations intended to improve Idaho's endowment lands administration by emphasizing integrated asset management (lands and funds), increasing organizational efficiency, and diversifying revenue streams. The committee suggested that the Land Board adopt a formal investment policy that includes a statement of investment objectives, an annual investment plan, and commercial real estate policies. The investment policies should

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[594] Idaho Watersheds Project v. State Board of Land Commissioners, 982 P.2d 371 (Idaho 1999).
[595] Drew Lindsay, *Idaho grazing lands eyed as cash cows for schools*, 14 EDUCATION WEEK 35 (May 24, 1995).
[596] *See* O'Laughlin and Cook, *supra* note 376.
[597] 2004 ANNUAL REPORT, *supra* note 510.
[598] *Public Elementary –Secondary Education Finances: 2002-2003*, U.S. Census Bureau, *available at:* http://www.census.gov/govs/www/school.html.
[599] *Report and Recommendations of the Governor's Citizens Ad-Hoc Evaluation Committee on Lands/Endowment,* Idaho Department of Lands, *available at:* http://www2.state.id.us/lands/LandBoard/CitizenComm/CitizensReportPrelim.pdf (hereafter, "Citizens Committee Report").

include a target return rate and regular benchmark performance reporting to the Land Board. At the same time, the committee recommended that the agency as a whole develop a real estate business plan that should, (a) maximize financial return, (b) maintain the property in productive condition on a long-term basis, and (c) enhance the capital appreciation of the real estate that is owned. They recommended that the Land Board and agency work closely together on mutually established goals and review and consider the research organizational and governance models from other states with more established real estate programs.

The report made it clear that Idaho state endowment lands are to be managed to provide "maximum long term financial return" in accordance with the requirements of the Constitution, although it recognized the importance of economic benefits (not just financial benefits) as well as environmental principles and values:

> Maximizing the long-term economic benefits to the Endowment is the primary objective in managing the trust lands. The management of trust lands shall incorporate sound environmental principles with consideration of impacts on wildlife, water and air quality, and soil conservation. Respecting the desire to maintain environmental quality, the department of lands shall strive to use the best and highest standards commercially and economically feasible while meeting or exceeding the performance objective.[600]

Relative to this concern, the position of IDL, as stated by Director Winston Wiggins, is that non-economic values of endowment lands are important because they contribute to sustaining the maximum income for trust beneficiaries.[601]

However, the committee report was critical of both SBLC and IDL, noting that the returns provided to the endowment and its beneficiaries were significantly below the benchmark rates of return obtained by other investments. The report indicated that part of this shortfall is a result of a "mindset," common to both the SBLC and IDL, that the endowment lands are the "crown jewels of Idaho" and therefore should be protected and preserved for the benefit of the state and its citizens. The report recommended that the agencies undergo a "paradigm shift" by viewing the lands as owned by the various beneficiary endowments, not as public assets that are owned for the state or its citizens. With this shift the agencies could actively and intensively manage the lands as valuable real estate assets "to provide the maximum possible financial return to the endowments on a long-term basis."[602]

d. Increased Timber Harvest

An increase in the annual sustainable yield of timber will be phased in beginning in fiscal year 2006. With the approval of the Land Board and the legislature, in 2004 authority and funding was provided to increase the harvest of timber from endowment lands by 30 million board feet per year.[603] This is an approximately 15 percent increase from the 186 million board feet per year the IDL had previously identified as the long-term sustained-yield timber harvest from its lands.[604]

At issue is protecting endangered species habitat and old-growth values that exist on some of these timberlands. The IDL has created a new staff position to work with the U.S. Fish and Wildlife Service to develop a Habitat Conservation Plan that would reduce some of the uncertainties about managing timber in the presence of federally protected species such as grizzly bears, woodland caribou, and bull trout. The IDL has undertaken a cooperative research project with the University of Idaho to identify potential old-growth forests and management strategies that can preserve these values while also providing benefits for public schools and other beneficiaries of endowment lands.

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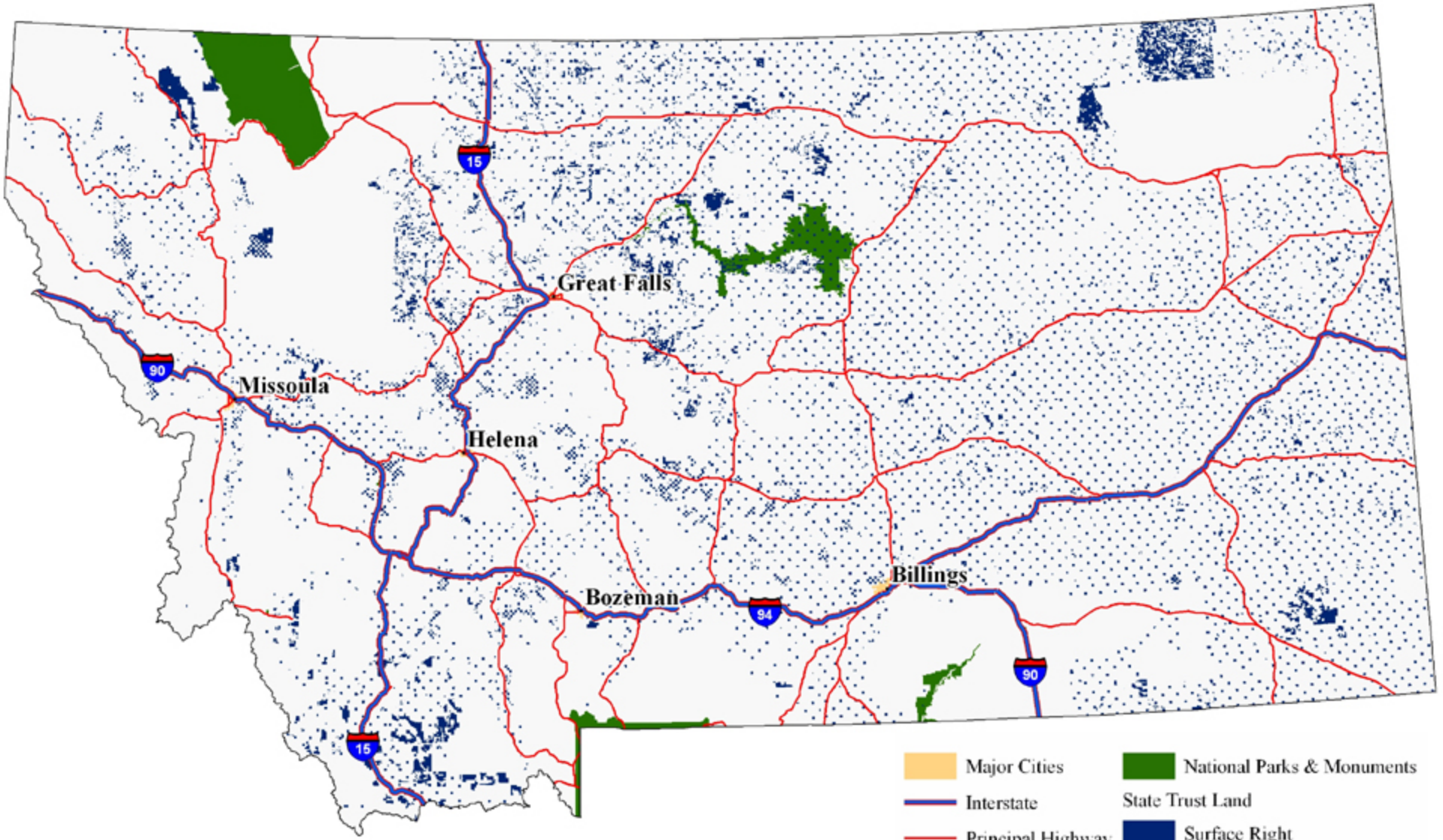
[600] *Id.*
[601] O'Laughlin and Cook, *supra* note 376, at 26.
[602] Citizens Committee Report, *supra* note 599; *see also* O'Laughlin and Cook, *supra* note 376, at 29.
[603] 2004 ANNUAL REPORT, *supra* note 510, at 1.
[604] O'Laughlin and Cook, *supra* note 376, at 52.

State Trust Lands in Montana



E. Trust Land Management in Montana

Montana's trust lands comprise over 5 million acres of surface and 6.2 million acres of subsurface lands. These lands are predominantly found in a checkerboard pattern with a few consolidated areas that resulted from post-statehood exchanges, foreclosures, and the establishment of national parks and forests.

1. Montana's Land Grant

Montana was admitted as a state under the Omnibus Enabling Act of 1889 (Enabling Act),[605] along with Washington, North Dakota, and South Dakota. Although Montana was prepared for admission to the union in 1884, Congress did not act on its request until 1889 due to concerns over maintaining the balance between democratic and republican representatives in Congress. Upon admission, Congress granted each state sections sixteen and thirty-six from each township for support of the "common schools." Montana currently retains about 90 percent of its original land grant of 5.7 million acres.

In addition to the section sixteen and thirty-six lands, Montana received additional land grants for specific public institutions – seventy-two sections exclusively for university purposes; 100,000 acres each for a school of mines and normal schools; 50,000 acres for agricultural schools; 50,000 for deaf and dumb asylum school; and 150,000 acres for public buildings. The state received an additional 100,000 acres under the Morrill Acts of 1862 and 1890 for the benefit of higher education.

2. Enabling Act and Constitutional Requirements

Under the terms of the Enabling Act, Montana is permitted to:

- "Dispose of" the lands for a minimum price only at advertised public sale;
- Exchange lands where the lands have equal value and are as nearly as possible of equal area;
- Lease lands for a term of years; and,
- Grant easements or other rights.

The Enabling Act also required the state to place revenues from the sale of lands in a permanent fund set up solely for the benefit of the institution for which the lands were granted and requires the state to obtain "full market value" for the disposal of any estate or interest in trust lands.[606]

Montana's Constitution mirrors the Enabling Act requirements by directing the state government to hold the public lands of the state "in trust for the people" to support schools.[607] The Constitution also requires proceeds from land sales to be placed in a permanent fund, to be held "forever inviolate and protected against loss or diversion," and that the lands be classified "in a manner provided by law." [608] It also creates and designates the composition of the state Board of Land Commissioners (Land Board), and grants the Land Board authority to "direct, control, lease, exchange, and sell school lands…under regulations and restrictions as may be provided by law."[609]

While the beneficiaries of Montana's trust are widely presumed to be the public institutions for which lands were granted by the Enabling Act and subsequent legislation, Montana's Constitution imposes a co-existing public obligation on the state as a land manager. Article IX of Montana's Constitution charges the state government with protecting and enhancing the inalienable right of all Montanans to a clean and healthful environment.[610] The combination of this constitutional right with

[605] Montana Enabling Act, 25 Stat. 676 (1889).
[606] *Id.* at § 11. *See* discussion *infra* regarding the state's land banking program, which allows proceeds from the sale of land to be used to purchase other lands.
[607] MONT. CONST. Art. X.
[608] *Id.* at Art. X, §§ 2-3.
[609] *Id.* at Art. X, § 4.
[610] *Id.* at Art. IX.

the state's well-established duties to manage the grant of lands as a trust has shaped Montana's approach to trust land management. One of the primary effects of this constitutional provision is the application of the Montana Environmental Policy Act (MEPA) to state trust lands, which requires state agencies to identify the environmental impacts of proposed actions.[611]

3. Montana's Trust Responsibility

The courts have interpreted Montana's Enabling Act and Constitution to impose a trust responsibility, with Montana's Land Board functioning as the "trustee" of this trust.[612] Based on this trust responsibility, the courts have held that:

- Although the legislature may establish the definition of full market value, the state must actually receive full market value; as a result, a statute allowing the state to issue free firewood permits on state lands violated the trust responsibility because agency failed to capture value for valuable wood.[613]

- Trust lands are subject to the requirements of MEPA.[614]

- The state as trustee has the discretion to accept a lesser bid for a state school land lease, despite the requirement to obtain "full market value" from dispositions, since the trustee's discretion permits "getting the best lessees possible" to ensure "maximum return with the least injury occurring to the land."[615]

4. Governance of Trust Lands in Montana

The Land Board is made up of the top five elected officials in the state – the Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and State Auditor – and serves as the trustee in the management of Montana's trust lands. The Land Board's role is to exercise general authority, direction, and control over the care, management, and disposition of state lands.[616]

The Trust Land Management Division (TLMD), one of seven divisions within the Montana Department of Natural Resources and Conservation (DNRC), is charged with executing the direction of the Land Board in the selection, exchange, classification, appraisal, leasing, management, sale, or other disposition of state lands.[617] The DNRC director is appointed by the Governor, subject to Senate confirmation, and serves at the Governor's pleasure.[618] The TLMD is divided into four primary management areas: Agriculture and Grazing, Forest, Minerals, and Real Estate. Most dispositional transactions undertaken by DNRC (e.g., easements, certain leases, exchanges and sales) must be finally approved by the Board.

TLMD receives 39 percent of its funding from trust fund revenues, 33 percent from timber sales, 21 percent from forest improvement fees, and the remaining 6 percent from resource development funds. The state's practice of using trust revenues to cover the agency's administrative

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[611] *See* MONT. CODE. ANN. § 75-1-101 et seq.
[612] State ex rel. Thompson v. Babcock, 409 P.2d 808, 812 (Mont. 1966) (Board of Land Commissioners is the trustee of state lands); s*ee also* State ex rel. Gravely v. Stewart, 137 P. 854 (Mont. 1913) (Board of Land Commissioners acts as trustee). However, although the BLC acts as trustee for purposes of the administration of the lands, the lands are held in trust by the state, such that the state and the legislature are also in the position of a trustee. *See Toomey v. State Board of Land Commissioners*, 81 P.2d 407, 414 (Mont. 1938) (state of Montana is the trustee); *Strandberg v. Board of Land Commissioners*, 307 P.2d 234, 236 (Mont. 1957) (legislature is the trustee).
[613] Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Commissioners, 983 P.2d 937 (Mont. 1999).
[614] North Fork Preservation Ass'n v. Department of State Lands, 778 P.2d 862, 866-67 (Mont. 1989).
[615] State ex rel. Thompson v. Babcock, 409 P.2d 808, 811-12 (Mont. 1966).
[616] MONT. CONST. Art. X § 4; MONT. CODE. ANN. §§ 2-15-201, 77-1-202.
[617] MONT. CODE. ANN. § 77-1-301.
[618] *Id.* at §§ 2-15-301, 2-15-111.

costs (as occurs in several other Western states) was questioned during an audit in 2004, but was subsequently confirmed by the state legislature in 2005.[619]

5. Trust Land Management in Montana

> The "guiding principle" for the administration of Montana's trust lands is that
>
> [the] lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in the Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.[620]

The legislature has directed the Land Board and DNRC to manage trust lands under a "multiple-use management concept" that balances land uses with "the needs of the people and the beneficiaries of the trust."[621]

DNRC's trust land management activities can be broken into three general types of activities: surface uses, subsurface uses, and land sales and other uses.

a. Surface Uses

Surface uses provide the largest source of revenue from Montana trust lands. Almost 99 percent of the lands in the state are leased or managed for agriculture, grazing, and timber production; in combination, these uses generated nearly 60 percent of the state's management revenue in 2003.

Agricultural, grazing, and other leases are granted to lessees through a competitive bidding process for terms of five to ten years, although the state reserves the right to reject the high bid for reasons stated in writing.[622] Agricultural lease rates are based on a crop-share formula or cash value, while grazing rates are derived from a defined animal-unit-month (AUM) unit value on the basis of carrying capacity. The state manages its forest land under sustained yield principles as set forth in the State Forest Land Management Plan (SFLMP) and Montana's administrative rules. The SFLMP is a programmatic environmental impact statement which established a general management philosophy and specific resource standards, pursuant to a yield amount established by statute.[623] The current annual sustained yield harvest requirement is 53.2 MMBF, which constitutes about 5 percent of timber volume harvested in the state.

The Real Estate Management Bureau (REMB) administers all activities on lands that do not have a primary surface use for agriculture, grazing, or timber management. The residential, commercial, industrial, and conservation uses for trust lands are developed in accordance with the Real Estate Management Plan. REMB also manages all secondary activities on lands classified as grazing, agriculture, or timber. Secondary uses are characterized by the state as "licenses." A license may be issued for temporary storage of gravel, construction materials, or equipment, for a group activity, for research, for outfitting and other forms of recreation, and for short-term agricultural uses such as grain bins, stockwater reservoirs, or pipelines.

Commercial uses, which exclude agriculture, grazing, mining, single family residences, home sites, and cabin leases, can be solicited by the state and awarded to the highest and best bidder for

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[619] In November, 2004, the Legislative Audit Division of the state of Montana released a report questioning the constitutionality of the legislature's authorization for DNRC to cover the administrative costs of trust management from certain trust revenues. *See* Audit Report No. 04-17, *Report to the Legislature, Financial-Compliance Audit For the Two Fiscal Years Ended June 30, 2004 Department of Natural Resources and Conservation* (2004).
[620] MONT. CODE. ANN. § 77-1-202.
[621] *Id.* at § 77-1-203.
[622] *Id.* at §§ 77-6-101 et seq.
[623] *Id.* at §§ 77-1-223 to 224.

up to a ninty-nie year lease term.[624] The state also offers licenses for specific types of uses such as recreation, hunting and fishing, and conservation uses.[625]

b. Subsurface Uses

The state may lease trust lands for mining prospecting and activities, including navigable stream beds and other reserved lands or rights for full market value. The primary types of mining activities that occur on trust lands are for oil and gas, coal, and minerals (metalliferous and non-metalliferous). Oil and gas leases are let on a quarterly basis by a competitive, oral bidding process and are awarded to the highest, qualified bidder.[626] Coal leasing may take place upon application or at the initiative of the agency and leases are awarded through a competitive, oral or sealed bidding process.[627] Requests for metalliferous and non-metalliferous leases and licenses are awarded on both competitive and non-competitive basis, with the primary term varying from less than one year to ten years.[628]

Geothermal and hydroelectric resources are also available for prospecting, exploration, and production.[629] Geothermal resources are leased by competitive bid by sealed bid for a ten year primary term.[630]

c. Land Sales and Other

Montana's Land Board is authorized to sell or exchange trust lands, as well as easements or rights-of-way across trust lands. However, the state has generally preferred to retain its ownership in trust lands, and has historically focused on the use of land exchanges to diversify its land base, while utilizing renewable resource leases to generate revenues. Less than 1 percent of Montana's trust land management revenue was generated through the sale of lands in fiscal year 2004; however, as discussed *infra*, the state is currently considering a proposal that would significantly increase land sale activities.

The sale of trust lands takes place at a noticed, public auction. Land is sold to the highest bidder at a minimum value established by the Board after qualified appraisal, with all sales subject to the final approval of the Board. By law, the state retains subsurface rights and generally retains riparian rights to sale property. DNRC is authorized to sell state trust land and use those funds to purchase replacement lands for the trust through a process called "Land Banking."[631] The intent of the Land Banking program is for the state to dispose of scattered tracts of land that generally do not have legal access and that generate substantially less income for the trust than their relative value, or that are difficult for the Department to manage; the Department can then purchase property in larger blocks, land that is contiguous to existing state land or that has legal access, or other land with the potential for increased revenue and more efficient management. The statute limits the amount of land that can be sold to one hundred thousand acres until the program is evaluated by the legislature in 2009. The sale of trust lands takes place at a noticed, public auction.

The Board may also exchange trust lands with governmental or non-governmental entities for lands of equal or greater value as determined by appraisal, income generating potential, and relative parcel size; lands with equivalent navigable or waterway values; or lands that aid consolidation.[632] When an exchange is proposed, the Board is required to notify former and current lessees, hold a

[624] *See id.* at §§ 77-1-901 et seq.
[625] *Id.* at §§ 77-1-801 et seq.
[626] *Id.* at § 73-3-402; ARM § 36.25.205.
[627] MONT. ADMIN. R. §§ 36.25.301 et seq.
[628] *Id.* at § 36.25.605.
[629] MONT. CODE. ANN. § 77-4-101.
[630] MONT. ADMIN. R. § 36.25.404.
[631] MONT. CODE. ANN. §§ 77-2-361 to 366.
[632] *Id.* at §§ 77-2-201, et seq.

public hearing in the county where the land is located, and adopt findings of fact to respond to any objections.[633] All exchanges are subject to the final approval of the Land Board.[634]

The Land Board is also authorized to grant easements for public purposes such as schoolhouse sites, parks, community buildings, rights-of-way, or utility uses; but it is limited in its authority to grant easements for conservation purposes.[635] Only the Department of Fish Wildlife and Parks (DFWP) and two specified non-profits may hold a conservation easement over trust lands.[636] The state is not required to advertise the sale of easements for bid, but must receive full compensation which may include in-kind services and materials as payment.[637]

With the growing interest in commercial and residential development on the part of the TLMD, and a growing concern among the public with regard to the loss of recreational access and natural resource use of state lands, the legislature has adopted school trust management programs such as the "land banking" program, that allows the state to sell certain designated lands and use the proceeds to purchase other lands, as well as a statutory program that allows the state to designate ecologically significant trust lands as "natural areas."[638]

[633] *Id.* at § 77-2-204.
[634] *Id.* at § 77-2-207.
[635] *Id.* at § 77-2-101.
[636] *Id.* at § 77-2-101(e).
[637] *Id.* at § 77-2-106.
[638] *Id.* at § 76-12-101

Table V(E): FY 2004 Revenues – Montana DNRC Trust Lands Management Division

Source	% of Revenue	Receipts
Surface Uses		
Agriculture	20.2%	$9,331,416
Grazing	9.7%	$4,494,637
Timber sales	22.9%	$10,591,657
Forest Improvement Fees	3.3%	$1,524,822
Total Surface	**56.1%**	**$25,942,532**
Subsurface Uses		
Oil and Gas	23.5%	$10,895,367
Coal	10.2%	$4,720,861
Other	0.4%	$194,759
Total Subsurface	**34.2%**	**$15,810,987**
Sales and Other		
Land Sales	0.0%	$2,900
Other Leases and Licenses*	5.2%	$2,410,210
Right of Way	4.6%	$2,117,993
Total Sales and Other	**9.8%**	**$4,531,103**
Grand Total	**100%**	**$46,284,622**
Trust Land Administration Budget		**$8,800,000**

* Lease and license revenue figures combined for FY 2000-2003

Source: Montana Department of Natural Resources and Conservation FY 2004 Annual Report

6. Trust Revenue Distribution in Montana

There are nine beneficiaries who receive revenues from Montana's trust lands: (1) the common schools; (2) the University of Montana; (3) Montana Tech; (4) Montana State University; (5) the state normal school; (6) the School for the Deaf and Blind; (7) the State Reform School; (8) the state Veteran's Home; and (9) Public Buildings. Each parcel of state trust land is assigned to a specific trust beneficiary and trust account, and each beneficiary has an individual, segregated trust fund account within the permanent fund.

Revenues generated from the trust lands are treated differently depending on the source of income, the beneficiary, and the type of transaction used to generate the revenue. Proceeds from the sale of lands, along with rights-of-way, certain timber sales, and mineral royalties, are treated as "nondistributable" revenues and placed in the permanent fund. The Montana Board of Investments, the state entity responsible for investment of the permanent fund (also known as the "Trust Legacy

Fund") is constitutionally prohibited from equity investments and emphasizes instead "a diversified portfolio of fixed income securities."[639] The current balance of the permanent fund in Montana is $411,173,416. The common schools are the largest single beneficiaries, accounting for about 90 percent of the total land holdings in the trust.[640]

Generally, proceeds from state trust land leases, interest on deferred payments from land sales, interest earned on the permanent funds, and all other actual income are made available for the maintenance and support of such schools and institutions.[641] These funds are referred to as "distributable."

Montana employs an equalization method of funding public education that provides each school district a base budget and a per student entitlement (direct state aid and local revenue). The state's general fund currently contributes approximately 38 percent of the entire school budget, with the remainder coming from local property taxes (46 percent) and federal funding (12 percent).[642] The remainder of the funding is provided by 95 percent of the distributable revenues, including interest from the permanent fund.[643] In fiscal year 2004, $58,378,908 was distributed to the common schools, representing a 4.8 percent contribution to the state's overall K-12 school budget of $1.2 billion.

7. Recent Developments and Emerging Issues in Montana

a. Real Estate Management Bureau Programmatic Environmental Impact Statement (PEIS)

The state of Montana is currently engaged in a programmatic planning process for "special uses" (i.e., residential and commercial development) on over five million acres of trust lands. The plan, which is currently under consideration by the Land Board following the completion of a programmatic environmental impact statement (PEIS) by the DNRC, sets forth a process for investigating the commercial, industrial, residential, and conservation development potential of state lands. The PEIS represents a marked departure from Montana's historical trust management regime, which has focused almost exclusively on natural resource surface management.

The plan relies on a "funnel filter" methodology for identifying and evaluating development opportunities on state trust lands, which involves a progressive analysis of development suitability. This analysis begins with a "physical environment filter" that evaluates physical development constraints, and removes from consideration lands above an identified slope (25 percent), those located within one hundred-year floodplains, and those within designated grizzly bear and bull trout habitat.[644]

The second stage of the "filter" process applies a "transitional filter," which ranks various state trust land parcels based on the "locational attributes" associated with those parcels.[645] A Geographic Information Systems (GIS) model was used to measure the proximity of each state trust land parcel to transportation infrastructure, existing development, natural amenities, and other factors that studies had shown to be commonly correlated with growth areas and development suitability. These factors were utilized to categorize trust land parcels into high, medium, and low development suitability classes, with the values averaged to determine the final class assigned to each trust land parcel.[646]

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[639] DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION FY 2004 ANNUAL REPORT, 87 (2005) (*citing Fiscal Year 2002 Annual Report,* Montana Board of Investments, at 41).
[640] *Id.* at 84.
[641] Montana Enabling Act, 25 Stat. 676 § 11.
[642] *Education Week*, Editorial Projects in Education, Inc., *available at:* http://edcounts.edweek.org.
[643] ANNUAL REPORT, *supra* note 639, at 84.
[644] *Final Real Estate Management Programmatic Environmental Impact Statement,* Real Estate Management Bureau, Montana Department of Natural Resources and Conservation, 2-18 (November 19, 2004) (hereafter, "PEIS").
[645] *Id.* at 2-19 to 2-21.
[646] *Id.* at Appendix C.

The third step in the filter process applies a "market filter" that attempts to assess the market demand for development of trust lands over the next twenty years in each land office.[647] The "market filter" utilized an economic study to assess overall population and income trends statewide. A second study then projected expected growth in acreage of residential, commercial and industrial uses on a land office-wide basis using income and population projections. This information was then used to derive estimates of the potential growth that could occur on trust lands based on the ratio of trust land ownership to private land ownership in each region.[648]

Under the plan, project opportunities would be initially evaluated in relationship to the first three filters; this landscape-level analysis would be followed by a project-level analysis of market demand and economic factors, local planning, MEPA analysis, and an analysis and application of other regulatory constraints and requirements in order to identify and evaluate development opportunities.[649]

The draft document originally considered five alternatives which used the filter information to establish acreage ranges for potential development based on how aggressively the agency would move to capture its "proportionate share" of the expected growth in each land office area. These included an aggressive strategy in which the agency would actively seek to capture twice this proportionate share;[650] an active strategy in which it would seek to capture the full proportionate share;[651] and a less active strategy (similar to the current state of affairs) in which the agency would capture approximately half of this share of development.[652]

DNRC received extensive comments on the PEIS from a number of participants, including the Lincoln Institute/Sonoran Institute Joint Venture. Overall, these comments encouraged DNRC to focus its limited resources on a set of lands most "ripe" for development and recommended several ways the agency could use its innovative "filter" to accomplish that goal. Participants suggested that the agency might better meet the needs of the beneficiaries and the public by limiting consideration of lands with outstanding public values (e.g. watershed protection, high fire hazard, key wildlife habitat). They also suggested ways that the agency's model could predict more accurately where growth should occur in order to enhance both Montana's communities and revenues to the beneficiaries, and recommended that the agency conduct more sophisticated market projections to support its potential development decisions.[653]

In direct response to the comments of Lincoln Institute/Sonoran Institute Joint Venture and others, the agency prepared an additional alternative (Alternative D) that incorporates several of the above mentioned recommendations. First, it adds endangered species habitat (grizzly bear and bull trout) to steep slopes and floodplains as criteria for designating lands unsuitable for development. Second, it proposes to view lands with development potential with a higher level of scrutiny at the project level, and to incorporate outcome criteria in development proposals in order to ensure quality growth. Finally, even though the PEIS retains the very broad demographic growth projection as its basis for determining its market share, it did include a monitoring protocol that requires plan review if the projected acreage thresholds are reached.[654]

The plan is currently on hold pending the resolution of issues regarding its implementation; however, the Land Board will likely make a decision on the plan in mid-2005.

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[647] *Id.* at 2-21.
[648] *Id.*
[649] *Id.* at 2-19 to 2-25.
[650] *Draft Real Estate Management Programmatic Environmental Impact Statement,* Real Estate Management Bureau, Montana Department of Natural Resources and Conservation, 2-44 (June 21, 2004).
[651] *Id.* at 2-37.
[652] *Id.* at 2-31, 2-50, 2-43. The plan also considered two "conservation" alternatives in which the agency would seek to dispose of approximately half the land proposed for residential development for conservation purposes.
[653] C.f. *Public Comments of Lincoln Institute of Land Policy/Sonoran Institute Joint Venture on the June 21, 2004 Draft Real Estate Management Programmatic Environmental Impact Statement*, Sonoran Institute (Letter Filed August 19, 2004).
[654] PEIS, *supra* note 644, at 4-66.

b. Whitefish Planning Process

Prior to the release of its PEIS, the agency initiated a collaborative, community based land use planning process in the town of Whitefish, Montana, which serves as a "gateway" community to Glacier National Park. Although the Whitefish economy has traditionally been based on the timber and rail industries, the community has grown rapidly over the past few decades and has shifted from a natural resource-based economy to a service-based economy that relies heavily on the "natural amenities" of the area. As a result, property values are skyrocketing, with recent increases ranging from 10-20 percent per year. The state trust lands in the area, currently managed for timber, are thus under increasing pressure for development as well as for the preservation of recreational and conservation uses that contribute significantly to the local economy and its growth potential.

As part of its overall plan to diversify its revenue streams, the state initiated a planning process on thirteen thousand acres of trust lands located within and around the community of Whitefish with the goal of transitioning some of these lands from natural resource production to real estate development. Because the DNRC proposal encompassed such a large area – essentially all of the trust lands in the vicinity of Whitefish – many residents who use these lands for recreation immediately expressed concern with protecting the aesthetic and environmental values that were associated with the lands. Given that all thirteen thousand acres were potentially under consideration for development, there was a tremendous amount of uncertainty and trepidation regarding the agency's plans for the land. The (reasonable) assumption made by many community members was that any or all of the lands could be at risk for development. Citizens were concerned that a project proponent could come forward at any time, and that the timeframe for the community to propose alternatives could be very short.

Because of the controversy and the high political stakes involved with the potential development of these lands, the Land Board appointed a diverse group of community stakeholders to develop a proposed Whitefish State Lands Neighborhood Plan as a supplement to the Flathead City County Master Plan. The planning process was generally rocky and reflected continued suspicion with regard to the DNRC's motives. However, the community advisory group eventually identified the trust lands with the highest community value for recreational, wildlife, water quality, and other important ecological features. They also helped to identify which lands were most suitable for development in terms of access, infrastructure, proximity to development, and economic factors. The advisory group attempted to identify strategies that would balance the values, ensure predictable and quality development, and increase revenues to the trust beneficiaries.

The Plan strongly reflects the community's concerns with the development of these lands, and DNRC has expressed support for the draft plan that resulted from this effort. The Plan allocates only a small amount of land for development in the near term, proposing instead to either develop new revenue generation mechanisms that will increase value to the trust while preserving the lands for traditional uses (such as timber production), or identifying disposition strategies that will result in the conservation of the lands. Ultimately, it appears that the key to the success of the Plan will lie in the implementation. The strategies developed by the group rely heavily on voluntary conservation mechanisms such as conservation easements, conservation buyers, deed restrictions, incentives, and other types of private sector real estate management techniques not commonly used in Montana. At the present time, the state lacks both the experience and statutory authority to fully carry out the Plan. DNRC has expressed willingness to develop the necessary tools in the interests of broadening the options for the management of trust lands across the state.

c. Preference Rights Challenge

Montana's historic system of granting an absolute preference right to existing grazing lessees was challenged in a recent lawsuit. The case, *Broadbent v. State of Montana ex rel. DNRC, Board of Land Commissioner*s, involved the de facto grant of a preference right to an existing lessee who submitted a competitive high bid.[655] The court ruled that the absolute grant of a preference right with

[655] BDV-2003-361, 1st Jud. Dist. Lewis and Clark (2004).

no factual review by the Land Board infringes on the trustee's discretion to grant the lease to the lessee who will act in the best interests of the trust.

The Land Board adopted rules in late 2004 to reinstate the preference right, subject to the Land Board's ultimate approval, and to ensure that, in awarding grazing and other leases, the trustee is able to consider short term revenue opportunities as well as the long term impacts to the trust of good stewardship practices.

d. School Funding

In 2002, a coalition of school districts, administrators, and educational organizations called the Montana Quality Education Coalition (MQEC) filed a lawsuit charging that the state of Montana is failing to meet its constitutional obligation to provide Montana's children with a quality education. In an April 2004 opinion, District Judge Jeffrey Sherlock of Helena ruled in favor of the plaintiffs holding that the state, through actions of successive legislatures, has not adequately funded schools, and has thus violated the constitutional guarantee of a quality education. The judge ordered the legislature to devise a new funding system based on the "needs and costs" of the public school system and gave lawmakers until October 2005 to put a new system in place.[656]

The case was appealed to the Montana Supreme Court. In November 2004, the Court issued a preliminary order that unanimously upheld the lower court decision, agreeing that the state's education funding system is unconstitutional and directing the state to develop a funding system that is rationally related to the quality of education.[657]

Currently, Montana's public schools are funded by legislative appropriation, with funding based on a combination of local property taxes and state equalization payments. As noted above, trust revenues comprised only around 4.8 percent of the $1.2 billion appropriated to public schools in 2003. Whatever the outcome of the current budget crisis, it seems quite likely that the Montana legislature will be looking for revenues to fill budgetary gaps in school funding, which could lead to pressure to increase short-term revenues from trust lands.

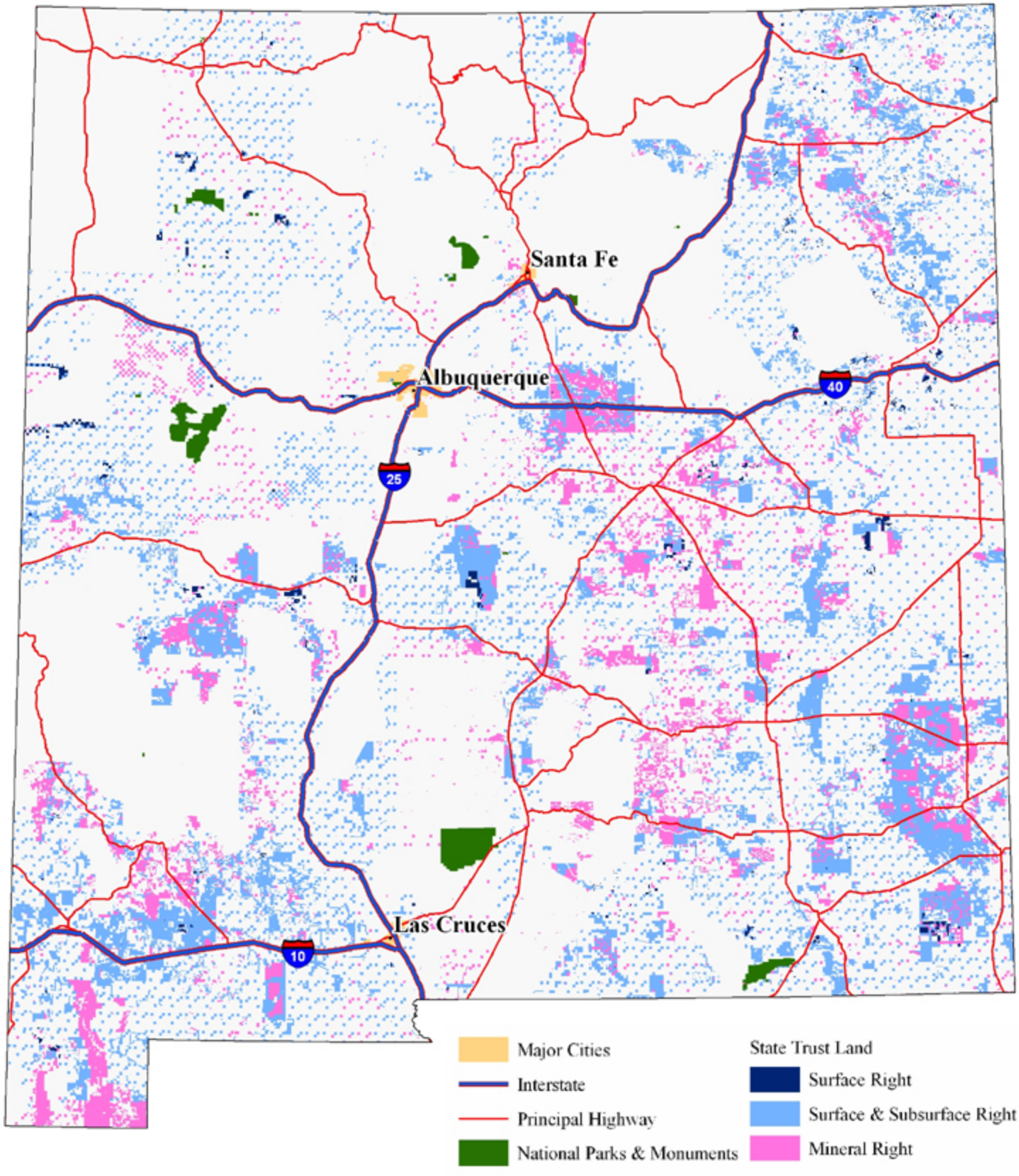
e. Coal Tax Trust Loan

The 2001 legislature passed Senate Bill 495, which authorized the DNRC to borrow against future mineral royalties from the Coal Severance Tax Trust Fund in order to increase the balance of the Common Schools Permanent Fund, and consequently increase the amount of distributable interest income available to fund the common schools. Under the direction of the Land Board, the DNRC borrowed $46,366,904 at a discount rate of 9.85 percent from the Coal Severance Tax Fund and placed it in the Common School Fund in lieu of $138,894,596 in future net mineral royalties. While the transfer results in increased distributable revenues for the common schools, over the life of the loan the Permanent Fund stands to lose almost $100 million.

MonTrust, a non-profit citizens group, filed suit in 2002 alleging that the state breached its fiduciary duties. The case, decided in favor of the state at the trial court level, is currently before the Montana Supreme Court.

[656] Columbia Falls School District v. State of Montana, Case No. BDV-2002-528, 1st Jud. Dist. Lewis and Clark (2004).
[657] Order, Columbia Falls School District et al v. State of Montana, Sup. Ct. Mont., No. 04-0390 (2004).

State Trust Lands in New Mexico



F. Trust Land Management in New Mexico

The New Mexico State Land Office is responsible for managing approximately nine million surface acres of trust lands and thirteen million acres of subsurface lands.[658] New Mexico's trust lands are distributed throughout the state, with trust lands located in virtually every county,[659] and encompassing environments ranging from heavy forest to barren desert. Although the majority of the trust's surface ownership exists in scattered parcels (corresponding to the reserved sections in the original land grants), New Mexico was afforded a significant number of *in lieu* selections – nearly five million acres of the thirteen million acres in its original grant. As a result, New Mexico has a large number of significant, contiguous parcels, many of which approach hundreds of square miles in size.

1. New Mexico's Land Grant

With racial, religious, political, and economic tensions preventing the state from entry into the Union, New Mexico made some eleven separate bids for statehood before its ultimate admission in 1910. Although statehood was contemplated for the New Mexico territory as early as the end of the Mexican War in 1848, Congress ultimately denied statehood to the region, creating the New Mexico Territory with the passage of the Organic Act in 1850. The New Mexico Territory was later partitioned in half to create the Arizona Territory. Because of the long delays in achieving statehood, New Mexico already had a functioning land office with a Commissioner of Public Lands well before statehood. In light of the protracted nature of the statehood process and the growing needs of the territorial government, the 1899 Ferguson Act established the Commissioner's office as well as a Land Grant Permanent Fund, both of which were later confirmed in the state's Enabling Act.[660]

The 1850 Organic Act had reserved sections sixteen and thirty-six in every township for the support of common schools; the 1910 Enabling Act (which also admitted the state of Arizona) added to these reservations and granted the state sections two, sixteen, thirty-two, and thirty-six in every township for the support of the common schools. In addition to this common school grant, the state also received specific grants for a variety of other public institutions, including: 100,000 acres for legislative, executive, and judicial public buildings; 100,000 acres for penitentiaries; 100,000 acres for insane asylums; 100,000 acres for schools and asylums for the deaf, dumb and blind; 50,000 acres for miners' hospitals; 200,000 acres for "normal schools"; 100,000 acres for charitable, penal, and reformatory institutions; 150,000 acres for agricultural and mechanical colleges; 150,000 acres for a school of mines; 100,000 acres for military institutes; and 1,000,000 acres for the payment of county bonds and thereafter to common schools (the majority of this latter grant eventually devolved to the New Mexico common schools trust).[661] New Mexico retains approximately 69 percent of its state trust lands granted at statehood.

2. Enabling Act and Constitutional Requirements

As discussed in section II(C)(3), due to their late entry into the Union, New Mexico and Arizona have some of the most restrictive Enabling Act provisions with regard to trust lands of any Western state. Most importantly, New Mexico and Arizona were the first states in which Congress indicated that the granted lands were to be held "in trust," to be "disposed of in whole or in part only in the manner as herein provided," and providing that any disposition of trust lands or the monies and resources derived from trust lands in a manner contrary to the provisions of the Enabling Act "shall be deemed a breach of trust."[662]

Like Arizona, New Mexico's Enabling Act identifies a series of detailed restrictions on trust land dispositions. Most significantly, the Enabling Act prohibits any mortgage or encumbrance of trust lands, and requires that trust lands and the natural products of trust lands may only be sold or leased

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[658] NEW MEXICO STATE LAND OFFICE FY 2004 ANNUAL REPORT, 2, 9 (2005).
[659] Lawrence Spohn, *UNM, state agree to inventory species on N.M. land,* ALBUQUERQUE TRIBUNE (January 25, 2001).
[660] SOUDER AND FAIRFAX, *supra* note 4, at 25.
[661] New Mexico-Arizona Enabling Act 36 Stat. 557, § 7 (1910).
[662] *Id.* at § 10.

"to the highest and best bidder at a public action,"[663] providing for only a few exceptions to this strict public auction requirement. The Act also specifies notice requirements and other details regarding the conduct of the auction, requires trust lands to be appraised at their true value and disposed for no less than this value, and other restrictions (essentially identical to those discussed for the state of Arizona in section V(B)).[664] Because the Enabling Act was so extensive in its detailing of the use of school trust lands, the New Mexico Constitution actually contains relatively few provisions with regard to trust lands.[665]

3. New Mexico's Trust Responsibility

The extreme specificity of New Mexico's Enabling Act has been interpreted by the courts to impose a rigid federal trust responsibility that is among the most restrictive in the Western states. Based on this trust responsibility, the courts have held that:

- The State was not permitted to expend a percentage of the annual income from leases and sales in advertising and marketing the state to prospective residents; although this would indirectly benefit the trust by increasing the market for state trust lands, it was impermissibly designed to benefit the state as a whole.[666]

- The State must lease lands in the best interests of the trust, and thus cannot grant a grazing lessee an absolute right to renew a short-term grazing lease.[667]

- The State could not utilize funds produced by trust lands to help defray general government expenses.[668]

- Commissioner of Public Lands of New Mexico must charge the State Highway Commission for the value of rights-of-way and easements across state lands, as well as for the removal of sand and gravel for state highways.[669]

4. Governance of Trust Lands in New Mexico

Pursuant to the state's Constitution, New Mexico's trust land is administered by a Commissioner of Public Lands, who presides over the State Land Office (SLO) and is elected by the citizens of the state to four-year terms.[670] The Commissioner is also advised by a State Land Trusts Advisory Board, which is composed of seven members appointed by the Commissioner of Public Lands with the advice and consent of the Senate. Each Board member's term lasts for six years and the board members are to represent a geographic balance from across the state. Two members are required to represent the beneficiaries of the state trust land, one represents extractive industry, one represents agricultural industry, one represents conservation interests, and finally, two members represent the public at large. No more than four members of the Advisory Board are allowed to be from the same political party.[671]

The Advisory Board assists the Commissioner in maximizing the income for the trust and protecting and maintaining trust assets and resources, reviewing policies and practices of the Commissioner, and advising the Commissioner on a wide variety of other matters.[672] The Board and Commissioner are required to meet four times per year, and although the actions of the Board are not

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[663] *Id.*
[664] *Id.*
[665] SOUDER AND FAIRFAX, *supra* note 4, at 26.
[666] Ervien v. U.S., 251 U.S. 41 (1919).
[667] State ex rel. McElroy v. Vesely, 52 P.2d 1090 (N.M. 1935); *see also* Ellison v. Ellison, 146 P.2d 173 (N.M. 1944) (renewal not absolute right).
[668] State ex rel. Shepard v. Mechem, 250 P.2d 897 (N.M. 1952).
[669] State ex rel. State Highway Commission v. Walker, 301 P.2d 317 (N.M. 1956).
[670] N.M. CONST. Art V§ 1; *see also* N.M. STAT. ANN. § 19-1-5.
[671] N.M. STAT. ANN. at § 19-1-1.1.
[672] *Id.* at § 19-1-1.4.

binding on the Commissioner (who has the ultimate constitutional and fiduciary responsibility as the trustee), New Mexico's Administrative Code advises the Commissioner to cooperate with the Board and obtain its consensus.[673] In addition, the Board and Commissioner hold an annual joint meeting with representatives of the beneficiaries of the trust to report on the performance of trust assets.

The SLO is divided into three sections: Surface Resources (which includes the Commercial section), Mineral Resources, and Administration. The SLO maintains twelve district offices located across the state. Unlike many other Western states, New Mexico's SLO is self-funding, with the agency's salaries and expenses paid from a "state lands maintenance fund."[674] Pursuant to New Mexico statutes, income that is derived from state lands is first deposited into the state lands maintenance fund; distributions are made to the permanent funds only after the expenses of the state land office are deducted;[675] all necessary costs and expenses that are incurred in the management, protection, sale, or lease of state lands are charged to the appropriate beneficiary of those lands.[676]

5. Trust Land Management in New Mexico

> New Mexico's SLO manages state trust land under its "ABC program" principles:
>
> Administer state trust land to generate the highest possible level of sustainable revenues for New Mexico's public schools, public institutions of higher learning, and other public institutions, so that all New Mexicans can enjoy a higher quality of life.
>
> Benefit the trust and its natural resources through responsible stewardship which creates a strong economic environment that will contribute to healthy rural and urban communities so that future generations will continue to benefit from their endowment.
>
> Conduct the operations of the SLO with the highest level of fiscal accountability, efficiency, customer service, and employee relations.[677]

The vision for the SLO is to be "the nation's model for state trust land management, providing for current and future productivity of the state trust lands for the next generation of beneficiaries."

New Mexico's trust management activities can be roughly divided into three categories: surface uses, subsurface uses, and trust land sales and other uses. New Mexico currently receives virtually all of its trust revenues (96 percent) from subsurface activities and surface leasing (4 percent), with less than 1 percent of revenues derived from land sales or other permanent dispositions. However, the state is positioned to significantly increase its revenues from dispositions of trust lands for commercial, industrial, and residential development.

a. Surface Uses

Pursuant to the requirements of the state's Enabling Act, state trust lands can generally only be leased to the "highest and best bidder at public auction."[678] However, many of the leases administered by the SLO take advantage of an exception to this strict public auction requirement, which allows lands to be leased for less than five years without public auction.[679]

Grazing and agricultural leases in New Mexico are almost universally administered under these short-term, five-year leases without public auction.[680] New Mexico has issued approximately

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[673] N.M. ADMIN. CODE § 19.2.18.
[674] N.M. STAT. ANN § 19-1-12.
[675] *Id.* at § 19-1-11.
[676] *Id.* at § 19-1-14 .
[677] 2004 ANNUAL REPORT, *supra* note 658, at 4.
[678] New Mexico-Arizona Enabling Act, 36 Stat. 557 § 10.
[679] *Id.*
[680] N.M. STAT. ANN. § 19-7-30.

three thousand five hundred leases covering 8.7 million acres of land; 1/5 of these leases are renewed each year.[681] Leases are available from the land department upon application. When an existing short-term lease expires, the leases are generally advertised and are open for bid from existing or prospective lessees. In the event that there is more than one bid, the department awards the lease to the highest bidder.[682] However, existing lessees who are in good standing with their leases are also eligible for a "preference right," which allows them to win a new short-term lease by matching the highest bid.[683] Another exception in the Enabling Act allows for provisions that protect lessees' rights to improvements by requiring purchasers or subsequent lessees to compensate the existing lessee for those improvements.[684] In addition, these leases cannot be cancelled at will – without the written consent of the lessee, grazing leases cannot be canceled absent fraud, collusion, mutual mistake, or default by the lessee.[685] Agricultural leases are afforded somewhat less protection, with the Commissioner generally authorized to withdraw up to half of a section of agricultural lease land from a lease upon ninety days notice to the lessee if a higher and better use is identified, unless there is an adverse impact on the lessee's water rights.[686]

Lease rates for grazing leases are set on a per-acre basis, based on an economic valuation of the carrying capacity of the leased land, and considering economic conditions at the time of the lease. These rates are subject to established "minimum rental rates" (ranging from $0.03 per acre for five head per section, and topping out at $0.22 per acre for twenty-two head per section and up). However, the Commissioner is authorized to reduce minimum rental rates by up to 1/3 in the event of drought or adverse economic conditions.[687] In addition, New Mexico operates a Range Stewardship Program that provides economic incentives for range management techniques that maintain or improve range quality, allowing for up to a 25 percent reduction in range fees.[688] Similarly, the SLO facilitates agricultural lessees' participation in federal conservation and environmental programs such as the Conservation Reserve Program, the Environmental Quality Incentive Program, and the Ogallala Aquifer Recharge Program.[689]

Business (commercial) leases may be issued "for business, commercial, residential, industrial, or real estate planning and development purposes, or for surface uses that are not otherwise provided for under other state land office rules," at a public auction. At the Commissioner's discretion, a lessee may be granted a "non-bid lease" (without auction) for a term of five years or less. Business leases may also be used to lease trust lands to state parks or to extend the boundaries of local government parks on terms not to exceed twenty-five years.

New Mexico issues recreational permits for virtually all state lands,[690] although vehicle travel is limited to established, ungated roads; otherwise access to state lands is limited to foot travel.[691] Administrative rules provide for a broad set of authorizations and restrictions for recreational users of state lands.[692]

Surface leases (including commercial uses) contributed approximately $12 million to the trust, or about 4 percent of revenues generated in 2004. Of that amount, grazing leases generate the greatest portion for New Mexico's trust beneficiaries, at over $7.6 million in fiscal year 2004, with business leases next at with $2.3 million.[693]

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[681] 2004 ANNUAL REPORT, *supra* note 658, at 18.
[682] N.M. ADMIN. CODE § 19.2.8.9.C.
[683] N.M. STAT. ANN. § 19-7-49.
[684] *Id.* at § 19-7-14.
[685] *Id.* at § 19-7-35.
[686] N.M. ADMIN. CODE § 19.2.8.10.A, B.
[687] N.M. STAT. ANN. § 19-7-29.
[688] SOUDER AND FAIRFAX, *supra* note 4, at 281; N.M. ADMIN. CODE § 19.2.8.20.
[689] 2004 ANNUAL REPORT, *supra* note 658, at 18.
[690] N.M. ADMIN. CODE § 19.2.2.10.
[691] *Id.* at § 19.2.19.12.
[692] *Id.* at § 19.2.19.16.
[693] 2004 ANNUAL REPORT, *supra* note 658, at 7.

b. Subsurface Uses

The New Mexico Constitution provides broad authority to the state to issue contracts for the development and production of minerals or geothermal resources on state lands under "such terms and provisions as provided by the legislature," provided that the contracts further the interests of the trust.[694] As noted above, New Mexico currently obtains approximately 96 percent of its total trust revenues from subsurface rentals and royalties; virtually all of these revenues are derived from oil and gas, with only a little over one half of 1 percent derived from all other subsurface activities. Like other Western states, New Mexico reserves the mineral and hydrocarbon rights on any state trust lands when they are disposed, together with access rights to develop the same.[695] New Mexico law also affirmatively prohibits the sale of lands on which saline resources, valuable minerals, or oil and gas are known to be located.[696]

New Mexico administers two types of oil and gas districts. "Restricted" districts are usually on proven oil and gas areas and are created by the Commissioner, while "unrestricted" districts lie outside any restricted district.[697] In restricted districts, a variety of classifications are applied to define oil and gas trends, the oil and gas traps, reservoir volume, and recovery ratings, bonus ratings, and exploration and drilling activity.[698] Leases on restricted lands can only be granted to the highest and best bidder at a public auction.[699] Unrestricted lands are also normally offered at auction; however, the Commissioner retains the discretion to issue a lease without bidding if it is in the best interests of the trust.[700] Lease rates are based on a low surface "rental" (of between $0.25 and $1 per acre)[701] to cover up to two sections worth of land,[702] plus royalty payments for oil and gas that is produced from the lease property,[703] plus a variety of fees.[704]

Mineral leases are issued on terms for three years, and thereafter as long as minerals are produced in paying quantities, based on a surface "rental" ($1 per acre) plus royalties of between 2 percent and 50 percent of gross returns less smelting and transport costs. If minerals are not discovered in the first three years, a secondary term of five additional years can be issued for a substantially higher surface rent ($10 per acre).[705] Leases are issued to the highest bidder at a public auction,[706] are limited to six hundred forty acres,[707] and are subject to a strict mine development and reclamation plan to provide for orderly development and prevent resource waste.[708]

Coal leases are administered on a similar system, issued for minimum five year terms that continue as long as one percent of the estimated recoverable reserve is produced.[709] Royalties are a fixed 12.5 percent of proceeds for surface mined coal and 8 percent of underground coal unless the Commissioner can justify a lower rate.[710] Leases are issued to the highest bidder at public auction, although existing leases that were issued prior to 1989 can be renewed without competition.[711]

Leases for sand, gravel, clay, and similar materials are issued for five year terms, generally issued on a non-competitive basis at market value with an established minimum of $0.55 per cubic

[694] N.M. CONST. Art. XXIV § 1.
[695] N.M. ADMIN. CODE § 19.2.14.8.
[696] N.M. STAT. ANN. § 19-7-25.
[697] N.M. ADMIN. CODE § 19.2.100.1.
[698] *Id.* at § 19.2.100.11.A.
[699] *Id.* at § 19.2.100.25.
[700] *Id.* at § 19.2.100.12.
[701] *Id.* at § 19.2.100.14.
[702] *Id.* at § 19.2.100.16.
[703] *Id.* at § 19.2.100.69.
[704] *Id.* at § 19.2.100 15.
[705] *Id.* at § 19.2.2.47.
[706] *Id.* at § 19.2.2.11.
[707] *Id.* at § 19.2.2.23.C.
[708] *Id.* at §§ 19.2.2.31, 19.2.2.28.
[709] *Id.* at § 19.2.6.14.C.
[710] *Id.* at § 19.2.6.15.
[711] *Id.* at § 19.2.6.24.

yard.[712] However, when the estimated amount of material to be removed from state lands exceeds forty thousand cubic yards, competitive bids are required.[713]

c. Land Sales and Other

As noted elsewhere, New Mexico's Enabling Act imposes a series of strict requirements on sales of trust lands, including that trust lands and the products of trust lands be sold "to the highest and best bidder at a public auction." In addition, the Enabling Act requires that auctions be held at the county seat where the lands are located, that public notice be provided for not less than ten weeks in a newspaper of general circulation at the state capitol and in whatever newspaper is published nearest the lands that are the subject of the auction. Finally, the New Mexico Enabling Act provides that no sale or disposal of trust lands can be made for less than the "true value" of those lands as determined by appraisal, and provides that legal title cannot pass until this consideration is paid. The Act also requires "ample security" for any sales on credit.[714]

Similar requirements apply to sales of participation agreements, sales of natural products (including timber), and most other permanent dispositions of trust resources.[715] There are only a few exceptions to the public auction requirements, such as a special provision for sales of dead and down firewood;[716] New Mexico now operates a free firewood harvesting program to help reduce overgrown stands of timber on eight trust parcels.[717]

One of the key exceptions to these requirements applies to rights-of-way and easements. Under New Mexico statute, "the Commissioner may grant rights-of-way and easements over, upon, or across state lands for public highways, railroads, tramways ... and other purposes upon payment by the grantee of the price fixed by the Commissioner, which shall not be less than the minimum price for the lands, used, as fixed by law." Although this requires the Commissioner to obtain full market value for easements, it does not necessarily require this value to be obtained at public auction.[718] This broad authorization is also interpreted to allow for the grant of conservation easements by the SLO.[719]

New Mexico law also permits land exchanges when they are in the best interests of the trust; although exchanges typically only include the surface estate, mineral estates are sometimes offered where the circumstances justify it.[720] Exchanges may be made for either federal or private lands that are equal or greater in value,[721] provided that an environmental assessment is performed to ensure that there are no hazardous materials on the exchanged lands.[722] Exchanges must be advertised for ten weeks;[723] in addition, the beneficiaries of the appropriate trust(s) must be notified.[724] All exchanges must be packaged in a manner that will result in a net increase in trust acreage statewide.[725]

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[712] *Id.* at §§ 19.2.5.9.E, 19.2.5.9.D.
[713] *Id.* at § 19.2.5.9.
[714] New Mexico-Arizona Enabling Act, 36 Stat. 557 § 10.
[715] *Id.*
[716] N.M. ADMIN. CODE § 19.2.13.9.
[717] Personal Communication with Michael Bowers, State Land Office, March 24. 2005.
[718] N.M. ADMIN. CODE § 19.2.10.8.
[719] A recent Nature Conservancy report indicates that conservation easements are rarely issued in New Mexico, although in late 2002, the Land Office granted Santa Fe County a conservation easement for the use of trails and the protection of open space on state trust lands located along the Santa Fe River. *Santa Fe Canyon Preserve*, Nature Conservancy, *available at* http://www.nature.org/wherewework/ northamerica/states/newmexico/preserves/art9769.html.
[720] N.M. ADMIN. CODE § 19.2.21.8.A.
[721] *Id.* at § 19.2.21.8.B – C.
[722] *Id.* at § 19.2.21.9.I.2.
[723] *Id.* at § 19.2.21.9.A.
[724] *Id.* at § 19.2.21.12.
[725] 2004 ANNUAL REPORT, *supra* note 658, at 16.

Table V(F): FY 2004 Revenues – New Mexico State Land Office

Source	% of Revenue	Receipts
Surface Uses		
Commercial	0.8%	$2,313,273
Grazing	2.8%	$7,629,897
Rights-of Way	0.7%	$1,869,562
Water	0.1%	$253,606
Other	0.0%	$1,240
Total Surface	**4.4%**	**$12,067,578**
Subsurface Uses		
Coal	0.0%	$96,680
Oil and Gas	95.1%	$263,812,377
Minerals	0.5%	$1,374,429
Total Subsurface	**95.6%**	**$265,283,486**
Sales and Other		
Other	0.0%	$1,353
Total Sales and Other	**0.0%**	**$1,353**
Grand Total	**100%**	**$277,352,417**
Agency Budget*		**14,000,000**

* Figure includes operating and special project expenses.
Source: New Mexico State Land Office Annual Report FY 2004

6. Trust Revenue Distribution in New Mexico

There are twenty-one beneficiaries who receive revenues generated from trust activities in New Mexico. These beneficiaries include: (1) the Common Schools; (2) Eastern New Mexico University; (3) New Mexico State University; (4) New Mexico Institute of Mining and Technology; (5) the University of New Mexico; (6) Western New Mexico University; (7) New Mexico Highlands University; (8) Northern New Mexico Community College; (9) New Mexico School for the Deaf; (10) New Mexico School for the Visually Handicapped; (11) Public Buildings at Capital; (12) Penitentiary of New Mexico; (13) New Mexico Boys' School; (14) Carrie Tingley Hospital; (15) Charitable Penal and Reform;[726] (16) New Mexico State Hospital; (17) Rio Grande Improvements; (18) UNM Saline Lands; (19) Water Reservoirs; (20) Miner's Hospital of New Mexico; (21) New Mexico Military Institute. Each acre of trust land is designated to a specific beneficiary.

[726] Seven institutions receive equal shares of the Charitable Penal & Reform beneficiary; these include: Carrie Tingley Hospital, Las Vegas Medical Center, Los Lunas Hospital, Miner's Colfax Medical Center, Penitentiary of New Mexico, New Mexico Boys' School, and the Youth Diagnostic and Development Center.

Revenues from renewable resource uses and rentals – such as from grazing leases, commercial leases, mineral, oil, and gas rentals, right-of-ways, and interest on earnings and bonuses – are deposited into the state Maintenance Fund; once the costs of SLO operations are deducted, these revenues are distributed directly to beneficiaries. Revenues to the maintenance fund totaled $42.5 million from all trust lands in 2004, of which SLO operations, including special projects, cost $14 million.[727]

By contrast, revenues from nonrenewable uses – such as the royalties from oil and natural gas extraction and the proceeds of land sales – are credited to the appropriate beneficiary and are deposited into the Land Grant Permanent Fund.[728] The monies in the Land Grant Permanent Fund are invested by the State Investment Officer under the oversight of the State Investment Council. Monies may be invested in various federal, state, and local bonds;[729] warrants; and stocks listed on national exchanges, including international securities, provided that no more than 65 percent of the fund can be invested in corporate stocks, and no more than 15 percent in international securities.[730]

Under the New Mexico Constitution, the beneficiaries receive a fixed 5 percent return on the corpus of the Permanent Fund (regardless of the actual investment earnings on the Fund); all earnings and additions to the Permanent Fund (including interest, dividends, and capital gains) are credited to the Fund. Each month, a fixed percentage of the value of the Permanent Fund is distributed to each beneficiary, while the investment interest on the fund is used to maintain the principal of the fund to offset distributions.[731]

New Mexico public schools, entitled to revenues from 6.8 million surface acres, are the largest recipient of trust benefits. In fiscal year 2004, common schools received $314,296,60 in total trust land fund distributions from both trust revenues and interest from the Permanent Fund, out of total distributions to all beneficiaries of $352.5 million.[732] The market value of the Land Grant Permanent Fund was $7.6 billion in 2004.[733]

In addition, under a 2003 constitutional amendment that is intended to fund an ongoing educational reform effort in the state, the common school beneficiaries are to receive an additional 0.8 percent of the average of the year-end market value of the fund (for the preceding five years) from 2005 through 2012, and an additional 0.5 percent for 2013-2016, unless the five year average balance of the fund drops below $5,800,000,000. (The amendment is expected to produce an additional $67 million for public school funding annually).[734]

Regardless, in New Mexico, state trust land revenues are generally used to offset, not supplement funds for education from the general fund; revenues from state trust lands become a part of the Public School Fund, which in combination with General Fund monies goes to meet state equalization payments, transportation costs, and certain supplemental distributions.[735] Thus, even though New Mexico's trust land revenues are some of the highest in the West, they represent about 13 percent of the state's overall pre K-12 budget of 2.6 billion.[736] As such, increases in trust revenues do not necessarily translate into increased educational funding in the state.

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[727] 2004 ANNUAL REPORT, *supra* note 658, at 6.
[728] N.M. STAT. ANN. § 19-1-18.
[729] N.M. CONST. Art. IX § 11.
[730] *Id.* at Art XII § 7.
[731] N.M. STAT. ANN. § 19-1-17.
[732] 2004 ANNUAL REPORT, *supra* note 658, at 8.
[733] *Id.* at 7.
[734] 2003 NM PUBLIC EDUCATION DEPARTMENT ANNUAL REPORT, *available at:* http://www.ped.state.nm.us/resources/downloads/2003.annual.report.pdf.
[735] Don Gaspar, *How New Mexico Public Schools are Funded*, N.M. DEPT OF EDUCATION (2001).
[736] *Annual Survey of Local Government Finances 2002-2003, Summary of Public School System Finances for Elementary-Secondary Education by State*, U.S. CENSUS BUREAU (2005), *available at* http://www.census.gov/govs/www/school.html.

7. Recent Developments and Emerging Issues in New Mexico

a. Development Opportunities on State Lands

New Mexico is actively working to increase revenues from commercial and residential development on state trust lands to exploit the rapid growth of many of New Mexico's cities and towns. Although the state currently receives relatively little income from commercial, industrial, and residential uses of state land, the SLO's Economic Development Working Group is currently exploring on a variety of development projects around the state, and has identified approximately thirty thousand acres of state trust land that have current development potential.[737]

Among other projects identified by the Working Group are:

- Edgewood Town Center, a 600-acre mix of retail, offices, and residential uses;
- 11,000 acres near Las Cruces for residential and commercial development;
- Las Leyendas, a master-planned residential development near Edgewood, NM;
- San Cristobal, a 1,775-acre master-planned community in Santa Fe County;
- Sandia Science and Technology Park, a 90-acre industrial development in Albuquerque;
- Loma Barbon, a 600-acre master-planned community in Rio Rancho;
- Mesa Del Sol, a 12,000-acre master-planned community near Albuquerque;
- Santa Teresa, a 1,000-acre residential and industrial development;
- Tierra Madre, a sustainable community comprised largely of straw bale homes constructed by community residents.

b. Community Development Partnership Program

The Surface Resources Management program is continuing to identify trust lands ideally suited for development, and involve the private sector to develop neighborhoods and communities. Such projects often take years to plan and will develop slowly relative to real estate market conditions.

One of the first major planning projects undertaken by the SLO was the Mesa Del Sol development, a master-planned community that will be located on twelve thousand four hundred acres of state land near Albuquerque that represents the largest parcel of land under single ownership in the city. The project was initiated in 1987 under the leadership of Commissioner Jim Baca. Partners on the Mesa del Sol project include the Sandia National Laboratories, the Department of Energy, and the University of New Mexico. The Mesa Del Sol project envisions residential, retail, recreational, and open space areas in a sustainable development model that incorporates urban and rural villages, recreational centers, community parks, open space, trails, a two thousand eight hundred-acre nature refuge (Press Advisory, May 26, 2004, New Mexico State Land Office), and an environmental education campus to be known as "La Semilla," or "the seed," which will provide an ecological field station, a research and demonstration center for renewable energy, agriculture, and horticulture, and an arboretum and ranch interpretive center.[738]

Mesa Del Sol represents the SLO's first attempt to preserve trust lands for conservation purposes as a part of development projects; however, this idea has now been incorporated into other planned development projects, including the Solana and San Cristobal. This innovative, large-scale sustainable development, designed for buildout over a seventy-year period, has faced a number of challenges. Thus far, the state has had some difficulty recruiting businesses that are willing to enter into joint venture agreements with the state on leased land; in addition, although a highway (a.k.a., the University Boulevard Extension) has been contemplated for years, the site is currently accessed by largely unpaved roads. Without a 1.5 mile extension of University Boulevard from Albuquerque, the state continues to face reluctance among businesses and potential residents to move to the

[737] *See* State Land Office Website, http://www.nmstatelands.org/GetPage.aspx?sectionID=32&PagID=156.
[738] *See id.* at http://www.nmstatelands.org/landoffice/MdelSol/MdelFisc.asp.

developing location. Currently, more than $21 million in funding has been pledged for the $27 million project.

The scale of this development highlights the impact of different trust management philosophies among administrations over the lifespan of a long-term project. While the current SLO administration under Commissioner Lyons is following through on Mesa del Sol and other commercial projects, it is generally opposed to state-led master planning on trust lands. The rationale for this position is that state-led planning is unattractive to the developers who undertake the actual development of property and the financial risks associated with that development.[739] This position is somewhat controversial; a recent letter to the editor alleges that the state is missing opportunities to capture enhanced value from trust lands, with the profits instead flowing to land developers.[740]

c. Outdoor Classroom Program

The SLO has recently begun operation of an Outdoor Classroom Program in which New Mexico public schools are granted an environmental education easement on trust land (subject to availability of suitable lands) for outdoor classroom activities relating to archaeology, geology, range analysis, re-vegetation, watershed rehabilitation, and wildlife preservation; the easements may additionally be secured in perpetuity to provide for environmental and conservation goals. [741]

Farmington and Santa Fe public schools heavily utilize the Outdoor Classroom program in their curricula, by providing hands-on experiences in geology, rock climbing, and mineral development in Farmington; and river restoration, wildlife, watershed ecology, team building, and leadership skills programs in Santa Fe. The program, known as the "River Angels", has expanded to Silver City where children are enhancing watersheds and building trails.[742]

d. Statewide Biological Assessment

Under a 2001 Memorandum of Understanding negotiated between the SLO and the University of New Mexico, the University of New Mexico and New Mexico Tech have agreed to undertake a comprehensive biological survey of plants, animals, and biological conditions on trust lands throughout the state, and to construct an "inventory" that can be used by the SLO to protect trust assets for future generations. Data will be collected by university faculty and students and will benefit both the lands and the university educational programs. This information will become part of the LOGIC (Land Office Geographic Information Center) database that is maintained by the State Land Office – a web-based mapping service is also in the works to allow the public to access the LOGIC database and produce Geographic Information Systems (GIS) maps.[743]

e. Don't Trash the Trust Program

For years, illegal dumping has posed a health risk on school trust lands and has generally degraded the value of the lands. However, in 2003, the state initiated a cooperative clean up program with local, state, and federal entities and communities to restore and preserve thirteen million acres of state trust lands. In the view of State Land Commissioner Patrick Lyons, "by preserving the trust assets we create jobs, economic development opportunities and maximize revenues for the trust beneficiaries.... Keeping trust lands clean is essential to our mission."[744] As of the end of 2003, the state office had partnered with an oil lessee to clean up one of the most egregious illegal dumping sites, it had also cleaned up a few other sites, and was working on several more illegal dump removal projects across the state.[745]

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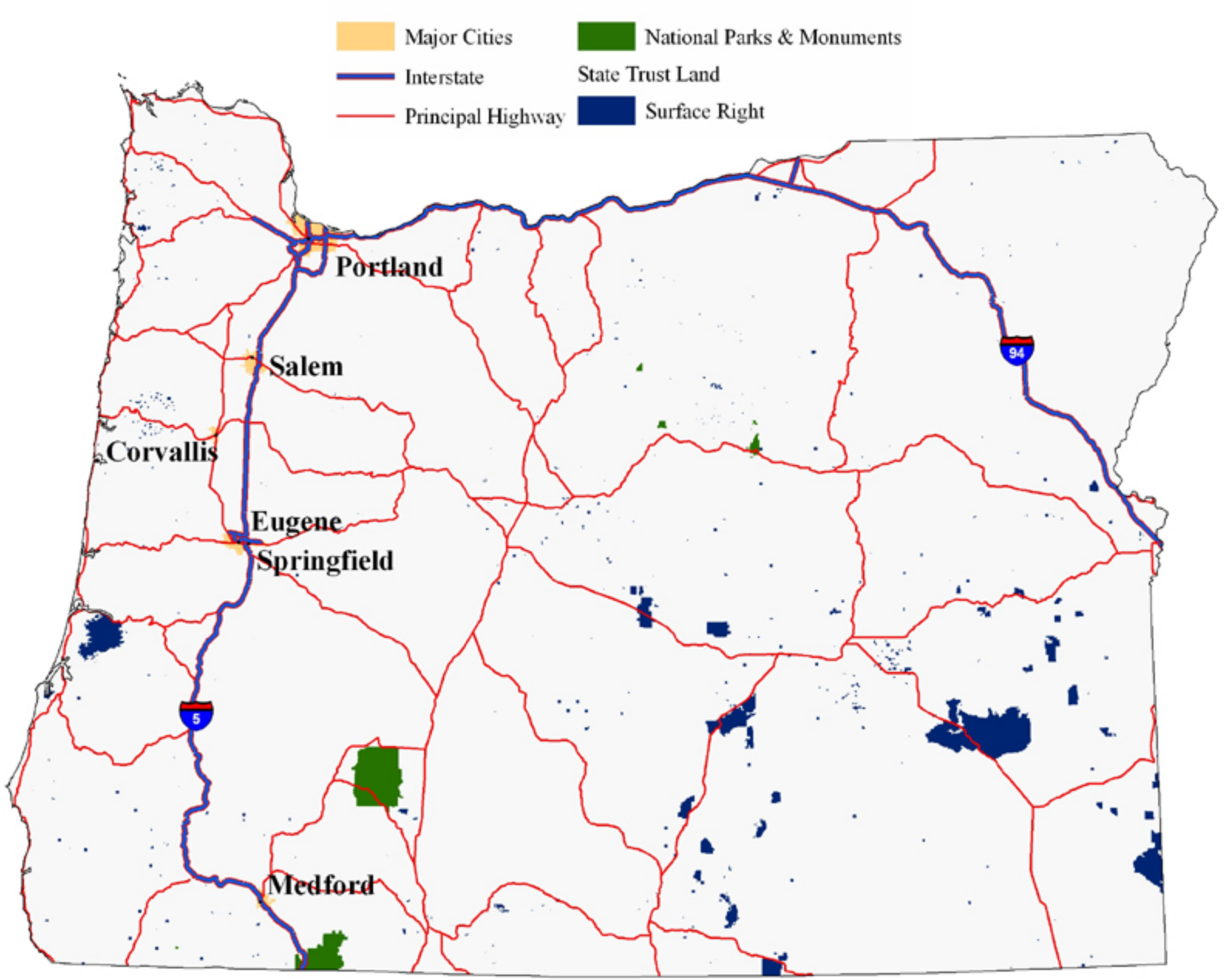
[739] Personal Communication, M. Bowers, State Land Office, March 29, 2005.
[740] Joe Chavez, "Mesa is pay dirt for Ohio firm," ALBUQUERQUE JOURNAL (February 22, 2005).
[741] 2004 ANNUAL REPORT, *supra* note 658, at 22.
[742] *Id.*
[743] *Id.* at 18.
[744] Press Release, *Land Commissioner Targets Illegal Dumping On Trust Land*, New Mexico State Land Office (December 9, 2003).
[745] *Id.*

f. Wind Energy

The New Mexico SLO recently expanded its wind energy program when Commissioner Lyons signed two leases to develop wind generating facilities in New Mexico. In fiscal year 2004, Commissioner Lyons signed an agreement with a Texas company to develop a wind power generating facility on 1,840 acres of state trust lands southeast of Tucumcari in Quay County. The facility is expected to consist of 80 turbines, 20 of which will be located on trust lands, and is expected to produce eighty megawatts of power. In 2003, Commissioner Lyons leased 1,160 acres of trust lands near House, also in Quay County, to Florida Power and Light to develop the New Mexico Wind Energy Center. The facility consists of 136 turbines, sixteen of which are located on trust lands, and produces enough electricity to power a city the size of Santa Fe. The output is marketed by the Public Service Company of New Mexico.

State Trust Lands in Oregon



G. Trust Land Management in Oregon

Oregon has approximately 769,000 surface acres and 2.1 million subsurface acres of trust lands. These lands are most heavily concentrated in the southeastern portion of the state, where the state holds several multi-section blocks of land that are primarily managed for grazing. Elsewhere in the state the lands primarily consist of scattered parcels, with the exception of an 85,000 acre block of land in the southwestern part of Oregon known as the Elliott State Forest.

1. Oregon's Land Grant

Oregon was admitted as the thirty-third state in the Union in 1859 under the Oregon Admission Act, which granted the state sections sixteen and thirty-six of every township for "the use of schools."[746] Where land had been previously deeded or was otherwise unavailable due to federal reservations or other restrictions, the state was permitted to choose other public lands *in lieu* of those sections.[747] The Act also granted Oregon seventy-two sections of land for a state university, and ten sections for public buildings. Prior to statehood, Oregon had also been granted five hundred thousand acres of land by the federal government under a general grant for the state's "internal improvement."[748]

Like other states, Oregon took title at statehood to the beds and banks of all navigable waterways in the state, including tidelands.[749] Although these lands are not considered to be trust lands, unlike most states, Oregon deposits the proceeds from the management of these lands into the Common School Fund after subtracting costs for administering other programs assigned to DSL – most notably, Oregon's Removal-Fill Law, a program regulating dredge and fill in wetlands and waterways.[750]

Oregon currently retains ownership of only about 769,000 acres, or approximately 1/4th of its original trust land grant, due in large part to a state policy of liquidating trust lands during the years immediately following statehood. This policy was discontinued after the discovery of widespread corruption and fraud in a series of investigations from 1872 to 1913 that ultimately led to the conviction of twenty-one high level state and federal officials.[751]

2. Admission Act and Constitutional Requirements

The Oregon Admission Act is fairly general in its description of the grant of lands, lacking the specificity found in the enabling legislation of later admitted states. The Admission Act imposes no restrictions on the disposition of the granted lands, does not require the creation of a "permanent fund," and does not use the term "trust" to describe the grant.

Oregon's Constitution requires the creation of a Common School Fund for the support and maintenance of common schools.[752] As a result of subsequent constitutional amendments, current revenue sources for the Common School Fund consist primarily of revenues from the granted trust lands; money accrued to the state from escheats and forfeitures, grants, gifts, bequests; and revenues from the management of the beds and banks of all navigable waterways in the state, including the Territorial Sea.[753] These combined assets – consisting of both financial and real property – are managed as a trust for the benefit of the common schools.

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[746] Oregon Admission Act, 11 Stat. 383 § 4 (1859).
[747] Act of January 7, 1853, 10 Stat. 150.
[748] Act of September 4, 1841, 5 Stat. 455.
[749] OR. REV. STAT. § 274.025; *See also* Johnson v. Dept. of Revenue, 639 P.2d 128 (Or. 1982).
[750] OR. REV. STAT. § 327.0405.
[751] *Administrative Overview*, Oregon Department of State Lands, at 2. *Available at:* http://www.oregonstatelands.us/adminoverview.htm.
[752] OR. CONST. Art. VIII § 2; OR. REV. STAT. § 327.405.
[753] OR. CONST. Art. VIII § 5; OR. REV. STAT. § 327.405.

3. Oregon's Trust Responsibility

Despite the lack of specificity in Oregon's Admission Act grants, the Oregon Attorney General has found that "Oregon's acceptance of the proposition of its Admission Act, granting land to the state 'for the use of schools,' imposed a binding obligation on the state."[754] Although the courts have not expressly ruled on whether the Admission Act created a trust, they have found that Oregon's Constitution requires the lands to be held in trust. Based on these provisions, the courts have held that:

- Any act of the Legislature purporting, directly or indirectly, to divert the Common School Funds from the purpose to which they were dedicated is unconstitutional.[755]
- Laws relating to the expiration of mortgages do not apply to foreclosures on mortgages that secure moneys borrowed from the permanent fund.[756]
- Although the proceeds from submerged and submersible lands are dedicated to support public education, unlike the lands granted for the support of common schools, these lands are not held in trust for this purpose by the state.[757]

4. Governance of Trust Lands in Oregon

Oregon's trust lands are managed by the Oregon Department of State Lands (DSL). The agency's activities are overseen by the State Land Board (Board), which is composed of the Governor, Secretary of State, and State Treasurer.[758] The Board is responsible not only for the management of state-owned trust lands, but also assets of the Common School Fund, offshore lands and coastal estuarine tidelands, submerged and submersible lands of the navigable waterways within the state, unclaimed property, and escheats (estates with no heirs).

The DSL, acting under the direction of the Board, manages federally granted trust lands and non-trust lands (the state's submerged and submersible land under navigable rivers, lakes, estuaries, and the Territorial Sea to maintain fisheries, commerce, recreation, and navigation), administers Oregon's Removal-Fill Law, acts as the trustee for unclaimed property and intestate estates, manages the South Slough National Estuarine Research Reserve, and provides support to the Oregon Natural Heritage Program.[759]

The Director of the DSL is appointed for a four year term, and has authority over the management and disposal of all lands under DSL jurisdiction.[760] The Director oversees the administrative needs of the Board, makes recommendations to the Board and Legislature, and directs the operation of DSL which includes approving policies and area management plans, overseeing budget preparation, and administering federal grants and contracts.[761] DSL's budget is derived from revenues taken from the Common School Fund.[762]

DSL is divided into the Land Management Division, the Wetlands and Waterways Conservation Division, Finance and Administration Division, the Director's Office, and the South Slough Reserve. The Land Management Division performs a variety of services related to functions of land ownership and property management, including: administering land sales and exchanges; issuing

[754] 46 Op. Atty Gen. Or. 468, Opinion No. 8223 (July 24, 1992).
[755] Eagle Point Irr. Dist. v. Cowden, 1 P.2d 605 (Or. 1931).
[756] State Land Board v. Lee, 165 P. 372 (Or. 1917).
[757] Johnson v. Department of Revenue, 639 P.2d 128 (Or. 1982).
[758] OR. CONST. Art. VIII § 5.
[759] *Administrative Overview*, *supra* note 751, at 1.
[760] OR. REV. STAT. § 273.161.
[761] *Administrative Overview*, *supra* note 751, at 5.
[762] OR. REV. STAT. § 273.161(3).

leases, such as mineral leases, waterway leases, communications site leases, sand and gravel leases, and agriculture and rangeland forage leases; granting easements, rights-of-way, and licenses for use of state-owned upland and waterways. The Land Management Division also maintains all state land ownership records as well as historical navigable waterways information.[763] The Wetlands and Waterways Conservation Section issues permits and carries out enforcement actions for removal-fill activities on public and private waterways, wetlands, the Pacific Ocean, and other waters of the state.[764] Each Division develops its own policies and rules, and promotes DSL's constitutional and statutory interests via public information and interagency coordination.

The Finance and Administration Division consists of four units: Fiscal Services, Information Services, Auditing Services, and Trust-Unclaimed Property. The Assistant Director of this section also serves as the agency's legislative coordinator responsible for development of legislative concepts, tracking legislation during sessions, providing information to legislative committees, and maintaining relationships with legislators.[765]

Legislation under consideration in the 2005 legislative session would reorganize the agency by transferring the unclaimed property program to the State Treasurer; however, revenues from this program will continue to accrue to the Common School Fund.[766]

5. Trust Land Management in Oregon

Under the Oregon Constitution, the State Land Board is directed to "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."[767] DSL operates in accordance with general policies formulated by the State Land Board and defines its mission as follows: "The mission of the Department of State Lands is to ensure a legacy for Oregonians and their public schools through sound stewardship of lands, wetlands, waterways, unclaimed property, estates and the Common School Fund."[768]

DSL's management activities on all lands are guided by an Asset Management Plan prepared under the direction of the 1995 legislature, which establishes management philosophies and strategies tailored to the Board's legal obligations with regard to trust assets.[769] The Plan was developed with the goal of establishing a coordinated comprehensive real estate management philosophy; proactively managing the Land Board's real estate assets with the same vigor applied to the investment portfolio; increasing net revenues from CSF real estate assets to meet Land Board goals; and providing a guide to balance revenue generation and resource conservation decisions.[770] It provides an overall management philosophy, guiding principles for more detailed management direction for all land assets, resource-specific management descriptions, and strategies to resolve potential conflicts between resource stewardship and revenue enhancement. Finally, the Plan includes overall implementation measures – developed with input from stakeholders, other affected parties, and the Land Board – to define the actions necessary to carry out the Plan. In 2005, DSL began to revise its Asset Management Plan. The primary purpose of this revision, which is expected to be completed by the end of 2005, is to provide more resource-specific focus and guidance in the document. Additionally, this revision is intended to incorporate elements of DSL's Strategic Plan and changes that have been made to statutes and administrative rules since 1995.

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[763] *Id.*
[764] *Administrative Overview*, *supra* note 751, at 5-6.
[765] *Id.*
[766] *Removal and Fill Technical Advisory Committee*, Oregon Department of State Lands, *available at:* http://www.oregonstatelands.us/ff_110404_tac.htm.
[767] OR. CONST. Article VIII § 5.
[768] OREGON DEPARTMENT OF LANDS STRATEGIC PLAN 2004-2008 (2004).
[769] OR. REV. STAT. § 273.245.
[770] ASSET MANAGEMENT PLAN: A PLAN TO GUIDE THE MANAGEMENT OF LAND, WATERWAYS, AND MINERALS TO BENEFIT THE COMMON SCHOOL FUND, OREGON DEPARTMENT OF STATE LANDS, 2 (1995) (Hereafter, "ASSET MANAGEMENT PLAN"). *Available at:* http://www.oregonstatelands.us/amp_95.htm.

The current plan requires trust lands to be managed "with the overriding objective of maximizing revenues over the long term for the Common School Fund, while conserving the value of the land and complying with applicable federal laws." Interestingly, the Asset Management Plan provides a limited exception with regard for compliance with state laws, indicating that compliance with state law should be pursued only "to the extent that it does not conflict with constitutional requirements, as determined by the Land Board and reviewable by the courts."[771]

However, in recognizing that the agency has a duty to obtain market value for trust lands and maximize revenues, the Plan also notes that this duty does not limit the Land Board to consideration of only economic factors in managing trust lands. The Land Board is free to explore innovative mechanisms for securing environmental, social, and other non-economic benefits so long as doing so would not diminish prudent long-term economic return from the lands. In executing its duty, present income may be foregone to conserve specific properties if it is determined that such action will enhance land value and income for the benefit of future beneficiaries.[772]

Under the Plan, real estate assets are classified as forest lands, agricultural lands, rangelands, industrial/commercial/residential lands, special interest lands, waterways, and mineral lands. Management activities in each classification are governed by a set of principles which are embodied in the development of area management plans. The types of lands with a priority for area planning are those with potential for sale or exchange; industrial, commercial and residential lands; or lands which attract a significant level of public interest.

Area management plans address geographic location, resource type or revenue generation potential, and inventory, as appropriate, as well as various economic, environmental and social factors. When completed, they are intended to govern all management activities undertaken by the Division within the subject area, including the identification of appropriate land classification(s), such as "special interest" lands and the establishment of specific land management strategies and implementation measures. Area management plans are required to maximize revenue to the Common School Fund over the long term for trust lands; complement the efforts of other agencies by developing coordinated management strategies; and include lessees, adjacent property owners, beneficiaries, and other interested parties in the planning process.[773] To date, the only area management plans that have been prepared are for the Elliott State Forest; the Lower Willamette River; and the Stevens' Road Tract (Deschutes County, Oregon).

In addition to area management plans, DSL also prepares other resource-specific management plans. For example, to promote better management of state rangelands, the agency has prepared a rangeland management plan for each of its major forage leaseholds in eastern Oregon.

The state's activities on trust lands can be divided into three general categories: surface uses, subsurface uses and land sales and other uses.

a. Surface Uses

The majority of the state's trust land surface acreage is leased for grazing and agriculture, with limited leasing for recreation cabins, industrial, commercial and residential uses, mineral extraction, and communication sites. However, the single largest source of revenue from trust-related activities is the sale of forest products from classified forest lands.

DSL currently manages about one hundred thirty-one thousand acres of forest lands, the majority of which are located in the Elliott State Forest in the Coast Range northeast of Coos Bay

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[771] *Id.* at 6. By way of contrast, the Land Board manages non-trust lands "with the overriding objective of providing the greatest benefit to the people of the State of Oregon, as determined by the Land Board in a manner consistent with all applicable laws and reviewable by the courts. Public Trust Doctrine requirements to manage Waterways in a manner that avoids unreasonable interference with public navigation, fisheries and commerce will be met." *Id.* at 7.
[772] *Id.* at 5.
[773] *Id.*

(comprising nearly eighty-five thousand acres of the total). Other major DSL timber holdings are within the Sun Pass Forest near Klamath Falls and in the Tillamook and Clatsop forests on the northwest Oregon Coast. The agency contracts with the Oregon Department of Forestry to manage forest lands.[774] DSL forest lands are managed primarily to produce a "sustainable, even-flow harvest of timber, subject to economic, environmental and regulatory considerations."[775] The agency has adopted special provisions that apply in the case of default by a purchaser of timber from common school lands.[776] In addition, the state is constitutionally prohibited from exporting raw logs harvested from Oregon's state lands.[777]

Grazing leases are issued on approximately 95 percent of the lands designated as rangelands (around six hundred thirty-two thousand acres in total), or approximately 83 percent of the total trust land acreage. The state leases forty-four large parcel leases and 107 smaller parcel leases on isolated tracts. For unleased parcels, the agency notifies the public once the lands become available. If there is more than one applicant, the agency grants the lease based on the ownership and control of the lands immediately surrounding the state property, the willingness of the lessees to develop a range management plan, and other factors, such as the offer of a bonus bid.[778] Leasing preference is given to current lessees and landowners who can use the trust lands in conjunction with privately owned lands in the operation of a livestock business.

A relatively small percentage of trust acreage is leased for other surface uses. Agricultural leases exist on 5,700 acres of Oregon trust land, most of which is located in the central and eastern parts of the state. Industrial, commercial, and residential leases have been issued on around 695 acres;[779] however, that number may increase as the agency makes this type of development a higher priority in the coming years.

b. Subsurface Uses

Mining constitutes a relatively small portion of total trust land revenues in Oregon. In fiscal year 2004, DSL received approximately $726,000 per year in mineral royalties, the majority of which (around $500,000) was derived from sand and gravel mined from state-owned submerged and submersible land (i.e., non-trust lands). Other minerals produced on state-owned land include rock, diatomite, and natural gas.[780] Over half of the state's mineral rights are "split estates," in which the overlying surface is owned by either a private party or another government agency, most often the Bureau of Land Management. The majority of the state's mineral rights occur in southeastern Oregon; however, the state has retained mineral rights in its scattered parcels, large forested areas, and state-owned submerged and submersible land. [781]

Mineral and geothermal mineral rights are retained by the state unless their sale or exchange is for the purpose of obtaining the greatest benefit for the people of this state, consistent with the conservation of lands and under sound techniques of land management.[782] Mineral leases are typically offered upon application and proof of discovery to the holder of an exploration permit. However, DSL may offer a mineral lease through a competitive bid process. The initial term of a lease is ten years, subject to renewal up to a maximum of fifty years.[783] The lease rate is $1 per acre per year, until the third year at which the rate may increase to $3, depending on production. The royalty rate is 5 percent of the gross value for metallic minerals and uranium. For non-metallic minerals

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[774] *Id.* at 13.
[775] *Id.*
[776] OR. ADMIN. R. §§ 141-015-000 to 0050.
[777] OR. CONST. Art. VIII § 5.
[778] OR. ADMIN. R. § 141-110-0040.
[779] *DSL Real Property Inventory and Estimated Market Value, 1994*, Oregon Department of State Lands, *available at:* http://www.oregonstatelands.us/landbase.htm.
[780] *Mining*, Oregon Department of State Lands, *available at:* http://www.oregonstatelands.us/mineintro.htm.
[781] *Id.*
[782] OR. REV. STAT. § 273.780.
[783] OR. ADMIN. R. § 141-071-0595.

except sand and gravel, oil and gas, and geothermal resources, the royalty is determined by DSL's Director. Available lease acreage ranges from a minimum of forty acres to a maximum of six hundred forty acres. Lease applications for minerals valued at more than $100,000 require final approval by the Land Board. If there is a discovery of minerals on lands in close proximity to state lands, the state may offer its unleased lands by competitive bid, either sealed or at public auction, without an application.[784]

c. Land Sales and Other

Over the last few decades, land sales have played a minor role in the overall asset management activities on trust lands. Under the 1995 Asset Management Plan, the state is attempting to identify and utilize those lands with high potential for increased revenue, and to dispose of poorly producing, isolated, or difficult to manage rangeland parcels. The Asset Management Plan also directs DSL to identify lands most appropriate for sale or exchange, those located within a transition area, and other lands with potential for disposal. Under the state's recently adopted strategic plan, the acquisition, improvement and disposal of lands will become a higher priority than it has been in the recent past. Consistent with its intent to dispose of isolated, poorly producing, or difficult to manage parcels, the state recently accepted bids for seven parcels in the amount of $402,500.[785]

The state can sell lands, or interests in lands, to people or qualified entities where this would achieve the objectives of the Asset Management Plan.[786] Upon application, the agency determines if the land is "available for sale" by considering current and future estimates of value and income potential; location, accessibility, and manageability; the potential for alternative income-generating uses; the level and intensity of expressed interest in a sale, exchange, or purchase; and whether the land is classified as trust or non-trust land.[787] If the land is deemed "available for sale," the method of sale varies with the type of transaction.[788] For example, if the applicant is a governmental entity, the agency can offer the lands as a direct sale at a DSL-appraised value. By contrast, if the applicant is private party, the state may offer the lands to the highest bidder at auction with a minimum or reserve bid based on the agency's estimated value.[789]

The state can also exchange lands for the purposes of consolidating and accumulating larger tracts, where this would achieving the objectives of the AMP, or where this would advance the purposes of the South Slough National Estuarine Research Reserve Management Plan.[790] DSL grants four types of easements: temporary (up to ten years), term (between ten and thirty years), permanent, and "special" for certain identified purposes.[791] In addition, DSL offers easements for fiber optic and other cables on state-owned submerged and submersible land within the Territorial Sea.

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[784] *Id.* at § 141-071-0545.
[785] News release, *State accepts bids on six range and forest parcels,* Oregon Department of State Lands (March 30, 2005). *Available at:* http://www.oregonstatelands.us/pr_2005/22_landsale_bids.htm.
[786] OR. ADMIN. R. § 141-067-0140.
[787] ASSET MANAGEMENT PLAN, *supra* note 770; OR. ADMIN. R. § 141-067-0140.
[788] OR. ADMIN. R. § 141-067-0270.
[789] *Id.*
[790] OR. REV. STAT. §§ 273.316, 273.820. The South Slough National Estuarine Research Reserve is a nationally recognized estuarine research facility that studies how estuaries function and the benefits to Oregon's coastal environment and economy.
[791] OR. ADMIN. R. § 141-122-0070.

Table V(G): FY 2004 Revenues– Oregon Department of State Lands

Source	% of Revenue	Receipts
Surface Uses		
Agriculture	0.90%	$141,408
Grazing	2.30%	$623,648
Forest	92.00%	$14,325,310
Other (Industrial, Commercial and Residential)	4.30%	$470,390
Total Surface	**99.50%**	**$15,560,756**
Subsurface Uses		
Oil and Gas		
Coal		
Other (Sand and Gravel)	0.50%	$211,406
Total Subsurface	**0.50%**	**$211,406**
Sales and Other		
Land Sales and Other		$0
Total Sales and Other	**0.00%**	**$0**
Grand Total	**100%**	**$15,772,162**
Agency Budget*		**$5,000,000**

* Approximate

Source: Data provided by Oregon Department of State Lands, April 2005.

6. Trust Revenue Distribution in Oregon

The only remaining beneficiary of the trust lands granted to the state of Oregon at statehood is the common schools (K-12). Although lands were granted for the benefit of higher education and other public institutions, these lands were sold early in the state's history as part of its aggressive land disposal policy.

All distributions to the trust beneficiaries come from the Common School Fund, which consists primarily of revenues derived from uplands (generally trust lands), submerged and submersible lands (generally non-trust land), and escheats, unclaimed property, and gifts to the state not designated for some other purpose.

Funds are distributed to county school districts based on the number of county residents from ages four to twenty and by law, are dedicated to "support and maintenance of common schools in each school district."[792] In order to ensure intergenerational equity, the state applies a sliding-scale distribution policy based on the annual change in value of the fund. At a minimum, the Board distributes 2 percent of the fund, up to a maximum of 5 percent if the fund value increases 11 percent or more in a single year.[793] In 2004, the DSL distributed $26.8 million to Oregon counties for the support of public schools. This amount constituted somewhat less than 1 percent of the state's overall K-12 budget of almost $5 billion.[794] In 2005, DSL expects to distribute $42.9 million to the public schools.

7. Recent Developments and Emerging Issues in Oregon

a. Strategic Plan and Sustainability Plan

Over the last decade, Oregon has adopted a series of innovative plans to guide trust management decisions for the benefit of trust beneficiaries and the state government as a whole.

In addition to the AMP that was adopted by the legislature in 1995, the DSL has developed a Strategic Plan to outline current and future needs and to describe trends affecting agency programs. As a part of the Strategic Plan, DSL revised its mission statement and vision statement, and crafted a set of goals that reflect the input of the public, staff, and environmental consultants, organizations, and associations. The Strategic Plan identifies several areas of focus, ranging from land and waterway management (e.g. updating and implementing the asset management plan) to investment fund management and customer service.[795]

The achievement of the Strategic Plan, as well as the asset management and other plans, is tracked under a set of eleven performance measures, developed as part of the overall state government framework for measuring success. These benchmarks are intended to measure outcomes over which the agency has primary control.

Finally, the DSL has recently prepared a Sustainability Plan to ensure that the agency incorporates sustainability in its management of the assets of the Common School Fund. In addition, the agency is in the process of revising the forest management and Habitat Conservation Plans for the Elliott State Forest. [796]

b. Elliott State Forest Cost Benefit Analysis

As part of its overall asset management plan, DSL commissioned a study in cooperation with the Oregon Department of Forestry to determine whether it is cost effective for the state to continue to retain ownership and manage lands for timber production in the Elliott State Forest, or whether it would be more profitable over the long term to sell the Forest in its entirety and invest the proceeds of the sale.

The January 2005 study, prepared by Mason, Bruce, and Girard, Inc., provides an estimate of the current value of the Common School Fund timberland on the Elliott State Forest under current market conditions, recognizing the effects of the federal and state Endangered Species Acts and other state and federal laws. The study discusses potential rates of financial return and other factors that

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[792] OR. REV. STAT. § 327.405.
[793] *Oregon's Common School Fund*, Oregon Department of State Lands, *available at:* http://www.oregonstatelands.us/csfbrochure.pdf.
[794] *Annual Survey of Local Government Finances 2002-2003, Summary of Public School System Finances for Elementary-Secondary Education by State*, U.S. CENSUS BUREAU (2005), *available at* http://www.census.gov/govs/www/school.html.
[795] OREGON DEPARTMENT OF STATE LANDS SUSTAINABILITY PLAN, OREGON DEPARTMENT OF STATE LANDS, 6-7. *Available at:* http://www.oregonstatelands.us/sust_plan0304.pdf.
[796] *Id.* at 6-7.

would be considered by private managers for valuation purposes, and discusses the indirect economic impacts as well the non-market costs and benefits of each alternative.[797]

The study alternatives were developed from two points of view. The first, from the fiduciary perspective of the State Land Board, compares the present value of future income from the Forest to the Common School Fund under continued ownership and management by the state versus a one-time lump sum payment to the Fund that would result from the sale of the Forest. The second perspective is that of the state government in general, considering the indirect economic and non-economic impacts of a decision to sell or not to sell the Forest, including impacts on employment, property tax rates, and other factors. The study concluded that the net present value of the Forest under continued state ownership is near the midpoint of the net income if the Forest were sold. With continued state management, the Forest value is projected to range from $282 million to $381 million. The range of net income from the sale of the forest is estimated at $245 million to $488 million.[798]

In February 2005, the Land Board considered the cost-benefit study of the Elliott State Forest and stated that they had no intention of selling this asset because of its importance to the Common School Fund portfolio. The Board, however, said that it would use the study results in other planning efforts relating to the management of its forest assets.

c. *Rangeland Audit*

In 2004, the State's Audits Division released an audit of the DSL's rangeland management program. The audit found that the grazing fee was not being periodically reviewed as required by law, and that the management of rangelands resulted in a net loss of at least $13,115 for the Common School Fund during the period 1998-2002 (not including a 1999 payment of $3.5 million from the General Fund to the Common School Fund to provide assured grazing rights to lessees for the term of their leases.) Had the lands been sold and the proceeds invested, the auditor projected "the Common School Fund would have received at least $3 million to $4.2 million more income for fiscal years 1998 through 2002. Alternatively, if market lease rates had been charged for state rangeland leases for the five fiscal years from 1998 to 2002, we estimate that the Common School Fund would have earned $1.45 million more."[799]

Consequently, the Audits Division recommended selling all or part of the rangelands through an open, competitive bidding process, exchanging all or part of the land for a better performing asset, and obtaining market rates for leases, either through competitive bidding for rangeland leases or by increasing grazing fees to market rates.[800]

Although DSL concurred with many of the audit findings, it disagreed with others. DSL agreed with a finding that competitive bidding is a legitimate method of realizing market rates for grazing leases but was unable to let all leases competitively. As a result, DSL reached an agreement with a group of lessees who had sued the Board and the agency which allocated a $3.5 million legislative appropriation to the Common School Fund to offer assured grazing rights to existing lessees.

In response to the report, the agency convened a Rangelands Grazing Fee Advisory Committee to make recommendations to the DSL and Land Board. The Committee, chaired by the Department's Assistant Director for Policy and Planning, has reviewed the audit findings with regards to grazing fees, analyzed whether the current rate reflects at least a fair market value rental rate, and, as of April 2005, is in the process of determining what recommendations it should make to the

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[797] Carl F. Ehlen and Roger G. Lord, *A Cost-Benefit Analysis of the Elliott State Forest Common School Fund Lands,* Mason, Bruce & Girard, Inc., on behalf of the Oregon Department of State Lands Oregon Department of Forestry (January 12, 2005).
[798] *Id.*
[799] *Oregon State Land Board Rangeland Revenue for the Common School Fund Fiscal Years 1998 to 2002*, Oregon Secretary of State, Report No. 2004-09 (2004). *Available at:* http://www.sos.state.or.us/audits/audreports/lands.html.
[800] *Id.*

Director concerning adjustments, if any, that should be made to fee formula.[801] The Committee, which was appointed in September 2004, is scheduled to have developed a set of final recommendations by June 2005.

As for the audit's other recommendations, DSL has indicated that the agency will continue its practice of issuing only expired or cancelled leases on a competitive basis and will keep to its plan of actively disposing of grazing lands (subject to governing administrative rules) that are largely surrounded by land not owned by the Land Board or that are not contiguous to other, larger tracts of state land, as well as parcels that are difficult or uneconomical to manage due to access, location, isolation, low production value, or similar factors.[802]

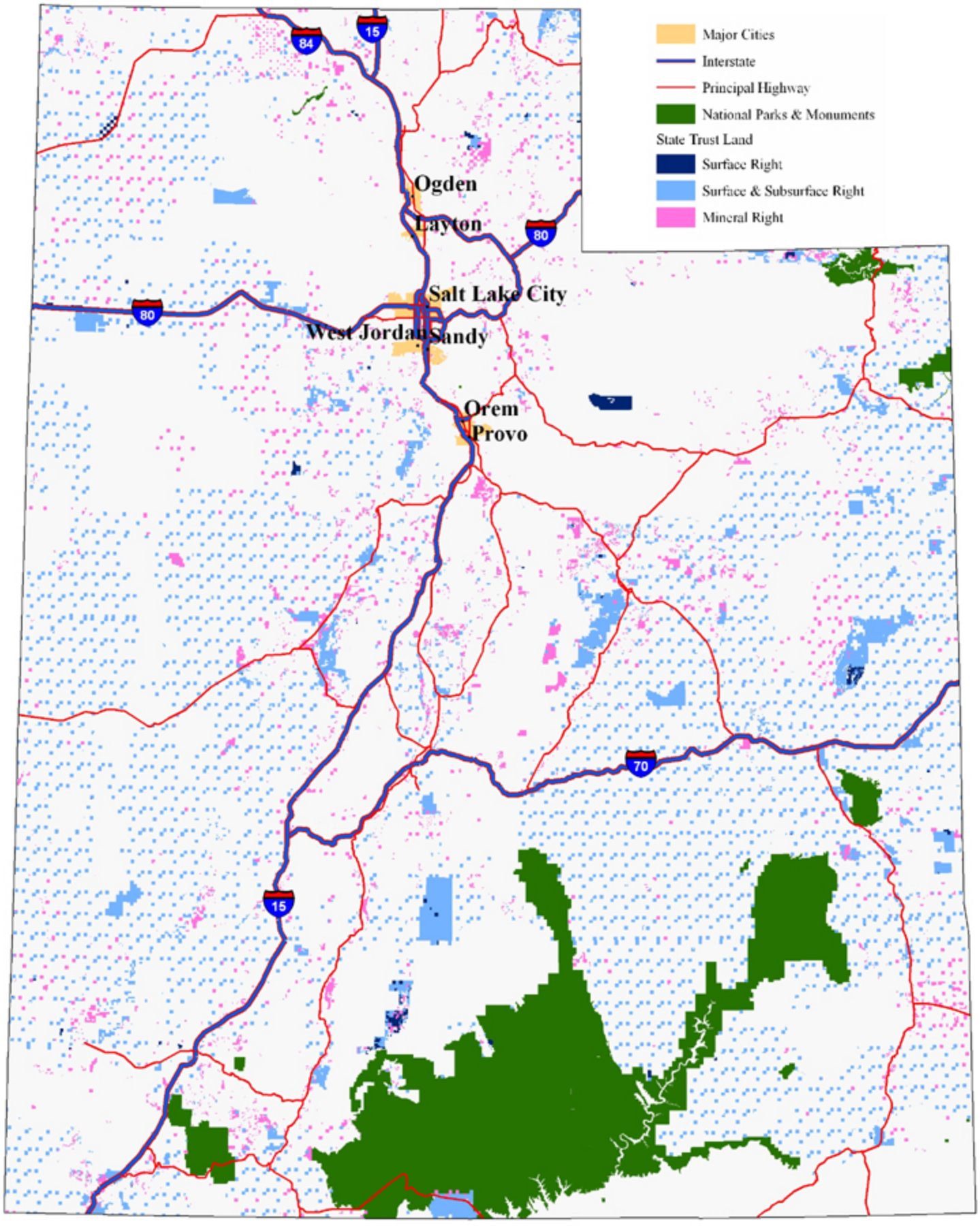
d. Contaminated Beds and Banks

As manager of the beds and banks of major rivers, DSL is facing an increased responsibility associated with efforts to clean up contaminated areas. While these lands are not designated "trust lands," the revenues arising from the management of these lands contribute to the Common School Fund, and as such, the expenses associated with these efforts will affect revenues to the Fund.

The largest current project is known as the Portland Harbor Federal Superfund Site where contaminated in-water sediments have been found along this heavily industrialized, six-mile stretch of the lower Willamette River. An investigation is underway to characterize the contamination and evaluate the risk that contamination poses to human health and the environment. The next steps will likely require a feasibility study to develop and evaluate cleanup options. In the meantime, investigations are beginning for areas of the Columbia River in Astoria and near Portland. The extent to which DSL will contribute to this work and to the clean-up effort is still under consideration.[803]

[801] Charter, Rangeland Grazing Fee Advisory Committee. *Available at:* http://www.oregonstatelands.us/rangeland_gfac_charter.htm.
[802] OR. ADMIN. R. §§ 141-067-0130 et seq.
[803] *DSL Works on Contaminated River Cleanup*, DSL In The News, Oregon Department of State Lands, Fall 2004, *available at:* http://www.oregonstatelands.us/news/print.htm.

State Trust Lands in Utah



H. Trust Lands Management in Utah

Utah has approximately 3.5 million surface acres and 4.5 million subsurface acres of trust lands. These lands are scattered throughout the state, primarily in a checkerboard pattern, with the state holding only a few larger, consolidated parcels. Approximately half of the lands granted to Utah at statehood have been sold into private ownership, such that approximately 30 percent of the private land in Utah was once trust land.[804] Nearly 70 percent of Utah's land is held by the federal government (largely the Bureau of Land Management); as a result, trust land is one of the few sources of available land for development in Utah.

1. Utah's Land Grant

Utah's road to statehood was not a smooth one. Its first attempt in 1849-1850 failed due to concerns over the political power of the Mormon Church, in combination with the fact that Utah (then hoping to become the state of Desert) did not have the sixty thousand eligible voters required for admission as a state. A second attempt in 1856 met with Congressional disapproval of the Mormon Church's acceptance of polygamy, as did a third attempt in 1862 that led to the passage of federal legislation prohibiting plural marriage. A fourth attempt in 1876 was rejected over concerns that the political power of the Mormon Church would lead to insufficient separation between church and state. In 1887, the Mormon Church authorized the insertion of a clause prohibiting polygamy into the Utah Constitution, but Congress again rejected statehood based on concerns that Church leaders were not specifically committed to the prohibition. With the help of some influential politicians and the Church's eroding commitment to polygamy, Utah finally achieved statehood in 1896, although admission was reached through a compromise that stipulated Utah would not be admitted until after the congressional term had expired in order to insulate hesitant Congressmen from criticism.[805]

The Enabling Act of 1894 granted Utah sections two, sixteen, thirty-two, and thirty-six in every township, plus *in lieu* lands, for the support of the common schools.[806] In addition, the following lands were granted to Utah: 500,000 acres for water reservoirs; 100,000 acres for an insane asylum; 100,000 acres for the school of mines; 100,000 acres for the deaf and dumb asylum; 100,000 acres for a state reform school; 100,000 for the state normal school; 50,000 acres for the miner's hospital; 200,000 acres for the state agricultural college; 110,000 acres plus the equivalent of two townships for the University of Utah; and 100 sections for public buildings.[807] The common schools are the largest beneficiary of the trust lands, holding approximately 95 percent of the total trust land in Utah. Utah retains approximately 44 percent of its original trust land grant of 7.5 million acres.

2. Enabling Act and Constitutional Requirements

By the time Utah became a state in 1896, Congress had begun the practice of reserving mineral rights in the lands granted to the states. Utah bargained with Congress for these mineral rights as part of the school land program. Congress also required that a "permanent fund" be established from the proceeds of the sales of granted lands, the interest of which was to be used to support the common schools. Unlike previous state enabling acts, Utah's Enabling Act did not establish a minimum sales price or any restrictions regarding the lease of these lands.

Utah's Constitution established a Permanent State School Fund that is derived from the proceeds from trust land sales and revenues from nonrenewable resources, as well as from the net sale proceeds from federal lands in Utah (5 percent), and other legislative appropriations. The Constitution also declares that interest of the Fund "shall [only] be expended for the support of the public

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[804] Utah State and Institutional Trust Lands Administration, *About Us*, *available at:* http://www.utahtrustlands.com/about/.
[805] Edward L. Lyman, *Struggle for Statehood, Utah History Encyclopedia*, *available at:* http://historytogo.utah.gov/statehood.html. The enabling act of 1894 did not result in statehood until 1896 because Democrats feared the recent trend in Utah territorial elections, which were against Democrats, would hurt them in the upcoming elections.
[806] Utah Enabling Act, 28 Stat. 107 § 6 (1894).
[807] *Id.* at §§ 6, 7, 8, and 12.

elementary and secondary schools" and "shall be guaranteed by the state against loss or diversion."[808]

3. Utah's Trust Responsibility

The relative absence of restrictions in Utah's Enabling Act has led the Tenth Circuit Court of Appeals to find that there was no federal trust created under the Utah Enabling Act for the grant of lands to benefit the Miner's Hospital. While the court did not address the other land grants under the Enabling Act, presumably the court's rationale would apply to other federal land grants as well. It is clear however, that the lands are held in trust pursuant to the Utah Constitution, which expressly declares that the lands are "held in trust by the State for the respective beneficiaries and purposes stated in the Enabling Act grants."[809] The legislature requires the state to be concerned with "both income for the current beneficiaries and the preservation of trust assets for future beneficiaries, which requires a balancing of short- and long-term interests so that long-term benefits are not lost in an effort to maximize short-term goals."[810]

4. Governance of Trust Lands in Utah

Prior to 1994, the Utah Division of State Lands and Forestry managed Utah's state trust lands. But due to sluggish revenue production, the agency was overhauled and modernized, and was reformed into the School and Institutional Trust Lands Administration (SITLA).[811]

SITLA is responsible for the management of all school and institutional trust lands and assets, under the leadership of a Director.[812] SITLA's operations are funded by a portion of the revenues generated by trust land management activities.[813]

The Director of SITLA is appointed by a majority vote of a Board of Trustees,[814] which establishes policies for the management and administration of the trust lands.[815] The Board consists of seven members appointed by the Governor on a non-partisan basis, with the consent of the Senate, for non-consecutive six-year terms. Each candidate is to possess "outstanding professional qualifications pertinent to the purposes and activities of the trust," including non-renewable resource management or development, renewable resource management or development, and real estate.

Six of the candidates for the Board are selected by an eleven-member nominating committee, which is appointed via a complex representative process intended to allow input from a variety of stakeholders. The State Board of Education appoints five members of the Committee from different geographic areas of the state. The Governor also appoints five members as follows: one from a nomination list of at least two persons knowledgeable about institutional trust lands submitted by the University of Utah and Utah State University on an alternating basis every four years; one from a nomination list of at least two persons submitted by the livestock industry; one from a nomination list of at least two persons submitted by the Utah Petroleum Association; one from a nomination list of at least two persons submitted by Utah Mining Association; one from a nomination list of at least two persons submitted by the executive director of the Department of Natural Resources after consultation with state wildlife and conservation organizations. Finally, the president of the Utah Association of Counties designates the chair of the Public Lands Steering Committee, who must be an elected County Commissioner or Councilor, to serve as the eleventh member of the Committee.

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[808] UTAH CONST. Art. X § 5.
[809] *Id.* at Art XX § 2.
[810] UTAH CODE ANN. § 53C-1-102(2)(c).
[811] *Id.*
[812] *Id.* at § 53C-1-201(3)(b)(i).
[813] STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION ANNUAL REPORT, FISCAL YEAR 2003, at 5 (2004) (hereinafter "2003 ANNUAL REPORT").
[814] UTAH CODE ANN. § 53C-1-103(4).
[815] *Id.* at § 53C-1-103(5)(a).

The Director and Board are additionally required to meet with an Advisory Committee at least three times per year.[816] The Advisory Committee consists of five county commissioners appointed by the Utah Association of Counties,[817] and is intended to evaluate the impact of trust land management on rural economies.

Utah has divided its trust land activities into three groups: Surface, Minerals, and Planning and Development. The Surface Group governs the use of trust lands for commercial and industrial purposes, telecommunication, cabin sites, farming, grazing, easements, rights-of-way, filming, and other organized events such as cross-country racing, and the selling of trust lands (the major responsibility of the group).[818] Responsibilities for land sales are shared between the Surface Group and the Planning and Development Group, which manages 1 percent of the lands managed by SITLA,[819] and seeks to capture revenues through "well structured, creative transactions with the private sector, always with an eye toward quality planning, preserving open space, and meeting larger community needs."[820] The Minerals Group manages mineral and subsurface resources, which have significant leasing potential and currently generate the largest returns to the trust.[821]

5. Trust Land Management in Utah

The management objectives for state trust lands are detailed in a Utah administrative rule that implements the Enabling Act, constitutional, and statutory provisions regarding state trust lands. The main objective is to "optimize and maximize trust land uses for support of the beneficiaries over time."[822] Specific goals include:

- Maximizing the commercial gain from trust land uses consistent with long-term support of the beneficiaries;
- Managing school trust lands for their highest and best use;
- Ensuring that no less than fair-market value be received for the use, sale, or exchange of school trust lands;
- Reducing the risk of loss through reasonable trust land use diversification;
- Upgrading school trust land assets where prudent through exchange; and
- Permitting other land uses and activities not prohibited by law which will not result in a loss to the trust assets or a loss of economic opportunity.[823]

Utah's trust management activities can be roughly divided into three categories: surface uses, subsurface uses, and land sales and other uses.

a. Surface Uses

Surface uses on trust lands (including leases and sales, development, and grazing/forestry activities) contributed about 27 percent or $14.1 million of the overall net revenues of $52.5 million in 2004.[824] Surface leases may be entered into by negotiation, public auction, or other public competitive bidding process.[825] If a lease contains an option to purchase, the lease must be entered into through a public competitive process.[826]

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[816] *Id.* at § 53C-1-204(7)(a)(i).
[817] *Id.* at § 53C-1-204(7)(b).
[818] State of Utah SITLA, *Surface Management, available at:* http://www.utahtrustlands.com/surface/.
[819] State of Utah SITLA, *Development*, *available at:* http://www.utahtrustlands.com/development/.
[820] *Id.*
[821] State of Utah SITLA, *Minerals*, *available at:* http://www.utahtrustlands.com/minerals/.
[822] UTAH ADMIN. CODE § R850-2-200.
[823] *Id.* at § R850-2-200 §§ 1-6.
[824] STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION ANNUAL REPORT, FISCAL YEAR 2004, at 8, 29 (2005) (hereafter "2004 ANNUAL REPORT").
[825] UTAH CODE ANN. § 53C-4-201(3).
[826] *Id.* at § 53C-4-201(3)(ii).

SITLA is required to receive at least the fair market value for all surface leases,[827] as determined by a market analysis that examines the income-producing ability of the highest and best use of the property and a market study of comparable properties. Minimum lease rates may be determined based on the costs associated with the administration of the lease.[828] Special use surface leases, excluding grazing, may be issued for up to fifty-one years, and up to ninety-nine years in exceptional cases.[829]

Grazing leases (referred to as grazing permits) are issued for no longer than fifteen years and must include terms and conditions that protect the interests of the trust beneficiaries in regards to securing payment, and terms and conditions that protect the range resources from improper and unauthorized use.[830] Existing grazing permittees have a preferential right to the permit if that permittee agrees to match or exceed the highest competing application bid.[831] Fees for grazing permits are established and reviewed annually;[832] the fee for grazing in 2003 was $2.05 per "Animal Unit Month" (i.e., one cow for one year = 12 AUMs) plus a 5¢ noxious weed fee.[833] In fiscal year 2003, SITLA also adopted rules requiring grazing lessees to make beneficial use of water rights associated with grazing leases or risk losing the permit to graze.[834]

Forest product permits or sales fall into three categories: permit sales (consisting of $300 or less), noncompetitive sales ($2000 or less), and finally, competitive sales (all sales over $2,000).[835] All competitive sales are administered through a competitive bidding process and are subject to public notice requirements. Sales are awarded to the highest qualified bidder.[836]

Commercial leases are classified as special use leases and include restaurant, recreation, service station, boating facilities, motels, and retail businesses. Commercial leases are generally issued for terms of fifty-one years.[837]

Grazing and forestry generated $713,147 for Utah's trust land beneficiaries in fiscal year 2003[838] and approximately $525,000 in fiscal year 2004.[839] These types of uses, generating well under $1 per acre, are a relatively minor revenue source for the trust beneficiaries compared with average revenues in 2003 of $7.31 per acre for use permits, $18.46 per acre for agricultural uses, $170.20 per acre for commercial leases.[840]

b. Subsurface Uses

Oil and gas production is usually the largest revenue source on Utah's school trust lands.[841] Oil and gas revenues for fiscal year 2004 were more than $36.8 million, a $13.8 million increase over fiscal year 2003.[842] Oil and shale leases are issued on terms of up to twenty years, with all other mineral leases administered on ten year terms.[843] There are also significant coal reserves in Utah that generated revenues of $4.3 million in fiscal year 2004. [844]

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[827] UTAH ADMIN. CODE § R850-30-400.
[828] *Id.* at § R850-30-400(3).
[829] *Id.* at § R850-30-200.
[830] *Id.* at § R850-50-600.
[831] *Id.* at § R850-50-400(6).
[832] *Id.* at § R850-50-500.
[833] 2003 ANNUAL REPORT, *supra* note 813, at 14.
[834] *Id.* at 21.
[835] UTAH ADMIN. CODE §§ R850-70-400, 500, 600.
[836] *Id.* at § R850-70-800.
[837] *Id.* at § R850-30-200(3)(e).
[838] 2003 ANNUAL REPORT, *supra* note 813, at 4.
[839] 2004 ANNUAL REPORT, *supra* note 824, at 29.
[840] 2003 ANNUAL REPORT, *supra* note 813, at 14.
[841] *Id.* at 12.
[842] 2004 ANNUAL REPORT, *supra* note 824, at 10.
[843] UTAH ADMIN. CODE § R850-20-3900.
[844] 2004 ANNUAL REPORT, *supra* note 824, at 10.

Subsurface leases, with a few minor exceptions, are let through a competitive, sealed bidding process that is administered on a periodic basis by SITLA. Mineral leases are awarded to the highest, responsible, qualified bidder[845] and are limited in size to 2,560 acres. Alternatively, the Director may authorize a public auction and set the minimum bid of the mineral interest available for lease.[846] A requirement that mineral rights be reserved when trust lands are sold has allowed the state to retain a substantial mineral acreage for revenue production. If a lessee waives or relinquishes to the trust a prior mining claim, mineral lease, or other right which might otherwise defeat or encumber the selection of newly acquired land or cloud the title to those lands, the Director may award the mineral lease without following competitive bidding procedures.[847] Mineral production generated just over $7.5 million for Utah's trust land beneficiaries in 2003.[848]

c. Land Sales and Other

Trust lands may not be sold for less than fair market value.[849] The Director determines whether to retain or dispose of trust lands according to the best interests of the beneficiary.[850] If the Director finds that disposition of the trust land is in the best interest of the beneficiary, the Director must advertise the impending sale, lease, or exchange in a reasonable manner consistent with the Director's fiduciary duty.[851] Any tract may be subdivided under the supervision of the Director.[852] Competitive bidding procedures must be followed for the sale of trust lands.

Prior to the sale of trust lands for development, the Director designates the parcel of trust land as development property. To qualify for designation, the parcel must be near an urban or high growth area or must otherwise be suitable for development activities, such that development would be the highest and best use of the property, and a development transaction would be in the best interest of the beneficiary.[853] The State Planning Coordinator and SITLA operate under a Memorandum of Understanding under which SITLA submits development proposals to the Resource Development Coordinating Committee prior to sales of trust land.[854]

Land sales in Utah are generally of two types. The first is the Surface Group sales, which are held twice a year.[855] Usually ten to twenty parcels of various sizes are offered for sale at auction. The second type are Development Group sales.[856] The Development Group works to increase land values with the use of an approved capital budget. The intent is to produce higher profits for beneficiaries by allowing development of the parcels before selling them. SITLA is also authorized to become a member of a limited liability company in connection with joint ventures for the development of trust lands and minerals.[857]

In 2003, the state's trust land sales generated over $14 million for the various beneficiaries of the trusts.[858] In the past ten years, SITLA has sold 5,300 acres for $42 million.[859]

Trust lands may be exchanged, however, the Resource Development Coordinating Committee must first review any proposed land exchange.[860] Trust lands must be exchanged for lands or assets of equal or greater value, with the assets consisting of no more than 25 percent cash.[861] SITLA is

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[845] UTAH CODE ANN. § 53C-2-407(2).
[846] *Id.* at § 53C-2-407(4).
[847] *Id.* at § 53C-2-407(5).
[848] 2003 ANNUAL REPORT, *supra* note 813, at 4.
[849] UTAH CODE ANN. § 53C-4-102(1).
[850] *Id.* at § 53C-4-102(2).
[851] *Id.* at § 53C-4-102(3).
[852] *Id.* at § 53C-4-102(4).
[853] UTAH ADMIN. CODE § R850-140-300.
[854] *Id.* at § R850-80-100.
[855] 2003 ANNUAL REPORT, *supra* note 813, at 13.
[856] *Id.* at 13
[857] UTAH CODE ANN. § 53C-1-103(6).
[858] 2003 ANNUAL REPORT, *supra* note 813, at 4.
[859] 2004 ANNUAL REPORT, *supra* note 824, at 16.
[860] UTAH ADMIN. CODE § R850-90-100.
[861] *Id.* at § R850-90-200.

required to solicit competitive exchanges through advertising in much the same way as for a sale or lease of trust land.[862]

Exclusive, non-exclusive, and conservation easements may be granted by SITLA when deemed consistent with the trust responsibilities.[863] The minimum charge for the easement is based on the costs incurred by SITLA and the fair market value of the particular use.[864] Easements are generally for no longer than thirty years. However, the Director may adjust this term if it is in the best interest of the trust beneficiaries.[865] Conservation easements must specify the resource being conserved and the conditions under which the easement may be terminated.[866]

Conservation sales are also allowed as long as the beneficiary receives full compensation for this use of the land. Buyers interested in protecting land for conservation purposes may purchase the land, or the lands may be exchanged with the federal government for parcels that would better suit the trust purposes.[867] Utah also engages in habitat mitigation programs that conserve trust lands – including a successful prairie dog relocation program[868] – that earn the state credits that can be used to mitigate the loss of habitat through development of other trust lands or private lands.[869]

Table V(H): FY 2003 Revenues – Utah School and Institutional Trust Lands Administration

Source	% of Revenue	Receipts
Surface Uses		
Development Rents	1%	$409,413
Grazing & Forestry	1%	$713,147
Surface Leases	4%	$2,051,665
Total Surface	**6.0%**	**$3,174,225**
Subsurface Uses		
Oil & Gas	46%	$23,035,410
Other minerals	15%	$7,587,292
Total Subsurface	**61.0%**	**$30,622,702**
Sales and Other		
Surface Sales	9%	$4,596,179
Development Sales	21%	$10,469,686
Interest from operations	3%	$1,396,565
Other Activities	0.01%	$8,021
Total Sales and Other	**33.0%**	**$16,470,451**
Grand Total	**100%**	**$50,267,378**
Agency Budget*		**$9,397,011**

* Includes operating costs and capital expenses.

Source: Utah School and Institutional Trust Lands Administration FY 2003 Annual Report. (The data from the 2003 report was used for this chart as the most recent 2004 Annual Report does not include a detailed list of revenues and expenditures).

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[862] *Id.* at § R850-90-400.
[863] *Id.* at § R850-40-200.
[864] *Id.* at § R850-40-600.
[865] *Id.* at § R850-40-800.
[866] *Id.* at § R850-40-900(2).
[867] 2003 ANNUAL REPORT, *supra* note 813, at 31.
[868] *Id.* at 29.
[869] *Id.*

6. Trust Revenue Distribution in Utah

Utah ranks near the top among states in per taxpayer burden for funding public education, but near the bottom in per pupil spending due to the large average size of Utah families.[870] Traditionally, payments from the state trust land fund have done little to ease the burden on Utah's taxpayers or to improve the financial situation. In fiscal year 2000, the fund distributed around $3.8 million to Utah's education programs, accounting for just 0.115 percent of the $3.3 billion state education revenues.[871] However, these revenue contributions are increasing: by fiscal year 2003 these distributions had grown to approximately $9 million.[872]

There are twelve beneficiaries of the trust lands in Utah: the common schools; reservoirs, Utah State University, University of Utah, School of Mines (University of Utah), Miners' Hospital, Normal School (at University of Utah), Utah School for the Deaf, Public Buildings, State Hospital, Utah School for the Blind, and the Youth Development Center. Of these beneficiaries, the common schools are by far the largest, accounting for approximately 95percent of the trust land in the state. The revenues from each beneficiary's grant lands are managed as a separate fund from which the beneficiary receives interest payments.

State law requires that all revenues generated by the common school trust lands be placed in the permanent fund.[873] The interest from this account is distributed to the individual schools based on the number of students at each school.[874] The Uniform School Fund, established by the Utah Constitution, consists of the State School Fund, money transferred to the fund through the Unclaimed Property Act, revenue from forfeited property, and any other allocations – either constitutional or legislative -- including taxes on income or intangible property.[875] According to the Director in SITLA's 2003 Annual Report, the current balance of the permanent fund is around $500 million,[876] up from approximately $300 million in fiscal year 1999.[877]

The Uniform School Fund contains a restricted account called the Interest and Dividend Fund. This account consists of interest and dividends derived from the investment of the State School Fund monies and interest on account monies.[878] Funds in this account are used for the School LAND Trust Program (discussed below) and for teachers' classroom supplies.[879] Remaining funds may be appropriated by the state legislature for the support of public education.

Revenues from mineral leases are deposited into the Land Grant Management Fund.[880] The Land Grant Management Fund consists of all revenues derived from trust lands except from sales, interest earned by the fund, revenues collected from certain types of vehicle fees, and all other revenues obtained from other activities of the Director or administration.[881] All revenues in excess of that required to fund the budget are distributed to the various beneficiaries in shares proportionate to the amount obtained from each beneficiary during that fiscal year.[882]

Money from the lease, sale, rental, or use of school trust lands, or the natural resources on the school trust lands, including fees, forfeitures, and penalties, are deposited into the Permanent

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[870] Bill Hedden and Craig Bigler, *School Trust Lands in Utah,* GRAND CANYON TRUST, at 3 (2002). *Available at* http://www.grandcanyontrust.org/media/PDF/forests/schtrust.pdf.
[871] *Id.* at 4.
[872] 2003 ANNUAL REPORT, *supra* note 813, at 4.
[873] *Id.* at 10.
[874] *Id.*
[875] UTAH CONST. Art. XIII § 5(5) ("All revenue from taxes on intangible property or from a tax on income shall be used to support the systems of public education and higher education as defined in Article X, Section 2").
[876] 2003 ANNUAL REPORT, *supra* note 813, at 3.
[877] *Utah Public Education Financing and the State School Trust Fund,* Utah Foundation Research Report #632 (March/April 2000).
[878] UTAH CODE ANN. § 53A-16-101(2).
[879] *Id.* at § 53A-16-101(3).
[880] *Id.* at § 53C-2-402.
[881] *Id.* at § 53C-3-101.
[882] *Id.* at § 53C-3-101(3).

State School Fund.[883] All non-land sale revenue from surface uses and natural resources on other granted lands are distributed to the corresponding beneficiary. [884]

The Director transfers the funds received from the trust lands to the State Treasurer, classifying each source as a sale, rental, royalty, interest, fee, penalty, or forfeiture.[885] All revenue generated by the sale of school trust lands is deposited into the State School Fund.[886] Interest and dividends from the Permanent State School Fund are distributed for the maintenance of public elementary and secondary schools with realized and unrealized gains remaining in the State School Fund.[887]

Under the "State Money Management Act," adopted in 2002, the State Treasurer invests the fund proceeds primarily in equity securities and fixed income securities that do not to exceed a 80/20 percent balance, respectively. The investment activity is reviewed at least quarterly by the Investment Advisory Committee.[888]

The School LAND (Learning and Nurturing Development) Trust Program was established to provide financial resources to enhance student academic achievement.[889] This program is funded through the Interest and Dividends Account, which is a part of the Uniform School Fund. Interest and monies deposited into the Interest and Dividends account from the State School Fund, and interest earned from money already in the Interest and Dividends account are the sources of this funding. The program is funded up to an amount equal to 2 percent of the funds provided for the Minimum School Program each fiscal year.[890]

School districts receive 10 percent of the funds on an equal share basis each fiscal year.[891] The remaining 90 percent is distributed based on the number of students enrolled in the school district compared to total state student enrollment.[892] Each school district distributes the funds to the individual schools on an equal, per student basis.[893]

In order for schools to receive their allocation of the Interest and Dividends money, the school must have established a School Community Council. This council is a collaborative group of teachers, administrators, parents, community members, and sometimes students who make decisions for their particular school.[894] The School Community Council must develop a plan to use its allocation of the Investment and Dividends Fund to improve the school's most critical academic needs.[895] The local school board must approve this plan. Each school is required to implement the developed plan and report on the progress of the plan, as well as publicize to the general public and the patrons of the school how the funds it received were used.[896]

7. Recent Developments and Emerging Issues in Utah

a. Permanent Fund Raid

In the 1980's, Utah's permanent fund was raided due to a state budget crisis in funding for higher education. The state legislature shifted significant amounts of general funds from the public education system to the higher education system and replaced the general funds for public schools

[883] *Id.* at § 53C-3-101(4).
[884] *Id.* at § 53C-3-101(5).
[885] *Id.* at § 53C-3-102.
[886] *Id.* at § 53C-2-102(2).
[887] *Id.* at § 53C-3-103.
[888] *Id.* at § 51-7-12(2)(a)
[889] UTAH CODE ANN. § 53A-16-101.5.
[890] UTAH CODE ANN. § 53A-16-101.5(2)(b), as amended by H.B. 43 (2005), effective March 17, 2005.
[891] *Id.* at § 53A-16-101.5(3)(a)(i).
[892] *Id.* at § 53A-16-101.5(3)(a)(ii).
[893] *Id.* at § 53A-16-101.5(3)(b).
[894] *Id.* at § 53A-1a-108.
[895] *Id.* at § 53A-16-101(5).
[896] *Id.* at § 53A-16-101(6).

with permanent funds, resulting in a significant reduction to the principal balance.[897] Although the shift of funds was challenged, the Utah Supreme Court upheld the legislature's actions in *Jensen v. Dinehart,* finding that the state had been improperly withholding revenues from mineral royalties from the beneficiaries on the basis that lands of mineral character did not fall under the authority of the Enabling Act, but rather under the Jones Act of 1927. Utah distributed these funds to beneficiaries from 1983 through 1987, which included the entire amount of royalties in the permanent fund collected over the eighty-nine years since statehood.[898] The Utah Constitution was amended in 1988 to stem this practice; however, the result is that Utah's permanent fund was reduced to less than $100 million by 1990.

The State Treasurer has since moved much of the State School Fund assets from fixed income securities into the stock market. This has resulted in a rapid increase in Utah's permanent fund assets. By fiscal year 2002 the fund held $399 million. In fiscal year 2003, the fund had grown to $445 million and by the end of fiscal year 2004 the fund balance was 469 million.[899] SITLA has indicated that it intends to rapidly replenish the Fund through dispositions of trust lands, and anticipates the permanent fund will increase to $1 billion by 2010.

b. Development Planning Efforts

Based on the principle that "active engagement in property planning and development can greatly increase the value of lands and resulting revenues for the trust beneficiaries over the long run," SITLA's Planning and Development group is currently working on development opportunities on a variety of trust parcels around the state, primarily in St. George, Cedar City, and the counties of Utah and Tooele. Although SITLA has disposed of a number of smaller parcels of land through traditional auction processes, it has also begun to engage in joint venture arrangements with the private sector, including the development of investment properties (such as industrial parks), "development leases" (in which the land is leased by a developer during the development stage, with the trust receiving compensation based on the final sales price of developed lots), and arrangements in which the agency participates as a member of a limited liability company and obtains a share of the profits.

As a part of this transition, the Planning and Development Group has also initiated planning efforts in a number of communities to integrate trust lands planning with larger community planning; the Group represents that is has placed "particular emphasis on 'smart growth' issues such as open space, mixed uses, and maintenance of trail corridors, while keeping its legal obligations to the Trust beneficiaries." Recent efforts have included a community planning effort in the south end of Spanish Valley in Grand and San Juan Counties, a wetlands planning effort in Tooele County, and a series of planning "charettes" for an eight thousand acre trust parcel located near the St. George airport in Washington County.

Among the most significant developments undertaken by SITLA is the Coral Canyon master-planned community in Washington County, which is being undertaken through a "development lease" arrangement with SunCor, a major Arizona land developer. SITLA represents that Coral Canyon "is destined to be one of Utah's most scenic, livable, and desirable communities" and provides "a model of what can be accomplished through meticulous planning and creative business associations" that combine "private enterprises with state and local governments." When completed, the community will include homes for ten thousand people, a city center, shopping areas, churches, schools, office developments, golf courses, and recreational centers, with more than 50 percent of the total land area dedicated for open space.

Other significant SITLA development projects include a proposed twelve hundred acre development in Utah County, which was the subject of a development agreement between SITLA and the town of Eagle Mountain in 2003. This development will consist of approximately four thousand housing units, several hundred acres of mixed use and commercial developments, parks, school sites,

[897] SOUDER AND FAIRFAX, *supra* note 4, at 54; Jensen v. Dinehart, 645 P.2d 32 (Utah 1980).
[898] SOUDER AND FAIRFAX, *supra* note 4, at 96.
[899] 2004 ANNUAL REPORT, *supra* note 824, at 8.

a town center, and a trail corridor, with advance funding provided for the construction of roads and utility infrastructure. SITLA is also in the process of planning a one thousand acre parcel in Washington County and a fifteen hundred acre parcel and separate seven acre industrial park in Cedar City.

c. Castle Valley Community Planning Process

SITLA has been engaged over the past few years in a significant community planning effort in Castle Valley area, a scenic area near Moab, Utah, and a well-known climbing resource that incorporates approximately forty-five hundred acres of trust lands. After heated political controversy surrounding the proposed auction of approximately two hundred twenty acres of trust lands near a local landmark at the base of Castleton Tower, SITLA eventually agreed to place a moratorium on land sales in Castle Valley pending the completion of an extensive planning process involving SITLA and a community advisory group, the Castle Rock Collaboration (CRC).

SITLA and CRC jointly hired a planning consultant to oversee the planning process, which ultimately divided the Castle Valley land into seven separate parcels ranging from between 141 acres and over 600 acres, with "developable" and "undevelopable" areas identified along with concepts for the type and style of permissible development to establish land values. A disposition schedule for these areas and appraisals were then developed that allow the community the first option to purchase the parcels for conservation, assuming that the money necessary to purchase them could be raised in time.

To date, the community has been able to raise millions of dollars to secure several key pieces of land, including a staging area for Castleton Tower, an internationally renowned rock climbing site. The implementation of the collaborative plan was complicated by controversy over some of the agreed elements of the plan between an incoming town government in Castle Valley (which had not participated in the collaborative process) and SITLA. The plan is currently on hold while the state explores a potential exchange of the Castle Valley lands for BLM lands with potential for oil and gas production.[900]

d. School-Community Councils

In order to more effectively distribute trust proceeds, the Utah legislature recently created a system of "School Community Councils."[901] Rather than distributing the funds to schools on a strictly formulaic basis, the state requires school districts to plan for ways to spend the money that will achieve the state's ultimate goal of having 90 percent or more of all third graders reading at grade level by 2006. Each school district is required to establish a Council which is responsible for preparing a "school improvement plan" subject to the approval of the local school board. The plan provides for school improvement, for staff professional development, and recommends expenditures of school trust revenues designed to improve academic achievement.

The trust funds provided to the School Community Councils through this program are one of the few sources of discretionary funds available to school districts. According to Utah trust managers, this is one of the key reasons that the program has grown so rapidly in popularity, as it provides a source of revenue that can be used to fund school activities and needs that cannot be served through regular educational funding programs. In addition, the program has had the effect of generating strong local constituencies in each district that take an active interest in trust lands and trust lands management, as council members and the recipients of the funds distributed by them develop an appreciation for the value that trust-related revenues can bring to public education.

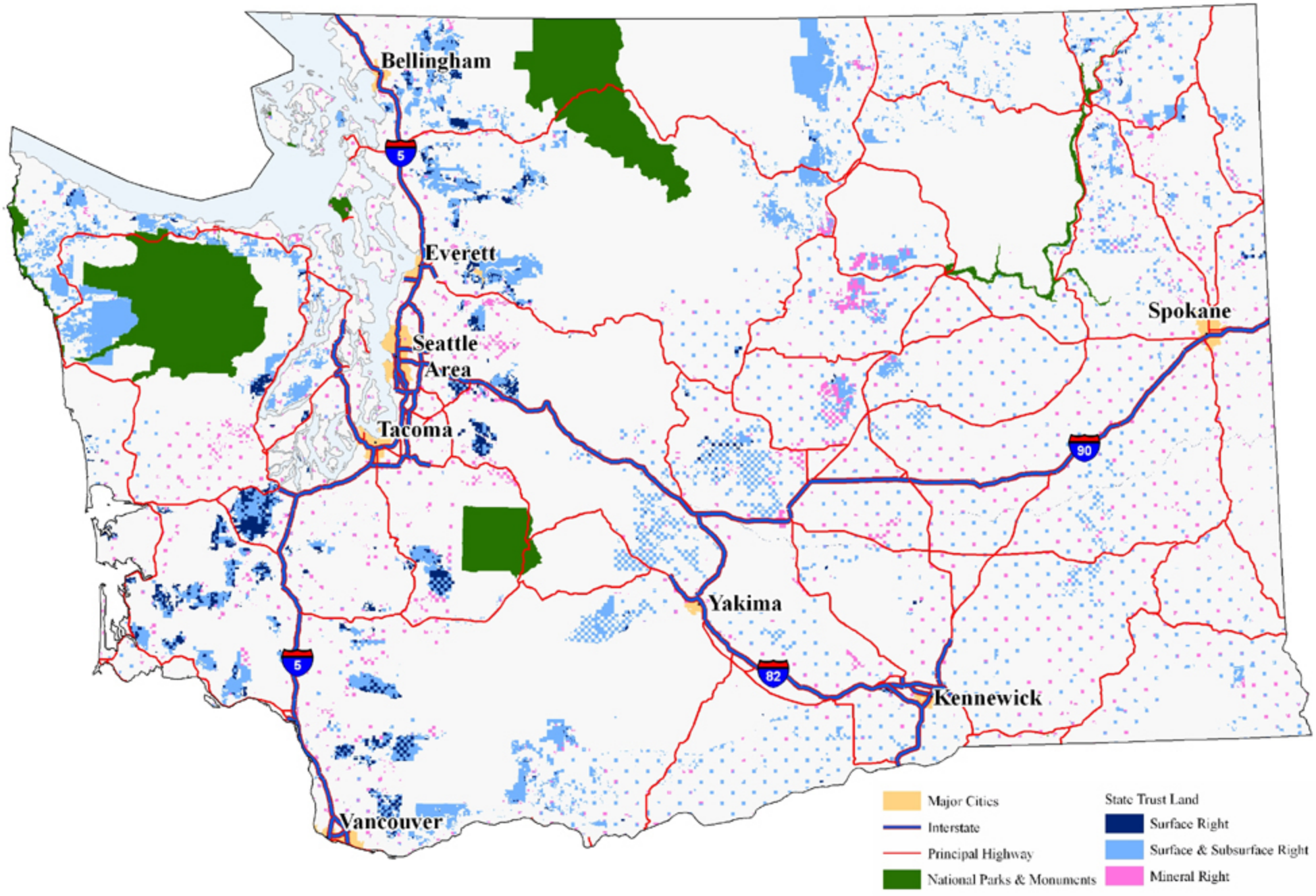
[900] For a more detailed description of the lands involved and the community planning process, *see* Brooke Willliams, *Saving School Trust Lands,* WILD EARTH, 89-93 (Fall/Winter 2001-2002).
[901] UTAH CODE ANN. § 53A-1a-108.

e. Land Exchanges

As noted above, much of Utah's trust land is held in a checkerboard ownership pattern that corresponds to the section reservations from its original school land grant. This ownership pattern creates particular challenges for Utah trust managers because of the large federal land base in Utah, which is now operated under a preservation-oriented model, creating inherent conflicts between federal land management goals and the revenue generation goals of Utah's trust managers. To resolve these conflicts and accomplish the protection of environmentally sensitive trust lands, Utah has recently engaged in two large land exchanges with the federal government, including a three hundred seventy-five thousand acre transfer that exchanged lands in the Grand Staircase-Escalante National Monument and other Utah national parks and national forests for cash and mineral lands, and an exchange in 2001 for over one hundred thousand acres of trust lands in several proposed federal wilderness areas for larger, consolidated blocks of BLM lands with greater revenue potential.

Utah also recently proposed (in 2002) an exchange of scattered trust parcels in the San Rafael Swell and several other areas of environmentally sensitive lands for federal lands elsewhere in the state. This proposal met with public criticism and ultimately failed in the U.S. Senate.

State Trust Lands in Washington



I. Trust Lands Management in Washington

Washington holds approximately 2.9 million surface acres of trust lands.[902] Some agricultural lands are held in a checkerboard pattern in eastern Washington, but the state also owns a series of large, contiguous forested parcels throughout eastern, central, and western Washington, where the Department of Natural Resources has worked to consolidate its landholdings to improve management.[903] Timber sales are the primary source of revenue from Washington's trust lands.

1. Washington's Land Grant

At statehood, Washington received sections sixteen and thirty-six in every township "for the support of common schools."[904] In addition to the common school grant, Washington also received specific grants for a variety of other public institutions, including: 90,000 acres for agricultural colleges; 100,000 acres for a scientific school; 100,000 acres for a state normal school; 100,000 acres plus 50 sections for public buildings; 72 sections for University purposes; and 200,000 acres for charitable, educational, penal, and reformatory institutions.[905] The common schools are the largest single beneficiary, with approximately 1.7 million acres, or 63 percent of the total trust land holdings. Washington currently retains ownership of more than 90 percent of its original land grant of more than 3 million acres.

In addition to and separate from the federal land grants, the State of Washington administers a legislatively created trust consisting of acquired lands deemed suitable for state forests and reforestation, and lands acquired by counties through foreclosure of tax liens that were suitable for inclusion as state forests, and transferred to the state.[906] This trust is managed in conjunction with other forested state lands.

2. Enabling Act and Constitutional Requirements

In the late 1800's, after several unsuccessful attempts at statehood that were frustrated by concerns over maintaining the balance of power between Democrats and Republicans in Congress, Washington was finally admitted as a state. Washington was admitted under the Omnibus Enabling Act of 1889, along with Montana, North Dakota, and South Dakota.[907] Generally, Washington's Enabling Act permits the state to "dispose of" lands for a minimum price only at an advertised public sale; exchange lands where the lands have equal value and are of as nearly as possible equal area; lease lands for a term of years; and grant easements or other rights.[908] Proceeds from the sales of lands are required to be deposited in a permanent fund, with the interest expended in support of the beneficiaries of those lands. Section eleven of Washington's Enabling Act has been amended by Congress in 1921, 1932, 1938, 1948, 1952, 1962, 1967, and 1970 to allow for the grant of easements, longer-term leases for mineral lands and hydroelectric purposes, public sales of agricultural and grazing lands, land exchanges, and to create a Common School Construction Fund for support of the construction of school facilities.

Washington's Constitution states that the granted lands are to be held in trust for "all the people."[909] The Constitution also requires that school lands cannot be sold for less than fair market

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[902] WASHINGTON DEPARTMENT OF NATURAL RESOURCES ANNUAL REPORT, FISCAL YEAR 2003 (Draft 2004) (hereafter, "DRAFT 2003 ANNUAL REPORT") (Washington had not released a final annual report for 2003 or a report for FY 2004 at the time of publication; the agency indicates that the reports will be published together in the spring of 2005.) However, of these nearly 625,000 acres are derived from tax foreclosures on forest lands; Washington's granted trust lands comprise only around 2.3 million acres of the state's current holdings.

[903] The state also manages 2.4 million acres of state-owned aquatic lands received at statehood (e.g. tidelands, bedlands of Puget Sound, navigable rivers, lakes, and other waters) for a variety of aquaculture cultivation activities. However, these lands are not "school trust" lands and therefore are not addressed in this report. WASH. REV. CODE § 79.90.450.

[904] Omnibus Enabling Act, 25 Stat 676 § 10 (February 22, 1889).

[905] *Id.* at §§ 12, 14, 16, 17; *see also* 7 U.S.C. § 301-308 et seq.

[906] WASH. REV. CODE §§ 79.22.020, 79.22.040.

[907] Omnibus Enabling Act, 25 Stat. 676 (1889).

[908] *Id.* at § 17.

[909] WASH. CONST. Art. IX § 1.

value, at public auction, to the highest bidder,[910] with a restriction that no more than ¼ of the lands granted for education could be sold before January 1, 1895, and no more than half before January 1, 1905.[911]

3. Washington's Trust Responsibility

As noted in section IV(A), the courts have held that Washington's Enabling Act and Constitution operate to create a binding trust responsibility. Based on this trust responsibility, the courts have held that:

- The state could implement a sustained yield plan with respect to timber production on lands granted for common schools.[912]

- The state was prohibited from enacting legislation to allow timber companies holding timber contracts on state lands to escape from their contract obligations where this would benefit the timber industry and the state's economy at the expense of trust beneficiaries.[913]

- The state was prohibited from granting trust lands to the United States for an irrigation project.[914]

4. Governance of Trust Lands in Washington

To more effectively and efficiently manage state land and forest resources, in 1957 Washington consolidated a number of agency activities from the state Division of Forestry, the Board of State Land Commissioners, the state Forest Board, and several other committees and commissions, into a Department of Natural Resources (DNR).[915] The DNR consists of a Board of Natural Resources (BNR), an administrator, and a supervisor.[916] The Commissioner of Public Lands, a constitutionally established statewide elected official, is the administrator of the DNR.[917]

The BNR is made up of representatives from the various beneficiary groups and consists of the Governor or the Governor's designee, the Superintendent of Public Instruction, the Commissioner of Public Lands, the Dean of the College of Forest Resources at the University of Washington, the Dean of the College of Agriculture, Human, and Natural Resource Sciences at Washington State University, and a representative of those counties that contain state forest lands[918] acquired or transferred for reforestation purposes.[919] The BNR establishes policies for state trust land management,[920] and adopts and enforces rules deemed necessary for carrying out the duties of the Board.[921]

The Commissioner[922] appoints DNR's Supervisor, who serves at the pleasure of the Commissioner, with the advice and consent of the BNR.[923] The Commissioner and Supervisor direct DNR, although they must conform to the policies established by the BNR.[924]

DNR is divided into a number of different divisions that engage in resource protection and land management activities: Aquatic Resources, Asset Management and Protection, Engineering and

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[910] *Id.* at Art. IX § 1 and 2.
[911] *Id.* at Art. XVI § 3.
[912] State ex rel. Forks Shingle Co. v. Martin, 83 P.2d 755 (Wash. 1938).
[913] County of Skamania v. State, 685 P.2d 576 (Wash. 1984).
[914] United States v. 111.2 Acres of Land in Ferry County, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (9th Cir. 1970).
[915] WASH. REV. CODE § 43.30.010.
[916] *Id.* at § 43.30.030.
[917] *Id.* at § 43.30.105.
[918] *Id.* at §§ 79.22.010, 79.22.040, and 79.22.020.
[919] *Id.* at § 43.30.205.
[920] *Id.* at § 43.30.215(2).
[921] *Id.* at § 43.30.215(5).
[922] WASH. CONST. Art. III § 1.
[923] WASH. REV. CODE § 43.30.155.
[924] *Id.* at §§ 43.40.421, 43.40.430.

General Services, Financial Management, Forest Practices, Geology and Earth Resources, Human Resources, Information Technology, Land Management, Office of Budget and Economics, Office of the Commissioner of Lands, Product Sales and Leasing, and Resource Protection. The responsibilities of the department are administered by several geographic divisions – the Northeast Region, Northwest Region, Olympic Region, Pacific Cascade Region, Southeast Region, and South Puget Sound Region.

The agency receives funding for the administration and management of federally granted trust lands from a Resource Management Cost Account (RCMA),[925] which receives a percentage of the funds derived from the various trusts. Charges for the RMCA are made against most trust transactions, and state statute allows up to 25 percent of the revenue earned to be placed in the account.[926] The funds in the account are appropriated by the legislature and may only be used to defray the costs and expenses necessary for the management of the trust lands.

5. Trust Land Management in Washington

The Department of Natural Resources' mission is to provide professional, forward-looking stewardship of state lands, natural resources, and environment, as well as leadership in creating a sustainable future for the Trusts and all citizens.[927] The agency relies on principles of stewardship, respect for creativity, and inclusiveness to achieve its mission.[928]

DNR's trust management activities are subject to Washington's State Environmental Policy Act (SEPA), which requires all state agencies, including DNR, to prepare an environmental impact statement for all management decisions that are likely to have a "significant impact" on the environment. Under state law, trust lands are also subject to local land use planning and zoning.

Washington's trust land management activities can be roughly divided into four general categories: surface uses, subsurface uses, land sales and other uses, and multiple uses. Surface uses (primarily timber production) currently contribute the bulk of the revenues earned by the trust.

a. Surface Uses

In Washington, lands may be leased for agriculture, grazing, commercial, industrial, residential, recreation, or any other lawful purposes.[929] Lease terms generally may not exceed ten years with the following exceptions: agricultural leases may not exceed twenty-five years; tree fruit or grape production leases may not exceed fifty-five years; commercial, industrial, business, or recreational leases may not exceed fifty-five years; leases to public school, college, or universities may not exceed seventy-give years; and residential leases may not exceed ninety-nine years.[930]

Leases are administered through a competitive bidding process with only two exceptions: first, the United States is specifically allowed to lease state lands for national defense purposes at the fair rental value for a period of five years or less without competitive bidding;[931] and second, public school districts are granted priority in the leasing of common school lands when the district clearly demonstrates an actual or reasonably foreseeable need for the lease.[932]

Agricultural leases, which include leases for dryland farming, irrigated farming, orchards, vineyards, and grazing, cover approximately 1.2 million acres[933] and generated around $16 million in

[925] *Id.* at § 79.64.020.
[926] *Id.* at § 79.64.020.
[927] See Washington Department of Natural Resources, *available at:* http://www.dnr.wa.gov/base/aboutdnr/html.
[928] *Id.*
[929] WASH. REV. CODE §§ 79.13.010(1); 79.13.010(3).
[930] *Id.* at § 79.13.060(1).
[931] *Id.* at § 79.13.090.
[932] WASH. ADMIN. CODE § 332-100-020.
[933] DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 5.

revenue in fiscal year 2003.[934] Grazing, considered a lower priority use than irrigated agriculture, generated only $1 million in revenue statewide. [935] Grazing leases are based upon a grazing capacity which permits the maximum forage utilization and seeks to maintain the condition of the range or improve it to "good" condition.

There are several types of grazing permits – special use, temporary, operational, and preference. Temporary permits are limited to five years and are generally issued for specific grazing needs.[936] Preference permits are allocated to an eligible applicant who owns "base ranch" property for grazing on state range allotments.[937] These permits are valid until they are revoked, but may be passed from one generation to another through inheritance, gift, or sale.[938] The state may encourage improvements of grazing ranges by extending grazing permit periods to a maximum of ten years, reducing grazing fees where the permittee contributes to the improvement of the range,[939] and by developing coordinated resource management plans with lessees, agencies, and private landowners to protect fish and other wildlife habitat.[940]

Leases for commercial, industrial, or residential uses are authorized by statute and these agreements may be entered into at public auction or through negotiations at the option of DNR.[941] Where public auctions occur, leases are awarded to the highest bidder for not less than the appraised value,[942] although DNR is permitted to reject any or all bids in the best interests of the state.[943] Commercial real estate leasing generated over $6.8 million for the school trust in Washington in 2003,[944] resulting in more trust revenue than any source other than timber sales and land transfers. The role of real estate in Washington's trust management program is detailed in the "Transition Lands Policy Plan" adopted by the BNR in June 1988.

Sales of valuable materials from state trust lands (primarily timber) are the largest single source of revenue for the trust. Sales are required to take place at public auction or by sealed bid and are awarded to the highest bidder, subject to the approval of the Board. (For materials valued at less than $20,000, the department may sell the materials directly).[945] For timber damaged by fire, wind, or floods, the legislature has provided an expedited sale process in order to minimize lost value from rot and disease.[946] Timber on state lands may not be sold for less than the appraised value.[947]

Approximately 2.1 million acres of the state's 3 million surface acres of trust lands are managed for timber use, [948] and timber sales and related activities accounted for more than $62 million in revenue on trust lands in 2003.[949] Timber resources are managed under the state's "sustained yield" plan, which provides for "harvesting on a continuing basis without a major prolonged curtailment or cessation of harvest."[950]

Once timber has been removed from state lands, DNR may classify the lands and may reserve portions of the land from any future sale in order to promote reforestation.[951] Lands so reserved are

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[934] *Id.* at 22.
[935] WASH. REV. CODE § 79.11.310.
[936] *Id.* at § 79.11.310.
[937] *Id.* at § 332-20-180. (Base ranch property is defined as "a place on which to hold and feed the permitted units of livestock prior to and after the grazing season," *Id.* at §332-20-030(13)). If the base ranch property ownership does not change, there is no opportunity for the lessee of the state land to change, thereby evading the public auction process.
[938] *Id.* at § 332-20-180.
[939] WASH. REV. CODE § 79.13.410.
[940] *Id.* at § 79.13.610.
[941] *Id.* at §§ 79.13.010 and 79.13.110(2).
[942] *Id.* at § 79.13.140(1).
[943] *Id.* at § 79.13.140(5).
[944] DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 19.
[945] WASH. REV. CODE § 79.15.050.
[946] *Id.* at § 79.15.210. *Id.* at § 79.10.450. DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 37.
[947] *Id.* at § 79.10.450.
[948] DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 37.
[949] *Id.* at 14.
[950] WASH. REV. CODE § 79.10.310.
[951] *Id.* at § 79.10.080.

not subject to sale or lease,[952] and reserved lands must be protected from fire and reforested by the DNR.[953] This section of law was enacted in 1895 to prevent the sell off of forestland after timber was removed and to protect the future income potential of the lands.

b. Subsurface Uses

The state of Washington grants leases for the extraction of oil and gas, minerals (including prospecting), geothermal resources, as well as for rock, sand, and gravel (though these leases are treated as surface uses). Subsurface leases are awarded on a competitive basis to any applicant,[954] though for coal mining, current lessees are generally afforded a preferential right to re-lease over any new applicant.[955] Combined, mineral and hydrocarbon revenues totaled $1,181,000 in fiscal year 2003, or less than 1 percent of the total revenues generated on trust lands.[956]

The allowable acreage for an oil and gas lease is capped at 640 acres unless on a riverbed, lakebed, or on tide and submerged lands; in these cases the lease is limited to 1,920 acres.[957] Initial terms may be from five to ten years in duration and can be extended for as long thereafter as the lessee diligently prosecutes development of the resource.[958] If lands are known to be within an oil or gas producing geologic structure, DNR may lease any or all unleased lands within such geologic structure, in areas not exceeding 640 acres, at public auction[959] to the bidder offering the greatest cash bonus.[960] A DNR lessee can also enter into cooperative or unit agreements to facilitate the conservation of the natural resource in the oil or gas pool or field when doing so is in the public interest and DNR consents to the plan.[961]

Initial rental rates for oil and gas leases are set at a minimum rental of $1.25 per acre plus bonus bids. Annual rental rates are then set by the BNR but can never be less than $1.25 per acre, and are paid until such time as oil, gas, or other hydrocarbons are actually produced. At that time the lessee begins paying royalties.[962] If the lessee is pursuing drilling operations with due diligence at the end of the lease term and has not encountered oil, gas, or other hydrocarbons, the lease term may be extended.[963] As set by statute, the minimum royalty paid on oil and gas leases is 12.5 percent of the gross production and 25 percent for mining royalties.[964]

Coal leases may not exceed twenty years,[965] and are subject to per-ton royalties. The royalty may be graduated so that the lessee pays a lower minimum royalty at the beginning of the lease to encourage development of coal extraction.[966]

For mineral and prospecting leases, the acreage cap is set at six hundred forty acres.[967] For placer mining contracts for gold, the leases may only be offered at public auction;[968] otherwise, the DNR may issue permits and leases for mineral prospecting.[969] If a prospecting lessee wishes to convert the prospecting lease to a mining contract, the prospector has a preferential right to do so if an application is made at least one hundred eighty days prior to the expiration of the lease, and the

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[952] *Id.*
[953] *Id.*
[954] WASH. ADMIN. CODE § 332-12-230.
[955] WASH. REV. CODE § 79.14.570.
[956] DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 14.
[957] WASH. REV. CODE at § 79.14.020.
[958] *Id.*
[959] *Id.* at § 79.14.080.
[960] *Id.*
[961] *Id.* at § 79.14.100.
[962] *Id.* at § 79.14.030.
[963] *Id.* at § 79.14.050.
[964] *Id.* at § 79.14.070.
[965] *Id.* at § 79.14.510.
[966] *Id.*
[967] *Id.* at § 79.14.300.
[968] *Id.* at § 79.14.310.
[969] *Id.* at § 79.14.315.

applicant furnishes an acceptable mining plan.[970] Mining contracts are issued for a term of twenty-five years.[971]

Rock, gravel, sand, and silt leases – treated as surface uses – are sold at public auction for terms of up to thirty years, and for not less than the appraised value of the material,[972] with payments made on a royalty basis.[973] Road material may additionally be sold to any county, city, or town at not less than the fair market value.[974]

Leases to explore for and develop geothermal resources are also limited to six hundred forty acres,[975] and are issued for terms of up to fifty-five years, subject to re-approval every five years.[976] Production royalty payments are required, and shall be not less than the cumulative amount of 10 percent of the gross proceeds received from the sale of the resources, and 10 percent of the fair market value of products utilized but not sold, and 10 percent of the gross proceeds for all by-products derived from the leasehold estate.[977]

c. Land Sales and Other

Washington has an established transaction program for land sales, purchases, and exchanges. Land sales take place at public auction, with the minimum bid no less than the appraised value of the property.[978] DNR is authorized to purchase forested, agricultural, or commercial properties to replace acres sold. The Legislature appropriates funds from various sources to DNR to pay for the acquisition of new trust properties.

DNR may also exchange lands for any land of equal value, subject to Board approval, in order to facilitate the marketing of forest products from state lands, to maintain or increase lands determined by DNR to be in the best interest of the trust, to consolidate or block up lands, to acquire urban property with higher income generating potential, or to acquire lands having commercial recreational leasing potential.[979]

Prior to a land sale, DNR is required to have the lands inspected for the following: topography; development potential; forestry, agricultural, and grazing qualities; coal, mineral, stone, gravel, or other valuable materials; the distance from any city or town, railroad, river, irrigation canal, ditch, or other waterway; and location of utilities.[980] When lands are expected to convert to commercial, industrial, or residential uses within ten years, the DNR is required to identify and designate these trust lands as "urban lands." When determining the fair market value of these properties, local land use planning and zoning requirements are applied.[981]

To facilitate better management, state trust lands that were isolated or could not be effectively managed have been exchanged or sold over time. Proceeds from certain land sales can be used to acquire replacement trust lands with higher long-term income potential. Washington's Land Bank program allows the purchase of up to fifteen hundred acres at fair market value to be held in a "land bank." [982]The land purchased should add to the value of state lands based on the natural resource or income production potential of the property.[983] This property may be sold or exchanged for

[970] *Id.* at § 79.14.360.
[971] *Id.*
[972] *Id.* at §§ 79.15.300(2), 79.01.032(4).
[973] *Id.* at § 79.15.300(2).
[974] *Id.* at § 79.15.320.
[975] WASH. ADMIN. CODE § 332-22-170.
[976] *Id.* at § 332-22-190.
[977] *Id.* at § 332-22-210.
[978] WASH. REV. CODE § 79.11.090.
[979] *Id.* at § 79.17.010(1).
[980] *Id.* at § 79.11.080.
[981] *Id.*
[982] *Id.* at §7 9.19.020.
[983] *Id.*

any other public or private lands of equal value, including lands held in trust.[984] Lands held in the land bank for potential commercial, industrial, or residential use are subject to the payment of an "in-lieu of real property tax" to the county where the land is located.[985]

There are also several established programs in Washington that are targeted at protecting conservation and recreation uses on state lands, including trust lands; of these, the most significant are the Natural Areas Preserve system, and the Natural Resource Conservation Area program. The Natural Area Preserves system,[986] established in 1972, permanently protects private or public lands or waters which have retained their natural character, or which are important in preserving rare or vanishing flora, fauna, geological, natural historical, or similar features of scientific or educational value.[987] The DNR is authorized to purchase, lease, set aside, or exchange any public land or state-owned trust lands which are deemed to be natural areas.[988] The trust must receive fair market value for any interests disposed of and the transactions must be approved by the BNR.[989] Proceeds from this transfer must be used to acquire new, replacement trust lands in order to meet the DNR's fiduciary obligations and to maintain the productive land base of the various trusts.[990]

The Natural Resources Conservation Areas (NRCAs) program, created in 1987, protects lands with a high priority for conservation, critical wildlife habitat, prime natural features, examples of native ecological communities, and environmentally significant sites threatened with conversion to other uses. The state may acquire property by all means except eminent domain for the purposes of creating natural resources conservation areas.[991] Conservation purposes include enhancing sites for primitive recreational purposes and outdoor environmental education.[992] However, the conservation use must be consistent with the financial management obligations of the trustee.[993]

d. Multiple Use

DNR is directed to manage trust lands for "multiple uses." This can involve several land uses simultaneously on a single tract or the rotation of uses between specific portions of the parcel.[994] In addition to resource extraction, "multiple uses" include recreation for vehicular and non-vehicular uses, special education or scientific uses, experimental programs by public agencies, special events, hunting and fishing or other sports activities, non-consumptive wildlife activities, and public rights-of-way.[995] Such uses must be compatible with the financial obligations in the management of the trust, and financial compensation must be provided.[996] In planning for multiple uses, the DNR is required to consider various ecological conditions, values, public use potential, accessibility, economic uses, recreational potentials, and local and regional land use plans or zones, local, regional, state, and federal comprehensive land use plans.[997]

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[984] *Id.* at § 79.19.030.
[985] *Id.*
[986] WASH. REV. CODE § 79.70.010.
[987] *Id.* at § 79.70.020(2).
[988] *Id.* at § 79.70.060.
[989] *Id.*
[990] *Id.* at § 79.71.050.
[991] *Id.* at § 79.71.040.
[992] *Id.* at § 79.71.030.
[993] *Id.* at § 79.10.120.
[994] *Id.* at § 79.10.110.
[995] *Id.* at § 79.10.120.
[996] *Id.*
[997] *Id.* at § 79.10.200.

Table V(I): FY 2003 Revenues – Washington Department of Natural Resources

Source	% of Revenue	Receipts
Surface Uses		
Agriculture	6.0%	$7,054,743
Grazing	0.5%	$601,583
Timber sales	53.4%	$62,854,200
Commercial leases	5.8%	$6,829,449
Rights of Way	0.9%	$1,056,568
Total Surface	**66.6%**	**$78,396,543**
Subsurface Uses		
Minerals and Hydrocarbons	0.9%	$1,079,225
Total Subsurface	**0.9%**	**$1,079,225**
Sales and Other		
Land Sales*	5.4%	$6,346,480
Trust land transfers	21.6%	$25,425,999
Other**	5.5%	$6,421,431
Total Sales and Other	**32.5%**	**$38,193,910**
Grand Total	**100.0%**	**$117,669,678**
Agency Expenditures* **		**$24,234,259**

*Includes land bank sales
**Includes asset transfer/loan repayment
*** This figure reflects operational expenditures from the Resource Management Cost Account for all state grant land management activities, minus line item expenditures for "aquatic resources" (a non-trust related activity).

Source: Washington Department of Natural Resources FY 2003 Annual Report, at 19.

6. *Trust Revenue Distribution in Washington*

Washington administers separate trusts for the following beneficiaries: the Common Schools; Agricultural School Trusts and Scientific School (Washington State University); Capitol Building Trust; University Original and University Transfer (University of Washington); charitable, educational, penal, and reformatory institutions; and Normal Schools (The Evergreen State College and Western, Central, and Eastern Washington Universities). Funds generated from the sale of timber on common school trust lands are distributed to the Common School Construction Fund, proceeds from the sale of land (except land bank and trust land transfers), minerals, oil and gas are distributed to the Common School Permanent Fund. A portion of the revenues generated goes to the Resource Management Cost Account which is used to pay expenses in the management of trust lands. Revenue generated on other trust lands is distributed to the appropriate fund as established by law for the support of the specific trust. Except for lands granted under the Morrill Act of 1862, up to 25 percent of the revenues generated from the lands may be deposited into the Resource Management Cost Account[998] which is utilized to pay the costs of managing trust lands.[999]

The Washington Constitution describes the common school fund as "permanent and irreducible."[1000] The fund consists of the principal existing on June 30, 1965 and any additions

[998] DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 19.
[999] *Id.* at 13.
[1000] WASH. CONST. Art. IX § 3.

thereafter from appropriations and donations to the fund, donations to the state for the common schools, the proceeds of lands and property, the proceeds from the sale of stone, minerals, or property other than timber and crops from school and state lands, all money recovered from those trespassing on school and state lands, 5 percent of the proceeds from the federal sale of public lands within the state, and the principal of all proceeds from the sale of lands and other property granted for the support of the common schools.[1001] The legislature may provide for the enlargement of the fund.[1002]

The Permanent Fund accounts are managed by the Washington State Investment Board which invests in a mix of public and private equities, fixed income, and real estate. The permanent funds may be invested in state, county, municipal, or school district bonds, but may not be loaned to a private person or corporation.[1003] The fund balance for the Common Schools Permanent Fund is currently $171,923,819, with all six of the trust permanent funds totaling approximately $728 million.[1004] The interest from each fund is distributed to the appropriate beneficiary. Any loss to the Permanent Fund becomes state debt.[1005] Washington's current policy of depositing the revenues derived from current land sales into the land bank fund means that these permanent funds are not likely to see substantial growth from new deposits in the near future.[1006]

The Common School Construction Fund (the common schools' current fund), originally created to accommodate rapid post-World War II growth, is utilized for the exclusive purpose of financing facility construction for common schools.[1007] The sources of this fund are:

1) Proceeds from the sale or appropriation of timber and other crops from school or unspecified state lands after June 30, 1965;
2) Interest accruing on the Permanent School Fund after July 1, 1957, and all rentals and other revenues from the Permanent Fund and school lands; and
3) Other sources as the legislature may direct.[1008]

The portion of the Common School Construction Fund derived from interest on the Permanent Common School Fund may be used to retire bonds for financing facility construction for the common schools.[1009] Historically, the Common School Construction Fund was the only source of funds from the state for school building construction;[1010] however, the Fund currently supports only about 50 percent of school construction.[1011] Funds in the Common School Construction Fund in excess of the needed amount are deposited into the Permanent Common School Fund, or can be distributed directly for use by the common schools.[1012]

Of the $131 million generated by state trust lands in fiscal year 2003 (including aquatic lands proceeds), approximately $89 million was distributed to beneficiaries and $9.1 million was placed in permanent funds; the remaining $33.7 million was deposited into the Resource Management Cost Account. The Common School Construction Fund received approximately 60.3 percent of the total revenues generated by the trust.[1013]

[1001] *Id.*
[1002] *Id.*
[1003] *Id.* at Art. XVI § 5 (amended 1894).
[1004] Washington State Investment Board, Permanent Fund Performance Report, *available at:* http://www.sib.wa.gov/financial/pdfs/permanentperformance.pdf.
[1005] WASH. CONST. Art. IX § 5.
[1006] SOUDER & FAIRFAX, *supra* note 4, at 55.
[1007] WASH. CONST. Art. IX § 3.
[1008] *Id.*
[1009] *Id.*
[1010] SOUDER & FAIRFAX, *supra* note 4, at 61.
[1011] *Id.* at 158.
[1012] WASH. CONST. Art. IX § 3.
[1013] DRAFT 2003 ANNUAL REPORT, *supra* note 902, at 19, 21.

7. Recent Developments and Emerging Issues in Washington

a. Sustainable Forestry Plan

As part of a ten-year sustainable forestry planning process, in September 2004 the Board adopted a forest management policy intended both to protect and increase old growth forest habitat, and to generate 1.5 billion dollars for trust beneficiaries over the next decade.[1014] The Washington State Board of Natural Resources set the sustainable harvest level for forested trust lands in Western Washington at 597 million board feet (mbf) per year, a 23 percent increase from the previous level of 460 mbf.[1015]

The Commissioner stated that the approved alternative[1016] takes an "active stewardship" approach to begin to increase the amount of fully functioning forests (i.e. old growth), thereby improving forest and stream health, improving habitat for salmon and other fish, generating hundreds of millions of dollars for construction of public schools and universities, and increasing the amount of timber available to future generations.[1017]

However, the proposal is not without controversy. Shortly after the plan was adopted a group of Washington environmental groups filed a legal challenge asserting that the increased logging levels will harm salmon, wildlife habitat, and clean water. According to an October 5, 2004 press release:

> Commissioner Sutherland and the BNR failed to properly consider the consequences of dramatically increasing clearcut logging in sensitive forests near streams, across landslide-prone slopes, and within wildlife habitat areas. Decisionmakers also failed to consider an approach that would have met Forest Stewardship Council (FSC) standards and allowed certification of state forest as well managed. Widespread problems with logging roads that dump tons of sediment into Washington waterways also were not sufficiently addressed by Commissioner Sutherland's logging plan. Nor does the plan commit to protecting the State's swindling old-growth forests. The suit calls for a return to the status quo logging plan, pending proper consideration of environmental impacts and FSC certification.[1018]

b. Recreation on State Trust Lands

Recent budgets have offered no General Fund support for recreation on state trust lands. Without these funds the department is having difficulty managing the lands and controlling invasive weeds, lawlessness, and overuse. In 2002, the Commissioner proposed the "Legacy Trust for Recreation and Conservation" (Legacy Trust) to fund the recreational management of trust lands. These lands are under increasing pressure for recreation and, unfortunately, are increasingly regarded as preferred sites for multi-acre methamphetamine labs. The Legacy Trust proposes to acquire and hold lands (and other assets) to generate revenue for the support of recreational use, access, maintenance and enforcement. Funding for this acquisition would come from bonds, private donations, and federal grants.[1019]

[1014] News Release, *Commissioner of Public Lands Doug Sutherland proposes policy preventing clear-cuts of old-growth stand in Western Washington state trust forest*, Washington Department of Natural Resources (January 21, 2004).
[1015] News Release 04-078, Washington Department of Natural Resources (September 7, 2004), *available at:* http://www.dnr.wa.gov/htdocs/adm/comm/nr04_078.htm.
[1016] Washington Department of Natural Resources, *available at:* http://www.dnr.wa.gov/htdocs/fr/sales/sustainharvest/sustainharvest.html.
[1017] *Id.*
[1018] *Latest News,* Northwest Ecosystem Alliance, *available at:* http://www.ecosystem.org/statelands/press_release_10_04.html.
[1019] News Release, *Recreation on state lands threatened by Governor's budget*, Washington Department of Natural Resources (December 18, 2002).

c. Ecoregional Assessments

Washington's Department of Fish and Wildlife, DNR, and the Nature Conservancy have signed a Memorandum of Understanding to create a series of eco-regional assessments embracing state and private lands using the best available science and human expertise. The assessments are not regulatory, but are intended to guide conservation across eco-regions (large geographic areas that share similar climate, landforms, and native species). This holistic approach will better inform the agencies making management and policy decisions affecting the ecological and economic well being of the trust lands.[1020]

d. Upland Trust Review Committee

The Commissioner of Public Lands recently appointed an advisory committee of individuals with expertise in private or public sector finance and organizational management "to evaluate the agency's effectiveness and efficiency concerning trust land costs and benefits, and to make recommendations for positive change." The review committee is charged with looking for less costly more efficient ways for the Board of Natural Resources to carry out its objectives in light of DNR's economic prediction that management fund balances are likely to fall.

The committee began meeting in early October 2004 and reported its findings in December 2004. It recommended:

- An increase in management funds by an amount equal to about 5 percent or 8 percent of annual gross trust land revenues, depending on the fund.
- DNR should more actively market all trust land products and services including specialty timber products, wind power, telecommunication sites, and mitigation banking and carbon sequestration opportunities.
- DNR should pursue benchmarking its costs to similar private and public sector organizations to discover opportunities for further savings.
- DNR should more aggressively reposition high-value trust lands not currently returning significant trust revenues.[1021]

e. Lake Whatcom Landscape Management Plan

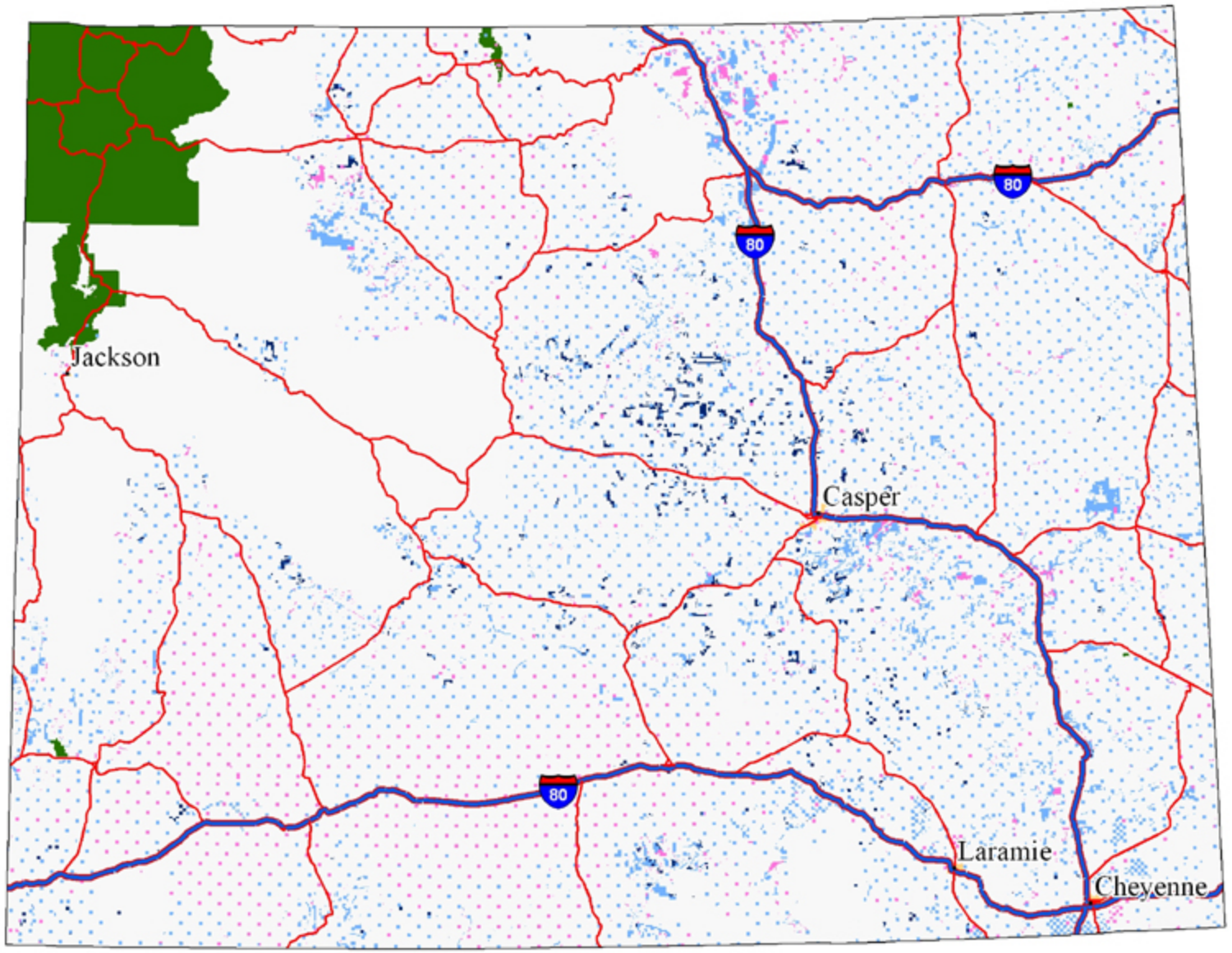
After four years of effort, the DNR has finally adopted the Lake Whatcom Landscape Plan, prepared in cooperation with local tribes and the community. The plan, which resulted from legislation requiring DNR to seek a new approach for the state trust lands it manages in the Lake Whatcom watershed, appears to have widespread support.

The plan includes riparian management zones on all streams, careful regulation and planning of harvest and road construction on potentially unstable slopes, use of a sustained yield model specific to the Lake Whatcom watershed, as well as incorporating community and scientific information in management decisions. It will create a five-member inter-jurisdictional committee made up of those with technical expertise that will be appointed by the Commissioner of Public Lands from nominees submitted by the local government jurisdictions and public members nominated by DNR's Northwest Region manager. The committee will evaluate any planned activities against the strategies contained within the Lake Whatcom Landscape Plan, and make appropriate recommendations to the Department.

[1020] News Release, *New agreement to usher in comprehensive approach to conservation*, Washington Department of Natural Resources (June 24, 2004).
[1021] News Release, *Business and legislative experts report on financial health of DNR state trust land management: Independent Review Committee offers ideas to Commissioner of Public Lands,* Washington Department of Natural Resources (December 14, 2004).

A lawsuit has been filed by Skagit County and several beneficiaries challenging the constitutionality of the Lake Whatcom management plan. The lawsuit alleges the legislature and DNR have breached their fiduciary duties to the trust beneficiaries and have adopted unconstitutional legislation to facilitate the project.

State Trust Lands in Wyoming



J. Trust Lands Management in Wyoming

Wyoming's trust lands comprise over 3 million surface acres and 4.2 million subsurface acres of land, scattered throughout the state in a checkerboard pattern. The lands include agricultural and grazing lands, forests, commercial and residential areas, and large deposits of oil, gas, coal and other minerals. Oil and gas, followed by coal and other mineral production are the primary revenue sources from Wyoming's trust lands.

1. Wyoming's Land Grant

Prior to Wyoming's admission to the Union in 1890, Congress granted 46,080 acres to the territory of Wyoming for a state university and 5,640 for a fish hatchery.[1022] At statehood, Wyoming received sections sixteen and thirty-six in every township "for the support of common schools."[1023] In addition to this common school grant, the state also received specific grants for a variety of other public institutions, including: 50 sections for the purpose of erecting public buildings at the capital; 90,000 acres for the agricultural college; 30,000 acres for the insane asylum; 30,000 acres for the penal, reform, or educational institutions; 5,000 acres for a fish hatchery; 30,000 acres for the deaf, dumb, and blind asylum; 10,000 for the poor farm; 30,000 for the miners' hospital; 75,000 acres for public buildings; and 260,000 acres for the charitable, educational, penal, and reformatory institutions.[1024] The University of Wyoming, as the state's land grant college, also received a land grant under the Morrill Act of 1862.[1025] Wyoming retains ownership of 83 percent of its original land grant of more than 4.3 million acres.

2. Enabling Act and Constitutional Requirements

The 1890 Wyoming Act of Admission, enacted after the Territory of Wyoming had adopted its Constitution in September 1889, contains only minimal restrictions on the sale of trust lands, providing that the lands may not be sold for less than $10 per acre, and providing broad authority to the state in the management of these lands. The Enabling Act provides that the lands "shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, as the state legislature may provide."[1026]

The Wyoming Constitution similarly does not refer to the trust lands being held in trust; however, the permanent fund is expressly labeled as a trust:

> All funds belonging to the state for public school purposes, the interest and income of which only are to be used, shall be deemed trust funds in the care of the state, which shall keep them for the exclusive benefit of the public schools.[1027]

3. Wyoming's Trust Responsibility

As discussed in section IV(A), the Wyoming Supreme Court has since interpreted Wyoming's Admission Act as not imposing a federal trust responsibility on the state. Similarly, the Wyoming Supreme Court has found that under the Constitution, the permanent fund is held in trust, but the lands themselves are not. Rather, these lands are held in trust pursuant to Wyoming statutes – which gives the legislature broad authority to establish the rules for the disposition of trust lands in Wyoming. Because the trust obligation is not constitutionally created or federally created, the Wyoming legislature does not require a constitutional change or congressional approval to alter the

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[1022] WYOMING OFFICE OF STATE LANDS AND INVESTMENTS ANNUAL REPORT, FISCAL YEAR 2004, 22 (2005)(hereafter, "2004 ANNUAL REPORT").
[1023] Wyoming Admission Act, 26 Stat. 222 § 4 (1890).
[1024] *Id.* at §§ 6, 10-11.
[1025] 7 U.S.C. §§ 301 et seq.
[1026] Wyo. Admission Act, 26 Stat. 222 § 12.
[1027] WYO. CONST. Art VII § 6.

trust management scheme as long as it remains within the boundaries of the minimal requirements in the Constitution and Enabling Act. Under this statutory trust responsibility, the courts have held that:

- The state can exchange trust lands[1028] and grant right-of-ways[1029] without a public auction.
- Trust management decisions (such as leasing decisions) are governed by common law trust principles in the absence of countervening statutes.[1030]
- The state may use trust lands to support established ranching businesses by granting preferences to existing grazing lessees.[1031]

4. Governance of Trust Lands in Wyoming

Wyoming's state trust lands are managed by the Wyoming Office of State Lands and Investments (OSLI), under a Director that is appointed by the Governor with the consent of the Senate.[1032] OSLI serves as the advisor and administrator to the Board of Land Commissioners (BLC) and the State Loan and Investment Board (formerly known as the Farm Loan Board), each is composed of the state's five top elected officials: the Governor, the Secretary of State, the State Treasurer, the State Auditor, and the Superintendent of Public Instruction.[1033] The BLC is constitutionally authorized to dispose of or lease the school lands with the limitation that the lands be sold at public auction in such a manner as to "realize the largest possible benefit."[1034] The State Loan and Investment Board is charged with oversight of the investment of all state funds.[1035] Although many of the BLC's duties are actually performed by the Director, the BLC has the authority to override any decision made by the Director.[1036]

OSLI is divided into four divisions: Real Estate Management and Farm Loans, Mineral Leasing and Royalty Compliance, the Forestry Division, and Administrative Services. Approximately 80 percent of the $10 million budget of the Office of State Lands and Investments is legislatively appropriated from general funds, with the remaining $2 million made up of federal and other state funds.[1037]

5. Trust Land Management in Wyoming

The Wyoming legislature has directed the BLC to manage the trust lands, trust minerals, and permanent land funds under a "total asset management policy" with a focus on protecting the corpus of the trust for future generations. In a series of session laws that substantially modified Wyoming's trust management system in 1997, the legislature adopted the following "statements of principle" and directed the BLC and the Commissioner to follow these principles in managing the trust:

> (i) The state land trust, consisting of trust lands, trust minerals, and permanent land funds shall be managed under a total asset management policy;
>
> (ii) The state land trust is inter-generational. Therefore, the focus is on protecting the corpus for the long term;

[1028] Director of the Office of State Lands & Investments, Board of Land Commissioners v. Merbanco, Inc., 70 P.3d 241 (Wyo. 2003).
[1029] Ross v. Trustees of Univ. of Wyo., 222 P. 3 (Wyo. 1924).
[1030] Riedel v. Anderson, 70 P.3d 223 (Wyo. 2003).
[1031] Stauffer v. Johnson, 259 P.2d 753 (Wyo. 1953).
[1032] WYO. STAT. ANN. § 36-3-101(a).
[1033] WYO. CONST. Art. XVIII § 3; WYO. STAT. ANN. § 36-2-101.
[1034] WYO. CONST. Art. XVIII § 3.
[1035] WYO. STAT. ANN. §§ 9-4-709 through 9-4-711.
[1036] *Id.* at § 36-3-102(C).
[1037] WYOMING OFFICE OF STATE LANDS AND INVESTMENTS ANNUAL REPORT, FISCAL YEAR 2003, 1 (2004) (hereafter, "2003 ANNUAL REPORT").

(iii) Trust land should remain a substantial, integral component of the state land trust portfolio. There is no mandate to sell any trust asset to maximize revenue in the short term;

(iv) All leases of trust land shall assure a return of at least fair market value considering the management practices and risk assumed by the lessee when determining fair market value;

(v) Investment policies shall ensure that the earning power of the Permanent Land Fund is not reduced from the effect of inflation.[1038]

The state's management activities on trust lands can be roughly divided into three categories: surface uses, subsurface uses, and trust land sales and other uses.

a. Surface Uses

Approximately 90 percent of Wyoming's trust lands are utilized for surface leases for agriculture, grazing, timber, and real estate, with lease terms ranging in length from ten years for agriculture and grazing, to seventy five years for commercial uses. However, the revenue from these uses is relatively insignificant by comparison to the revenues generated from subsurface uses. As a result, the state generally "stacks" leases, allowing both surface and subsurface leases on the same lands to the extent that these uses do not conflict.

Grazing and agricultural leases are administered on a ten-year lease program, [1039] and are theoretically required to result in the greatest benefit to the trust beneficiaries;[1040] however, preference is given to applicants who are bona fide residents of Wyoming having actual and necessary use of the land.[1041] Preferences are also granted to applicants who are the owners or lessees of adjoining lands who offer to pay the fair market value,[1042] as well as to current lessees who are not in violation of their lease terms and can meet the highest bid.[1043] In addition, where there are two competing, equal offers to lease state trust land, the applicant who owns land nearest the area to be leased shall be preferred.[1044]

Of the 3.6 million acres of state trust land, 3.5 million are leased for agricultural or grazing purposes.[1045] However, these uses combined generated less than 5 percent of the total trust revenue in 2003. Agricultural and grazing leases average $9.21 per acre where there are conflicting lease applications, with the minimum lease price set at $4.04 per acre.[1046]

Timber on state land may be sold at not less than the reasonable market value.[1047] A non-timber lessee on state lands may cut only as much timber as necessary for the improvements of the land, or for fuel for the use of the family of the lessee.[1048] Sales of timber for personal use (under $250) are at fair market value.[1049] Permit sales (over $250, under $5,000) are based on the most recent competitive bidding on comparable products.[1050] Bid sales (over $5,000) are based on the

[1038] WYO. STAT. ANN. § 36-9-101; *see also* 1997 Wyo. Sess. Laws Ch. 200 § 3.
[1039] WYO. STAT. ANN. § 36-5-103.
[1040] *Id.* at § 36-5-105(a).
[1041] *Id.*
[1042] *Id.*
[1043] *Id.*
[1044] *Id.* at § 36-5-108.
[1045] 2003 ANNUAL REPORT, *supra* note 1037, at 5.
[1046] *Id.*
[1047] WYO. STAT. ANN. § 36-1-112(a).
[1048] *Id.*
[1049] WYO. R. & REGS. Ch. 8 § 6.
[1050] *Id.*

minimum bid as determined by appraisal with the sale awarded to the highest bidder.[1051] The BLC reserves the right to reject any and all bids in the competitive bidding process.[1052]

Industrial, commercial, or recreational leases are issued for up to seventy-five years, with the term established in a manner that will bring the greatest benefit to the beneficiaries.[1053] Industrial, commercial, and residential lessees are required to conform to all applicable land use planning and zoning laws and the BLC may terminate the lease for good cause.[1054] Recreational leases are issued for cabin sites, public campsites, public parks and recreation areas, golf courses and any associated residential development, youth groups, and ski or winter sports areas.[1055] Rental values are based on fair market value except for leases to Wyoming school districts, which are allowed to lease lands for $100 per acre or less regardless of their market value.[1056]

b. Subsurface Uses

Subsurface royalties, especially oil and gas, produce the lion's share of income from trust activities, accounting for more than 91 percent of total revenues. Natural resource leases are granted separately from agricultural or grazing leases, and as long as they do not interfere with existing leases, they are often stacked with existing leases.[1057] The BLC provides rules and regulations to prevent interference with joint uses of the land. The Director is authorized to enter into cooperative or unit plans to develop natural resources on state lands.

The primary term of an oil and gas lease is set by statute at ten years.[1058] The BLC sets the term at five years in the Administrative Code.[1059] The lease may be extended thereafter for as long as the wells are producing in paying quantities.[1060] The state of Wyoming may require that all natural gas lessees dedicate all of the natural gas produced on lands owned by the state for the use or benefit of the people of the state.[1061] The BLC is required to dispose of royalty in-kind oil and gas in such a manner that secures the greatest benefit to the trust beneficiaries.[1062] If there are two or more eligible refiners seeking to dispose of in-kind oil or gas, the BLC must also consider whether the refinery is able to produce the types of products needed in the state, and how much of that product is already sold in the state.[1063] Oil and gas resources currently earn more than 70 percent of the income generated by trust lands in Wyoming.

Other minerals (primarily coal) are also mined on trust lands. The primary term of a mineral lease is ten years.[1064] A lessee has the exclusive right to renew for successive ten-year terms if the minerals are actually being produced and the lessee is in compliance with all lease terms.[1065] Leases are offered to the first qualified applicant, although the BLC may determine if the lands should be leased through competitive bidding.[1066] Acreage available for coal and mineral leasing on state trust land totaled 2.2 million acres in fiscal year 2004.[1067]

Wyoming also has large deposits of fossils and prehistoric ruins on state lands that are protected under Wyoming law. The BLC is authorized to issue permits for the excavation of the ruins,

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[1051] *Id.*
[1052] *Id.* at Ch. 8 § 8.
[1053] WYO. STAT. ANN § 36-5-114(a)-(b).
[1054] *Id.* at § 36-5-114(d).
[1055] *Id.* at § 36-5-115.
[1056] *Id.* at § 36-5-114(c).
[1057] *Id.* at § 36-6-101(c).
[1058] *Id.* at§ 36-6-101(a).
[1059] WYO. R. AND REGS. Ch. 18 § 8.
[1060] WYO. STAT. ANN. § 36-6-101(a).
[1061] *Id.* at § 36-6-101(g).
[1062] WYO. R. AND REGS. Ch 7 § 3.
[1063] *Id.* at Ch. 7 § 4.
[1064] WYO. STAT. ANN. § 36-6-101(m).
[1065] WYO. STAT. ANN. § 36-6-101(m)(i)-(iii).
[1066] WYO. R. AND REGS. Ch. 19 § 5.
[1067] 2004 ANNUAL REPORT, *supra* note 1022, at 11.

hieroglyphics, pictographs, archeological, or paleontological deposits.[1068] Because all fossils and paleontological deposits on state lands belong to the state, the BLC must authorize their removal.[1069]

c. Land Sales and Other

Land sales and exchanges are permitted but have not been widely used as a method of generating trust revenue. In 2003, the state sold a total of 1321 acres for $428,000.

The only lands available for sale, acquisition, or exchange are those on the state's "disposal" list, which is comprised of lands determined suitable for disposition based on market value, income generating potential, wildlife habitat, recreational opportunities, cultural resources, and management feasibility in relation to other lands.[1070] The sale of state trust land requires the BLC to hold a public hearing in the county where the land for sale is located.[1071] Trust lands may be subject to sale only if the BLC finds that the proceeds of the sale are protected from inflationary effects and will earn a significantly higher rate of return than can be realized through leasing.[1072] The BLC must also find that the sale will make the lands more manageable, meet a specific need of a school or community, better meet multiple use objectives for the beneficiaries, or realize a clear long term benefit to the trust which substantially exceeds the present and probable future benefit from continued ownership.[1073]

The sale of land must be at public auction to the highest, responsible bidder for not less than the appraised value and in no case less than $10 per acre.[1074] Mineral rights, either known or unknown, may be reserved together with the right of access to prospect for, mine, and remove any such minerals, or they may be sold where it is in the best interests of the trust.[1075] The BLC may also exchange mineral rights on a value for value basis, with a cash equalization of up to 25 percent.[1076]

The state is permitted to exchange state owned lands for federal, state, and private lands without a public auction.[1077] Exchanges must be in the best interest of the trust. Whenever the majority of the BLC determines that a land exchange with the federal government is in the best interest of the state, the BLC is authorized to exchange lands provided that the amount of land exchanged is equivalent and the state does not give away mineral rights unless mineral rights are obtained in the exchange.[1078] Similarly, state-owned land may also be exchanged with privately owned lands.[1079] The BLC may authorize the Director of the BLC to effect and complete exchanges of land.[1080]

The BLC may grant rights-of-way or easements across or upon state or school lands for any public conveyance.[1081] Permanent or temporary rights-of-way for ditches owned by the county or for county roads may be granted at no charge.[1082] The easement grant may be in perpetuity or for a term of years and whenever possible and practical, for no more than thirty-five years with the option to

[1068] WYO. STAT. ANN § 36-1-114.
[1069] WYO. R. AND REGS. Ch. 11 § 2.
[1070] *Id.* at Ch. 26.
[1071] WYO. STAT. ANN. § 36-1-117; WYO. R. AND REGS, Ch. 26 § 3.
[1072] WYO. STAT. ANN. § 36-9-101.
[1073] *Id.* at §§ 36-9-101(a)(i)-(iv).
[1074] *Id.* at § 36-9-102.
[1075] *Id.* at § 36-9-112; *see also Attorney General's Opinion – Wyoming Board of Land Commissioners' authority to sell and/or exchange a mineral estate under its jurisdiction,* Office of the Attorney General (April 14, 2004) (on file with Office of State Lands & Investments).
[1076] WYO. STAT. ANN. § 36-9-112.
[1077] Director Of The Office Of State Lands & Investments, Board Of Land Commissioners V. Merbanco, Inc., 70 P.3d 241 (Wyo. 2003).
[1078] WYO. STAT. ANN. § 36-1-105.
[1079] *Id.* at § 36-1-107.
[1080] *Id.* at § 36-1-110.
[1081] *Id.* at § 36-9-118.
[1082] *Id.* at § 36-9-120.

renew.[1083] The BLC requires the minimum consideration for an easement on state land be $250 or not less than market value if market value exceeds $250.[1084]

Regardless, as mentioned above, land sales are not a primary source of revenue from trust activities; other surface activities and subsurface royalties average 99 percent of total revenues.

Table V(J): FY 2004 Revenues – Wyoming Office of State Lands and Investments

Source	% of Revenue	Receipts
Surface Uses		
Timber	0.3%	$240,942
Grazing	4.5%	$4,180,972
Total Surface	**4.8%**	**$4,421,914**
Subsurface Uses		
Coal	0.6%	$564,085
Oil and gas	84.3%	$78,343,804
Other	6.4%	$5,944,256
Total Subsurface	**91.3%**	**$84,852,145**
Sales and Other Uses		
Land Sales	0.6%	$511,659
Surface Damages	1.2%	$1,154,081
Easements, Temporary Use Permits and Special Uses	2.0%	$1,849,134
Other	0.2%	$198,543
Total Sales and Other	**4.0%**	**$3,713,417**
Grand Total	**100%**	**$92,987,476**
Agency Budget		**10,006,009**

Source: Wyoming Office of State Lands and Investments, FY 2004 Annual Report

6. Trust Revenue Distribution in Wyoming

There are six categories of beneficiaries that receive revenues from trust activities in Wyoming. These beneficiaries include: (1) common schools; (2) university; (3) penitentiary; (4) the state hospitals; (5) omnibus; and (6) "other". The common schools are by far the largest beneficiary of state trust lands, with over 3 million acres of the 3.6 million acres of trust land in the state.[1085]

Revenues from Wyoming's non-renewable natural resources such as oil, gas, and minerals are deposited into the Permanent Land Fund. This Fund is invested and only the interest of this fund is used for the support of the common schools, although the Fund may be used to guarantee bonds issued by the school district for buildings, land, and equipment necessary to operate public schools. Revenues from renewable natural resources, such as surface and mineral leases, mineral lease bonus bids, temporary use permits, and timber sales[1086] are deposited into the Permanent Land Income Fund, where they are combined with interest from the Permanent Land Fund, bonuses, and interest on purchase money. The Permanent Land Income Fund is used to directly support the common

[1083] WYO. R. AND REGS. Ch. 3 § 4(c).
[1084] *Id.* at Ch. 3 § 6.
[1085] 2004 ANNUAL REPORT, *supra* note 1022.
[1086] *Id.* at 23.

schools. Revenues from state trust lands were approximately $93 million during fiscal year 2004. Of the $66.3 million generated by state trust lands, $69.7 million went to the permanent fund, $14 million went to the land income fund, $8 million went to the School District Capital Construction Fund from state royalty collections, and $1.3 million to the general fund.[1087]

Each individual county also has a school fund consisting of stocks, money, bonds, lands, and other property that may be used only for that county's free public schools.[1088] Fines and penalties generated within a county likewise remain in that county's school fund.[1089] Also within the county's school fund is a capital construction fund which includes 33.3 percent of oil, gas, or other mineral royalties arising from the lease of school lands.[1090] However, the amount of oil, gas, coal, or other mineral royalties received from the lease of any school lands and deposited into the Public School Capital Construction account cannot exceed $8 million in any one year.[1091]

The Wyoming Constitution places responsibility for the investment of any funds of the state in the hands of the legislature.[1092] The legislature has authorized the state treasurer to invest these funds in bonds issued by the United States, the state, counties, cities, or school districts of Wyoming.[1093] Fully insured certificates of deposit are also allowable investments.[1094] The Treasurer may also invest in any security which has been approved by the state loan and investment board.[1095] With written authority, the state treasurer is currently allowed to invest up to 55 percent of permanent funds in common stocks.[1096] The value of the Permanent Land Income Fund was approximately $1.129 billion in 2004,[1097] which produced $39.4 million earned in interest and trading profits.

As noted above, the BLC is also allowed to guarantee school district bonds.[1098] If the district fails to repay the loan, the state makes the full payment due on the bond from the funds in the common school account and in the Permanent Land Fund.[1099] The bond guarantee program was designed to allow credit worthy districts that might otherwise not be able to pursue a bond measure to do so with the increased financial security of the state fund guarantee. The result is an increase in bond ratings to AAA levels on debt issuance, reducing interest costs, and enhancing access to the credit markets.[1100] At the close of fiscal year 2004, the outstanding bond principal debt was $80,365,000.[1101]

Monies in the Permanent Land Income Fund that are credited to the common schools are distributed to the School Foundation Program,[1102] which guarantees a minimum education for every child by providing state financial assistance in inverse proportion to the tax-paying ability of the local school district.[1103] The state treasurer may utilize inter-fund loans from the common school account, to the foundation account to make statutory payments when dedicated revenues are not yet received.[1104]

The Wyoming School Foundation Program provides a guaranteed level of funding to every Wyoming public school district based on a number of factors, including in large part, the number of

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[1087] *Id.* at 25.
[1088] WYO. CONST. Art. VII § 4.
[1089] *Id.* at Art. VII § 5.
[1090] *Id.* at Art. VII § 2.
[1091] WYO. STAT. ANN. § 9-4-305(b).
[1092] WYO. CONST. Art. VII § 6.
[1093] WYO. STAT. ANN. § 9-4-711(a)(ii).
[1094] *Id.* at §§ 9-4-831(ix) and (x).
[1095] *Id.* at § 9-4-711(a)(iv).
[1096] *Id.* at § 9-4-834(a).
[1097] 2004 ANNUAL REPORT, *supra* note 1022, at 4.
[1098] WYO. STAT. ANN. § 9-4-711.
[1099] *Id.* at § 9-4-1001(d)(iii)(A).
[1100] 2004 ANNUAL REPORT, *supra* note 1022, at 17.
[1101] *Id.* at 31.
[1102] WYO. STAT. ANN. § 21-13-301.
[1103] Washakie Co. Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824.
[1104] WYO. STAT. ANN. § 21-13-316.

students enrolled in the district the previous year. Special education,[1105] at-risk students,[1106] transportation costs,[1107] and "small school" designations[1108] also factor into the funding equation. Once the district's guaranteed funding level is established, the district's local funding sources are evaluated. Local funding sources include: property taxes, Taylor Grazing Act Funds, railroad car company taxes, county and district levies, motor vehicle taxes, fines and forfeitures, tuition payments, forest reserve funds, and delinquent tax penalty and interest. If a district's local revenues are lower than the guarantee, the state makes up the difference through a series of entitlement payments to the district from the School Foundation Program Fund.[1109] If the district's local revenues are in excess of the guaranteed funding level, the district must rebate to the state the excess, otherwise known as recapture.[1110] These recaptured funds are then redistributed to those districts receiving entitlement payments. The funding for the School Foundation Program comes from a statewide levy, the common school land income fund, pooled interest, motor vehicle fees, and car company taxes.[1111]

The school district Capital Construction Assistance Account, which receives at most $8 million per year, and is funded through the state's share of federal mineral royalties plus 1/3 of the state land mineral royalties. These funds are used for capital construction grants or loans, school building site acquisitions or development, or major renovations or repair of existing school buildings.[1112]

7. Recent Developments and Emerging Issues in Wyoming

a. Total Asset Management Planning

Wyoming's 1997 amendments to the statutes governing the administration of trust lands created a statutory trust, and endorsed a total asset management policy that focused on the multi-generational protection of the corpus of the trust. In response to this mandate, the Wyoming Board of Land Commissioners, together with the Office of State Lands and Investments, has initiated the development of a "comprehensive trust asset management plan" that will identify the governing trust principles, trust management objectives, and core indicators for evaluating trust managers' performance.

In August of 2003, the Wyoming Office of State Lands and Investments initiated an request for proposals process for the design of a planning process that would employ a total asset management policy to determine "the best ownership pattern, use and long-term care of state trust surface lands and minerals," incorporating input from the public, interested parties, and local, county, and federal land management representatives. The contractor would also be required to develop a time-frame for agency actions and a plan for allocating responsibilities among agency staff; develop procedures for monitoring and evaluating the implementation of the planning process; make recommendations for further legislation, rulemaking, or actions at the local or federal levels that would be necessary to implement the planning process; and identify planning support technologies.

b. Voluntary Conservation Easements

Voluntary conservation easements have allowed farmers and ranchers in Wyoming to ensure continued, future use of the land for production of crops or livestock while at the same time protecting wildlife habitat and natural areas. Conservation easements may cover an entire parcel of land or just the appropriate portions of the property. The landholder receives the fair market value of the easement and if the landowner donates to a conservation easement, they may qualify for a charitable tax deduction. To qualify for the deduction, the easement must meet the following: easement must be

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[1105] *Id.* at § 21-13-321.
[1106] *Id.* at § 21-13-332.
[1107] *Id.* at § 21-13-320.
[1108] *Id.* at § 21-13-218.
[1109] *Id.* at § 21-13-311.
[1110] *Id.*
[1111] *District Funding*, Wyoming Department of Education, Finance Division, *available at:* http://legisweb.state.wy.us/2004/interim/schoolfinance/Reports/WyFundingModel/Wyoming%20Funding%20Model%204.2a.
[1112] 2004 ANNUAL REPORT, *supra* note 1022, at 23.

perpetual in duration, it must be granted to a qualified organization, it must prohibit all surface mining, and it must serve at least one of the following purposes: preserve open space; preserve areas for public recreation or education; protect natural habitat; or preserve historically important lands or structures. Term easements are allowed, but do not qualify for any income or estate tax benefits.[1113]

In 2005, Wyoming became one of the last states to adopt the Uniform Conservation Easements Act.[1114]

[1113] Allison Perrigo and Jon Iversen, *Conservation Easements: An Introductory Review for Wyoming*, WYOMING OPEN SPACE (December 2002).
[1114] Enrolled Bill SF0149 (2005); to be codified at WYO. STAT. ANN. §§ 34-1-201 to 207.

VI. Research and Policy Analysis: Opportunities for Improving Trust Lands Management

At the time of statehood, the economies of the Western states were based primarily on natural resource extraction activities that supported the industrial economies of the East, including hard rock mining, timber, grazing, agriculture, and later coal, oil and natural gas. In line with these economic realities, revenue generation from state trust land management has focused on the lease and sale of natural products, with the majority of state trust lands managed for grazing, agriculture, and mining uses.

Many Western states continue to enjoy significant financial benefits from specific natural resource management activities on trust lands – particularly subsurface uses. Oil and gas now provide the bulk of trust revenues for states such as New Mexico, Texas, Utah, Wyoming, and Colorado, and will likely continue to do so in the future. Similarly, mineral extraction continues to play a significant economic role in a number of states, including Colorado and Utah. Timber also continues to provide significant revenues in many states, including Idaho, Minnesota, Montana, Oregon and Washington.

Many parts of the West are being transformed by urbanization, the decline of key natural resource industries such as agriculture, ranching, and timber production, and an ongoing economic shift towards more diversified, knowledge-based economies. In many communities across the West, this transformation has diminished the role of natural resource extraction in the region's economy, while elevating cultural, environmental, recreational, and location-based amenities to ever-increasing prominence.[1115] Demographic changes and cultural value shifts throughout the West also mean that state trust lands are viewed by many members of the public as public lands with conservation values – including open space, watershed protection, fish and wildlife, and recreation – that have as great or greater importance than traditional natural resource uses. In many places around the West, trust managers are diversifying trust portfolios to respond to these changes, while finding ways to balance public values associated with healthy landscapes and quality growth with their fiduciary responsibilities as trust managers.

Our research into state trust land management in the West suggests that most trust management agencies face significant budgetary, legal, and institutional constraints, challenging their ability to manage trust resources effectively and to adapt to the changing economic, political, and cultural landscape of the West. With this in mind, the Joint Venture convened a group of current and former state land commissioners, along with academic experts in economics, planning, and resource management to identify key issues for policy research and analysis that could assist trust managers and key stakeholders in improving trust lands management and in responding to public values within the limits of the trust responsibility.

The Roundtable participants (listed in section V-1, following) defined a variety of research topic areas that would benefit from focused investments of research and policy analysis, that can be roughly grouped into five larger categories: (1) Total Asset Management; (2) Planning and Information; (3) Disposition Tools; (4) Institutional Assessment; (5) Dissemination and Change Strategies.

A. Total Asset Management

A consistent, over-arching theme identified by the Roundtable was the importance of developing the concept of "total asset management" (TAM) as applied to trust lands – i.e., a holistic and strategic approach to the management of trust resources which optimizes management of the total trust portfolio within the practical, political, and legal limitations applicable to trust managers to achieve sustainable, short-term and long-term revenue goals. Although a few states – most notably Wyoming – have taken admirable steps towards the implementation of TAM-based strategies, the vast

[1115] See *generally* Rasker, et. al., *supra* note 1.

majority of trust resources are not managed within a holistic, strategic asset management framework.[1116]

In light of this situation, the Roundtable found that the development of information and tools that would guide trust managers in their thinking about TAM was among the highest priorities for trust land policy development. It was recommended that professional managers for insurance pools, oil and gas reserves, pension funds, charitable trusts, and real estate investment trusts be consulted to identify best management practices (BMPs) for TAM. This work would build on a previous report by the Western State Land Commissioner's Association (WSLCA) on asset performance measurement[1117] and the work of Wyoming legislative task force that was charged with the development of TAM-based strategies for the management of Wyoming's trust lands.

However, to account for the unique nature of state trusts, these BMPs should also incorporate the perpetual nature of trust management into evaluations of asset management; i.e., accounting for the way in which trust asset management strategies should differ given that trust assets are to be maintained and managed in perpetuity (as compared to strategies that are applied to assets that are managed for shorter time horizons). With this in mind, the Roundtable identified a series of TAM-related issues that should be addressed by these BMPs:

1) Reporting and accounting standards, with benchmarking for purposes of accountability;

2) Monetization of non-economic asset values (e.g. ecosystem services) in a manner that justifies resource allocations for the protection or enhancement of non-economic values, and which allows for more objective assessment of management strategies or projects that have both economic and non-economic impacts;

3) Accounting for permanent fund management and the strategic monetization of assets as a component of an overall portfolio strategy;

4) Accounting for the costs of inaction (e.g., waste) as well as action;

5) Accounting for strategically or politically desirable asset management decisions and similar practicality-driven decisions;

6) Accounting for the allocation of staffing and other management resources (and strategies for obtaining sufficient resources to allow proper staffing) in accordance with both (a) short-term and long-term returns and (b) long term/intergenerational preservation/enhancement of trust assets (current management models show varying degrees and quality of relationship between the value of the assets being managed and the assets spent to manage the trust).

B. Planning and Information

1. Disposition Planning for Residential, Commercial, and Industrial Development

Trust managers vary in the degree to which they apply comprehensive, objective information to guide real estate disposition of trust resources. Without a more analytical, focused strategy to identify real estate development opportunities for trust lands, a disproportionate reliance may be placed on project proponents whose interests may not coincide with the best interests of the trust or

[1116] The Western States Land Commissioner's Association (WSLCA) took a step in this direction when they commissioned an investigation of performance measures for public land management from a consulting firm (Agland Investment Services, Inc.), resulting in a report to the WSLCA in December of 2000; however, the recommendations of the report have not yet been taken further by WSLCA. *See Trust Performance Measurement: A Report to the Western States Land Commissioners' Association*, Agland Investment Services, Inc. (December 15, 2000).
[1117] *Id.*

trust management objectives. As such, a disproportionate share of staff time will likely be engaged in assessing proposals that have little merit from a trust perspective. In addition, individual development projects can only be assessed in relation to other proponent-driven proposals or staff-driven proposals and such comparisons may be hampered by the lack of evaluation metrics.

As a practical matter, investment of trust assets in one project generally forecloses other opportunities for a given trust parcel, and, given limited staff and budgetary resources, commitments to projects also foreclose the pursuit of opportunities on other lands. However, when these projects cannot be evaluated in relationship to a defined disposition strategy, it may be difficult to evaluate, from a fiduciary standpoint, the relative advantages or disadvantages of proceeding with any individual proposal versus seeking an alternative opportunity. Decisions may thus be based on a subjective, internally-driven decision-making process.

Similarly, without a defined disposition strategy that targets an identifiable set of high-opportunity lands, it may be difficult to evaluate the performance of trust real estate managers as asset managers, since the financial "success" of an individual project can only be evaluated in comparison to other, similar projects – rather than with regard to its contribution to achieving a desirable rate of return on lands that have the highest suitability for development. With regard to commercial, industrial, and residential development opportunities, the absence of a disposition strategy may also make it difficult for managers to focus on proactively planning and entitling lands with high suitability for development to take advantage of anticipated market conditions, as well as responding to community interests and concerns by engaging in prospective planning that allows appropriate trade-offs and negotiations with regard to entitlements.

The lack of a clear disposition strategy may additionally serve to increase the potential conflicts over the development of trust lands, as it provides little certainty to interested parties – such as local communities, recreational users, conservation groups, and state land lessees – that a given trust parcel or trust resource will or will not be considered for disposition in the near term. As such, trust managers may face a perception that other values located on trust lands are at continuing risk, leading to perceived needs to protect trust lands in the short term via regulation or permanent restrictions against development use. Our experience suggests that this perception may foster a climate of conflict that hampers trust managers and limits trust opportunities in the long term. Ed McMahon, formerly with the Conservation Fund, has noted that "when all lands are perceived to be at risk, all projects are a problem."

As a result, the development of tools to guide effective trust disposition strategies should be a key part of promoting a TAM-based approach to trust management. For example, various studies have suggested that the suitability of a given parcel of land for development can be more objectively assessed via the identification of "locational attributes" that have an objectively high correlation with development, such as proximity to transportation infrastructure, schools, employment centers, existing developments, airports, cultural centers, and natural amenities. With the advance of PC-based Geographic Information Systems (GIS) modeling capability there is tremendous opportunity to develop spatially explicit, analytical models that can better characterize development suitability based upon a wide variety of variables. Arizona utilizes this type of model to inform its five-year disposition planning, and Montana is currently considering the use of a similar model.

The Roundtable found that the development of disposition tools should go beyond simply improving short-term disposition planning strategies that were initially investigated by the Joint Venture in Arizona and Montana. Rather, disposition tools should also incorporate a longer-term approach to disposition planning, including the use of more predictive, scenario planning approaches (incorporating different market and planning futures) that identify opportunities associated with the long-term nature of trust holdings, and address the potential for repositioning and consolidation of trust holdings. Disposition tools should also ideally account for political concerns associated with situations where community needs are inconsistent with trust interests in maximizing revenues.

The Roundtable found that the initial areas for investigation in the development of more sophisticated, long term approaches to real estate development could be the review and analysis of

efforts undertaken by other large landowners, such as the Irvine Ranch planning effort, a large property development under the Princeton endowment, the divestiture program in the British public housing program, the Lowry Air Force Base closure and development project in Colorado, and other examples.

Another essential component of strategic decision-making to optimize returns from the disposition of trust resources is the prioritization of disposition efforts based on market information that assesses the relative valuation and demand for trust lands over a discrete period of time. For example, the disposition of trust lands for commercial, industrial, or residential development should incorporate information about relative valuation of trust lands to assess the opportunity costs associated with pursuing projects on lower-value lands and should incorporate information about market absorption rates to ensure that projects are viable and appropriately scaled. At the same time, the timing of dispositions for these purposes is critical, since deferring sales until land prices are approaching a predicted maximum will yield higher returns than if lands are sold in advance of significant anticipated appreciation.

Also important are the "transaction costs" associated with disposing lands. These may include obtaining legal access to the parcel (generally a prerequisite for sale), a lack of potentially interested bidders, the lack of comparable sales appraisal information for land-locked individual parcels, and the difficulty (and cost) of ascertaining the ownership of lease-related improvements on a particular parcel. In some cases, these factors may make disposition more expensive than continued custodial management.

The Roundtable found that the development of a set of proposed practice guidelines for the assessment of land valuation, demand for trust lands, and absorption rates for various land use categories to guide trust managers in the assessment of local market conditions could help to significantly improve disposition strategies. At the same time, an understanding of longer-term market trends and scenarios could assist trust managers in developing objectively defensible and economically responsible strategies for the identification and disposition of trust lands that produce higher returns to the trust over the long term, particularly where irretrievable commitments of trust assets are involved (such as disposition of fee title for residential uses).

However, the Roundtable also found that additional analysis should be directed towards the assessment of the effects of trust lands on local markets, particularly the characteristics of trust lands as "patient capital" – i.e., assets which are held over the long term without pressures to dispose them due to carrying costs. Concerns are frequently expressed by private developers with regard to the entry of trust lands into private real estate markets that trust lands will compete with private sector interests. However, the experience of many trust managers has suggested that due to their "patient capital" characteristics, trust lands can actually function as an important stabilizing force in real estate markets (i.e., "healthy" competition), provided that there is a strategy to function in such a role as opposed to simply being a "hostage to the marketplace." In addition, the ability of trust managers to hold real estate assets over long periods without "carrying costs" may also allow trust managers (singly or in partnership with private entrepreneurs) to achieve development objectives that are difficult to achieve through private sector ownership (such as holding out parcels for commercial/employment development to await the development of necessary levels of residential development). An investigation should be undertaken to highlight some of the potential characteristics and opportunities associated with this "patient capital" that should be factored into disposition planning, and to identify state efforts to play an effective role.

2. Regional Planning

In some areas of the West (particularly Arizona and New Mexico), trust lands represent a large percentage of the future land base for urban growth. In this context (and perhaps elsewhere), protection of the long-term interests of the trust mandates the proactive participation of trust managers in regional planning activities, particularly long-term infrastructure planning (such as water and transportation) and the planning of regional open space. Beyond simple regional development

planning and conservation opportunities, however, trust lands may also have a significant ability to contribute to "place-making" and the development of improved urban form on a regional basis.

The Roundtable found that the investigation of opportunities and methods for trust participation in regional planning activities could provide useful guidance for trust managers that are contemplating participation in regional planning efforts. This investigation would ideally incorporate case studies of successful (and unsuccessful) regional planning efforts involving trust lands to identify the short- and long-term benefits and potential pitfalls associated with regional planning efforts.

3. Collaborative Planning

With particular regard to the commercial and residential development of trust lands, collaborative planning with local communities can reduce conflict, effectively identify lands that have important public values, minimize the risk of poorly-planned development, and create effective and innovative implementation strategies that meet with the needs of the trust and the local community. By contrast, the failure to plan collaboratively almost inevitably leads to conflict with both local jurisdictions and community stakeholders. These conflicts can lead to increased constraints on trust management due to political pressures at the state and local levels, unfavorable zoning or land use allocations from local jurisdictions, litigation, and overall increases in uncertainty – translating into reduced economic value for trust beneficiaries over the long run.

There are numerous examples where the failure to plan collaboratively has led to conflict and poor planning outcomes on trust lands. For example, in many Arizona communities, conceptual plans for trust lands have been prepared in isolation from local planning efforts, leading to situations in which trust lands are subject to two conflicting plans without a clear process for resolving inconsistencies. In these cases, the uncertainty regarding the ultimate use of trust lands once they are disposed makes disposition of these lands difficult and reduces the market value of the lands. In one recent case in 2001, a six hundred forty acre parcel that had been the subject of an ongoing conflict between the Land Department and the City of Phoenix was brought to auction and received no bids whatsoever.

Collaborative planning is thus an increasingly common (and often essential) tool to minimize conflicts over land uses on trust lands that are planned for commercial, industrial, or residential development, as well as for the implementation of TAM-related approaches to asset management generally. However, not all collaborative planning efforts have led to favorable trust outcomes, and although there is extensive literature available on collaborative planning to draw from, none of this literature directly addresses the unique issues associated with trust lands.

The Roundtable found that a comparative case study should be conducted that would attempt to relate the principles identified in the literature to real-world examples involving trust lands, and also identify real-world practices and procedures for collaborative decision-making with regard to trust lands that have been associated with favorable (and unfavorable) outcomes. This information could then be used to define a set of BMPs for collaborative planning on trust lands, and could also be developed into a training course for trust land managers.

This case study should ideally attempt to document the comparative benefits/drawbacks to collaborative planning for trust managers to more aggressive disposition methodologies or simple wholesaling (i.e., leaving planning problems to the private sector). The case study should also seek to identify the social and political costs of failing to engage in collaborative planning, as well as identify methods of mitigating and/or accepting the risks associated with collaborative planning.

4. Biophysical Inventories

Many trust managers currently lack inventories of conservation values that are associated with state trust land portfolios. Although the majority of states utilize some sort of classification system

to identify potential uses associated with trust lands, this information is frequently incomplete with regard to environmental values. This information should be available to guide trust decision-making with respect to TAM strategies, and could also aid in the identification of conservation and mitigation opportunities on trust lands.

The State Land Office of New Mexico has recently partnered with the University of New Mexico to generate a trust lands inventory that will identify environmental values associated with trust lands and compile this data in a GIS database. The development of similar statewide biophysical assessments could serve as a significant tool for trust managers and stakeholders that are concerned with managing trust land resources. Using GIS data that has been developed or is in the process of being developed by a variety of agencies, these assessments could identify: threatened or endangered species habitat; areas with significant biodiversity; important wildlife corridors; threatened watershed areas; areas with limited water availability or fragile water quality; significant wetlands and riparian zones; fire hazard areas; important viewsheds; and special cultural or archaeological resources. Most of the data and resources necessary to conduct this sort of analysis are available from federal and state agencies; state, county, and local planning authorities; universities; non-profit groups; and private GIS consultants.

The application of an enhanced version of the physical environment filter could pre-identify, and even prioritize, a potential land base for the application of conservation-oriented management tools such as conservation sales of full fee or partial interests (e.g., development rights), conservation leases, exchange of trust lands with federal agencies, and so forth. In addition, many trust managers are currently facing limitations associated with the presence of endangered species, critical habitat designations, or waters of the U.S. on trust parcels. Given the size of many trust holdings, a comprehensive inventory could assist in the development of mitigation opportunities that could free up development potential on high-value lands under Habitat Conservation Plans or other mitigation mechanisms such as mitigation banks.

With this in mind, the Roundtable found that a methodology and one or more examples of statewide "biophysical assessments" that inventory and map this information (preferably relying primarily on existing, readily-available information) should be developed to guide trust decision-making.

C. Disposition Tools

1. Land Tenure Adjustment

One of the most critical issues facing trust managers is the historic pattern of land ownership associated with trust lands. All of the states that manage trust lands continue to hold a substantial percentage – and in many cases nearly all – of their portfolios in scattered or checkerboard parcels that correspond to the original pattern of state land reservations (such as most of Wyoming's trust holdings), or *in lieu* selections within historic railroad grants (such as in northern Arizona) or in the National Forest System (as in northern Idaho). Attempts to consolidate trust holdings through land exchanges have met with mixed results. Although Utah recently completed two successful land exchanges, a third recently failed in Congress. In Arizona, by contrast, land exchanges are prohibited, and ballot measures to legalize exchanges have failed six times in the past six election cycles.

The Roundtable noted that WSLCA has identified the issue of land tenure adjustment as a priority issue for that organization to address. As such, potential opportunities for collaboration with WSLCA or to provide assistance to WSLCA in addressing land tenure should be identified.

2. Joint Ventures and Participation Agreements

In the context of land developments for commercial, industrial, and residential uses, "joint ventures" and "participation agreements" are arrangements in which a landowner enters into an agreement with a project developer on their lands that shares the risk associated with the development in exchange for a share of the profits. These types of agreements are now commonly used in the private sector by developers – particularly in large developments – as an alternative to financing the outright purchase of developable land, as they limit the costs and risks associated with a development project.[1118] These agreements also offer landowners who are interested in disposing of lands for development to receive much higher potential returns on the disposition of those lands than they would receive if the land were sold as a "raw" parcel, since they can share in the significant increases in land value that occurs when lands are entitled, supplied with infrastructure, and developed or prepared for sale to optimize market demand.

In joint venture arrangements, the landowner generally functions as a co-investor in a development project through a partnership, corporation, or limited liability company, making the land available for development by other investors or "investing" the land in the development venture in exchange for a share of the profits when the land is sold. By contrast, in "participation agreements" the landowner typically maintains more of an arms-length relationship with the developer than in the joint venture context, receiving a low "base" price for their lands (representing some fraction of its appraised value), in exchange for receiving a continuing "participation" share of the revenues received by the developer when lands are ultimately disposed after planning, entitlement, and the installation of infrastructure. Utah, Arizona, and New Mexico are all experimenting with the use of these types of arrangements in connection with the development of trust lands.

Because the reductions in developer cost and risk associated with these types of arrangements make larger development projects more practical, joint ventures and participation agreements are an increasingly common tool in the development of large-scale, master-planned communities. These types of developments are increasing associated with more progressive types of developments than are normally associated with a subdivision-by-subdivision strategy that involves the development of numerous, unconnected small parcels, since a single development can encompass commercial centers (or even employment centers) to serve the residents of the new community, multifamily and affordable housing, integrated transportation and infrastructure planning, and a overall "vision" for a large portion of an urbanized area that is difficult to achieve when development occurs in a haphazard, market-driven fashion. In addition, by planning on a large scale, developers and local planning jurisdictions may enjoy increased flexibility in the planning process, allowing for density shifts and other tradeoffs and economies of scale in infrastructure planning that allow for the inclusion of significant amenities such as significant areas of open space, trails, neighborhood parks, community centers, and other elements that are frequently associated with progressive development models.

Because trust managers are often constrained by funding limitations and cannot normally undertake detailed planning, entitlement, and infrastructure construction on their own (or at least on a large scale), by partnering with the private sector, trust managers can take advantage of the much more extensive resources available to private sector developers. However, many trust management agencies (whose staff resources are normally focused on more traditional, natural resource activities) lack expertise and experience with complex real estate transactions and how best to negotiate these types of arrangements. This lack of expertise increases the risk that trust beneficiaries could ultimately lose out in failed arrangements where the "participation" share never materializes or is indefinitely postponed due to market fluctuations and project failures, and may lead trust managers to shy away from these types of arrangements in favor of more traditional (and less progressive) forms of development. In addition, in many states public auction requirements associated with the disposition

[1118] Outright financing (via a bank loan or similar mechanism) is comparatively expensive, risky, and frequently impractical for many developers, particularly in large developments where there tends to be significant up-front investments in infrastructure, planning, entitlements, permitting, and other costs and substantial lag times between the acquisition of land for development and the sale of individual lots that will return a profit.

of trust lands may make it difficult to appropriately qualify bidders or design participation structures that will maximize benefits to the trust.

The Roundtable found that a comparative assessment of recent participation-style developments on state trust lands in the West, combined with assessments of examples of joint venture arrangements and participation agreements from the private sector, could delineate common themes and practices that are associated with successful (and unsuccessful) joint ventures and participation deals. By identifying BMPs for the design and management of these types of arrangements, this type of comparative study could help to guide trust managers as they negotiate this increasingly complex field.

3. Conservation Mechanisms

As noted above, there is increasing demand for the conservation of trust lands to preserve viewsheds, open space, environmental values and functions, or recreational values that are associated with those lands. A review of trust land management practices in the West suggests that in many states, these types of dispositions are artificially constrained. In many cases, these constraints appear to derive from legislative or institutional cultures that are predisposed against conservation use, combined with politically powerful natural resource industries that view conservation uses as a threat to their continued access to trust resources.

The growing demand for conservation in the West may create significant opportunities for trust managers to enhance trust revenues if methods can be found that serve conservation needs while enhancing revenues to the trust. At the present time, there are remarkably few tools available to trust managers to accomplish conservation outcomes on trust lands – the primary mechanism for "conservation" on most trust lands appears to be the continuation of sustainable practices (such as timber harvesting, grazing, or special use permitting). In addition, sales of conservation easements or development rights – one of the few existing methods widely used in the West – are subject to narrow legislative restrictions on these types of transactions. For example, as discussed in section V(E) above, even where state agencies are involved, Montana only permits the sale of conservation easements on a narrowly circumscribed set of lands; sales of conservation easements to non-profit organizations are even more narrowly circumscribed (allowing only two specific organizations to purchase them in a few specific areas).

There are a number of alternative disposition strategies that could potentially be used to accomplish dispositions of land for conservation purposes and enhance trust revenues within the limits of trust managers' fiduciary responsibilities. For example, "cluster" developments, which concentrate development that will occur on several different parcels in a small area while leaving the majority of each parcel as open space, can accomplish conservation of the vast majority of "developed" land while not necessarily decreasing the density (or the price) returned for the land. In addition, large-scale planning of trust lands, density transfer or density banking programs, mitigation marketing, wildfire buffering arrangements, or development of management plans that incorporate sustainable, long-term management of trust resources for compatible uses may also provide workable mechanisms for conservation

The Roundtable found that an investigation should be conducted to identify a conservation "tool box" of potentially available resources and mechanisms for achieving conservation outcomes and capturing potential revenues from conservation uses of trust lands. This conservation "toolbox" could assist trust managers as they explore opportunities to capture conservation and recreation-related revenues on state trust lands, as well as efforts to ease artificial legislative restrictions on conservation disposals that may be inhibiting revenue opportunities.

This investigation should also identify funding programs through federal, state, local and private sources. This study could also investigate methods for capturing economic value associated with conservation (such as ecosystem services) that may not be currently monetized as a way to improve trust revenues.

4. Public Value Charges to Trust Lands

Although trust lands are frequently managed under a revenue maximization enterprise model, trust managers are also public officials with broader responsibilities to the public than simply fulfilling the mission of the trust. Trust lands and trust beneficiaries are frequently the recipients of public investments and other public benefits that might appropriately be accounted for by incorporating broader public values when making trust disposition decisions. As such, the Roundtable found that an investigation into methods and informational needs that could allow for "charges" against trust lands to account for socially-created value on trust lands, or which provide compensation to trust lands for providing these benefits, could assist trust managers in accounting for increased public benefits through trust land disposals. Similarly, there may be positive and negative externalities associated with the development of trust lands and adjacent lands that could or should be accounted for in the disposal process (i.e., the impacts of trust land development on surrounding private lands and communities, and the impacts of the development of private lands in the community on trust lands).

D. Institutional Assessment

1. Assessments of Institutional Capacity

Most trust management agencies are significantly constrained by a lack of institutional capacity resulting from budgetary limitations. These constraints are substantially hampering attempts to improve trust land management in the West, and in many cases hamper trust managers' ability to assess the current shortcomings in trust management or explore opportunities for improvement.

The Roundtable found that assessments of institutional capacity could assist trust managers in identifying what kinds of experience and expertise are lacking within agencies (and how this will impact their ability to carry out fiduciary duties). More importantly, these assessments could help to make the case for building capacity within trust management agencies within state executives and legislatures. State professional associations, including associations for planners, accountants, and other relevant fields, may be effective sources of evaluation information and could serve as effective lobbyists or leverage points for the use of this information.

2. Evaluation of Governance Models and Beneficiary Involvement

State trust lands governance models vary significantly from state to state, ranging from departments governed by a single appointed official to elected commissioners or land boards. Previous research has been unable to determine any clear correlation between returns on assets and particular governance models; however, governance models are nevertheless perceived to have substantially different implications for trust lands management. The Roundtable found that an investigation should be conducted to identify the various governance models currently in use, and attempt to identify, at least anecdotally, the potential implications of these governance models for trust management.

Similarly, the increased interest (and in many cases direct involvement) of beneficiaries in trust lands management and trust revenues has had significant implications for trust lands management. In Utah and Arizona in particular, beneficiaries have successfully sought or are currently seeking direct representation in trust management activities by obtaining seats on state land boards. The Roundtable found that an investigation should be conducted to highlight the potential benefits and drawbacks of different forms and intensities of beneficiary involvement in trust lands management.

3. Trust Revenues and Education/Trust Management Funding

The mechanisms by which trust revenues are distributed to educational institutions, as well as the mechanisms by which trust management is funded, appear to create very different incentive structures for trust managers, legislatures, and trust beneficiaries with regard to the management of trust resources and investments in trust land management. For example, anecdotal evidence suggests that in Washington, beneficiaries are generally less interested in promoting increases in revenue from trust management due to the perceived potential for "distracting" the legislature from dealing with education funding shortfalls with an improper reliance on increased trust revenues. By contrast, in Utah, a new system of school-community councils that are empowered to disburse quantities of trust-generated unrestricted funds has created a substantial constituency among the trust – beneficiaries despite the fact that Utah trust revenues contribute only about 0.5 percent of education funding in the state.

However, despite the influence of education funding mechanisms on trust management, in most states these mechanisms are extraordinarily complex and are often poorly understood by trust managers, beneficiaries and other stakeholders, and the public at large. The Roundtable thus suggested that an investigation should be conducted to identify the role of trust revenues in meeting educational needs in various states.

VI-1. Roundtable Participants

The State Trust Lands Research and Policy Analysis Roundtable met in Phoenix, Arizona on October 21 and 22, 2004. In attendance:

- Charles Bedford, Associate Director, The Nature Conservancy of Colorado
- Brian Boyle, former Commissioner of Public Lands, State of Washington
- Lynne Boomgaarden, Director, Wyoming Office of State Lands and Investments
- Kevin Carter, Director, Utah School and Institutional Trust Lands Administration
- Carol Heim, Professor of Economics, University of Massachusetts at Amherst
- Mark Muro, Senior Policy Analyst, Metro. Policy Program, Brookings Institution
- Jon Souder, Executive Director of the Coos Watershed Association
- Mark Winkleman, Commissioner, Arizona State Land Department
- Steven Yaffee, Professor of Ecosystem Management and Director of the Ecosystem Management Initiative, University of Michigan

Also participating (for the Lincoln Institute of Land Policy/Sonoran Institute Joint Venture):

- Armando Carbonell, Lincoln Institute of Land Policy
- Diane Conradi, Sonoran Institute.
- Peter Culp, Sonoran Institute
- Andy Laurenzi, Sonoran Institute
- Katie Lincoln, Lincoln Foundation
- Luther Propst, Sonoran Institute

VII. Conclusion

The intent of this report is to provide a starting point for discussion about trust land management within and among Western states that face a common set of management challenges. Throughout the West, many trust managers are seeking ways to adapt and diversify trust portfolios, improve management strategies, take advantage of explosive growth throughout the West, and, at the same time, reflect the needs and desires of a rapidly-changing population and contemporary environmental realities.

The unique history of these lands – and their distinctive trust mandate – confronts trust managers with challenges that are quite different than those facing other public land managers. Demands on schools and other public institutions, combined with growth pressures on trust lands and public concern with the protection of significant conservation values associated with those lands are rapidly expanding the mix of constituencies and concerns that must be addressed by trust managers. In many states, these pressures have brought trust management into the public eye in an unprecedented manner.

These changes create a critical need – and a real opportunity – to explore means of generating trust revenues that serve the needs of trust beneficiaries while increasing the compatibility of trust activities with the economic futures of Western communities and the preservation of important public values associated with trust lands. As this report has discussed, the historic trust responsibility associated with the management of these lands provides sufficient flexibility to allow trust managers to meet these challenges. Indeed, it may even mandate trust managers to do so as the custodians of a perpetual, intergenerational trust.

Many trust managers are already exploring innovative management practices in search of win-win solutions that produce larger, more predictable revenue streams for beneficiaries, and which balance the public values associated with the preservation of healthy landscapes, urban open space, and better planning for growth with their fiduciary responsibilities as trust managers. As we have discussed, this exploration could benefit from focused investments in research and policy analysis to assist the development of TAM strategies, tools for planning, disposition, and conservation, BMPs for collaborative planning and joint venture arrangements, and key information such as biophysical inventories and educational funding structures, among other issues. Taken together, this information could significantly broaden the range of information and policy options available to trust managers and stakeholders as they seek to improve state trust land management in the American West.