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NatAgLaw@uark.edu | (479) 575-7646

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**Changing the Focus: Managing State Trust
Lands in the Twenty-First Century**

by

Wade R. Budge

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Changing the Focus: Managing State Trust Lands in the Twenty-First Century

I. INTRODUCTION

In November 1998, the Tenth Circuit Court of Appeals upheld a Colorado program designed to preserve approximately 300,000 acres of Colorado's nearly 3,000,000 acres of school trust land.¹ The Colorado program is indicative of a much larger shift occurring on public lands throughout the West. For years, public land management has been undergoing a change in priorities and focus. Federal land managers such as the National Forest Service (NFS), Bureau of Land Management (BLM) and the National Park Service (NPS) now pepper their management plans with terms such as "ecosystem management" and give unprecedented attention to non-revenue producing values.² State land managers have also shifted their focus, using terms such as "stewardship" and "balanced environmental management" to describe their management plans.³ Simply put, land managers appear to be giving non-revenue producing uses unprecedented attention in managing public lands and resources.

Noticeably, however, one group of land managers has been slow to embrace many of these new management theories. This group consists of state land managers charged with caring for lands known as trust lands or school trust lands. A state holds lands in many capacities, including as trustee for lands given to the state from the federal government at the time of statehood. The purpose of these grants was to provide new states with a source of revenue to finance education. To accomplish this goal Congress granted parcels of land to new states, which the states would accept with the understanding of the lands' declared purposes. Because of their unique history, school lands differ from most public lands held by the federal and state governments.

Unlike other state and federal public lands, state trust lands are not owned for the benefit of the entire public.⁴ Rather, trust lands are owned, and in fact were granted, for the specific purpose of providing income to specified beneficiaries—in

¹ See *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 626–27, 643 (10th Cir. 1998) [hereinafter *Branson*].

² See BUREAU OF LAND MANAGEMENT, *ECOSYSTEM MANAGEMENT IN THE BLM: FROM CONCEPT TO COMMITMENT* 1–3 (1994). See also Memorandum from F. Dale Robertson, United States Forest Service Chief, to Regional Foresters and Station Directors, *Ecosystem Management of the National Forests and Grasslands 1* (June 4, 1992) (on file with author).

³ See, e.g., Department of Natural Resources, *Proposed Decision* (visited Apr. 1, 1999) <<http://www.dnr.state.co.us/slb/record.htm>>; Arizona Preserve Initiative, *Background Information* (visited Apr. 13, 1999) <http://www.land.state.az.us/asld/htmls/api_bkyrd.html>; Western Governors' Association, *Enlibra* (visited Apr. 9, 1999) <<http://www.westgov.org/Enlibra/>> .

⁴ See, e.g., UTAH CONST. art. XX, § 2 (amended 1998).

most cases, a state's school children.⁵ Second, a number of judicial decisions have declared that many trust land managers are legally obligated to seek the maximum possible return for the sale or use of trust lands.⁶ Because of this obligation, terms like "ecosystem management" and "balanced environmental management" have not been added to the lexicon of most trust land managers. Another distinguishing characteristic of school land grants is that school lands are usually small parcels, about one square mile each, that literally dot the public domain.⁷ Typically, trust lands are not blocked together in large tracts of land like most public lands.⁸ Thus, as trust land managers try to fulfill their duties to beneficiaries, they continually encounter a checkerboard pattern that makes effective management nearly impossible. To resolve these problems, states have had to experiment with a number of options to both effectively manage these lands as well as preserve the quality of the environment.

The purpose of this article is to explore some of the creative management techniques or strategies that a number of states are currently employing to better manage these peculiar lands. In addition, to better understand these management techniques, it is necessary to consider the history of the statehood grants as well as the nature of the judicially created obligations that adhere to these lands. Accordingly, this article begins with an historical analysis of statehood grants followed by a survey of the jurisprudence that has created the "maximization of revenue" principle that most states declare they are legally obligated to follow. Additionally, this article analyzes some of the new philosophies emerging from ecosystem and stewardship management theories in order to illustrate what principles are motivating states to explore new management solutions.

While this article does not seek to define something as yet undefined and amorphous as ecosystem management, it does examine many of the management alternatives used by a number of western states. These alternatives range from the traditional, such as land exchanges in Utah, to the inventive, like the changes to the state constitution of Colorado. It is hoped that this article will help illustrate the peculiar problems facing a state, as a trust land manager, in trying to fulfill its duties to trust beneficiaries as well as to the environment.

⁵ See STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, 3RD ANNUAL REPORT 5 (1997). Among Utah's beneficiaries are public schools, a miner's hospital, and schools for the disabled. See *id.* at 23-28.

⁶ See *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 466-67 (1967).

⁷ See UTAH DEPARTMENT OF NATURAL RESOURCES, PROJECT BOLD: PROPOSAL FOR UTAH LAND CONSOLIDATION AND EXCHANGE 1 (1985).

⁸ See *id.*

II. HISTORY OF STATEHOOD GRANTS

A. Early Land Policies

Many of the early federal land grant programs were extensions of two dominant national policies of the eighteenth and nineteenth centuries.⁹ The first policy was grounded in the belief that the newly formed country needed to expand westward into the frontier.¹⁰ The second policy embodied the view that a free people needed to be an educated people.¹¹

Thomas Jefferson, as one of the foremost politicians and leaders of his time, was a proponent of both of these national policies.¹² His ideals motivated many of America's initial federal policies. While Jefferson saw a role for the federal government in a number of limited areas, he clearly believed education required local, not national, control.¹³ An early problem that Jefferson recognized was that small communities, especially growing communities on the expanding frontier, could not afford schooling for their children.¹⁴ Education at this time was an activity only for the wealthy.¹⁵ In response, early national legislators proposed carving out one section in every surveyed township of the public domain for the purpose of supporting local education.¹⁶ Under this plan, communities would receive a section of land from every township that they could later sell to provide revenue for the construction and maintenance of local schools.¹⁷

As one of the first national education measures, the Continental Congress passed the General Land Ordinance of 1785, which provided that one section of every township in the Northwest Territory should be set apart for the maintenance of the "common schools."¹⁸ In a subsequent 1787 act, the Continental Congress explained the purposes of the land grants: "religion, morality, and knowledge, being necessary for good government and the happiness of mankind . . . schools, and the means of education, should be forever encouraged."¹⁹ The United States

⁹ See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 56-57, 67 (3d ed. 1993).

¹⁰ See *id.* at 56-57.

¹¹ See ROBERT M. HEALEY, *JEFFERSON ON RELIGION IN PUBLIC EDUCATION* 179 (1970).

¹² See Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 NAT. RESOURCES & ENV'T 39, 39 (1997).

¹³ See HEALEY, *supra* note 11, at 178-79.

¹⁴ See Hager, *supra* note 12. See also HEALEY, *supra* note 11, at 178-79.

¹⁵ See HEALEY, *supra* note 11, at 178-79, 185.

¹⁶ See COGGINS ET AL., *supra* note 9, at 56. Under the General Land Ordinance of 1785 the unappropriated public land was divided "into square townships of 36 identically-numbered sections, each section containing 640 acres or one square mile." *Id.*

¹⁷ See *id.* at 67.

¹⁸ Hager, *supra* note 12.

¹⁹ *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 177 (1855).

Congress replaced the Continental Congress, but the new national government left in place the Land Ordinance of 1785.²⁰ This early national policy made it possible for new states joining the Union to provide money for their schools while at the same time promoting expansion into the growing frontier.²¹

B. Ohio and the First "School Land" Grants

The first frontier state, Ohio, joined the Union in 1803 when Congress carved it out of land designated as the Northwest Territory by the Continental Congress.²² In its enabling act, Ohio received a promise that the federal government would grant to Ohio towns the sixteenth section in every township for the support of the common schools.²³ In return for this grant, the federal government requested that Ohio promise not to tax federal lands left unappropriated within the new state.²⁴ With this solemn agreement,²⁵ Congress established a pattern used to admit²⁶ nearly all post-Ohio states²⁷ into the Union.²⁸

Following Ohio, Congress admitted Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri and Arkansas in substantively the same way it had admitted Ohio into the Union—by granting each new state the sixteenth section in every township to benefit local education.²⁹ The initial federal grants assisted these new states in financing the education of their growing citizenry. These grants also provided land for settlers pouring over the Appalachians into the expanding frontier.

²⁰ See COGGINS ET AL., *supra* note 9, at 56.

²¹ *See id.*

²² See JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE* 24–25 (1996).

²³ *See* Ohio Enabling Act, 2 Stat. 173, 175 (1802).

²⁴ *See id.*

²⁵ *See* Alabama v. Schmidt, 232 U.S. 168, 173 (1914).

²⁶ According to this pattern:

[a] Territory could not be admitted to the Union until its population reached 60,000

At that time, popular opinion willing, people of the Territory could send a petition to Congress through the Territorial legislature or its delegate in Congress, or both, requesting admission. If the petition was favorably received, Congress would pass an *enabling act* authorizing a constitutional convention in the state-to-be. Then the state constitutional convention had to meet and draft a governing document, which would be subjected to popular referendum in the Territory. If that passed, the constitution would be sent to Congress for its acceptance, after which the state would be admitted on an equal footing with all others.

SOUDER & FAIRFAX, *supra* note 22, at 18.

²⁷ All states admitted after 1802 except Maine, Texas, West Virginia and Hawaii received trust land grants from the federal government. Maine and West Virginia did not receive grants because they were formed from pre-existing states. Texas and Hawaii were both independent nations before they were admitted into the Union. *See* Hager, *supra* note 12.

²⁸ *See* SOUDER & FAIRFAX, *supra* note 22.

²⁹ *See id.* at 20–21.

C. Michigan and the First "Trust" Lands

After more than thirty years of school grants to new states, a substantive change occurred in public land history when Congress admitted Michigan in 1837. Unlike previously admitted states that gave an honorary promise to use school land grants for education, Michigan strengthened its commitment to fulfilling this purpose by including directly in its state constitution restrictions on the use of the revenues from the sale of school lands.³⁰ In seeking statehood, Michigan's state constitution was written in much the same manner as in preceding states; however, the drafters of the Michigan Constitution included a provision requiring the state to place revenues from the sale of school lands into a permanent fund.³¹ The fund would hold proceeds from the sale of school lands and accrued interest from the fund could be distributed to pay for school operations.³² Thus, the permanent fund would provide a source for the operation and maintenance of the common schools.³³

After Michigan, nearly all subsequent states accepted school grants using language similar to Michigan's permanent fund language. Louisiana even amended its constitution to include language requiring it to place school land grant sales revenues into a permanent fund.³⁴ People have argued that Michigan's constitutional language creating a permanent fund represented the first time the idea of a trust ever entered into a school grant agreement.³⁵ In fact, courts often see in the words "permanent fund" a desire by earlier legislators to create a trust obligation rather than a mere honorary obligation to use school land revenues for educational purposes.³⁶

The next substantive change in the school grant process occurred in 1850 when Congress increased from one to two the number of sections granted to newly created states for education.³⁷ Congress made the change because it realized that states in the West, unlike the relatively uniform geography of states east of the 100th meridian, possessed a rugged, arid and difficult geography.³⁸ In the East, demand was high for valuable agricultural school sections; however, the school sections in the West were often of little value to the average settler. Thus, to offset

³⁰ See *id.* at 31-32.

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.* at 32.

³⁵ See *id.* at 31.

³⁶ See *Branson*, 161 F.3d at 634 (holding that the words "permanent fund" indicate "that Congress intended to create a fiduciary obligation for the state of Colorado to manage the school lands in trust for the benefit of the state's common schools").

³⁷ See *Hager*, *supra* note 12, at 40.

³⁸ See *id.*

the apparent inequity, Congress granted western states more sections of school lands.³⁹

D. Colorado and the Creation of a Federal Trust

One of the western states that received two sections per township was Colorado. Prior to Colorado's admission, the federal obligations, if any, that attached to school lands were largely honorary in nature. If there were any restrictions on the disposition or use of school lands, it came from the state's constitution, not federal legislation or a federal obligation. The situation changed, however, with the admission of Colorado into the Union.⁴⁰

In 1875, Congress passed the Colorado Enabling Act.⁴¹ For the first time, a federal enabling act included language requiring the establishment of a permanent fund for revenues derived from the school land grants.⁴² The effect of this change in federal policy is open to debate. Some believe that Congress' inclusion of the "permanent fund" language manifests a congressional intent to federalize the obligation that a state manage school lands consistent with trust principles.⁴³ The recent *Branson* decision reasons that Colorado's admission represented the first time the federal government made "explicit restrictions on how the school lands could be managed or disposed."⁴⁴ According to *Branson*, the Colorado Enabling Act differed from previous enabling acts in that Congress enumerated specific duties and conditions which had to be followed before Colorado could receive its school lands.⁴⁵ The duties and conditions set the minimum price for the sale of the lands, determined how the income from the sales was to be held, and established what was to be done with the interest that accrued on money held from the sale of trust lands.⁴⁶ These conditions, the Tenth Circuit held, "create[d] a fiduciary obligation for the state of Colorado to manage the school lands in trust for the benefit of the state's common schools."⁴⁷

If the Tenth Circuit's view in *Branson* is correct, then the Colorado Enabling Act actually created a federal trust. Thus, with Congress' increasingly restrictive land grants for newly admitted states, states admitted after Colorado probably hold their school lands subject to a federal trust.⁴⁸ The implications of this

³⁹ See *id.*

⁴⁰ See generally *Branson*, 161 F.3d 619.

⁴¹ See Colorado Enabling Act, 18 Stat. 474 (1875).

⁴² See Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 821 (1992).

⁴³ See *Branson*, 161 F.3d at 633-34.

⁴⁴ *Id.* at 634.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ The following states entered the Union between Colorado in 1876 and Arizona in 1912: Montana, North Dakota, South Dakota and Washington in 1889; Idaho and Wyoming in 1890; Utah in 1896; and Oklahoma

proposition have yet to be tested; however, the Tenth Circuit may have defined the line where the federal obligation attaches, a line the Supreme Court has been hesitant to define.⁴⁹

E. The Arizona-New Mexico Grants

After Colorado, Congress continued to place more sale and use restrictions in the enabling acts of subsequently admitted states.⁵⁰ The specificity of the federal trust requirements and obligations culminated in 1912 when Congress drafted the Arizona-New Mexico Enabling Act (Arizona-New Mexico Act),⁵¹ which contained the first express declaration by Congress that school lands were to be held in trust.⁵² Moreover, the Arizona-New Mexico Act contained the most detailed and restrictive school land grant language up to that point.⁵³ Not only could Arizona and New Mexico not sell their trust lands at below market value, but the trust lands could not be "leased, in whole or in part, except to the highest and best bidder at a public auction."⁵⁴ Congress went on to specify the procedures Arizona and New Mexico had to follow when leasing or selling their lands, and even placed explicit requirements on how many weeks notice the state had to give the public before a sale of trust lands could occur.⁵⁵ As if all these restrictions were not enough, Congress, as a final goodwill gesture to these soon-to-be admitted states, called upon the United States Attorney General to enforce the provisions of the Arizona-New Mexico Act and gave continuing authority to the Department of Justice to enforce all the provisions of the act.⁵⁶

The unique nature of the Arizona-New Mexico Act has made these trust land grants the subject of many lawsuits. As a result, as trust land law has developed over the years, the New Mexico and Arizona grants have formed the basis for a great deal of Supreme Court precedent.⁵⁷ The Supreme Court opinions construing the Arizona-New Mexico Act have created a tendency in lower federal courts and state courts to analyze trust land law from the perspective that all trust land grants contained similar enabling act language and restrictions as the Arizona-

in 1907. See SOUDER & FAIRFAX, *supra* note 22, at 21.

⁴⁹ Compare *Branson*, 161 F.3d at 634 (declaring Colorado's enabling act created for the first time explicit restrictions on the management and disposal of school lands) with *Papasan v. Allain*, 478 U.S. 265, 289 n.18 (1986) ("[I]t 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 substance of all of these grants is the same.").

⁵⁰ See *Branson*, 161 F.3d at 633-34.

⁵¹ 36 Stat. 557 (1910).

⁵² See SOUDER & FAIRFAX, *supra* note 22, at 33.

⁵³ See *id.* at 30-31, 33.

⁵⁴ 36 Stat. 557, 563 (1910).

⁵⁵ See *id.* at 563-64.

⁵⁶ See *id.* at 564-65. See also SOUDER & FAIRFAX, *supra* note 22, at 26.

⁵⁷ See SOUDER & FAIRFAX, *supra* note 22, at 34-36.

New Mexico Act.⁵⁸ This phenomenon has resulted in confusing decisions and a sense among trust land managers that the only choice they have in making management decisions is to comply with precedent construing obligations only found in the enabling act of two states. To better understand this notion held by many states, it is necessary to evaluate the development of school land jurisprudence.

III. DEFINING THE LEGAL OBLIGATIONS: THE JUDICIAL BACKGROUND

Trust land managers often cite two principle Supreme Court cases to bolster the claim that they must manage trust lands in a way that brings maximized revenue returns to the lands' beneficiaries. The two most prominent Supreme Court cases, *Ervien v. United States*⁵⁹ and *Lassen v. Arizona Highway Department*,⁶⁰ construed the unique Arizona-New Mexico Act.

A. *Ervien*: Strictly Interpreting the Federal Trust

In *Ervien*, the issue arose when New Mexico sought to use trust revenues to advertise the state's many resources.⁶¹ The United States Attorney General brought suit, under his special power contained in the Arizona-New Mexico Act, to enforce the federal trust provision prohibiting the use of "money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands . . . were granted or confirmed."⁶² The Court held that a plain reading of the Arizona-New Mexico Act prohibited New Mexico from spending trust funds on anything other than the beneficiaries.⁶³ New Mexico did not dispute that it was not bound by the federal trust restrictions, but rather argued that traditional trust principles allowed it to spend trust revenues prudently if such expenditures could reasonably bring more money into the trust.⁶⁴ The Court rejected New Mexico's argument and said that even though it may be prudent for a private trustee of land to expend trust funds to promote the land's advantages, the express trust language of the Arizona-New Mexico Act forbade such expenditures.⁶⁵ Thus, New Mexico learned of the strength of the federal trust

⁵⁸ See *id.* at 34.

⁵⁹ 251 U.S. 41 (1919).

⁶⁰ 385 U.S. 458 (1967).

⁶¹ See *Ervien*, 251 U.S. at 46.

⁶² Arizona-New Mexico Enabling Act, 36 Stat. 557, 563 (1910).

⁶³ See *Ervien*, 251 U.S. at 47-48.

⁶⁴ See *id.* at 47.

⁶⁵ See *id.* at 47-48.

obligation and of the stringent management required for trust lands subject to the federal trust.

B. Lassen: The Maximization of Revenue Principle

The next case that truly defined what has become known as the “maximization of revenue” principle was *Lassen*, where the United States Supreme Court addressed Arizona’s practice of placing highways over school trust sections without compensating the trust for the loss of land the roads occupied.⁶⁶ The Arizona Highway Department argued that the construction of a road added value to the trust lands and that it should be presumed that the enhancement from a road outweighed the value of the land occupied by the road.⁶⁷ The United States Attorney General did not entirely disagree.⁶⁸ He took only a slightly different position, arguing that the enhancement in value from the road should be considered, but insisting that there should not be a presumption that the road’s value outweighed the value of the land occupied⁶⁹—the position adopted by the Arizona Supreme Court in the earlier case.⁷⁰ Curiously, the United States Supreme Court rejected both parties’ positions and declared that in order to fulfill the purposes of the Arizona-New Mexico Act, the “beneficiaries [must] ‘derive the full benefit’ of the grant.”⁷¹ The Court held that the enhancement in value added to the affected parcel could not be considered and that the Arizona Highway Department had to pay the school trust fund the full value of the land that the newly constructed road now occupied.⁷²

The principle that arose from the *Lassen* decision was that trust beneficiaries are entitled to the full benefit of their grant. The Court once again rejected, as it had in *Ervien*, any notion that Arizona as trustee could weigh values and make decisions that might require the expenditure of trust assets, even though the expenditures would benefit the asset by promoting something that would increase the value of the whole—in this case a road.

The Court reaffirmed the idea that the explicit nature of the restrictions in the Arizona-New Mexico Act showed Congress’ concern that the trust lands be administered in a manner that assures maximum monetary return for the Arizona and New Mexico trust lands.⁷³ Although this is the rule for Arizona and New Mexico, it is not necessarily the rule for other states that received their trust lands

⁶⁶ See *Lassen*, 385 U.S. at 460.

⁶⁷ See *id.* at 465.

⁶⁸ See *id.* at 466.

⁶⁹ See *id.* (noting that both defendant’s and plaintiff’s formula for compensating the trust was too “narrow”).

⁷⁰ See *id.* at 465.

⁷¹ *Id.* at 468 (quoting H.R. REP. NO. 152, at 3 (1910)).

⁷² See *id.* at 469.

⁷³ See *id.*

with grants and enabling acts that do not approach the specificity or restrictions found in the Arizona-New Mexico Act.⁷⁴ However, this fact, as will be shown later in this article, has been glossed over by many lower federal and state courts as they have tried to resolve legal questions affecting trust lands in states other than Arizona and New Mexico.⁷⁵

C. *Post-Lassen Decisions*

After *Lassen*, state courts throughout the West began interpreting their own states' enabling acts in a rather bizarre way. Instead of strictly interpreting the plain language of the individual state's enabling act as the United States Supreme Court did in *Ervien* and *Lassen*,⁷⁶ courts chose to read into their own states' enabling acts principles and language that are found only in the Arizona-New Mexico Act.⁷⁷ Foremost among these principles was the idea that trust lands must only be managed in ways that maximize revenue.⁷⁸ As one commentator noted,

[o]nce the Supreme Court decided *Lassen*, state courts all over the West, irrespective of the language of their particular enabling act or state constitution, fell into line. Thus the least typical of the accession bargains has become central in defining all of them. A number of factors have contributed to this result Lawyers and judges have, not unpredictably, looked to familiar trust principles and previous decisions to unravel claims and counterclaims about the school lands.⁷⁹

An example of a state applying the *Lassen* principles with little regard for the specifics of its own enabling act occurred in Washington. In *County of Skamania v. State*,⁸⁰ the Washington Supreme Court adopted language from *Lassen*, holding that the state had a duty to maximize revenues and that the legislature could not pass a bill excusing timber companies from paying fees they owed for trust timber contracts.⁸¹ The legislature had granted the contract relief in face of an economic tragedy that had the potential of harming a major state

⁷⁴ See SOUDER & FAIRFAX, *supra* note 22, at 32.

⁷⁵ See *id.* at 32-33.

⁷⁶ Even though the Supreme Court strictly construed the plain language of the Arizona-New Mexico Act in *Ervien* and *Lassen*, the Court did not do so in another school lands case. See *Andrus v. Utah*, 446 U.S. 500 (1980) (ruling that section 7 of 1934 Taylor Grazing Act modified federal government's express promise to give Utah 223,000 acres or other equivalent land in lieu of school sections for those sections already reserved or taken up by private entry). The Supreme Court's inconsistency in strictly applying an enabling act in some cases (*Ervien* and *Lassen*) and not doing so in others (*Andrus*) leaves state and federal courts to choose whichever course they wish.

⁷⁷ See SOUDER & FAIRFAX, *supra* note 22, at 34-36.

⁷⁸ See *id.* at 34.

⁷⁹ *Id.* at 34-35.

⁸⁰ 685 P.2d 576 (Wash. 1984).

⁸¹ See *id.* at 583.

industry.⁸² In the 1970s, timber companies in Washington agreed to buy trust timber at prices between \$300 and \$800 per thousand board feet.⁸³ In the early 1980s, when the contracts were due, this timber was valued at only \$175 per thousand board feet.⁸⁴ Washington feared that requiring payment on the contract would devastate the state's economy.⁸⁵ Accordingly, the legislature passed a bill canceling the contracts so that the timber industry would not be adversely affected.⁸⁶ The Washington Supreme Court held that the relief act violated the principle that the "state as trustee may not use trust assets to pursue other state goals."⁸⁷ Rather than deciding that the lands were held in trust based on state law only, the state court went on to find that although *Lassen* "involved a different enabling act, the principle of [*Lassen*] applies to Washington's Enabling Act."⁸⁸ The Washington high court's use of the *Lassen* case to show an existence of a federal trust under the Washington Enabling Act did a great disservice to trust land jurisprudence. Instead of looking to the actual text of the Washington Enabling Act, the *Skamania* court merely looked to a case construing the Arizona-New Mexico Act, an act that is demonstrably more specific and restrictive than Washington's enabling act.⁸⁹

Some may argue that it is of little import whether the trust attached to school trust lands is federally or state created. However, this was not the case in the recent *Branson* decision where Colorado made the argument that they could change their trust responsibilities through a constitutional amendment.⁹⁰

In 1993, Utah joined the ranks of other states⁹¹ that had declared the maximization of revenue duty as incumbent on trust land managers, when the Utah Supreme Court decided *National Parks and Conservation Association v. State*.⁹² In *National Parks*, an environmental organization brought suit to challenge a land exchange between Garfield County and the State Land Board.⁹³ The state trust land being exchanged was located within Capitol Reef National Park.⁹⁴ Among other claims, the National Parks and Conservation Association (NPCA) argued that the Director of the State Land Board⁹⁵ erred in ruling that the Division "could not give

⁸² See *id.* at 578.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.* at 578-79.

⁸⁷ *Id.* at 582.

⁸⁸ *Id.* at 580.

⁸⁹ See *id.*

⁹⁰ See *Branson*, 161 F.3d at 635.

⁹¹ See generally *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982); *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985).

⁹² 869 P.2d 909 (Utah 1993).

⁹³ See *id.* at 911.

⁹⁴ See *id.*

⁹⁵ In 1994 the School and Institutional Trust Lands Administration (SITLA) was created and is responsible for the management of state trust lands. See UTAH CODE ANN. § 53C-1-201 (1997).

preference to scenic, aesthetic and recreational values” because of its duty to obtain maximum revenue for the trust beneficiaries.⁹⁶ NPCA also argued that a plain reading of the Utah Enabling Act and the Utah Constitution requires that all revenues from the disposition of trust lands must be used for the benefit of the common schools; however, trustees were free to manage and hold school lands in trust for the people rather than the schools.⁹⁷ The Utah Supreme Court rejected NPCA’s arguments.⁹⁸ The court explained that the Utah Enabling Act and the Utah Constitution should be read together, and held that the state has a duty as “trustee to maximize the monetary return of school trust lands.”⁹⁹ In effect, the court ruled that the express terms of the Utah Constitution at the time only required the state to hold trust lands in “trust for the people, to be disposed of as may be provided by law”¹⁰⁰ However, because the Supreme Court ruled that the Arizona Enabling Act required the maximization of revenue theory applied in *Lassen*, it compelled a finding that Utah must maximize revenue even though a literal reading only requires that the money received from the disposition of trust lands goes to the trust.¹⁰¹ Despite the fact that the constitutional language only applies to disposition of lands, the *National Parks* court held that the state must manage its trust lands according to the maximization of revenue principle detailed in *Lassen*.¹⁰²

Although the Utah Supreme Court upheld the maximization of revenue standard for trust land management, it indicated that there could be instances where non-monetary values override the need for maximized revenue return.¹⁰³ The court stated: “[t]he Division should recognize that some school lands have unique scenic, paleontological, and archaeological 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.”¹⁰⁴ While this dictum has not yet been tested in Utah courts, it does seem to stand for the proposition that some values, even non-monetary values, can be considered in satisfying a state land trustee’s obligation to its beneficiaries.

⁹⁶ *National Parks*, 869 P.2d at 916–17.

⁹⁷ See *id.* at 920–21. For a complete discussion of the wording distinctions between the Utah Constitution and the Utah Enabling Act, see Wayne McCormack, *Land Use Planning and Management of State School Lands*, 3 UTAH L. REV. 525, 532 (1982).

⁹⁸ See *National Parks*, 869 P.2d at 921.

⁹⁹ *Id.* at 920.

¹⁰⁰ UTAH CONST. art. XX, § 1 (1997). It must be noted that in the 1998 November elections the people of Utah agreed to a change of the Utah Constitution. Now the Utah Constitution declares: “[l]ands granted to the State under Sections 6, 8, and 12 of the Utah Enabling Act, and other lands which may be added to those lands pursuant to those sections through purchase, exchange, or other means, are declared to be *school and institutional trust lands*, held in trust by the State for the respective beneficiaries and purposes stated in the Enabling Act grants.” UTAH CONST. art. XX, § 2 (1998) (emphasis added).

¹⁰¹ See McCormack, *supra* note 97.

¹⁰² See *National Parks*, 869 P.2d at 918–21.

¹⁰³ See *id.* at 921.

¹⁰⁴ *Id.*

In sum, it is clear that many courts pay little attention to whether a trust is created by federal or state law. Although this may seem trivial, the nature of the trust may determine whether a management plan incorporating ecosystem or stewardship values can be implemented. Before evaluating the many management options available to the states, however, it is necessary to briefly highlight a few of the emerging management theories that impact the way decisions are made regarding the public lands.

IV. ECOSYSTEM MANAGEMENT AND NEW THEORIES OF LAND STEWARDSHIP

Although none of the many emerging management theories, such as ecosystem management, have been precisely defined by any legislative action on the scale of MUSY¹⁰⁵ or FLPMA,¹⁰⁶ changes are occurring on our public lands. Traditionally, land management has been a process for controlling a carefully defined area to promote a single or narrow set of uses. Timber development and grazing were, and many argue still are, the driving forces behind traditional management decisions. New management theories such as ecosystem management and Enlibra¹⁰⁷ represent a change from the traditional revenue resource management focus. For state trust lands, a change from a revenue focus to a non-revenue focus is something entirely new. How trust lands will be affected by the increasing focus on non-revenue uses on neighboring public lands is a question that remains to be answered. Regardless, it is important to understand the principles at the heart of these new management theories so that agencies can determine which management options will help states manage their trust lands so as to protect the interests of trust beneficiaries and the environment alike.

According to BLM, ecosystem management is "the integration of ecological, economic, and social principles to manage biological and physical systems in a manner that safeguards the long-term ecological sustainability, natural diversity, and productivity of the landscape."¹⁰⁸ The Chief of NFS said in 1992 that ecosystem management means "blend[ing] the needs of people and environmental values in such a way that the National Forests and Grasslands represent diverse, healthy, productive, and sustainable ecosystems."¹⁰⁹ Another expert on forestry said ecosystem management "differs from the multiple-use concept in that it focuses on inputs, interactions, and processes as well as on uses or outputs."¹¹⁰

¹⁰⁵ Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (1994).

¹⁰⁶ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1994).

¹⁰⁷ See generally Western Governors' Association, *supra* note 3.

¹⁰⁸ BUREAU OF LAND MANAGEMENT, ECOSYSTEM MANAGEMENT IN THE BLM: FROM CONCEPT TO COMMITMENT 1-2 (1994).

¹⁰⁹ Memorandum from F. Dale Robertson, *supra* note 2.

¹¹⁰ John C. Gordon, *From Vision to Policy: a Role for Foresters*, 92 J. FORESTRY 16, 18 (1994).

Clearly a principle theme of ecosystem management is that the environment is interconnected in ways we cannot begin to comprehend.¹¹¹ This interconnectedness has compelled some to argue the "irrelevance of political boundaries in the face of natural processes."¹¹² Thus, ecosystem management proponents argue that because ecosystems do not respect political boundaries, a broader approach to land management is needed to avoid fragmentation and differing management strategies.¹¹³ Another element of ecosystem management is the belief that "[e]cosystems are not only more complex than we think, but more complex than we can think."¹¹⁴ To attack this complexity, many ecosystem management proponents look to science to provide answers to questions, such as what harms the biotic elements in an area. Furthermore, many argue that preservation should be the preferred management strategy for public lands in light of the assertion that ecosystems are infinitely more complex than can be understood.¹¹⁵

Both of these themes could prove problematic for management of state trust lands. First, state trust lands are usually small, fragmented parcels of land. If public land managers like BLM and NFS are moving toward implementing ecosystem management, as it appears they are, this could make the continuation of traditional trust management problematic. Furthermore, to prefer preservation over development will cause problems for states whose trust mandates have been judicially interpreted as calling for management practices that maximize revenue. To illustrate, suppose a mineral discovery makes a trust section valuable as a mine or some other heavy extractive use. Although the trust section may be most valuable as a mine, what happens if the neighboring federal land manager decides that a mine would conflict with a riparian restoration area or habitat conservation area for a sensitive species? Under traditional trust doctrine, if the mine would maximize revenue for that section the trustee must allow its development, regardless of a competing restoration or habitat plan. Such a trust mandate makes consensus building difficult and negotiations arduous.

States, however, are not completely without options in managing trust lands. Some states are experimenting with a number of plans to implement ecosystem and other management innovations. An analysis of these plans illustrates some problems states have faced in establishing more diverse management techniques. These options also show the creativity and determination

¹¹¹ See Reed F. Noss, *Some Principles of Conservation Biology as They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893, 898 (1994).

¹¹² Robert B. Keiter, *Beyond the Boundary Line*, 65 COLO. L. REV. 293, 301 (1994).

¹¹³ See Noss, *supra* note 111, at 905-06.

¹¹⁴ *Id.* at 898 (citing FRANK E. EGBER, *THE NATURE OF VEGETATION: ITS MANAGEMENT AND MISMANAGEMENT* (1977)).

¹¹⁵ See *id.*

many states have developed in managing trust lands with an eye toward the long-term condition of the land.

V. MANAGEMENT OPTIONS FOR STATE TRUST LANDS

Although the principles in *Ervien* and *Lassen* seem to indicate that revenue values are the only values a state holding trust land subject to a federal trust can pursue, there are still a number of management options that states can consider that emphasize values other than purely revenue values. In fact, some management options listed below, such as land exchanges, are not new innovations but have been used for years to help improve management efficiency as well as preserve parcels of sensitive land. Other management options are so new that they have only been tried in a few states and have been greeted by lawsuits from various opponents.¹¹⁶ These management options can be broken into four general categories. The first option is for states to pursue land exchanges that consolidate trust land sections to improve management efficiency, thereby eliminating conflicting management programs and fragmentation in sensitive areas. The second option is to remove the trust requirement through the leasing or sale of trust property to private parties or public entities. The third option is to pursue constitutional amendments to state constitutions to modify state imposed trust restrictions. The final option is to pass police power regulations such as zoning, reclamation requirements, and other restrictions that serve legitimate governmental objectives and that only incidentally affect use plans on trust lands. Each of these management options warrants discussion and is reviewed below.

A. Land Exchanges

The traditional way to handle conflicts between state and federal land managers has been to conduct land exchanges.¹¹⁷ Land exchanges allow for compromise on seemingly unresolvable disputes and generally keep one side from stalling the others' management plan. The primary goal in a state trust land exchange is to consolidate scattered parcels of state land so that a trust section is not an isolated island in a sea of federally owned land.

Recently, one such exchange occurred in Utah where the federal government agreed to exchange federal lands for state trust sections located within federal reservations.¹¹⁸ The exchange process, however, is not an easy process to complete. Utah, for example, had for over twenty years tried to complete an exchange of many of its school sections located within federal reservations for

¹¹⁶ See, e.g., *Branson*, 161 F.3d 619.

¹¹⁷ See COGGINS ET AL., *supra* note 9, at 309-10.

¹¹⁸ See Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (1998).

federal lands near cities and revenue producing lands. Utah had repeatedly argued that use restrictions placed on the lands surrounding its state trust sections made efficient and effective management of these lands impossible.¹¹⁹ The federal government, on the other hand, had tired of complaints about management conflicts and threats to develop state parcels within federal reservations.¹²⁰ Despite the seemingly mutual interests in conducting an exchange and a congressional instruction to the Department of Interior to cooperate,¹²¹ the entire process stalled.

Ironically, the creation of the controversial Grand Staircase-Escalante National Monument¹²² actually made possible a land exchange that both Congress and Utah had been seeking for years. The controversy that led to the exchange began when, during the 1996 presidential campaign, President Clinton created the Grand Staircase-Escalante National Monument out of valuable resource lands in southern Utah.¹²³ The monument caused a local outcry; so, in an effort to appease those upset by its creation, Clinton promised to exchange state trust lands trapped inside the new federal reservation. This public promise, along with the determined efforts of Utah's leaders to hold Clinton to his vow, resulted in the exchange of 376,739 acres of state trust lands for more than 139,000 acres of federal land and \$50 million.¹²⁴ This exchange was part of a long history of attempts by Utah to exchange many of its trust parcels for more manageable, larger blocks of land.¹²⁵

Utah's recent experience is merely one example of how difficult land exchanges are to accomplish. There are a variety of reasons, but most frequently disputes arise over the federal method of determining the value of lands to be exchanged.¹²⁶ Other problems occur when interest groups feel their interests or political positions would be impaired if the proposed exchange took place. One example of this problem occurred over fifteen years ago in Utah. In 1980, Governor Scott Matheson announced Project BOLD, which was an attempt to consolidate state school sections—including those located on the public domain.¹²⁷

¹¹⁹ See generally *Andrus v. Utah*, 446 U.S. 500 (1980).

¹²⁰ See Scott T. Evans, *Revisiting the Utah School Trust Lands Dilemma: Golden Arches National Park*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 347, 356 (1991).

¹²¹ See Utah Schools and Lands Improvement Act of 1993, Pub. L. No. 103-93, 107 Stat. 995 (1993).

¹²² See 61 Fed. Reg. 50,223 (1996).

¹²³ See *id.*

¹²⁴ See Jenifer K. Nii, *Land swap is a done deal*, DESERET NEWS, Jan. 9, 1999, at B1.

¹²⁵ Senator Robert F. Bennett's comments on the floor of the Senate give a sense of just how much time a federal-state land exchange requires:

As I think about the issue of swapping land, school trust lands in Utah for other Federal lands, I realize that this is an issue my father worked on in this Chamber over 40 years ago. Governor Matheson . . . tried an initiative on this same issue while he was the Governor some 20 years ago. To see it finally come to fruition now brings me a great sense of satisfaction.

144 CONG. REC. S12101 (daily ed. Oct. 9, 1998) (statement of Senator Bennett).

¹²⁶ See Evans, *supra* note 120, at 360-61.

¹²⁷ See SOUDER & FAIRFAX, *supra* note 22, at 268-69.

The hope was that a few large tracts would eliminate the managerial headache of overseeing thousands of isolated trust sections scattered throughout the federal lands.¹²⁸ This aggressive plan, however, was never carried out. It was eventually abandoned after special interest groups expressed fears that if they lost the state sections within federal lands their ability to influence federal management decisions would diminish.¹²⁹ Land exchanges, however, are not hopelessly impossible to accomplish. As the Utah Schools and Lands Exchange Act¹³⁰ proved, political pressure and deal-making can speed up the entire process.

Another example of a land exchange born from political compromise occurred in the mid-1990s when the State of Utah sought to sell trust lands in Washington County.¹³¹ Several trust parcels in Washington County had appreciated greatly in value and, because the parcels were located near the expanding city of St. George, were particularly attractive to the city and developers. The only problem with the state's plan to sell the parcels was that the land in question also served as the habitat for a federally listed threatened species—the desert tortoise.¹³² Out of concern for the tortoise, BLM and United States Fish and Wildlife Service (USFWS) met with state trust land officials to discuss the issue. The often-opposed groups agreed to a series of exchanges that allowed the state to sell as trust lands certain parcels of land previously held by the federal government.¹³³ The exchange allowed the trust beneficiaries to receive revenue from the sale of valuable lands near St. George. Similarly, BLM and USFWS benefitted by acquiring prime desert tortoise habitat.¹³⁴ The desert tortoise exchange is instructive of how federal and state land managers, when they agree on a common goal, can overcome the usual administrative exchange hurdles that can stymie proposed exchanges. If land exchanges are to be used in the future as tools for ecosystem or stewardship management, the key will be to convince both state and federal land managers that the proposed exchanges improve management and ecosystem health and satisfy each groups' statutorily created mandates.

There is another type of land exchange that warrants discussion. It is not the traditional federal-state exchange, but rather an exchange that the state conducts with itself. In *National Parks*, the majority noted in dictum that “when economic exploitation of such [trust] lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state

¹²⁸ See *id.* See also UTAH DEPARTMENT OF NATURAL RESOURCES, *supra* note 7, at 16–21.

¹²⁹ See COGGINS ET AL., *supra* note 9, at 310.

¹³⁰ Pub. L. No. 105-335, 112 Stat. 3139 (1998).

¹³¹ See STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, *supra* note 5, at

14.

¹³² See U.S. Fish and Wildlife Service, *Region 6 Listed Species by State, Endangered Species* (visited Apr. 12, 1999) <<http://www.fws.gov/r9endspp/statl-r6.html#lnkUT>>.

¹³³ See STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, *supra* note 7, at

14.

¹³⁴ See *id.*

lands for school lands."¹³⁵ The Utah Supreme Court postulated that by exchanging state lands for trust lands, the state could satisfy its trust mandate while preserving a non-revenue value.¹³⁶ For example, the State of Utah owns 3,745,015 acres of trust land, 1,640,744 acres of submerged or intermittently submerged lands, 72,895 acres of state park land and 397,831 acres of wildlife lands.¹³⁷ In *National Parks*, the Utah Supreme Court suggested that should a trust section of land be better suited for a non-revenue use, the state may need or desire to conduct an exchange of that trust section for land it holds in one of its other governmental capacities.¹³⁸ This would allow the trust to receive the revenue that it is owed under Utah's trust obligations, while at the same time allowing the state to protect a non-resource value.

In sum, if a state chooses the land exchange method to implement ecosystem management principles it must find a common value and build consensus with other federal land agencies in order to accomplish a trade. As long as the trade benefits the trust and is politically feasible through consensus, exchanges can be a tool for aiding one part of ecosystem management—the creation of large undisturbed blocks of land that avoid management fragmentation.

B. Removing the Revenue Requirement: Buying Out the Trust

The second option states may choose to pursue is to initiate a program where private individuals or governmental entities purchase the trust obligation. To purchase a trust obligation, a group pays the trust the amount of money that would flow to the trust if the land was subjected to an extractive or other revenue producing use. This was mentioned in *National Parks* where the court stated, "[i]ndeed, it might be necessary for the state to buy or lease the school 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."¹³⁹ Although Utah has not yet pursued this option, general counsel for the agency charged with managing Utah's trust lands recently wrote:

[SITLA] is currently developing plans for soliciting corporate and individual contributions for formal protection of scattered sections of trust lands within BLM wilderness study areas, enabling the agency to receive monetary benefit from lands that are trapped by the WSA

¹³⁵ *National Parks*, 869 P.2d at 921.

¹³⁶ *See id.*

¹³⁷ *See* STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, *supra* note 5, at

¹³⁸ *See National Parks*, 869 P.2d at 921.

¹³⁹ *Id.*

designation without the cost and time of exchanging the lands with BLM.¹⁴⁰

Arizona and Washington have already begun programs for leasing or selling trust lands for conservation purposes.¹⁴¹ These programs provide an option to states that have determined that land exchanges are not feasible. In Washington, the state land board recently arranged for nearly \$20 million in donations from private parties to finance the removal of 30,000 acres of Loomis State Forest from trust status. This payment, made by five conservation groups, has allowed for the preservation of both old growth forest and prime lynx habitat.¹⁴² Similarly, Arizona has in place a program entitled the Arizona Preservation Initiative (API).¹⁴³ API allows the state land board charged with managing Arizona's trust lands to inventory and make available for sale or lease trust lands that meet the criteria established by the legislature for designation as conservation lands.¹⁴⁴ The procedure is simple. An interest group, or even a state agency such as the parks department or wildlife division, nominates a parcel of trust land for conservation designation. The land board reviews the land to see if it meets conservation standards.¹⁴⁵ Usually, designation depends upon existing leases and whether the proposed land is close to an urban center. If the board is satisfied that the land meets the given conservation criteria, the land is set aside for two years to give the current lessees time to acquire different leases.¹⁴⁶ Additionally, the two year period gives the nominator time to raise the necessary funds to either buy or lease the trust land for conservation purposes.¹⁴⁷

The attractive part of the conservation lease option is that it gives state agencies and private groups the opportunity to raise funds and preserve lands they find environmentally sensitive. The obvious difficulty is financing such leases or sales. Nonetheless, conservation leases and purchases are examples of where both the beneficiaries and the successful lessees or purchasers can come to a mutually agreeable solution—the trust receives its money and the conservation proponents have an opportunity to affect management on trust lands.

¹⁴⁰ John W. Andrews, *State Trust Lands—Reconciling the Public Interest in Environmental Protection with Trust Management Principles*, 10-11 (1998) (unpublished manuscript, on file with author).

¹⁴¹ See *id.* at 9. See also *API Preserve Initiative Background Information* (revised Jan. 12, 1998) <http://www.land.state.az.us/asld/htmls/api_bkgrd.html>.

¹⁴² See Andrews, *supra* note 140, at 10.

¹⁴³ See *API Preserve Initiative Background Information*, *supra* note 141.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

*C. Constitutional Amendment to Modify
the Trust/Revenue Requirement*

One of the most innovative attempts to change the management focus for state trust lands occurred in Colorado. In November 1996, Colorado voters passed the Stewardship Trust Amendment¹⁴⁸ (Amendment 16) to their state constitution.¹⁴⁹ The theory behind Amendment 16 was that the trust duty owed the trust land beneficiaries arises from the state constitution and not Colorado's enabling act.¹⁵⁰ Accordingly, the Amendment 16 drafters posited that an amendment to the state constitution that modified the state's management duty was a sovereign right Colorado could choose to exercise.¹⁵¹ The issue of whether there is a federal trust or a state trust can be important for a state trying to develop its management philosophy. A state trust obligation can be changed through a state constitutional amendment. A federal trust, however, is more restrictive and courts usually apply the principles found in *Ervien* and *Lassen* to such obligations.

Amendment 16 specifically calls for the placement of 300,000 acres of Colorado's 2,857,593 acres of trust land into a Stewardship Trust.¹⁵² The stated goal of the Stewardship Trust is to:

[p]rotect and enhance the long-term productivity and sound stewardship of the trust lands held by the board, by, among other activities: Establishing and maintaining . . . land . . . valuable primarily to preserve long-term benefits . . . to maximize options for continued stewardship . . . by permitting only those uses . . . that will protect and enhance the beauty, natural values, open space and wildlife habitat thereof . . .¹⁵³

Shortly after the passage of Amendment 16 by a narrow margin of voters,¹⁵⁴ a school district and some local schoolchildren sued in United States District Court to stop the implementation of the amendment.¹⁵⁵ The plaintiffs alleged that by "implementing a state constitutional measure that contradicts the terms of the Colorado Enabling Act, the defendants have violated the United States Constitution."¹⁵⁶ The plaintiffs' argument was based on a statement in the Colorado

¹⁴⁸ See *Branson*, 161 F.3d at 627.

¹⁴⁹ See COLO. CONST. art. IX, § 10 (amended 1996).

¹⁵⁰ See *Branson*, 161 F.3d at 633-36.

¹⁵¹ See *id.*

¹⁵² See *id.* at 627. See also SOUDER & FAIRFAX, *supra* note 22, at 50.

¹⁵³ COLO. CONST. art. IX, § 10(b) (amended 1996).

¹⁵⁴ On November 5, 1996, Colorado voters approved Amendment 16 by a vote of 708,502 (51.9%) in favor and 656,095 (48.1%) against. See 1997 Colo. Sess. Laws 2399, 2402.

¹⁵⁵ See *Branson School District RE-82 v. Romer*, 958 F. Supp. 1501, 1506 (D. Colo. 1997) [hereinafter *Branson School District*].

¹⁵⁶ *Id.* at 1511.

Enabling Act directing that proceeds from the sale of trust lands shall “constitute a permanent school-fund, the interest of which to be expended in the support of common schools.”¹⁵⁷ The plaintiffs argued that this statutory language, even though the word trust is never mentioned and the language seems to only apply to the proceeds from sales, created a binding federal trust.¹⁵⁸

The district court in *Branson School District* agreed with the plaintiffs’ argument to an extent, but refused to block the implementation of Amendment 16.¹⁵⁹ The court held the plaintiffs had not yet proved any actual breach of the trust and that Amendment 16 could be applied so as to not violate the federal trust.¹⁶⁰ The judge simply found that the issues “are not yet ripe for consideration.”¹⁶¹ The district judge did warn, however, that “if it were in the long-term best interests of the public schools to strip mine and sell every acre currently held in the trust, this section would be unconstitutional because it would prevent such uses and sales.”¹⁶²

In November 1998, the Tenth Circuit Court of Appeals affirmed the district court decision.¹⁶³ The Tenth Circuit agreed with the district court judge in holding that the Colorado Enabling Act created a binding federal trust.¹⁶⁴ It also noted that Colorado’s admission into the Union represented the first time Congress created a federal trust.¹⁶⁵ Although the Tenth Circuit only cited language in the enabling act that applied to the disposition of school lands, the court nonetheless applied this trust responsibility to the management of other trust lands as well.¹⁶⁶ Admittedly, a distinction between management and disposition may be artificial considering that some use activities, such as mining, literally effect a disposal of land. Nonetheless, the Tenth Circuit failed to point to any explicit language in the Colorado Enabling Act using the word “trust” or applying the permanent fund obligation to management. In contrast, language in the Colorado Constitution states that the lands are to be “held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made”¹⁶⁷ It appears that a plain reading of both Colorado’s enabling act and constitution leads to the conclusion that management and trust obligations spring from the state constitution, and obligations for the use of sale revenues from the enabling act.

Despite the legal challenges, Amendment 16 proved to be an initial success. The program elicited a great deal of public response because it called for

¹⁵⁷ Colorado Enabling Act § 14, 18 Stat. 474, 476 (1875).

¹⁵⁸ See *Branson School District*, 958 F. Supp. at 1514–15

¹⁵⁹ See *id.* at 1523.

¹⁶⁰ See *id.* at 1522.

¹⁶¹ *Id.* at 1521.

¹⁶² *Id.*

¹⁶³ See *Branson*, 161 F.3d at 625.

¹⁶⁴ See *id.* at 634–35.

¹⁶⁵ See *id.* at 634 (noting that the sales restrictions in the Colorado Enabling Act marked a turning point in the specificity of Congress’ land grants) (citing Fairfax et al., *supra* note 42).

¹⁶⁶ See *id.*

¹⁶⁷ *Id.* at 635 (emphasis omitted) (quoting COLO. CONST. art. IX, § 10 (amended 1996)).

private interest groups and state agencies to nominate lands for inclusion within the stewardship program. In fact, Colorado received 130 applications from fifty-one nominators for the initial 200,000 acres of stewardship land open for conservation designation.¹⁶⁸ Nominators consisted of such groups as the Sierra Club, Nature Conservancy and Colorado Division of Wildlife, as well as private ranchers and citizens groups.¹⁶⁹ The program has brought hope that trust lands may begin to be managed for the long-term with a focus on long-term yields instead of immediate revenue returns. The *Branson* decision is both troublesome and helpful for proponents of less traditional management options. On one hand the Tenth Circuit held that Colorado's Stewardship Amendment did not facially violate the term of Colorado's trust agreement; however, the court did leave open the possibility that another lawsuit could completely strike Colorado's attempt to manage some of its trust lands for the long-term.

D. State Police Power Regulation

Although the primary objective of the school land trust is to maximize the economic value of school trust lands, school lands cannot be solely administered to maximize economic return while ignoring general regulations such as zoning and reclamation. Simply, the state's trust mandate is not without limits.

In the last seven years a number of state courts have observed the limits of the trust mandate. Justice Durham of the Utah Supreme Court, in her concurring opinion in *National Parks*, illustrated these limitations when she wrote:

suppose an applicant proposes to build a toxic waste disposal facility on trust land at the head of a major water source. If the applicant offers more money than the trust could ever hope to receive from any other use, a strict requirement of undivided loyalty to the school trust arguably would require the state to accept the project. However, such a project could seriously threaten several communities' drinking water, and the legislature has enacted laws designed to avoid such threats. It would be ludicrous to force the state to make the sale and allow the project, notwithstanding, health, environmental, or other consequences, simply because approval would provide the greatest monetary return to the school trust fund. Nothing in the Utah Constitution or Enabling Act would require such a result. In such a situation, the Board would be able to refuse the application.¹⁷⁰

¹⁶⁸ See Colorado State Land Board, Interoffice Memorandum, Apr. 24, 1998 (on file with author). See also COLO. CONST. art. IX, § 10 (amended 1996).

¹⁶⁹ See Colorado State Land Board, *supra* note 168.

¹⁷⁰ *National Parks*, 869 P.2d at 923-24 (emphasis and footnotes omitted).

Recently, in *Colorado State Board of Land Commissioners v. Colorado Mined Land Reclamation Board*,¹⁷¹ a Colorado county was able to successfully stop mining on a trust section that would have provided the maximum economic return but also would have violated the county's land use plan. In *Land Commissioners*, Conda, a mining operation, held a mining lease on trust lands in Boulder County.¹⁷² Conda applied for a limited-impact permit after the Colorado Legislature enacted the Colorado Mined Lands Reclamation Act (CMLRA).¹⁷³ Subsequently, Conda attempted to convert the limited-impact permit to a general permit.¹⁷⁴ After the passage of CMLRA, general permit regulations changed so that any proposed mine plan had to be compared with the county land use plan to look for conflicts.¹⁷⁵ When Conda applied for its general permit it was told by the Reclamation Board that its proposal for expanded mining operations on a trust section within Boulder County violated the county's zoning and land use plan.¹⁷⁶ Accordingly, the expansion was not allowed.¹⁷⁷ In the litigation that ensued, Conda and the State Land Board argued that the Reclamation Board had impermissibly interfered with the Land Board's ability to obtain maximum revenue from a trust section.¹⁷⁸ The Colorado Supreme Court rejected the Land Board's argument and ruled that the school trust mandate did not excuse the Land Board from adhering to reasonable legislative regulation.¹⁷⁹ Specifically, the Colorado Court stated:

[t]he constitutional grant of authority to the School Land Board to dispose of school lands in such manner as will secure the "maximum possible amount therefor," . . . was not intended as a license to disregard reasonable legislative regulations simply because compliance with such regulations might reduce the amount of revenues otherwise available from the leasing of school lands.¹⁸⁰

Because of the ruling in *Land Commissioners*, the Colorado Land Board could no longer hold up its trust mandate as a trump card to free trust land from reasonable regulation. The Colorado Court simply held that trust land is subject to the same regulations that affect other, similar operations within the state.

In a similar case, *Ravalli County Fish and Game Association v. Montana Department of State Lands*,¹⁸¹ the Montana Supreme Court held that Montana's

¹⁷¹ 809 P.2d 974 (Colo. 1991) [hereinafter *Land Commissioners*].

¹⁷² See *id.* at 975-76.

¹⁷³ See *id.* at 976-77.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 978.

¹⁷⁹ See *id.* at 987.

¹⁸⁰ *Id.*

¹⁸¹ 903 P.2d 1362 (Mont. 1995).

trust mandate did not excuse the Department of State Lands (DSL) from following the procedural requirements of the Montana Environmental Policy Act (MEPA).¹⁸² The DSL had ignored MEPA in approving a grazing lease modification, and recreationist plaintiffs sued to seek compliance with MEPA.¹⁸³ The Montana Supreme Court declared that “the goal of maximizing income derived from school trust lands does not exempt the DSL or any agency from complying with applicable environmental laws.”¹⁸⁴

The *Land Commissioners* and *Ravalli County* cases have important implications for proponents of change in traditional trust land management. These two cases stand for the proposition that, at least in Colorado and Montana, regulations that are meant to limit uses or protect non-revenue values can be generally applied to trust lands. Thus, these decisions limit, at least to some degree, the amount of emphasis placed on revenue producing uses and values. These cases can be helpful to states and communities trying to establish land use plans to achieve management goals. By enacting reclamation laws on the state level and county land use plans on the local level, values that traditionally have not been considered management priorities become important parts of any use decision. Admittedly, such legislative actions are difficult; however, many western states have begun to implement reclamation and land use requirements such as those in Colorado and Montana. Such regulations can be used as another tool for land managers and proponents of new management philosophies.

VI. CONCLUSION

State trust lands occupy a peculiar place among the various types of public lands. The federal government granted these lands to the states for a specific purpose—providing revenue for the named beneficiaries. While the main purpose may have been to provide revenue, the location of the trust lands makes it difficult for many states to dispose of or manage these lands in a profitable or efficient manner. Additionally, the fact that these lands are often dispersed among federal lands make the management of both federal and state lands more difficult. While the judiciary has consistently fought efforts to change the nature of the obligations that adhere to trust lands, recent developments provide hope that states can both honor their obligations to the beneficiaries as well as pursue development of non-revenue values. Simply put, a state has a number of options at its disposal. While some proponents of ecosystem or stewardship management may favor sweeping laws to repeal both federal and state obligations, it must be remembered that the beneficiaries of most of these lands are usually school children. For this reason the

¹⁸² See *id.* at 1370–71.

¹⁸³ See *id.* at 1365–66.

¹⁸⁴ *Id.* at 1370.

best method to affect change on trust lands is for states to pursue policies that both improve ecosystem and environmental health while honoring the financial obligations made to the nation's schoolchildren over a hundred years ago.

WADE R. BUDGE