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Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases

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Sally K. Fairfax & Andrea Issod

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TRUST PRINCIPLES AS A TOOL FOR GRAZING REFORM: LEARNING FROM FOUR STATE CASES

BY
SALLY K. FAIRFAX*
&
ANDREA ISSOD**

State trust land management provides both an alternative to the federal multiple-use model for public resource management and a large body of experience in applying it. Trust principles figure prominently in public and administrative discussions of an improved approach to federal programs. Four state grazing cases give cause for reconsidering the notion that trusts are readily enforceable in the courts. Their outcomes suggest that the trust can provide a useful framework and set of tools for reform, but that it is not a silver bullet. Grazing appears for many reasons as the "hard case" of resource management reform. The argument suggests that the quest for a trust-like silver bullet will be equally disappointing at the federal level. Trust principles—lease auctions, quest for the high bidder, and the like—are one part of a complex picture. However, in grazing's difficult political climate, any reform will not likely work as well on the ground as it does in theory.

 Professor Fairfax is currently the Henry J. Vaux Professor of Forest Policy at the University of California, Berkeley. Dr. Fairfax earned her BS at Hood College in Maryland and her MA from New York University. She also has an MS and a PhD from Duke University. The authors would like to thank Julie Teel, Jay Tutchton, John Horning, Stephen Hughes, Jim Coon, Gary Kahn, Timothy Murphy, Tim Hogan, Ray Powell, Stephanie Balzarini, Jennifer Anderson, Paul Cleary, Gus Gustavson, Deborah Kroneburg, Laird Lucas, William Cook, Diane Heinton, Stan Hamilton, Theresa M. Craig, Patricia J. Boland, Richard Oxford, and Jennifer Anderson for their valuable contributions to this Article.

** Editor-in-Chief, *Ecology Law Quarterly*. J.D. 2003 Boalt Hall, University of California at Berkeley. BSE, Rutgers University.

I. INTRODUCTION

This Article discusses four complex cases that challenge state trust land grazing programs.[1] For most of our nation's history, state trust lands have

[1] This Article has appeared in two preliminary forms. The first appeared as Sally K. Fairfax, *Grazing on State Trust Lands: Four Current Conflicts* (1996), a paper prepared for the Political Economy Research Center Forum "Environmentalism in the West" held June 1996 in Bozeman, Montana. It also appeared as Sally K. Fairfax, *State Trust Lands: The Culture of Administrative Accountability, in* ENVIRONMENTAL FEDERALISM 61 (Terry L. Anderson & Peter J. Hill, eds. 1997). Both incarnations were early in the evolution of the cases, and the second addressed only Idaho and Arizona. Nevertheless the later piece's emphasis on administrative accountability provided an interesting point of departure that is not substantially repeated here. This hopefully will be our last bite at this apple, though the cases will doubtless outlast both of us.

languished in an obscurity that perhaps ought to have suggested to us that examining four complex cases, or even four simple ones, might not be of enormous public interest or social utility. We persist not merely because we have already gone to great effort to understand the disputes, but because trust lands currently experience far more than their allotted fifteen minutes of fame. They provide not simply an alternative theory or idea about public resource management, but rather a deep and diverse body of land management experience that differs significantly from the law and practice of federal land management.

This is important at present because management practices at the federal level appear to be falling apart. Unable to agree on goals for the federal agencies, Congress has hamstrung the United States Forest Service (USFS),[2] the Bureau of Land Management (BLM),[3] and, to a lesser degree, the United States Fish and Wildlife Service (FWS) with an apparently endless planning process that permits advocates of every stripe and persuasion to talk and litigate almost without surcease. The plans that are the cynosure of so much public and agency effort are almost without effect on the ground. For example, whatever the forest plan says must be tied in a completely different process to a budget, and reanalyzed in a separate and equally contentious process of planning specific activities.[4]

Little wonder that a consensus has emerged among most scholars of public land management, and among both practitioners and the general public as well, that federal multiple-use land management has eroded beyond repair. One expert has argued, for example, that the progressive era consensus[5] that sustained federal land for most of the twentieth century has disappeared.[6] Although speculation that the Forest Service would be reorganized out of existence before its centennial (2005) seems to have subsided,[7] observations that the agency is demoralized and directionless have not.

Citizen activists, watershed alliances, consensus groups, and affected communities struggled throughout the 1990s to provide alternative

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2 *See* 16 U.S.C. § 1604 (2000) (detailing requirements of the National Forest System land and resource management plans).

3 *See* 43 U.S.C. § 1701 (2000) (setting policy for Bureau of Land Management).

4 USDA, Forest Service, *Colorado: White River Forest Plan Friend to All—And to None*, HIGH COUNTRY NEWS, July 8, 2002, at 3 (noting that the White River Forest plan does little in and of itself because further actions require further public process).

5 The progressive era is characterized by a belief in technical/scientific solutions to issues of resource allocation and management, rational, centralized planning, and an expansion of federal authority. For a description of the era's emergence, see SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 2, 66 (1959). For a description of the era as it frays, see ROBERT H. NELSON, PUBLIC LANDS PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 228, 335 (1995).

6 NELSON, *supra* note 5, Part 4.

7 *See, e.g.*, Randal O'Toole, Subsidies Anonymous Number 17, *at* http://www.backcountry.net/arch/pct/9701/msg00010.html (Jan. 15, 1997) (suggesting, via posting to the National Scenic Trails Internet bulletin board, that the United States Forest Service and the Department of Interior will merge before the end of the decade). Author Fairfax has risked a considerable portion of her sauternes collection in a number of wagers on this same subject, which she now regrets.

leadership and a new way of thinking about federal lands and their management. Scholars and activists have sought new "paradigms" for public resource management through everything from market-like incentives[8] to Green Christianity.[9] The current Bush Administration is pushing experiments on "charter forests" that will provide, according to Agriculture Undersecretary Mark Rey, case studies on one or two national forests to see "if the government can remove 'procedural bottlenecks' that occur in day-to-day management and emphasize local involvement in decision making."[10]

Trusts figure prominently in that discussion as an alternative approach.[11] In this environment, 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. Trusts are being analyzed and advocated[12] as an institutional approach to solve all sorts of conservation dilemmas.[13]

According to the authors of *State Trust Lands*, a principle virtue of the trust, as compared to the familiar federal multiple-use doctrine,[14] is that the trust is enforceable.[15] A clear mandate to provide benefit to a specified beneficiary is supported by centuries of statutory and common law of the trust. The trustee, in acting with undivided loyalty to the beneficiary, must disclose all trust dealings fully to the beneficiary, and an aggrieved beneficiary may seek judicial enforcement of the trustor's goals and the court's standards of prudent management.[16] In a burst of enthusiasm that

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[8] *Cf.* Turnpoint.org, *Petition to End Welfare Ranching*, http://www.turnpoint.org/grazing.txt (last visited Apr. 12, 2003) (proposing to reform grazing practices; signatories include Defenders of Wildlife and Rainforest Action Network).

[9] *Cf.* National Forest Protection Alliance, Supporters of the National Forest Protection and Restoration Act (H.R. 1494), http://www.forestadvocate.org/solutions/endorse.html (last visited Apr. 12, 2003) (listing religious organizations supporting the legislation, including California Environmental Ministries and Washington Christians for Environmental Stewardship).

[10] Katherine Pfleger, *Bush Proposes "Charter Forests" to Give Locals More Control Over Land*, ASSOCIATED PRESS, Feb. 6, 2002, *available at* http://www.enn.com/news/wire-stories/2002/02/02062002/ap_46317.asp (quoting Mark Rey, Undersecretary of Agriculture); JAY O'LAUGHLIN, COMMUNITY BASED LAND MANAGEMENT AND CHARTER FORESTS: TESTIMONY AT OVERSIGHT HEARING (Apr. 25, 2002), http://www.safnet.org/policyandpress/psst/charterforestwdiag.pdf (providing testimony on chartered forests).

[11] For example, there was recently a competition to design a management framework for the new Missouri Breaks National Monument. John A. Baden, *Preserving Montana's Treasures*, BOZEMAN DAILY CHRONICLE, Aug. 15, 2001, *available at* http://www.free-eco.org/pub/010815jb.html.

[12] *See* SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 25 (2001) (analyzing the trust framework as an institutional model for conservation groups); KARL HESS, JR., ROCKY TIMES IN ROCKY MT. NATIONAL PARK 109 (1993) (discussing the use of conservation trusts to restore Rocky Mountain National Park).

[13] *See* PETER BARNES, WHO OWNS THE SKY: OUR COMMON ASSETS AND THE FUTURE OF CAPITALISM 58, 120 (2001) (discussing the use of trusts to rehabilitate air quality).

[14] *See* 16 U.S.C. § 528 (2000) (providing for the development and administration of renewable surface resources in national forests for multiple use and sustained yield of products and services).

[15] JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 277 (1996) [hereinafter STATE TRUST LANDS].

[16] *Id.* at 3–4.

may henceforth be viewed as excessive, the two indefatigable trust mavens asserted, more or less, that the state lands managed under the trust mandate were a fairly good model of an institution designed to achieve sustainable resource management.[17]

Several major trust land cases in the 1980s and 1990s built on the U.S. Supreme Court decision in the classic case of *Lassen v. Arizona ex rel. Arizona Highway Department*[18] and perhaps justified the optimism. In *Lassen*, the Court overturned the Arizona Supreme Court's holding that the Arizona Land Commissioner cannot require compensation to the trust for material sites and rights of way on trust lands.[19] The Court unanimously concluded that the New Mexico-Arizona Enabling Act established a real trust and that Arizona must compensate the trust for the full value of resources acquired.[20]

That decision gradually began to reshape programs where a state's enabling act did not create the trust expressly. For example, in 1982 the Oklahoma Education Association successfully challenged the pro-lessee regulations of the State Land Board (SLB).[21] Under the regulations, rents were low, existing lessees had a virtually absolute right to renew their leases, and the state even lent money from its permanent fund to farmers and ranchers at subsidized rates.[22] The SLB promptly rewrote the offending regulations.[23] In 1984, the Washington Supreme Court declared that a statute allowing timber purchasers to opt out of contracts without penalty violated that state's trust.[24] Finally, in 1989, the U.S. Supreme Court again found the Arizona trust land programs in violation of the trust, this time with respect to the statutory method for pricing leases on trust mineral lands.[25]

Subsequently, a series of disputes regarding grazing leases put state trust lands in the national press[26] for perhaps the first time in history. In at least four jurisdictions—Arizona, Idaho, New Mexico, and Oregon—environmental groups have attempted to bid against ranchers in hopes of leasing state lands traditionally used for grazing. The difficulties the environmental groups have encountered have led to diverse litigation and legislation, and a rather mixed set of outcomes, for the applicants and for

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17 Jon A. Souder et al., *Sustainable Resources Management and State School Lands: The Quest for Guiding Principles*, 34 NAT. RESOURCES J. 271, 273 (1994).

18 385 U.S. 458 (1967).

19 *Id.* at 469–70.

20 *Id.* at 469.

21 Okla. Educ. Ass'n v. Nigh, 642 P.2d 230, 236 (Okla. 1982).

22 *Id.*

23 STATE TRUST LANDS, *supra* note 15, at 107–08.

24 County of Skamania v. State, 685 P.2d 576, 580 (Wash. 1984).

25 ASARCO, Inc. v. Kadish, 490 U.S. 605, 633 (1989); *see also* STATE TRUST LANDS, *supra* note 15, at 197–98, 286 (discussing impact of *ASARCO*).

26 Timothy Egan, *In Idaho, Wily Opponent Who Takes on Ranchers*, N.Y. TIMES, July 21, 1995, at A5. Of course, *The New York Times* is not the only national print medium in which these issues have appeared. *See* Ray Ring, *'Unranchers' Reach for West's State Lands*, HIGH COUNTRY NEWS, July 25, 1994 at 1 (describing environmentalists' efforts to lease state trust lands). For every dispute discussed below the authors have a folder full of clippings from the local and regional press.

trust principles. If we are to embrace trusts as an organizational option, we should explore these cases and the issues they raise for trust enforcement.

A. Goals of this Article

The four trust lands grazing debates are significant for three reasons. First, the cases underscore the easily overlooked fact that not all trusts are the same. Even the rather confined category of state trust lands is diverse. They have much in common, most notably their peculiar mandate, and it is legitimate to speak of them as a group. However, it is unwise to generalize across state lines without careful grounding in the frequently slight but important differences in enabling acts, constitutions, and other crucial trust documents, statutory law, and agency culture. The four grazing case stories unfold in very different ways because of important distinctions in some or all of those key variables. This ought to remind us to examine carefully generalizations about trusts and how readily and effectively they might be deployed as a key to reform in a given troublesome circumstance.

A second reason for looking at these cases is the specific examination of grazing policy. The disputes reviewed are deviant cases; they differ strikingly from the growing body of case law that, as noted above, has dominated discussion of state trust lands since the late 1950s. In diverse jurisdictions, and regarding diverse resources,[27] state and federal courts alike have insisted fairly emphatically on the fundamental principle of undivided loyalty to the beneficiary. What happens to these well-known and generally honored precedents when grazing issues arise? The trust appears to fall down on the job—in whole or in interesting part—as a mechanism stating a clear purpose and assuring that bureaucrats adhere to it.[28] This article addresses whether that is really true—and if so, why?

Third, these cases counsel caution in planning litigation strategy. Lawyers have been told repeatedly that the trust is a wonderful platform from which to sue. That line of reasoning suggests that trusts are so well defined, and enforcement such a cookie-cutter operation of placing well-known principles onto sloppy fact situations, that it is easy for environmental plaintiffs to prevail without mounting expensive cases at the trial level.[29] The cases herein tell a very different story: Enforcement is not nearly that simple.[30] A greater understanding of the complexities may enable a more practical assessment of the trust as a tool of reform.

This Article will proceed in four parts. The remaining introduction provides background on the trust lands, their history, management and funding arrangements, and relations to the beneficiaries. Part II discusses

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[27] *See ASARCO*, 490 U.S. at 605 (Arizona dispute involving mineral resources on state trust lands); *Lassen*, 385 U.S. 458 (1967) (Arizona dispute involving the state highway department's acquisition of state trust lands); *Okla. Educ. Ass'n*, 642 P.2d 230 (Okla. 1982) (Oklahoma dispute involving agricultural use of state trust lands); *Skamania County*, 685 P.2d 576 (Wash. 1984) (Washington dispute involving timber resources on state trust lands).

[28] STATE TRUST LANDS, *supra* note 15, at 293–300.

[29] *Id.* at 296–97.

[30] *Id.*

the Arizona, Idaho, Oregon, and New Mexico cases. Although they vary considerably in length and complexity, each discussion follows roughly the same format, beginning with a brief history of trust lands and grazing management in each state. After a chronology of events, claims and counterclaims, and key issues, the final element of each discussion answers "where are we now?" Trust enforcement appears complex in the context of these cases because the cases do not end. They morph from one framing of the issue to another, and reemerge in first one and then another political arena. Rather than wait for all four to roll to a stop at one tidy analytical crescendo, we just point to where the questions appear to be headed.

Part III discusses patterns observed in the four cases: the issues introduced by the scattered location of the originally granted parcels; bidder qualifications and sale terms and conditions; the applicability of state administrative law to trust decision making; and, underlying everything, the confounding issue of who has standing to challenge trust violations. This discussion may appear to be an apologia for the land managers because it tarries so long over issues of cherry picking and logical grazing units that have nothing to do with trust principles. However, that is not its intent. The section is aimed at explicating the tension between trust obligations and the political and intellectual setting of land management. It is not clear that trust obligations can be relied upon entirely to address the puzzling judgment calls of prudent land managers. The cases suggest that in the grazing issue, the balance has been struck closer to the political priorities as distinct from the trustee's prudence. However, it is not clear that the land managers are the ones drawing the lines. And it is not clear how effectively trust principles can be deployed to change that balance. Part IV uses those patterns to reflect upon the utility of the trust model more generally as a route to public grazing reform.

B. A Brief Overview of the State School Trusts

Before proceeding, some readers may appreciate a brief recapitulation of the law of trust lands. A trust is a fiduciary relationship in which the trustee holds and prudently manages property for the exclusive benefit of a designated beneficiary. In the case of school trust lands,[31] the beneficiary is the common school fund, and the trust property is land granted by the federal government to the states as they joined the Union.[32]

Until the Alaska accession, the school lands were granted "in place," with first section 16, then sections 16 and 36, and finally, starting with Utah

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[31] Many state lands departments manage trust lands granted for purposes other than supporting common schools. Over the accession period Congress granted more and more land for more and more purposes—including prisons, mental hospitals, universities, and schools for the "deaf and dumb." *Id.* at 26–33.

[32] For a detailed overview of state trust lands history, see generally STATE TRUST LANDS, *supra* note 15, at 1–16. For an excellent read on this subject, see PETER ONUF, BETWEEN STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987).

in 1896, sections 16, 36, 2, and 32 granted for the benefit of common schools.[33]

Land was reserved for the states for school purposes arguably in the General Land Ordinance of 1785,[34] and incontrovertibly when Congress passed each state's first enabling act.[35] Congressional acceptance of the fact that many parcels would be occupied before they were surveyed and granted to the states is reflected in the routine accession statutory provision allowing a state to make selections "in lieu" of the already-occupied granted sections.

Early-joining states disposed of their lands by indirection and corruption without achieving much lasting benefit for the schools.[36] By the 1830s, however, state constitutions stringently restricted the use of land grants. States established "permanent school funds" and implicit or explicit trusts to retain and manage the lands and receipts.[37] Under the leadership of a growing public school lobby, protective provisions became increasingly elaborate.[38]

The states made very different arrangements for managing the lands. For example, some states have elected land commissioners, some appointed; some states have powerful land boards and others have none at all.[39] But in most states, receipts from the sale of land or minerals are placed in a permanent fund, and only the interest is distributed to the beneficiaries.[40] Returns from renewable leases or timber sales are distributed directly to the beneficiaries.[41]

In the 1876 Colorado accession, Congress made its first modest effort to direct state management of the granted lands,[42] but it was not until the joint 1910 Arizona-New Mexico Enabling Act that the federal government defined certain lands as a trust or assumed any role in protecting the lands' resources.[43] Even after the Arizona and New Mexico accession, nearly fifty years elapsed before the trust lands were managed as trusts for the beneficiary. Until the late 1950s and early 1960s, most states treated trust resources in a manner similar to the federal lands: for the benefit of the lessees and resource developers.[44] The trust became a consistent factor in school land management only after *Lassen*.[45] Over the next several decades, plaintiffs generally succeeded in bringing trust principles to trust land

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33 *See State Trust Lands*, *supra* note 15, at 29 (providing figure of state trust land and ownership patterns for public school grants).

34 ONUF, *supra* note 32, at 21–44.

35 Many states had multiple enabling acts before they finally joined the Union. *See* STATE TRUST LANDS, *supra* note 15, at 18–25 (discussing the accession process).

36 *Id.* at 18–22.

37 *Id.* at 31–32.

38 *Id.*

39 *Id.* at 39–47.

40 *Id.* at 47–61.

41 *Id.* at 37–67.

42 *Id.* at 18–23.

43 *Id.* at 25–26.

44 *Id.* at 5–6, 33–36.

45 *Lassen*, 385 U.S. 458 (1967).

resource and realty programs, with the notable exception of some grazing programs. Still dominated by consistently grazer-oriented federal programs, the state trust lands grazing programs emerged in the mid-1990s as a target of environmentalist reform efforts.

II. THE FOUR CASES

A. Arizona—The Clearest Example of the Trust as Advertised: Judicial Enforcement of Trustee Duties

As suggested, those who look to the state trust grazing lands for a working example of clear mandates readily enforced will find little succor in these pages. However, the Arizona dispute comes closest because Arizona's two apparently endless cases ultimately come out "right" under trust principles. However, the story and the outcome are confused by the frequent involvement of the state legislature, which is never clearly on the side of the trust, trust principles, or the school children of Arizona.

1. Background

Arizona had a rocky road to admission, and finally joined the Union in 1912 under the same enabling act as New Mexico.[46] By that very late date in the accession process,[47] Congress had turned to granting four sections of land per township and imposing comprehensive restrictions on the sale and management of the granted lands.[48] Congress unambiguously established a trust in Arizona and New Mexico, and imposed a full panoply of public auction, advertising, and similar procedural requirements.[49] Therefore, one might predict that if the strict obligations of the trust and the specific procedural requirements for leasing and/or disposing of trust assets at public auction to the highest bidder were going to be enforced, it would happen in these two states. Arizona is closer to that target than New Mexico, but the tale is not the simple application of black letter law one might anticipate.

The granted school lands are treated in six lengthy sections of the Arizona-New Mexico Enabling Act.[50] Section 10 of the Act specifically declares that the lands are to be held in trust, and that it is the duty of the U.S. Attorney General to enforce the provisions in court.[51] The Arizona Constitution establishes an administrative structure for managing the grants: a land commissioner appointed by the Governor and a Land Board of

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[46] STATE TRUST LANDS, *supra* note 15, at 18–26, 23 n.24.

[47] Arizona and New Mexico were the last states to join the Union until 1958 when Alaska, followed by Hawaii in 1959, became states.

[48] STATE TRUST LANDS, *supra* note 15, at 27–28.

[49] New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910) (codified as amended at 28 U.S.C. §§ 44, 111 (2000)).

[50] *Id.*

[51] *Id.*

Appeals that "meets only to hear appeals of [Arizona State Land Department (Arizona SLD)] decisions, and has no other powers."[52]

By 1912, federal land reservations for national forests and monuments were recognized as extensive and permanent; Arizona could therefore make land selections in lieu of those already included in diverse federal reservations.[53] Many of Arizona's holdings were "blocked in" in the process of making those selections.[54] Arizona presently holds and manages eighty-eight percent of the total lands granted at statehood—a higher percentage than any other state.[55] By far the most extensive use of Arizona's trust lands is grazing. More that 8.4 million acres of the state's 9.47 million acres of trust holdings are leased for grazing.[56] However, the grazing program is not a big money maker for the state, which earns most of its revenues from its commercial lands leasing program.[57]

Arizona SLD is funded not from revenues but from a direct annual appropriation approved by the legislature.[58] This is unusual; most states rely on a percentage of receipts as either a floor or a ceiling for expenditures and only a few require legislative approval of expenditure of those receipts.[59] However, disbursement of Arizona's receipts to beneficiaries is fairly straightforward: receipts from renewable resource uses such as grazing, are distributed directly to the beneficiary, while royalties for non-renewable resource disposition are placed in the permanent fund.[60]

Disputes in the state have precipitated many of the most important and most explicit applications of trust principles to trust lands. However, trust grazing programs have proven distinctly impervious to the effect of those decisions.

2. Chronology, Claims, Counterclaims, and Key Issues

a. The Jeffries *Case*

The organization that represented the plaintiffs in *Jeffries v. Hassell*, the Arizona Center for Law in the Public Interest (ACLPI), had previously, in the

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52 STATE TRUST LANDS, *supra* note 15, at 40–43.

53 *Id.* at 28.

54 If that was not sufficient, further impetus came from the need to rearrange land holdings in order to complete the Central Arizona Project (CAP). The CAP land exchanges put the State Land Office in possession of enormous acreage of developable urban lands in and around Phoenix, and, accordingly, the largest state trust land commercial real estate development program. *Id.* at 269.

55 Alaska holds considerably more land—86 million acres as opposed to Arizona's 9.47 million acres—but that amount represents only 82 percent of Alaska's original grant. *Id.* at 48.

56 *Id.* at 51.

57 Although comparisons are not always helpful, given the differing quality of lands, it is nevertheless a good entry-level data point to know that Colorado manages about one quarter of the acreage as Arizona for grazing, and receives almost twice as much in receipts. *Id.* at 60–61.

58 STATE TRUST LANDS, *supra* note 15, at 46 tbl. 2-2.

59 *See, e.g., id.* at 55–66.

60 *Id.* at 63. Interestingly, in Arizona timber is treated as a non-renewable resource for the purpose of trust lands, as is water.

context of mineral management, successfully sued to force the state as trustee to pursue the beneficiaries' interests more aggressively.[61] In April 1995, ACLPI filed a complaint alleging that the state's grazing lease policies violate both the state Enabling Act and the trust obligation to achieve a high return.[62] ALCPI had no trouble establishing their clients' standing to bring the case. The right of the clients—two individuals who were taxpayers and parents of children attending Arizona public schools—to bring the suit was never challenged.[63]

The plaintiffs contested a "preference right" that granted the existing lessee a priority or preference when her lease came up for renewal. ACLPI argued the preference right effectively offered the leases for more than ten years, and hence ran afoul of the Enabling Act's requirements that long-term leases not be offered without advertisement.[64] The State countered that the preferred right of renewal was conferred not only in Arizona SLD's rules but also by state law and the Arizona Constitution.[65] The State also pointed out that Arizona was one of several jurisdictions that had held that preference right leases were not a per se violation of the trustee's obligations so long as they are not the only basis upon which a lease renewal is awarded, but merely one factor, or *equity*, in the assessment.[66]

The plaintiffs' complaint listed additional rancher preferences that violated the Enabling Act and state constitutional provisions that require advertising and/or auctioning of trust assets as well: 1) Arizona SLD's policy "not to offer open land for lease within an established ranch unit without first offering said lands to the owner or the person having control of the lands in such ranch unit," and 2) Arizona SLD's practice of providing a preference in leasing to persons residing upon contiguous lands.[67] The plaintiffs alleged these practices violated trust principles. That is, if the existing lessee, neighbor, or contiguous landowner has a preferred status in the granting or renewal of leases, the State's ability to achieve fair market value for the leases and the trustee's undivided loyalty to the beneficiary, as opposed to the range livestock industry, were cast into serious doubt.[68] The

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[61] *See ASARCO*, 490 U.S. 605 (1989) (addressing whether state mineral leasing statute conformed with land grant laws).

[62] Plaintiffs' Response to Motion to Dismiss and Plaintiffs' Motion for Partial Summary Judgment at 4–9, Jeffries v. Hassell (Ariz. Super. Ct. Maricopa County, May 30, 1995) (No. CV95-06303) [hereinafter Plaintiffs' Response].

[63] If that is not surprising now, it will be when we are finished discussing the Idaho and New Mexico cases. A real challenge to the application of trust enforcement mechanisms is that in many jurisdictions, those mechanisms are simply unplugged by standing rules. Beneficiaries cannot sue to enforce the trust. Arizona is, as we shall see below, quite lenient on the issue of standing to sue the trustees. *See ASARCO*, 490 U.S. at 612–24 (discussing the issue at length).

[64] Complaint at 4, *Jeffries* (No. CV95-06303) [hereinafter *Jeffries* Complaint].

[65] State Defendants' Motion to Dismiss at 3, *Jeffries* (No. CV95-06303) [hereinafter State Motion to Dismiss].

[66] *Id.* at 7–9 (citing Boice v. Campbell, 248 P. 34 (Ariz. 1926); Ewing v. State, 745 P.2d 947 (Ariz. 1987)); *see* Plaintiffs' Response, *supra* note 62, at 13–15 (disputing the State's characterization of preferential rights as equitable factors).

[67] *Jeffries* Complaint, *supra* note 64, at 4–5.

[68] *Id.* at 4.

Complaint also noted that Arizona has the lowest grazing fees on state lands in the western United States and argued that this was a result of leasing without advertisement or bidding at public auction.[69]

The State defended the prudence of its program. It introduced general and ranch-specific data to demonstrate that auctions and advertising were not necessary to a high return and could actually produce less than the minimum fee per animal unit month (AUM) that the State charged.[70] The State argued it was difficult to view the market for state leases as open[71] given the configuration of land ownership patterns, the fact that isolated state parcels are generally embedded in ranches characterized by mixed federal and private lands, the resulting lack of access to state parcels, the concentration of available water on private holdings, and the lessee's ownership of improvements under state law.[72]

Although ACLPI documented a low number of competitive grazing lease auctions and a high tendency to return a lease to the existing lessee at renewal, the State argued that neither of those facts demonstrated that the State could increase its revenues with competitive bidding or that the trustee was breaching its obligations.[73] The livestock industry agreed, arguing that given the nature and location of the lands, and the pattern of grazing use likely to predominate in the foreseeable future, the trustee was prudent to

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[69] *Id.* at 3–4.

[70] An AUM is a standard measure of forage defined as "one weaned beef animal over six months of age, or one horse, or five goats, or five sheep, or the equivalent" per month. ARIZ. REV. STAT. § 37-285(I)(1), (2) (2003). For more on the various bases for fee calculations, see generally STATE TRUST LANDS, *supra* note 15, at 124–47.

[71] *See* Defendants' Reply to Plaintiffs' Response to Motion to Dismiss and Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment at 14, *Jeffries* (No. CV95-06303) [hereinafter Defendants' Reply] ("There is no legal requirement that [leases] be auctioned.").

[72] *Id.* As described by Souder and Fairfax, "[a]n improvement is, generally, what it sounds like: 'A valuable addition made to the property . . . amounting to more than mere repairs or replacement.'" STATE TRUST LANDS, *supra* note 15, at 122 (quoting *Black's Law Dictionary*). Improvements matter to the marketing of leases because

> how they are appraised and transferred at lease termination significantly influences the state's ability to achieve fair market return. On the one hand, the state clearly has an interest in encouraging its lessees to make improvements to the lease[hold] that will increase its productivity . . . . On the other hand, . . . requiring future lessees to pay the existing one for the improvements could reduce the likelihood of receiving competitive bids. The state has two options for overcoming this problem. First, it can finance all the permanent improvements and require the lessee to remove the others at the end of the lease. To deal with existing lessee improvements, the state can adopt an accelerated depreciation schedule so that, at the end of [the lease term] no value remains that requires transfer . . . . Second, the state can be particularly vigilant in the future about the types of improvements that it approves, endorsing only improvements that are fixed, contribute value to the property that can be recovered by fees, and are useful to other potential lessees.

Id. at 123. The latter path presumes, or at least rests heavily on the notion, that the parcel will continue to be used for the same purpose lease after lease. *Id.* at 122–23

[73] *See* Defendants' Reply, *supra* note 71, at 14 ("Auctioning may destroy the state's ability to effectively manage its range lands").

seek cooperative arrangements with established ranchers as a means of both maximizing income and protecting the long term interests of the trust.[74]

The plaintiffs survived a motion to dismiss[75] but their motion for summary judgment was denied.[76] As the case dragged toward trial, the state auditor released a performance audit generally critical of Arizona SLD's grazing program.[77] The Auditor General's report appears to have been sufficient to cause the court to reverse its conclusion regarding summary judgment.

On reconsideration, the district court concluded that the plaintiffs "need not prove 'damages' in the usual sense. They need show only a 'reasonable likelihood' of a breach of trust to obtain relief."[78] The court pointed to four practices that "systematically violate the state's duties to maximize return on the trust lands for the benefit of the state's public schools": the "[f]ailure to advertise the availability of grazing leases upon renewal"; the "[f]ailure to seek and receive sealed bids for leases up for renewal"; reliance on preferences that "suppress market forces and return on grazing leases"; and failure to realize any return on "profitable subleases by grazing permittees."[79]

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[74] Affidavit of Stephen M. Brophy (Aztec Land & Cattle Company, Ltd.) at 2–5, *Jeffries* (No. CV95-06303); Affidavit of Stephen M. Brophy (Page Cattle Co.) at 2–3, *Jeffries* (No. CV95-06303).

[75] Minute Order Ruling on Defendants' Motion to Dismiss and Plaintiffs' Motion for Partial Summary Judgment at 10, *Jeffries*, No. CV95-06303 (Aug. 30, 1997).

[76] Minute Order, Denial of Motion for Summary Judgment at 7, *Jeffries*, No. CV95-06303 (Apr. 21, 1997).

[77] DOUGLAS R. NORTON, PERFORMANCE AUDIT: ARIZONA STATE LAND DEPARTMENT, REPORT NO. 97-6 TO THE ARIZONA LEGISLATURE 24–30 (1997). The report appeared on April 16, 1997, just two business days before the court's minute order. It was not a factor in the previous proceedings but was called to the court's attention by the plaintiffs in their Motion for Reconsideration. *See* Minute Order on Plaintiffs' Motion for Reconsideration at 5, *Jeffries*, No. CV95-06303 (July 24, 1997) (noting that the presiding judge had read the report). The report is far less substantial than the previous report of the Grazing Land Valuation Committee and contains little detailed data or analysis. It makes modest but important recommendations in three areas: management of urban lands, grazing and agricultural land leasing, and permanent fund investment strategies. In terms of impact on trust income, the investment strategy recommendations are most important. The second area of recommendation is least important, and the first concerns the major revenue producer in Arizona. One issue the Auditor General raised that did not figure in the litigation is the issue of rent reductions. State statute permits lessees to request reductions in their annual rental. Arizona SLD had no policies for deciding when a reduction is warranted but simply granted all leaseholders' requests. The report estimated that this policy cost more than $285,000 in 1997 alone and recommended the DSL seek a statutory amendment to prohibit rent reductions except where they are necessary to protect trust resources. The report also recommended statutory changes that would allow Arizona SLD to impose a surcharge on subleasing agreements, and recommended reevaluating the grazing lease rate at the earliest point permitted under the statute that established the Grazing Land Valuation Committee (1999). It also recommended posting notice of all available leases and advised undertaking a study of whether eliminating preference right leases could increase trust revenues. *Id.* at 24–25, 30.

[78] Minute Order Granting Plaintiffs' Motion for Reconsideration and Granting Partial Summary Judgment at 5–6, *Jeffries*, No. CV95-06303 (July 24, 1997).

[79] *Id.* at 8–9.

The judge ordered the parties to establish a timetable for the State's compliance with the judgment.[80] The timetable[81] turned into detailed proposals for changes in the Department's leasing practices. Not unexpectedly, the State proposed modest changes, particularly in the area of advertising available leases,[82] while the plaintiffs proposed a series of major changes in practice,[83] and the ranching industry intervenors prayed that whatever happened would be done slowly so as not to interrupt the delicate web of loans and financial arrangements that existed once the ranching year had begun.[84]

The most interesting debate that arose from the parties' responses to each other's proposed timetables was the issue of prudence in advertising expiring leases. The plaintiffs proposed extensive advertising in newspapers, requiring Arizona SLD to list in the largest circulation newspaper in the state all leases that would expire in a given year and to advertise each lease separately ninety days prior to expiration in a newspaper with circulation in the area of the leasehold as well as the largest circulation newspaper in the state.[85] This kind of advertising, the plaintiffs asserted, was "the *minimum* that a prudent trustee would do to generate true price competition."[86]

The State contested the prudence of advertising at the intensity suggested by the plaintiffs, arguing that it would not produce competition for leases in many instances.[87] Moreover, the State argued that the "advertising expenses would approach or exceed projected annual lease revenue based on appraised value."[88] The State reported that to advertise one year's expiring leases for just one day in the statewide *Arizona Republic* would cost approximately $44,352; in local newspapers in relevant jurisdictions the cost would vary from $1888 to $9535.[89] The advertising costs would exceed the annual revenue generated from the leases by just over $195,000.[90] Prudent investment of trust resources ran head on into the theoretical benefits of marketplace competition.

The timetable dispute turned out to be a wash. Although the district court issued a final ruling fully embracing plaintiffs' arguments,[91] the Arizona

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80 *Id.*

81 The defendants entered a motion for clarification, suggesting the court asked for a timetable and not a full-blown proposal for policy changes, but it went nowhere. State Defendants' Motion for Clarification, *Jeffries* (No. CV95-06303).

82 State Defendants' Proposed Schedule of Compliance at 3–5, *Jeffries* (CV95-06303).

83 *See generally* Plaintiffs' Proposed Timetable for Compliance, *Jeffries* (CV95-06303) [hereinafter Plaintiffs' Timetable].

84 Joinder in State Defendants' Response to Plaintiffs' Proposed Timetable of Compliance at 2–3, *Jeffries* (CV95-06303).

85 Plaintiffs' Timetable, *supra* note 83, at 3.

86 *Id.* at 4 (emphasis added).

87 State Defendants' Response to Plaintiffs' Proposed Timetable for Compliance at 4–5, *Jeffries* (CV95-06303).

88 *Id.* at 5.

89 Declaration of Richard B. Oxford at 5, *Jeffries* (CV95-06303).

90 *Id.* at 6.

91 The court held that the defendants breached their duties and they could no longer execute any grazing leases or approve any grazing subleases without complying with the provisions of the Enabling Act applicable to leases greater than ten years. *Jeffries*, 3 P.3d 1071,

Court of Appeals overturned the decision[92] because it found a genuine issue of material fact existed.[93] Because the trustee is charged with serving the "'best interests of the trust'"[94] and not simply maximizing lease revenues, the court found that consideration of stewardship and investments to "stabilize the trust's revenue stream" and "safeguard the land" might very well be best for the trust.[95] Because each side raised "thoughtful arguments," the court remanded the case to the trial court to sort through the facts.[96]

b. Legislative Response to the Jeffries *Case*

Meanwhile, the dispute changed focus. In 1998, the Arizona Legislature responded to *Jeffries* by passing H.B. 2509, which revised the state trust lands leasing regulations.[97] The changes addressed many of the issues raised by the plaintiffs. House Bill 2509 required Arizona SLD to advertise the availability of expiring grazing leases one year in advance[98] and the bill introduced a new surcharge on subleases.[99] Arizona SLD must accept either the highest bid in a competition or none at all.[100] Plaintiffs' attorney Tim Hogan commented that while these requirements were nothing close to their proposals for the court and "did not go as far as I would like," he stated that he was "not unhappy" with the new statutes.[101] Arizona SLD now advertises on its web site all leases that will expire within a year, making the pursuit of leases much easier for potential bidders.[102] Content with a partial victory in the new regulations, the plaintiffs declined to appeal the *Jeffries* decision, and the ACLIP concentrated its energy on a second case, *Forest Guardians v. Wells*.[103] It turned out to be a smart move.

c. The Forest Guardians *Case*

On October 14, 1997, as ACLIP and the State were submitting their proposed timetables for compliance in *Jeffries*, the State Land Commissioner denied applications for grazing leases submitted by two parties, an individual named John Tate and a New Mexico environmental group, Forest Guardians.[104] Both had applied for grazing leases and had

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1072–73 (Ariz. Ct. App. 1999).

92 *Id.* at 1075.

93 *Id.*

94 *Id.* at 1074 (quoting statutory language).

95 *Id.* at 1074–75.

96 *Id.* at 1075.

97 1998 Ariz. Legis. Serv. ch. 184 (West).

98 ARIZ. REV. STAT. § 37-281.01 (2003).

99 *Id.* § 37-283.

100 *Id.* § 37-284.

101 Telephone Interview with Timothy Hogan, Executive Director, Arizona Center for Law in the Public Interest (Oct. 10, 2001) (on file with authors).

102 Telephone Interview with Timothy Hogan, Executive Director, Arizona Center for Law in the Public Interest (Mar. 29, 2002) (on file with authors).

103 Telephone Interview with Timothy Hogan, *supra* note 101.

104 In the Matter of Grazing Lease Application No. 05-103404 for the State Land Described

stated with more or less clarity that they had no intention of grazing cattle on the land.[105] Both applicants sought to withhold the land from grazing in order to rest and conserve the land.[106] Both were represented in their appeals by the Arizona Center for Law in the Public Interest.

Again, the issue turned on departmental procedures and policies. After receiving applications for grazing leases by which the applicants actually intended to prevent the grazing of livestock, Arizona SLD encouraged the applicants to apply for a subspecies of the general category of commercial lease. Arizona SLD argued that the commercial lease was more appropriate to the intended use.[107] When the applicants refused to do so, Arizona SLD, concluding that it could not grant a grazing lease for purposes other than grazing, denied the applications and both Tate and Forest Guardians appealed.[108]

The State Enabling Act authorizes short-term leases for grazing, agricultural, commercial or domestic (homesite) purposes.[109] Grazing leases are offered on a specific classification of land, defined by the Legislature as "lands which can be used only for the ranging of livestock."[110] Grazing land is the lowest land category, classified and appraised based on its forage and annual carrying capacity.[111] The State argued that if the land was suitable for uses other than grazing, it should be reclassified and appraised for a higher and more rewarding use.[112] Because a reclassification has, under Arizona statute, the effect of terminating the existing lease, Arizona SLD does not routinely reclassify lands in the absence of an application for a new use.[113]

If a potential lessee wants to use land classified for grazing for another use, the system requires that the applicant apply for a reclassification.[114] During the process, the full ramifications of the proposed new use are

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Therein: Applicant: Jonathan D. Tate, Order No. 146-97/98, Denial of Application, Oct. 14, 1997.

105 Tate first stated he had no intention of grazing, then he stated that if required, he would graze the minimum number of animals allowed. He later recanted. The hearing officer concluded that the applicant had "furnished untrue and incomplete information regarding his actual intended use for the grazing lease." In the Matter of Grazing Lease Application No. 05-103404 for the State Land Described Therein: Appellant: Jonathan D. Tate, 97 F-031-LAN, Recommended Decision of Administrative Law Judge, March 9, 1998, at 4.

106 *Id.* at 2.

107 In the Matter of Grazing Lease Application No. 05-103404 for the State Land Described Therein: Applicant: Jonathan D. Tate, Order No. 446-97/98, Decision and Order Adopting the Recommended Decision of the Hearing Officer, April 1, 1998, at 3.

108 Forest Guardians v. Wells, 4 P.3d 1054, 1057 (Ariz. Ct. App. 2000).

109 New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910) (codified as amended at 28 U.S.C. §§ 44, 111 (2000)).

110 ARIZ. REV. STAT. § 37-101(7) (2003).

111 Arizona State Land Department Reply to Appellant's Response to Arizona State Land Department's Motion for Summary Judgment at 2–3, In the Matter of Grazing Lease Application No. 05-103404 for the State Land Described Therein, Before the State Land Commissioner (Feb. 18, 1998) [hereinafter State Reply].

112 *Id.* at 5.

113 Arizona State Land Department's Motion for Summary Judgment at 7, In the Matter of Grazing Lease Application No. 05-103404 for the State Land Described Therein, Before the Arizona State Land Commissioner (Jan. 27, 1999) [hereinafter State Motion for Summary Judgment].

114 State Reply, *supra* note 111, at 3.

appraised. "It is in the best interest of the Trust, if reclassification is viable, to appraise the rental for the argued higher and better use, which is non-grazing preservation, without assuming that the grazing rent is the fair market value for that use," the State argued.[115] The State also claimed it was in a Catch-22—reclassifying the land as commercial would cancel the grazing lease for which the applicant applied and yet, "the Applicant has refused to file the appropriate commercial lease application to lease the land for the reclassified purpose."[116]

The applicants refused to apply for leases in the recommended category. They argued that they plainly did not intend to make a commercial use of the lease,[117] and that if the land should be reclassified, the trustee bears the obligation to do so.[118] Because they were offering twice what the existing lessees were paying for the leases, the applicants argued that Arizona SLD, as a trustee, was obligated to consider the applications irrespective of the intended use.[119]

The Forest Guardians' case was weakened because in its fundraising activities the group advertised anticipated leasehold interests in state grazing lands as "available for recreational use by its membership."[120] The hearings officer concluded that a commercial lease permitted both recreational use and conservation/restoration use, and that the applicants were unwilling to apply for the commercial leases because they wished to avoid the higher commercial rates.[121] Following the advice of the administrative law judge, the Land Commissioner finally denied the applications; Tate and the Forest Guardians sued.[122]

The appeals proceeded as a single action.[123] After the trial judge affirmed the Commissioner's decision, the case moved to the court of appeals. There, the court accepted the State's argument that the scheme "is consistent with the Enabling Act in that it requires lessees to pay rental rates that are consistent with the appraised value of the land under the classification that reflects the highest and best use of the land."[124] The decision sanctioned the regulatory scheme under which the Commissioner classified state lands as either grazing or commercial.[125]

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115 State Motion for Summary Judgment, *supra* note 113, at 7–8.

116 *Id.* at 7.

117 This play on words simply ignores the meaning of the term in the relevant statute. The applicant's insistence on a grazing lease is at least equally inapt.

118 Appellant's Response to Arizona State Land Department's Motion for Summary Judgment at 8, In the Matter of Leasing Application No. 05-103404, Before the State Land Commissioner (Feb. 12, 1998).

119 *Id.* at 3–4.

120 Recommendation of Administrative Law Judge at 4, In the Matter of Grazing Lease Applications No. 05-103431 and No. 05-103432 for the State Lands Described Therein, In the Office of Administrative Hearings (Mar. 9, 1998).

121 *Id.* at 4.

122 Forest Guardians v. Wells, 4 P.3d 1054, 1057 (Ariz. Ct. App. 2000).

123 *Id.* at 1057 n.2.

124 *Id.* at 1059.

125 *Id.*

In a prolix and formalistic decision, the Arizona Court of Appeals concluded, "[I]t would be inconsistent with the statutory scheme for leases of public trust lands to allow the Commissioner to undermine the classification system by allowing grazing land to be used for purposes that fall within a higher classification."[126] It somehow made sense to the court that Arizona SLD could award a lease to a lower bidder but also that "if in fact the land is suitable for a use that is defined by statute as commercial, the trust is entitled to benefit from the increased value of the land."[127]

The dissent by Judge Gerber was a welcome simplification of the issues addressed in the majority's tight-grained opinion.[128] Judge Gerber simply observed that there is something inherently wrong with a system that "stifles market competition... by pricing conservationists out of the lease market."[129] He did not evaluate the disputed application within the existing classification system, but instead focused on the Enabling Act's mandate that trust lands must be awarded to the "highest and best bidder."[130]

In their petition for review to the supreme court, the Forest Guardians pointed out that "[w]hether the State may establish a classification system (which it surely can), or whether that classification system generally comports with the state's duties as trustee simply does not answer the question of whether the State acted as a trustee should act when it flatly refused to consider Appellants' offers in these cases."[131]

The state supreme court granted review because the case had "statewide importance with regard to operation of the trust."[132] Its decision followed the Gerber dissent closely. Instead of reanalyzing the classification system, the court relied on trust principles and the Commissioner's fiduciary duties under the Enabling Act and state constitution.[133] While recognizing that a classification system may "add to the proper administration of the trust," the court stressed that such a system must "conform to the core fiduciary trust duties imposed by our law."[134] The court continued:

> Under the circumstances presented by this case, we believe the Commissioner's fiduciary duty required him to *consider* Plaintiffs' bids and ascertain whether they were best for the corpus of the trust and its beneficiaries. We are mindful that the high bid is not necessarily the best bid. [citations omitted] But the Commissioner could not reject the high bids without first examining the facts and exercising a fact-based discretion to determine whether those bids would advance the interests of the trust and its beneficiaries. [citation omitted] The Department, in other words, cannot use the classification system in such a manner as to discourage or automatically

126 *Id.* at 1061.

127 *Id.*

128 *Id.* at 1064 (Gerber, J., dissenting).

129 *Id.* at 1065 n.6.

130 *Id.* at 1064.

131 Petition for Review at 9, Forest Guardians v. Wells, 34 P.3d 364 (Ariz. 2001) (No. CV-00-0177-PR).

132 *Forest Guardians*, 34 P.3d 364 (Ariz. 2001).

133 *Id.* at 368–72.

134 *Id.* at 371.

> reject those who seek to lease grazing lands for restorative purposes. Such a summary refusal to even consider whether Plaintiff's offers were in the best interests of the trust was a clear violation of the fiduciary duties imposed by the state constitution.[135]

The Arizona Supreme Court vacated the court of appeals decision.[136] Because so many assert or assume that the trustee is required to accept the highest bidder, it is worth reiterating that the court did not so state. The court emphasized that the high bid is not necessarily the best bid, and directed the Commissioner to determine whether the plaintiffs' bids were in the best interests of the trust.

3. Where We Are Now

Arizona SLD is currently reviewing the contested leases in *Forest Guardians*, and it is quite clear that the state supreme court wants the Forest Guardians bids to be considered seriously. However, the outcome in the legal proceeding does not assure the outcome on the ground. The court's decision certainly will not radically change the Arizona SLD, which has been partial to ranchers throughout its existence.[137] Nor will the court's holding change the political environment in which the agency operates.

The Arizona Legislature is arguably even more adverse to change than Arizona SLD. A bill is currently pending that requires new lessees to pay in advance for the value of past improvements and to pay up front for one year of the lease.[138] ACLPI attorney Tim Hogan, encouraged by the recent supreme court ruling, was surprisingly nonchalant, commenting that "it looks like we've got another struggle on our hands."[139]

B. Idaho—Less Standing, More Litigation with Less Result

1. Background

Although there are several ongoing disputes in Idaho, one is getting most of the publicity. It is in many particulars precisely as presented: Ranching industry frustrates highest bidder's quest to protect riparian areas.[140] However, the issue of prudence in dealing with scattered parcels is equally important. Moreover, what appears to be happening is a disruption

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135 *Id.* at 371–72 (emphasis in original).

136 *Id.* at 373.

137 Telephone Interview with Timothy Hogan, *supra* note 101.

138 *Id.*

139 *Id.*

140 Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs (*IWP*), 918 P.2d 1206 (Idaho 1996). *IWP* is also the only one treated in law reviews. *See* Laura Scales, *Note: Grazing Our School Endowment Lands: Idaho Watersheds Project v. State Board of Land Commissioners*, 20 J. LAND RESOURCES & ENVTL. L. 385 (2000) (arguing flatly for the high-bidder, maximize-returns view of the trust); Sean E. O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?*, 8 N.Y.U. ENVTL. L.J. 193 (1999) (using a bowdlerized version of the *IWP* and Oregon cases).

of established culture and ways of doing business: For many decades the livestock industry's approach to the state's trust land has been basically unchallenged.[141]

In 1863 Congress reserved sections 16 and 36 in what is now Idaho "for the purpose of being applied to schools."[142] However, Idaho did not join the nation and receive its grants until 1890. At that time the same sections were granted "for the support of common schools."[143] The granted lands used for grazing are concentrated in the southern portion of the state, while the more valuable lands to the north are used primarily for timber production.[144] Idaho currently holds about 2.4 million acres, roughly sixty-six percent of the lands originally granted.[145]

The thirty years between the land reservations and actual statehood put Idaho into the period of accessions, which started in Colorado in 1876, in which Congress began placing restrictions on management of the lands. In the Idaho Enabling Act, Congress provided that the granted lands may be "disposed of only at public sale," but "may be leased for not more than ten years."[146] The State interpreted this language to mean—among other things—that a lease for less than ten years is not a disposal and does not require a public auction.[147]

The original Idaho Constitution is considerably more explicit about the existence of a trust than those state constitutions that came before it. Idaho's constitution directs that the lands shall be "judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective objects for which said grants of land were made."[148] The constitution also established a politically responsive State Board of Land Commissioners (SBLC), composed of the governor, the superintendent of public instruction, the attorney general, the state controller, and the secretary of state.[149] It is SBLC's duty to "provide for the location, protection, sale, or rental of the lands . . . granted to the State . . . under such regulations as may be prescribed by law and in such manner as will secure the maximum possible amount therefor."[150] The Idaho Constitution was amended to provide that the Board must secure "the maximum long term financial return."[151]

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141 Telephone Interview with Stan Hamilton, Director, Idaho Department of Lands, Boise, Idaho (March 17, 1996) (on file with authors).

142 2 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 911–12 (1909).

143 *Id.* at 914.

144 A considerable portion of the original granted lands chiefly valuable for agriculture was sold during the early 1970s. STATE TRUST LANDS, *supra* note 15, at 102–04.

145 *Id.* at 48–51.

146 2 THORPE, *supra* note 142, at 936–38.

147 *Id.*

148 *Id.* at 937.

149 *Id.*

150 *Id.*

151 IDAHO CONST. art. IX, § 8 (1982); *see also* STATE TRUST LANDS, *supra* note 15, at 167 (quoting Idaho Constitution). Because the permanent school fund that constitutes the corpus of

In Idaho, timber is the primary revenue producer. Grazing is extremely small potatoes: in fiscal year 2000 grazing accounted for $1.527 million in receipts while timber produced $61.5 million in sales.[152] However, when the land is considered, the data are approximately reversed: Grazing leasing occurs on just more than two million acres of endowment land and timber is managed on 881,000 acres.[153]

It is also important to keep in mind the pattern of school land granting. As noted above, most of the state lands leased for grazing, and virtually all of those involved in the cases discussed herein, continue to be held in scattered section 16s and 36s, located in the townships as originally granted. The state lands typically appear as orderly squares intermixed with BLM and Forest Service holdings. The standard practice is for the state to enter into cooperative management plans with the BLM or the Forest Service for managing allotments that typically include extensive federal land, much smaller private holdings, and a spattering of state sections.[154]

Accordingly, SBLC leases most of its lands specifically for grazing. Unlike in Arizona, other uses on the leased lands are tolerated, even encouraged, and integrated with the grazing lease to the degree possible.[155] For example, if the SBLC receives an application for a lease to develop a backcountry guide camp, a put and shoot hunting operation, or similar operation on land that is already leased for grazing, the Agency will explore the possibility of blending the two uses.[156] The grazing lessee holds the state land lease subject to both general public hunting and recreation access and the possibility that additional lessees will manage the parcel for non-grazing uses.[157] The price of the AUMs is fixed by formula, and the bidders offer a premium for the lease.[158] When two or more applicants apply for a grazing lease on the same piece of land, Idaho Code Section 58-310 directs the SBLC

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the trust has always been perpetual, it is not clear whether this language change has much meaning other than to underscore long-standing obligations of the trustee to protect the long-term productivity of the trust. These issues are addressed in Souder et al., *supra* note 17, at 296–301.

152 IDAHO DEPARTMENT OF LANDS, ANNUAL REPORT 2000 12–13 (2000), *available at* http://www.idl.state.id.us/News/Annual%20Reports/Annual%20Report%202000.pdf (last visited Apr. 2, 2003).

153 STATE TRUST LANDS, *supra* note 15, at 51.

154 *See* State Board of Land Commissioners' Opening Brief at 2–6, Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs (Dist. Ct. Idaho, filed June 16, 1994) (No. CV-94-1171) (discussing the cooperation for the Herd Creek Allotment, three 640-acre state parcels within a 48,000-acre allotment).

155 Unlike the Oregon case, where an alleged statutory classification is at issue (*see infra* notes 339–46 and accompanying text), in Idaho the designation grazing lands has no legal status. It is a matter of historical use, lack of activity, scattered land parcels, and the dominant use on the surrounding and apparently controlling federal lands, most all of which is grazing. Telephone Interview with Jay Biladeau, Assistant Director, Lands, Minerals, Navigable Waters and Range Division of Idaho Department of Lands, Boise, Idaho (March 18, 1996) (on file with authors).

156 Telephone Interview with Stan Hamilton & Jay Biladeau, Boise, Idaho (March 18, 1996) (on file with authors).

157 *Id.*

158 STATE TRUST LANDS, *supra* note 15, at 139–40.

to "auction off and lease the land to the applicant who will pay the highest premium bid therefor."[159]

Also unlike Arizona, Idaho poses a serious barrier to standing to enforce trust provisions. A recent challenge to SBLC timber management appeared to foreclose the possibility of an environmental group gaining standing to sue to enforce the Idaho trust.[160] The Selkirk-Priest Basin Association (SPBA), an environmental group, challenged SBLC's decision permitting a timber sale on school endowment trust lands, alleging that SBLC's practices would result in destructive long-term effects on the land.[161] The Idaho Supreme Court concluded that the SPBA, and the school children and parents of school children who had joined the case as named plaintiffs, lacked standing to challenge SBLC's timber management practices.[162] The court explained that the Idaho Constitution provides that the schools, or the school districts of which they are part, are the only trust beneficiaries that have the legally protected interest necessary to sustain a cause of action.[163]

2. Chronology, Claims, Counterclaims, and Key Issues

a. IWP I—*The Herd Creek Dispute*

State leases in the Herd Creek Allotment were scheduled to expire in December 1993.[164] In September 1993, the existing lessee, William Ingram, applied to renew his lease.[165] Several days later, Jon Marvel, president of the Idaho Watersheds Project (IWP), an environmental group "founded to identify and lease important watershed and riparian areas occurring on the

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159 IDAHO CODE § 58-310 (Michie 2002).

160 Selkirk-Priest Basin Ass'n v. State, 899 P.2d 949 (Idaho 1995).

161 *Id.* at 950.

162 *Id.* at 952.

163 *Id.* One justice dissented from the court's holding on this point, stating that "[t]he true beneficiaries are those who benefit from the state's constitutional duty to maintain common schools—the students." *Id.* at 956 (Johnson, J., dissenting). The court did leave one small crack open, the possibility that the public's interest in the public trust aspects of navigable streams running through the contested sale area might give the public standing. The Legislature acted promptly after the decision to exclude operation of the public trust from endowment and other lands. IDAHO CODE § 58-1203 (Michie 2002). The timber industry also successfully sought legislation providing that anyone seeking to enjoin a timber sale must post a 10 percent bond. Revisions to the Idaho administrative procedures, moreover, created an exception for endowment land timber sales, which are no longer subject to judicial review. *See* IDAHO CODE § 58-405 (Michie 2002) (exempting SBLC actions from judicial review provisions of the Idaho Administrative Procedure Act).

164 SBLC Meeting Minutes at 4 (Dec. 21, 1993) (on file with authors).

165 *Id.*

school lands of the State of Idaho,"[166] submitted an application on the Herd Creek parcel, one of four state sections in the large BLM-managed pasture.[167]

On January 11, 1994, the Idaho Department of Lands (IDL) sent notice to Ingram and Marvel that an auction would be held January 28, 1994.[168] Marvel made an opening bid of $30.00.[169] Ingram did not bid, stating "$30.00 is too much—we are not bidding."[170] On February 4, 1994, Ingram filed an administrative appeal, seeking SBLC review of the conflict auction.[171] At the regular meeting on February 8, 1994, SBLC considered Ingram's appeal and by a vote of 4-1 awarded the lease to Ingram.[172] IWP sued soon thereafter.[173]

The Idaho District Court sided with SBLC, and IWP appealed.[174] The Idaho Supreme Court ultimately agreed with IWP that Ingram could not be granted the lease because "a party must actually place a bid at a conflict auction in order to be considered a qualified applicant."[175] The court based its decision solely on the plain language of the relevant statute governing lease auctions: "when two (2) or more persons apply to lease the same land, the director or the department of lands, or his agent, shall . . . auction off and lease the land to the applicant who will pay the highest premium bid

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166 Plaintiff/Appellant's Opening Brief at 1, Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs (Dist. Ct. Idaho, filed May 19, 1994) (CV-94-1171) [hereinafter Plaintiff/Appellant's Opening Brief]. The plaintiffs stated that their "purpose in leasing these lands is the protection and restoration of their watersheds and riparian areas for their intrinsic educational and recreational values and also for the benefit of Idaho's wildlife." *Id.* However, it is worth noting that IWP also bid on areas that, according to SBLC officials, have no important watershed or riparian values.

167 At the December 21, 1993 SBLC meeting it was announced that Marvel had, as required by law, "submitted an affidavit stating that he has received a copy of the [BLM] management plan [for the allotment] and will comply with the plan. The BLM was notified of Mr. Marvel's intent and indicated that as long as fencing is restricted to the south side of Herd Creek Road, there should be no substantial impact of [sic] the overall management of the allotment." SBLC Meeting Minutes, *supra* note 164.

168 *Id.* at 2 (Dec. 21, 1993) (on file with authors).

169 *Id.*

170 Plaintiff/Appellant's Opening Brief, *supra* note 166, at 5.

171 SBLC Meeting Minutes, *supra* note 164.

172 The meeting was open to all interested parties, including but not limited to the bidders, who spoke at length in favor of granting or not granting the lease. *See id.*

173 IWP was busy bidding on other leases while the dispute over the Herd Creek Allotment made its way through the courts. In September 1994, one month before the district court decision on the dispute was published, IWP bid on four more leases, involving contests with four other existing lessees. Three in which the low bidder prevailed gave rise to litigation that was dropped when Marvel switched attorneys. Telephone Interview with Debra Kronenberg, IWP Attorney, Boise, Idaho, (March 19, 1996) (on file with authors); *see also* SBLC Meeting Minutes (Mar. 31, 1995 and Apr. 4, 1995) (on file with authors). The fourth auction was delayed by suggestions of collusion between ranchers bidding on the lease. The existing lessee won a later auction with a premium bid of $13,550, but "request[ed] that the SBLC set aside the auction results and issue a new lease . . . for the original, prepaid, fair market value of the 320 acres." SBLC Meeting Minutes at 6 (Apr. 11, 1995) (on file with authors). After the appeal was heard, and before the SBLC rendered an opinion, the rancher decided to drop the issue and paid his premium. SBLC Meeting Minutes at 9 (June 13, 1995) (on file with authors).

174 *IWP*, 918 P.2d 1206, 1208 (Idaho 1996).

175 *Id.* at 1211.

therefor."[176] The court rejected SBLC's argument that it presumed former lessees place premium bids at conflict auctions even if they do not bid at all.[177]

The court simply said Ingram must place a bid; it did not require that the highest bidder be awarded the lease. Apparently quite confident, Ingram bid $10 to IWP's $2000 at the second auction.[178] Sure enough, SBLC awarded Ingram the lease, and IWP filed another suit in district court to contest this outcome. Because the story is about to get a bit more complicated, we will refer to this first case as *IWP I*.

b. Committee for Idaho's High Desert v. State Board of Land Commissioners

Meanwhile, another environmental group, Committee for Idaho's High Desert (CIHD), entered the fray in another leasing contest. It too followed the normal process for bidding on expiring leases. It also failed to obtain leases, but the problems it encountered were significantly different.

When the September 30, 1994 deadline for applying to bid on a particular lease passed, CIHD was the only valid applicant.[179] But the existing lessee's "failure to file a timely application"[180] did not mean CIHD was awarded the lease. Rather, SBLC concluded, it meant the lands could be offered as "unleased" land.[181] Accordingly, SBLC established a new deadline for applications.[182] On October 5, 1994, SBLC reminded the existing lessee, Simplot, of the missed deadline and the conflict application, and subsequently accepted Simplot's application.[183] Simplot won the leases after a public auction, partly because CIHD had submitted applications for two separate parcels.[184] SBLC decided at the last minute to combine the bidding on the two parcels.[185]

CIHD sued on the grounds that combining the units was contrary to law, procedurally irregular, and reduced the financial returns to the school fund.[186] The State responded that CIHD lacked standing to sue because it failed to demonstrate that it had suffered any injury. The State argued that CIHD was unable to demonstrate that combining the parcels had harmed its ability to prevail at the auction, and pointed out that even if CIHD had been

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176 *Id.* (citing IDAHO CODE § 58-310 (Michie 2002)).

177 *Id.* at 1211.

178 Telephone Interview with Laird Lucas, Senior Counsel, Land and Water Fund of the Rockies (Apr. 1, 2002) (on file with authors) [hereinafter Lucas Interview].

179 Opening Brief in Support of Petition for Judicial Review at 7–13, Comm. for Idaho's High Desert v. State Bd. of Land Comm'rs (Dist. Ct. Idaho, filed Aug. 12, 1995) (No. CV OC 9502027D).

180 *Id.* at 10.

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* at 12.

185 Opening Brief in Support of Petition for Judicial Review, *supra* note 179, at 12.

186 *Id.* at 16.

the high bidder, it would not necessarily have been awarded the lease.[187] The State also argued that CIHD's complaints that the combination of parcels reduced the income to the school fund were irrelevant because, following the *SPBA* cases, the environmental group had no standing to raise the issue.[188] The State it was "within the Department's discretion to configure the auctions to best fit its requirements in the management and administration of state endowment lands."[189]

Ruling for CIHD, the court was "not persuaded that the error [in failing to give adequate notice of the combining of the parcels] was harmless" and remanded for a new auction.[190] The court did not find favoritism for the ranching industry in SBLC's efforts to "prompt" a tenant of need to apply to renew the lease, stating "just because the statutes and regulations do not specifically authorize it does not mean that common courtesies are somehow prohibited."[191]

c. The Legislature

In 1995, the Idaho Legislature joined the fray, partly in response to *IWP I*, then pending in the courts. The legislature redefined the bidders' qualifications for state grazing leases. Known in some circles as the "anti-Marvel bill" because it appeared to have been adopted to prevent the kind of contested lease auctions precipitated by IWP, the bill was designed to support the endowment lands and the state "by encouraging a healthy Idaho livestock industry so as to generate related business and employment opportunities on a state and local level, thus supporting additional sales, income and property taxes."[192] The bill established criteria to be considered by SBLC in deciding who is a qualified applicant:

> (b) Whether the current lessee owns or controls sufficient real property to adequately feed the livestock in the lessee's agricultural operation when the lessee is not utilizing the state lands for grazing purposes;
> (c) The importance of the state grazing lands to be leased upon the current lessee's total annual livestock operation, and the ability of the lessee to remain economically viable without the lease;
> (d) The future revenues reasonably anticipated to be generated for the beneficiaries of the endowment and the state as a result of awarding the lease to one (1) applicant over others. If a conflict auction has been held, the board also may consider the premium bids resulting from the auction.
> (e) The indirect benefits to the beneficiaries of the endowment from tax revenues from all sources generated by the lessee's proposed activities on the leasehold and those activities related thereto, and the long-term stability or

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187 State of Idaho's Reply Brief at 16–20, *Comm. for Idaho's High Desert* (Dist. Ct. Idaho, filed Sept. 21, 1995) (No. CV OC 9502027D).

188 *Id.* at 16.

189 *Id.* at 20.

190 Mem. of Decision at 7–9, *Comm. for Idaho's High Desert* (Dist. Ct. Idaho, Dec. 14, 1995) (No. CV OC 9502027D).

191 *Id.* at 7–8.

192 IDAHO CODE § 58-310B(2)(a), (b) (Michie 2002).

appreciation of such tax revenues;
(f) The impact on endowment land or the return to the endowment if the leasehold is not managed in conjunction with adjacent grazing lands;
(g) Whether the current lessee has managed the conflicted parcels in accordance with a written cooperative grazing management plan which meets department standards;
(h) Whether the current lessee has applied in writing to the director for the development and implementation of a written cooperative grazing management plan which meets department standards.[193]

d. IWP Again

Undaunted by the new law, IWP entered the 1995 grazing leasing season by filing sixteen separate lease applications for parcels where the lease was due to expire in December 1995.[194] One might think the environmental groups were getting the hang of it by this time and might actually win a lease. However, in December 1995, SBLC used the criteria in the new statute to find Jon Marvel and IWP unqualified as applicants for four of the expiring 1995 leases.[195] Again IWP sued, and so began *IWP II.*

e. The Legislature Again

Unsatisfied with the "anti-Marvel" bill, the Idaho Legislature acted again in 1998, this time to amend the constitution. The constitution required that "disposal" of granted lands be made at "public auction."[196] A lease in excess of five years therefore required a public auction of the type IWP was using to bedevil established leaseholders. The 1998 amendment merely substituted the term "sale" for the term "disposal" among a number of tedious provisions regarding the permanent school funds.[197]

f. Court Decisions

April 2, 1999 was surely a day IWP celebrated. In three separate decisions IWP emerged victorious in the Idaho Supreme Court. First, IWP successfully barred the constitutional amendment.[198] The group prevailed on a technicality: The resolution violated the "single subject rule" of the Idaho Constitution, which requires the filing of separate amendments when a provision deals with more than one subject or purpose.[199]

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193 *Id.* § 58-310B(6)(b)–(h). According to the new qualifications, it is not even necessary to be in compliance with a written plan, but merely to have "applied in writing" for the development of one. *Id.*

194 Idaho Watersheds Project v. State Bd. of Land Comm'rs, 982 P.2d 371, 373 (Idaho 1999).

195 *Id.*

196 IDAHO CONST. art. IX, § 8 (1998).

197 *Id.*

198 No lawsuit had achieved this since the 1920s. Lucas Interview, *supra* note 178.

199 *Idaho Watersheds Project*, 982 P.2d at 363.

Secondly, IWP also prevailed on the "anti-Marvel" bill claim.[200] Because IWP sought judgment that the bill was unconstitutional as applied to it, the court first addressed whether IWP had standing to challenge the bill.[201] IWP was "adversely affected" by the bill because IWP was determined not to be a "qualified applicant" to bid on expiring leases according to the terms of the bill.[202] Secondly, IWP was "individually harmed" by the statute, in contrast to other citizens in the community, because the state rejected some of its applications and some auction bids using the statute's criteria.[203] Finally, the court found a sufficient causal connection between the denial of leases and the statute.[204] Thus, IWP had no trouble proving standing as a frustrated bidder.[205]

On the merits, the court ruled that Idaho Code Section 58-310B was unconstitutional because it "promote[d] funding for the schools *and* the state."[206] The dual funding was inconsistent with the Idaho Constitution, which allowed the state to consider only the "maximum long term financial return to the schools in the leasing of school endowment public grazing lands."[207] Of considerable significance to the court were the hearings on Idaho Code section 58-310B and the fact that the Legislature considered the effects of the livestock industry on the state economy.[208] The court noted that supporters of the bill had "urged the [legislative] committee to consider . . . the stability of the livestock industry, the effect on the overall economy of ranchers going out of business, jobs and additional tax funds generated by the livestock industry, and the effect on those who supply the livestock industry."[209] Thus, the bill was held unconstitutional because it "impermissibly direct[ed] the Board to focus on the schools, the state, and the Idaho livestock industry in assessing lease applications, all to the detriment of other potential bidders like IWP, who might provide 'maximum long term financial return' to the schools, but not to the state and the Idaho livestock industry."[210] The court remanded the case to SBLC with orders to hold new auctions for 1996 leases on which IWP was previously not allowed to bid.[211]

IWP ultimately prevailed in *IWP II*. The case was decided separately because the district court refused to consolidate IWP's two claims.[212] Although the State attempted to argue that the case was different from the anti-Marvel bill case because SBLC applied "general land classification

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200 Idaho Watersheds Project v. State Bd. of Land Comm'rs, 982 P.2d 367 (Idaho 1999).

201 *Id.* at 369.

202 Idaho Watersheds Project v. State Bd. of Land Comm'rs, 982 P.2d 371, 373 (Idaho 1999).

203 *Idaho Watersheds Project*, 982 P.2d 367, 369 (Idaho 1999).

204 *Id.* at 369–70.

205 In this context, IWP did not act to enforce the trust but challenged a legislative action directly affecting its interest as a prospective lessee.

206 *Idaho Watersheds Project*, 982 P.2d at 370.

207 *Id.* at 367 (internal quotations omitted).

208 *Id.* at 370.

209 *Id.*

210 *Id.* at 370–71.

211 *Id.* at 371.

212 *Idaho Watersheds Project*, 982 P.2d 371 (Idaho 1999).

concerns" instead of Idaho Code section 58-310B when it rejected IWP's 1995 lease applications, the court succinctly threw out this argument.[213] The court mainly relied on the holding in *IWP I* to find that IWP had standing and again remanded the auction of the 1995 lease applications to SBLC.[214]

3. Where We Are Now

On January 11, 2000, SBLC awarded IWP its first leases.[215] And finally, on July 11, 2000, after six years of legal battles, IWP beat out Ingram at the auction for the Herd Creek parcel—the same plot of land that launched the long-winded series of lawsuits.[216] This time Jon Marvel walked away (or perhaps rode off into the sunset) with the lease.[217]

IWP's persistent litigation arguably has resulted in real change in SBLC policies. Activists argue that returns to the fund are higher, applicants are required to submit grazing allotment management plans, and SBLC routinely performs resource inventories.[218] Nevertheless, the issues are far from settled. IWP plans to challenge new regulations that do not appear to be much of an improvement over the anti-Marvel bill.[219] Although IWP has finally secured a number of leases, it continues to lose the parcels it considers to be most important ecologically.[220]

And there are still more lawsuits. In one pending action, IWP claims SBLC did not follow proper procedures for contested case proceedings under the Idaho Administrative Procedure Act.[221] IWP claims this "deprive[d it] of any meaningful opportunity to develop the facts supporting its lease applications."[222] It also claims SBLC still fails to meet its fiduciary duties under the trust:

> Rather than focus solely on maximizing long-term financial returns to the school endowment trust . . . the Department and Land Board have again sought to assist the former lessees in continuing their livestock operations on state lands, and actively opposed IWP's competition in myriad ways—including by ignoring the advantages offered by IWP's management proposals in achieving stated management goals for the two allotments, and underplaying the

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213 *Id.* at 374.

214 *Id.* at 375.

215 Press Release, Idaho Watersheds Project, Victory! (Jan. 12, 2000), *available at* http://www.srv.net/~idwp/archives/email/emailarc.htm.

216 Press Release, Idaho Watersheds Project, Seven Year Battle Ends with Victory for Idaho Watersheds Project (July 11, 2000), *available at* http://www.srv.net/~idwp/archives/email/emailarc.htm.

217 *Id.*; Bob Fick, *Idaho Watersheds Wins 10-Year Lease*, IDAHO STATESMAN, July 12, 2000, *available at* http://www.srv.net/~idwp/archives/press/2000/2000_press5.PDF.

218 Lucas Interview, *supra* note 178.

219 *Id.*

220 *Id.*

221 Petitioner's Opening Brief at 2, Idaho Watersheds Project v. State Board of Land Commissioners (Dist. Ct. Idaho, Aug. 2001) (CV-OC-0100158D) (on file with authors).

222 *Id.*

> disadvantages of the status-quo management proposals advanced by [the existing lessees] LMGA and Pickett.[223]

But Marvel and IWP cannot, under Idaho's standing doctrine, raise these issues.[224] IWP has succeeded only in arguing as a disappointed bidder. As in Arizona, Idaho environmental groups have scored significant victories in the state courts. Although they continue to see their victories erode in the Legislature, IDL and SBLC appear less resistant to change. The litigation continues as the basic issues have yet to be settled.

C. New Mexico—Still Standing

1. Background

New Mexico joined the Union under the same enabling act as Arizona.[225] Congressional attention in the Enabling Act to the management of the trust and the procedural requirements for the sale and management of trust assets are peculiarly specific.[226] Contrary to what one might expect, such clarity was no more a guarantee in New Mexico—that basic trust principles would control grazing—than slightly further west in Arizona. To this point the New Mexico Legislature has stayed out of the debates, but that may be because the status quo is insulated from challenge by standing issues.

As of 1996 New Mexico managed 9.21 million acres of trust land, approximately sixty-nine percent of the original area granted.[227] Of that acreage, about 8.7 million acres were leased for grazing.[228] The New Mexico granted lands are administered by the Commissioner of Public Lands with the assistance of the Land Trusts Advisory Board (the Board), a statutory body that provides advice to the Commissioner but has no decision-making authority.[229]

As in Arizona, section 6 of the Enabling Act grants four sections of land in each county "for the support of common schools."[230] New Mexico

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223 *Id.* at 43.

224 *See Selkirk-Priest Basin Ass'n*, 899 P.2d 949, 952 (Idaho 1995) (standing to challenge management of trust lands restricted to schools and school districts).

225 New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557 (codified as amended at 28 U.S.C. §§ 44, 111 (2000)). However, Arizona was also New Mexico's comrade in nonadmissions. The New Mexico-Arizona accession was long and unattractively disputed. *See* STATE TRUST LANDS, *supra* note 15, at 18–24, for a brief discussion of land grants and the accession process. *See* PAUL WALLACE GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 315–16 (1968) (describing the admissions process of Arizona and New Mexico).

226 *See* Megan K. Davis, Evaluation of the New Mexico Range Stewardship Incentive Program (1995) (unpublished M.A. thesis, Northern Arizona University) (on file with authors) (providing an excellent summary of the New Mexico constitution-enabling act weave).

227 STATE TRUST LANDS, *supra* note 15, at 48–52 tbl.2-3, fig.2-3 (citations omitted).

228 *Id.* at 51 tbl.2-4. Many of those same acres are simultaneously under lease to other parties for oil and gas or coal development. *Id.*

229 Davis, *supra* note 226, at 13.

230 Arizona-New Mexico Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557 (codified as amended at 28 U.S.C. §§ 41, 111 (2000)). New Mexico indeed seems to have an uncommonly

continues to operate under original Enabling Act language—its constitution is far less amended than Arizona's. Thus, the state takes the position that all the restrictions of section 10 of the Enabling Act—requiring highest and best bidders at a public auction and advertisement for ten successive weeks (except for leases of not more than five years)—continue to apply in New Mexico.[231] However, unlike Arizona, New Mexico did not supplement the extensive Enabling Act language with even more extensive constitutional language. The New Mexico Constitution contains a fairly standard definition of the permanent fund,[232] and directs that a commissioner of public land "shall select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law."[233]

Although the grazing program occupies the majority of trust land, the minerals program, principally oil and gas, produces approximately twenty times the annual grazing revenues.[234] Revenues from nonrenewable trust resources, including oil and gas royalties, are deposited in the permanent fund,[235] earnings from which are distributed annually to beneficiaries.[236] Revenues from renewable resources, such as agricultural land leases, are distributed directly to the beneficiaries.[237] The same income from renewable resources is also used to fund the operation of the State Land Office (SLO).[238] Expenses are deducted from the receipts and are not subject to legislative appropriation.[239]

New Mexico State Land Office Rule 8 provides guidance on agricultural land leasing.[240] The state presumes existing leases will be renewed.[241] If a rival bidder wants to contest the lease, he or she must apply to the State Land Commissioner for permission to do so.[242] The rules provide that a rival bidder must apply for the entire acreage already under lease.[243] Further, "blanket bids" for acreage under more than one lease, or for acreage that

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diverse array of other beneficiaries. *See* STATE TRUST LANDS, *supra* note 15, at 50 tbl. 2-3.

231 In practice, almost all of New Mexico's grazing leases are for five years or less. Environmentalists believe public auctions are required for leases of all durations, including those less than five years. E-mail from Julie Teel, Associate Attorney, Earthjustice, to Sally Fairfax, Co-Author (Aug. 6, 2002) (on file with authors).

232 N.M. CONST. art. XII, § 2 (1911).

233 *Id.* XIII, § 2.

234 In 1990, for example, total revenue from state trust lands was $127 million—$115 million from oil and gas, and $6 million from grazing receipts. *See* STATE TRUST LANDS, *supra* note 15, at 60–61 tbl. 2-6.

235 Davis, *supra* note 226, at 14.

236 *Id.*

237 *Id.* at 13–14; *see also* STATE TRUST LANDS, *supra* note 15, at 59–63.

238 Davis, *supra* note 226, at 14.

239 STATE TRUST LANDS, *supra* note 15, at 45–47, 85–86.

240 N.M. ADMIN. CODE tit. 19, § 2.8 (2002). Beginning December 13, 2002, the State Land Office reformatted all of its rules in the New Mexico Administrative Code Format, as discussed at http://www.nmstatelands.org/landoffice/GenCoun/Rules.asp.

241 N.M. ADMIN. CODE TIT. 19, § 2.8.8(G) (2002).

242 *Cf. id.* (allowing existing lessees the right to match competitive bids and obtain new leases).

243 *Id.* § 19.2.8.9(F).

combines open and already leased land, will not be considered.[244] Separate bids and applications are required for each separate lease.[245]

2. Chronology, Claims, Counterclaims, and Key Issues

Two environmental groups, Forest Guardians and the Southwest Environmental Center, applied in August 1995 to lease nine parcels of state land as the existing grazing leases expired.[246] Three applications were for the entire parcel as previously leased, three were for a substantial portion of the previously leased parcel, and three were for a small portion of the previously leased unit.[247]

SLO rejected eight of the nine applications without conducting a public auction and awarded those leases to the existing lessee.[248] In one instance SLO accepted the application and issued a Notice of Contest.[249] (Interestingly, in New Mexico, the contest is between the existing lessee and the potential lessee, with the Land Commissioner acting as a hearing officer, rather than between two potential lessees and the state.)[250] After a sealed bidding process, which the applicants argued violated the requirement for a public auction, the existing lessee matched the environmental groups' bids and retained the lease.[251] In November 1995, Forest Guardians received rejection notices from the State Land Commissioner regarding the eight other applications.[252]

In January 1996, the two environmental groups filed suit, claiming that SLO regulations "harm their ability to successfully bid on leases for State school trust lands."[253] Their suit was a facial challenge to the constitutionality of state statutes and regulations. As it turned out, that decision to bring the suit as a facial challenge was its undoing.

In rejecting the applications, the Commissioner used a form drafted especially for the occasion.[254] The grounds for denial reflect some of the managerial challenges that arise from the section-by-section format of the

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244 *Id.* § 19.2.8.9(A).

245 *Id.*

246 *See, e.g.*, Petition Contesting Denial of Application for Lease of State Land at 1, *In re* the Matter of Forest Guardians and Southwest Environmental Center (Jan. 23, 1996); telephone interview with John Horning, State Lands Project Coordinator, Forest Guardians (March 22, 1996) (on file with authors) [hereinafter Horning Interview].

247 *See, e.g.*, Petition Contesting Denial of Application for Lease of State Land at 1, *In re* the Matter of Forest Guardians and Southwest Environmental Center (Jan. 23, 1996). Horning Interview, *supra* note 246.

248 Horning Interview, *supra* note 246.

249 Letter from Ray Powell, New Mexico Commissioner of Public Lands, to Kevin Bixby, Southwest Environmental Center, and John Horning, Forest Guardians at 1 (Mar. 5, 1996) (on file with authors).

250 SLO personnel note that this configuration is not well suited to cases when the disappointed bidder disputes the Commissioner's decision.

251 Horning Interview, *supra* note 246.

252 *Id.*

253 Plaintiffs' Petition for Writ of Certiorari at 2, Forest Guardians v. Powell, 26 P.3d 103 (N.M. 2001) (No. 26,915).

254 Horning Interview, *supra* note 246.

original grants. Regarding one of the lease applications, the Commissioner found:

> [1]. The field staff consider[ed] [the sought after] section important to the [existing] ranch unit. Separation from the current ranch unit would result in the need for extensive additional fencing and the establishment of a water source to serve the other state trust land that would remain with the lease . . . .[255]
> [2]. The lessee lives in the area of the leased property and his proximity better enables him to protect it from waste and trespass.[256]
> [3]. The competing bidder's offer of $0 for the improvements indicates the bid does not reflect the improvements located on the lease and was not made in good faith.[257]

With regard to another lease application, the Commissioner rejected the competing bid in part because, "[t]he current lessee has held the lease for at least 30 years and is a stable site steward."[258]

Some representative schoolchildren and their parents eventually joined the environmental groups in the suit, claiming that SLO's regulations harmed them by reducing income to the trust.[259] Although it was logical to include the school children in the case, the defendants argued their inclusion was merely a ruse.[260] Indeed, the Cattle Growers Association, who intervened in the suit, stated, "While they do not specifically so allege, it appears that

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[255] Agricultural Lease Competitive Bid, 1995 Decision Mem., Lease No. GO-0282 (Nov. 6, 1995) (on file with authors).

[256] *Id.*

[257] *Id.* This is in spite of the fact that the lessee did not protest the improvement value offered by the bidder. *Id.* The state field evaluation estimated the improvement's value at $2794.88. *Id.* When the lease changes hands, the treatment of the improvements has an enormous impact on the market value of the lease. For an introduction to the improvements issue, see STATE TRUST LANDS, *supra* note 15, at 122–23.

[258] Agricultural Lease Competitive Bid, 1995 Decision Mem., Lease No. GO-0318 (November 6, 1995) (on file with authors).

[259] Plaintiffs' Brief in Chief at 10, *Forest Guardians*, 24 P.3d 803 (N.M. Ct. App. 2001) (No. 20,758). On petition to the New Mexico Supreme Court, the plaintiffs argued that the schoolchildren and the environmental group's interests overlapped. Plaintiffs' Petition for Writ of Certiorari at 8, *Forest Guardians*, 26 P.3d 103 (N.M. 2001) (No. 26,915).

[260] Telephone Interview with Jay Tutchton, Staff Attorney, Earthjustice Denver Office (Nov. 29, 2001) (on file with authors). [hereinafter Tutchton Interview]. One of the more interesting themes to follow in a long-term study of state trust lands over many resources and jurisdictions is the constantly evolving relationship between diverse resource interests (particularly timber lessees, grazing lessees, environmentalists, and similar interests, and the beneficiary. For most of the twentieth century, it appeared that timber lease purchasers would, for example, prefer that the lands department ignore the beneficiaries and make resources available on a harvest schedule that benefited the harvesters. However, when the environmentalists succeeded in pressing land boards to attend to the environmental impacts of overharvesting (couched in the trust jargon of a concern for the long-term productive capacity of the trust corpus) the timber interests typically embrace the school children's interests, arguing that such abstinence impermissibly denies returns to the beneficiary. This is fairly predictable politics, but a scorecard can be helpful in identifying the players. *See* Jon A. Souder et al., *Is State Trust Land Timber Management "Better" Than Federal Timber Management? A Best Case Analysis*," 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 23–30 (1998) (discussing Okanogan Co. v. Belcher (Wash. Super. Ct. Chelan County, 1996) (No. 95-2-00867-9)).

schoolchildren parents Jacober, Atkinson, Jones and Scott are members of either Forest Guardians or the Southwest Environmental Center, or both."[261] The Cattle Growers continued: "Their interests, as those of the conservation groups, are not to see more income for the public schools but are to shut down or severely curtail productive and income-producing uses of state trust lands."[262]

Unfortunately, the merits of the Forest Guardians' arguments were never determined. Although the plaintiffs in the suit included schoolchildren and their parents, the Santa Fe County District Court held they lacked standing to sue, and the appellate court affirmed.[263]

The plaintiffs proffered five different theories of standing and the court of appeals rejected all of them. First, they argued that New Mexico schoolchildren and their parents were beneficiaries of the trust, which was set up to benefit the "common schools."[264] The court rejected this argument and announced that school trust lands are held in a charitable trust, not a private trust.[265] The distinction is crucial because beneficiaries can sue to enforce a private trust,[266] but only an attorney general or a person with a "special interest" can enforce a charitable trust.[267] Ignoring the plaintiffs' arguments that Arizona and Colorado courts had conferred standing upon schoolchildren,[268] the court first determined the New Mexico Enabling Act trust is a charitable one because its duration is perpetual. Thus, it followed that the trust beneficiaries, the public, are indefinite.[269]

Using the charitable trust framework, the court determined that the schoolchildren lacked the requisite "special interest" to gain standing to challenge trustee actions.[270] It held that "individuals must show that they have a special and definite interest in the trust or are entitled to receive a benefit."[271] Accordingly, the court held that because a specific public school, or schoolchild does not receive income directly from the trust the school children do not satisfy this standard.[272] The New Mexico court did not pull

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261 Response Brief of Appellees New Mexico Cattle Growers Association, at 4, *Forest Guardians*, 24 P.3d 803 (N.M. 2001) (No. 20,758).

262 *Id.*

263 *Forest Guardians*, 24 P.3d 803, 806 (N.M. Ct. App. 2001), *appeal denied*, 26 P.3d 103 (N.M. 2001). This is the end of the road for the case because the Supreme Court of New Mexico refused review. *Forest Guardians*, 26 P.3d 103 (N.M. 2001).

264 Plaintiffs' Brief in Chief at 7, *Forest Guardians*, 24 P.3d 803 (N.M. Ct. App. 2001) (No. 20,758) (citing the Enabling Act).

265 *Forest Guardians*, 24 P.3d at 808.

266 RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

267 *See id.* § 200 (stating that only beneficiaries or someone suing on their behalf may enforce a private trust).

268 Plaintiffs' Brief in Chief at 8–9, *Forest Guardians* (No. 20,758) (citing *Jeffries*, 3 P.3d 1071 (Ariz. Ct. App. 1999); Branson School Dist. RE-82 v. Romer, 958 F. Supp. 1501 (D. Colo. 1997)).

269 *Forest Guardians*, 24 P.3d 803, 808 (N.M.Ct. App. 2001). These characteristics are allowable in charitable trusts, RESTATEMENT (SECOND) §§ 364, 365 (1959), but not in private trusts. *Id.* § 112 ("A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust . . . .").

270 *Forest Guardians*, 24 P.3d at 809.

271 *Id.*

272 *Id.*

this trick out of thin air—determining who meets this special interest doctrine varies greatly case-to-case and among the states.[273]

The concept that schoolchildren are not affected by the administration of the trust is also the basis on which the court of appeals rejected the schoolchildren's standing to enforce the Enabling Act trust as a constitutional provision.[274] The court described the complex mechanisms by which trust funds are allocated to schools, and was not convinced that there "would be an actual increase in the funds available to individual public schools or school districts" if the trust fund increased.[275] Because the funds do "not go directly to individual schools or districts" but are "disbursed pursuant to a complicated school budgeting process," the court held there was no "causal relationship between the Land Office's alleged mismanagement and the funding available to local schools."[276]

The court did not unanimously conclude that there is no corresponding benefit to the beneficiaries when the pie grows larger, and one judge voiced a strong dissent on the issue of the schoolchildren's standing.[277] Conceding that an increase of the trust would not increase school funding dollar for dollar, Judge Bustamante argued that any increase in the total fund is a "real remedy."[278] In addition, Judge Bustamante "[f]ear[ed] that the issues will never be heard" because the only parties qualified to bring suit—the state or a federal agency—were in fact defending the present case "vigorously."[279] The adequacy of charitable trust enforcement is surely questionable. Commentators have noted that enforcement by an attorney general is far from ideal, not only politically, but also because "[a]ttorneys general's

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273 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). There have been many calls for reform to make the doctrine "more consistent and predictable." Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37 (1993) (espousing the adoption of the multifactor test used in *San Diego County Council v. City of Escondido*, 92 Cal. Rptr. 186 (Cal. Ct. App. 1971) and *Alco Gravure v. Knapp Found.*, 479 N.E.2d 752 (N.Y. 1985)).

274 *Forest Guardians*, 24 P.3d 803, 812 (N.M. Ct. App. 2001).

275 *Id.*

276 *Id.* at 812–14. A litigant must have a sufficient stake in the controversy to bring it before the court. The plaintiff must have suffered an "injury in fact," there must be a causal connection between the injury and the conduct complained of, and the injury must be capable of redress. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 562 (1992).

277 *Forest Guardians*, 24 P.3d at 815 (Bustamante, J., dissenting).

278 *Id.*

279 *Id.* at 816 (Bustamante, J., dissenting) According to the majority opinion,

> The state and federal attorneys general clearly have the power, the duty, and the public's interest to enforce the New Mexico school lands trust should the Land Office or any other agency seek to violate the terms of the trust. Plaintiffs could have asked either attorney general to review this case[.]

Id. at 814. SLO first argued that only the United States Attorney General could sue to enforce trust obligations. Response Brief of Appellees New Mexico Cattle Growers Assoc., at 19, *Forest Guardians*, 24 P.3d 803 (N.M. Ct. App. 2001) (No. 20,758). SLO later argued that the plaintiffs' case could be heard only if they appealed a specific adverse action. Response of Defendant Ray Powell, Commissioner of Public Lands, to Plaintiffs' Petition for Writ of Certiorari at 5, *Forest Guardians*, 26 P.3d 103 (N.M. 2001) (No. 26,915).

offices are traditionally understaffed, underfunded, and have many pressing concerns aside from charities."[280]

According to the plaintiffs' third standing theory, the conservation groups could enforce the constitutional provisions as bidders on the trust lands.[281] They claimed that SLO's practices "significantly impaired the conservation groups' access to and ability to receive leases on state trust lands, and will directly impair their efforts in the future."[282] Not surprisingly, this theory failed because the groups did not fit into the Enabling Act's "zone of interests."[283] Basically, an organization is denied standing to sue regarding the constitutionality of a statute or regulation if the group is not within the zone of interests to be protected by the particular rule. Because "the provisions of the Enabling Act are not for the benefit of purchasers or leases of trust land," but for the benefit of the state citizens, the court ruled the environmental groups' claims could not be heard.[284]

Forest Guardians' fourth standing theory also failed. An association has standing when the "interest it seeks to protect are germane to the organization's purpose."[285] In this case, the group's environmental focus did not coincide with the trust's purpose of "the maximization of profits derived from the leasing of the trust lands."[286] The court remarked that "it is easy to imagine a situation in which the best action for the trust would be contrary to the conservation groups' self-avowed missions."[287]

Theory number five was no more effective. The court ruled the doctrine of "great public importance"[288] did not apply to the case because the doctrine may be used only in cases involving "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution."[289]

While seemingly a discouraging opinion for trust enforcement, *Forest Guardians* can be viewed in another light. Stephen Hughes, SLO attorney, explained that the case was really all about forcing the plaintiffs to "exhaust their administrative remedies" through contest proceedings before filing lawsuits.[290] In other words, the bureaucrats wanted the plaintiffs to go through normal agency procedures: disputing an unfavorable decision within the agency system before filing a lawsuit in the courts.

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280 Blasko et al., *supra* note 273 at 48.

281 Plaintiffs' Brief in Chief at 4–5, *Forest Guardians*, 24 P.3d 803 (N.M. Ct. App. 2001) (No. 20,758).

282 *Id.* at 20.

283 *Forest Guardians*, 24 P.3d 803, 810 (N.M. Ct. App. 2001).

284 *Id.* at 811.

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.* at 814.

289 *Id.* at 815 (internal quotations omitted).

290 Telephone Interview with Stephen G. Hughes, Special Assistant Attorney General, New Mexico State Land Office (Nov. 30, 2001) (on file with authors).

3. Where We Are Now

Optimistically calling the appellate court decision a "momentary disappointment, a bump in the road," Forest Guardians went back to court to protest the denial of their lease applications by SLO.[291] This time, the group vowed not to make the same mistakes. It crafted its bids such that they could not be denied on technicalities,[292] and hoped that its case would be heard by the same district court judge who earlier concluded that "it appears that the Land Office routinely undervalues trust lands, and so it appears to shortchange beneficiaries; and it is also revealing that the Land Office regulations and statutes appear to create a closed society which has established by law a preference for the current leaseholders."[293]

Forest Guardians' optimism seemed justifiable because of the wiggle room apparently left for another round of challenges. The group had been denied standing to mount a *facial* challenge to the constitutional provisions.[294] This left it free to try again with an *as-applied* challenge. In the previous case, a facial challenge, the group did not allege any "specific, adverse action by the Land Office."[295] Consequently, it thought that the as-applied challenge would most likely not face the same standing problems. Indeed, the appellate court stated that "the conservation groups may have standing under different circumstances, such as for making an administrative appeal of a specific adverse decision."[296]

Nevertheless, this backdoor method should not be viewed as a means of trust enforcement, and it is far from ideal. Disappointed bidders cannot challenge many types of trustee breaches that raise serious concerns, such as the generally poor state of trust corpus, the truncated or inadequate auction process, or a damaged water supply. After *Forest Guardians v. Powell*, it appears that only the New Mexico Attorney General can raise these concerns.

Although the substance of the new suit was quite narrow, Forest Guardians were again denied standing.[297] Although Forest Guardians would ultimately like to be able to enforce trust principles, the group focused on winning grazing leases so it could rehabilitate the land. The group argued semantics only. Forest Guardians claimed that the Enabling Act required a public auction, and that the SLO practice of awarding a contested lease to

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291 Tutchton Interview, *supra* note 260.

292 *Id.* (suggesting previous bids were denied because the maps included were too detailed).

293 Forest Guardians v. Powell, at TR-4 (Dist. Ct. N.M. July 8, 1999) D-0101-CV-9900458.

294 *Forest Guardians*, 24 P.3d 803, 810 (N.M. Ct. App. 2001).

295 *Id.* Forest Guardians did not attempt an as-applied challenge initially because the group did not appeal the application denial within the statute of limitations. Additionally, at that time, there was no reason to believe the facial challenge would fail. Interview with Jay Tutchton, Staff Attorney, Earthjustice Denver Office, in Eugene, Or. (Mar. 9, 2001) (on file with authors).

296 *Forest Guardians*, 24 P.3d at 811

297 E-mail from Julie Teel, Earthjustice Attorney, to Sally Fairfax (Jan. 23, 2003) (on file with authors).

the existing lessee as long as the lessee met the highest bid did not qualify as a public auction.[298]

The plaintiff environmental group argued that potential lessees who were willing to pay more for a given lease were shut out of the process when a current lessee matched—as opposed to beat—the potential lessee's competitive bid. By permitting the current lessee to match any competitive bid and retain the lease, SLO deprived Forest Guardians and other interested members of the public the opportunity to counter-bid and either (1) drive the lease rental higher and lose, or (2) drive the lease rental higher and win, obtaining the lease to restore the trust land to better health. Either outcome would benefit the state trust lands.[299]

D. Oregon—Still in the Making?

1. Background

The Oregon story is still in the making. In spite of much litigation gnawing at the edges of trust issues, the Oregon courts have not yet had the opportunity to decide a case on trust grounds. In fact, voices offstage—the Legislature and the Oregon State Land Board—have dominated the action in Oregon.

Oregon received land sections 16 and 36 when it joined the Union in 1859.[300] The lands were granted "for the use of schools."[301] Because Oregon was an early joiner, and entered the Union before Congress began limiting the use of the grants, the state's Enabling Act contains no language about a trust or the management of the granted lands.[302] Nevertheless, the trust is well established as a matter of state case law.[303] Moreover, the 1857 Oregon Constitution established a "Common School Fund" that included a broad array of granted lands and funds, gifts, donations, and escheat lands.[304] The interest from the fund, "together with all other revenues derived from the school-lands . . . shall be exclusively applied to the support and maintenance of common schools in each-school district, and purchase of suitable libraries and apparatus therefor."[305]

Oregon's original constitution also established a "board of commissioners for the sale of school and university lands, consisting of the

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298 Petition to Appeal Denial of Competitive Bid on State Lease GR-1616. Letter from Julie Teel, Associate Attorney, Earthjustice Denver Office, to Ray Powell, Commissioner of Public Lands (Oct. 24, 2001) (on file with authors).

299 *Id.*

300 STATE TRUST LANDS, *supra* note 15, at 20.

301 5 THORPE, *supra* note 142, at 2997 (reproducing the Oregon Admission Act).

302 *Id.*

303 *See* Eagle Point Irrigation Dist. v. Cowden, 1 P.2d 605, 606 (Or. 1931) (characterizing the common school fund as a "trust of the highest nature, which has been created by the fundamental law of this state").

304 OR. CONST. art. VIII, § 2.

305 5 THORPE, *supra* note 142, at 3011 (setting forth original language of article VIII, section 5 of the Oregon Constitution).

Governor, the State Treasurer and the Secretary of State."[306] As in Idaho, members of the State Land Board (the Board) are all statewide elected officials; although, unlike Idaho, none even symbolically represents the beneficiaries.[307] The Board oversees operations of the Division of State Lands (DSL) and appoints the agency head.[308] At the time of the grant Congress expected—as the Commissioner's role suggests—that the lands would be sold.[309]

Oregon presently holds about twenty percent of the lands originally granted.[310] As discussed below, although scattering of parcels is a slight problem in some areas, an aggressive program of exchanges has recently put the scattered-parcels syndrome fairly well under control.[311] Approximately 280,000 acres of the original grants remain in state ownership.[312] Granted trust holdings have been supplemented: DSL manages about 650,000 acres for Oregon counties.[313] Atypically, the majority of Oregon's lands are *not* managed grazing leases: About 755,000 acres are managed for timber, and only 620,000 acres are leased for grazing.[314]

Granted and acquired trust lands proceed on very different bases, and because of this confusing situation, it is difficult to discuss succinctly DSL's sources of management funds and the disposition of land revenues. Management of forested lands held for the counties is funded from 36.25% of receipts.[315] All other programs are funded from receipts on a cost recovery basis; the funding does not pass through the legislative process.[316] The Oregon Constitution is also unusual because it provides that a small portion of the permanent fund produced may be used to improve land values.[317] Moreover, Oregon follows a unique pattern of fund disbursal to beneficiaries. Most states place nonrenewable resource receipts—such as land sales and minerals development—into the permanent fund with only

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306 *Id.*

307 *Id.*

308 STATE TRUST LANDS, *supra* note 15, at 40–42 (The Division of State Lands was established in 1967.).

309 For a discussion of the current administrative set up in Oregon, see *id.* at 40–45.

310 *See id.* at 48 (depicting in Figure 2-3 the percentage of current land ownership in each state that remains from its original grant).

311 *Id.* at 107.

312 *See id.* at 48 (multiplying Oregon's 1.4 million aces of state lands by 20 percent to determine that 280,000 acres remain of the state's original grant).

313 This figure is half the total acreage owned by the state and describes grant lands that *remain* in state ownership. The disparity arises because approximately 650,000 acres were *acquired* by the state during the Depression, and are managed by the Department of State Lands and/or the Department of Forestry mostly for the benefit of the counties. *See* STATE TRUST LANDS, *supra* note 15, at 155–56.

314 *See id.* at 51 tbl. 2-4 (identifying the number of acres of state trust lands that each state uses for various purposes). As discussed *supra* note 313, much of this acreage was acquired by the state rather than received as a grant.

315 *Id.* at 46.

316 *See id.* tbl. 2-2 (referring to funding for state land offices and noting that in Oregon, non-county forested lands "are managed on a cost recovery basis").

317 *See id.* (noting that in Oregon "[p]art of permanent funds can be used to improve land values").

the interest to be shared, while revenues from renewable resources are distributed annually to the beneficiaries. In Oregon, *everything* is deposited into the permanent fund, and only the interest is distributed.[318]

Prior to 1965, the Board managed the state lands suitable for grazing without "written rules or standards governing their administration."[319] Historically, ranchers with federal permits ignored the state lands scattered among the federal lands and grazed their animals without payment to the trust.[320]

Major changes within DSL and in the state's holdings disturbed this casual arrangement. In the 1960s, aggressive legislative and DSL action began the reordering that is only now taking place in Idaho.[321] In 1963, the Oregon Legislature authorized the state to lease common school lands. These lands were identified statutorily as "common school grazing lands" as those "chiefly suitable for the grazing of animals."[322] In 1967, the Division of State Lands was created to

> manage, control and protect" the common school lands, giving "due consideration in the sale, exchange or leasing of any state lands under its control, to the protection and conservation of all natural resources, including scenic and recreational resources . . . so as to conserve the public health and recreational enjoyment of the people, protect property and human life, and conserve plant, aquatic and animal life.[323]

The following year, the people of Oregon adopted an amendment to the Oregon Constitution directing DSL to "manage the 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."[324]

In 1969, DSL recognized that the grazing lands were so scattered "as to hamper scientific resource management," and declared its policy to "consolidate its scattered rangeland holdings . . . into reasonably-sized management units wherever such action does not result in the loss of significant appreciative or alternative use values."[325] The state initiated an enormous land exchange program, by far the largest ever attempted at the

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318 STATE TRUST LANDS, *supra* note 15, at 59–63.

319 Amended Complaint at 8, McKay v. Oregon, (Or. Cir. Ct. Marion County, October 7, 1994) (CV No. 94-1186-AS).

320 *Id.*

321 *Lassen*, 385 U.S. 458 (1967), is viewed as largely responsible for stopping the management of state trust lands for the benefit of lessees. *See* STATE TRUST LANDS, *supra* note 15, at 33–36 (discussing *Lassen*). However, *Nebraska ex rel. Ebke v. Bd. of Educ. Lands & Funds* (*Ebke*), 47 N.W.2d 520, 522 (Neb. 1951), was the first such case to end the practice in a specific state.

322 OR. REV. STAT. § 273.815 (2001) (authorizing leases); *id.* § 273.805 (2001) (defining "common school grazing lands").

323 *Id.* § 273.051.

324 *See* STATE TRUST LANDS, *supra* note 15, at 165 (quoting OR. CONST. art. VIII, § 5(2) (1968)).

325 Meeting Minutes of the Oregon State Land Board at 2 (June 5, 1969) (on file with authors).

time, designed to block the scattered parcels into manageable units.[326] As a result of that aggressive policy, Oregon presently controls manageable parcels of grazing lands: Of the 146 leases managed by DSL, thirty were involved in the exchanges, and the areas covered by those leases range up to 100,000 acres.[327] Hence, approximately thirty current state leaseholders also held BLM permits prior to the exchange program.

Unfortunately, the state's grazing leasing system did not keep pace with the administrative changes.[328] To the contrary, allegedly as part of convincing reluctant BLM permittees to switch to state leases in order to achieve the blocking process,[329] DSL adopted leasing policies that gave ranchers ten-year lease terms with a right to renew for another decade (styled in 1979 as a 10/10 lease). Four years later DSL changed the policy to permit a twenty-year lease with a right to renew for an equal length of time (hence a 20/20 lease).[330]

As a result, until 1994 DSL never leased common school "grazing" lands for any use other than grazing or conducted a competitive auction for grazing leases.[331] Environmentalists complained that "[u]ntil 1994 DSL's grazing policy was to grant existing lessees a 'non-exclusive right to negotiate for a new lease.' In fact, DSL grazing leases which were generally for terms of ten years, were customarily renewed automatically without re-negotiation of price or other lease terms."[332]

In the early 1990s, under another aggressive director, DSL undertook two activities that threatened to sour the ranchers' sweet deal. In July 1992 the State Land Board authorized DSL to develop an asset management plan. A new set of grazing regulations adopted in July 1994 allowed for competitive auctioning of expiring leases and further opened auctions to participants who might not use leased lands for grazing.[333] In 1995, DSL proposed a "Plan to Guide the Care and Management of the Land, Waterways and Minerals Entrusted to the Oregon State Land Board."[334] Consultants, appraisers, and planners analyzed lease and sale strategies for all trust lands and made a number of extremely controversial

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326 STATE TRUST LANDS, *supra* note 15, at 106–07.

327 *Id.*

328 *Id.* The book concludes that the blocking program was a necessary but not sufficient first step towards establishing an effective trust grazing program in Oregon. *Id.* at 107.

329 The plaintiffs in the cases to be discussed herein argued that the land blocking program obligated the state to overcome ranchers' reluctance to give up the almost permanent tenure promised by BLM and the Forest Service by giving ranchers a more secure tenure than that available under the rather informal leasing system operative prior to the 1960s.

330 Opening Brief and Abstract of Record Intervenors-Appellants Cross-Respondents at 5, Mendieta v. State, 941 P.2d 582 (Or. Ct. App. 1997) (No. CA A87490) [hereinafter Intervenors' Opening Brief].

331 *Id.* at 6.

332 Amended Complaint, *supra* note 319, at 10. For a more detailed discussion of the cattle price share approach used to set fees in Oregon, see STATE TRUST LANDS, *supra* note 15, at 140–42.

333 Amended Complaint, *supra* note 319, at 12.

334 OREGON DIVISION OF STATE LANDS ET AL., PROPOSED ASSET MANAGEMENT PLAN: A PLAN TO GUIDE THE CARE AND MANAGEMENT OF LAND, WATERWAYS AND MINERALS ENTRUSTED TO THE OREGON STATE LAND BOARD (1995).

recommendations. Most notably, the plan concluded that the rangelands had lost almost $1 million over the previous nine years, and thus recommended the sale of major portions of the state's grazing lands.[335]

2. Chronology, Claims, Counterclaims, and Key Issues

a. The Mendieta *Saga*

Unlike any of the cases discussed *supra*, the major lawsuit in Oregon was fought between ranchers and the state and ultimately turned on issues of administrative law. Environmental groups intervened in the suit to raise trust arguments, but these claims played no part in the court's decision. In 1994, ranchers, who felt threatened by emerging new regulations that allowed for competitive bidding on state grazing leases, brought suit. The plaintiffs, Mendieta and others, were DSL lessees whose BLM permit land was part of the 1983 land exchanges with the state.[336] They alleged that they were not aware of the 20/20 lease policy adopted in 1983.[337] However, when faced with the possibility of competitive bidding in the mid-1990s, they located the 1983 policy and argued that they and others "similarly situated" had a right to 20/20 leases that DSL had negligently withheld.[338] Thus, they asked the court to declare "that the term of the leases created as a result of the land exchange process and negotiations appurtenant thereto in 1983 resulted in a policy binding upon defendant [DSL] that requires 20-year terms for new and/or existing leases with a right to renew those leases for an additional 20-year term."[339]

The plaintiffs also complained that some former BLM lessees received leases from the State that included "valuation clause" sections, which contained an assessment of the value "of the relinquished . . . BLM livestock grazing permit and provided for compensation in the event of termination [of the state lease]."[340] That is, if the exchanging lessee ever lost the state lease, "the state would pay the lessee a sum of money equivalent to the market value of the BLM permit surrendered by the lessee."[341] The money involved was not trivial—a valuation clause in one of Mendieta's leases established a "surrender value" of $93,000.[342] The plaintiffs objected to what they characterized as "inequitable" actions by DSL personnel that left some lessees without the valuation clauses. They requested relief in the form of an order to "declare the rights of the parties to have incorporated in their

335 *Id.* at 5–7, 10, 14.

336 First Amended Complaint at 3, Mendieta v. State, (Or. Cir. Ct. Harney County, May 2, 1994) (No. 94-04-10725-E) [hereinafter Mendieta First Amended Complaint].

337 In fact, only nine of the lessees who converted from BLM to state lands were awarded such leases in the early 1980s. Intervenors' Opening Brief, *supra* note 332, at 5.

338 Mendieta First Amended Complaint, *supra* note 336, at 2.

339 *Id.* at 9.

340 *Id.* at 5–6.

341 Cross Opening Brief of Plaintiffs/Respondents/Cross-Appellants/Mendietas et al. at 12, Mendieta v. State, 941 P.2d 582 (Or. Ct. App. 1997) (No. CA A87490).

342 *Id.*

leases . . . an agreed valuation for the relinquished BLM permits and to order . . . DSL to incorporate in their existing and all future leases the valuation agreed upon for compensation if the leases should be terminated."[343]

The Circuit Court of Harney County, which sits in a one-room building adorned with a large mural of a cattle drive,[344] found for the plaintiffs on the core issue.[345] Although the judge admitted his surprise that the plaintiffs did not discover their right to 20/20 leases until the Board held policy change hearings a decade later,[346] he nevertheless ordered the Board to issue leases as of the 1983 date that would, with the renewal right, run until February 28, 2025.[347] However, regarding the "deleted and/or missing valuation clauses," the judge held that the petitions were not timely, and therefore the court could not declare the plaintiffs' rights in the matter.[348]

The ranchers' victory in the trial court spurred environmental groups to action, including Rest the West, Oregon Natural Desert Association and Oregon Natural Resources Coalition. As intervenors on appeal, the groups claimed that awarding the plaintiffs forty-year leases violated the state's trust duties "because the Common School Fund does not receive and has never received fair market value for those leases" and "[t]o extend the leases is to protect the ranchers from market pricing for three more decades."[349] They claimed that the state has continuously violated its duty to obtain fair market value for trust leases by automatically renewing leases at the same lease rate without using any "market mechanisms," such as competitive bidding, negotiations, or appraisal of individual leases.[350] Additionally, they argued that the trial court relied on the Board's 1983 policy incorrectly, because the policy itself confers consideration to grazing lessees in direct contravention of trustee duties.[351] The policy, reminiscent of Idaho's anti-Marvel statute, explicitly states that the Board "desires to continue its policy of improving State-owned grazing lands through a long-term contractual relationship with its lessees *which is beneficial to the lessees*."[352]

b. Legislative and Administrative Action

Meanwhile, as in Arizona and Idaho, the Legislature entered the fracas. A new governor joined the Board and the 1995 legislative session was

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343 Mendieta First Amended Complaint, *supra* note 336, at 9.

344 Telephone Interview with William Cook, Assistant Attorney General, Oregon Department of Justice, in Portland, Or. (March 11, 2002) (on file with authors) [hereinafter Cook Interview].

345 Mendieta v. State, (Or. Cir. Ct. Harney County, Dec. 12, 1994) (No. 94-04-10725-E at 2–4).

346 *Id.* at 31. Judge Yraguen stated, "This Court is surprised by the fact that something so important could not, and would not, have been learned by Plaintiffs and members of the class." *Id.*

347 *Id.* at 39.

348 *Id.* at 4.

349 Intervenors' Opening Brief, *supra* note 330, at 15.

350 *Id.* at 23–24.

351 *Id.* at 19 (citing 1983 amendments to policy statement regarding state-owned grazing lands).

352 *Id.* at 18 (quoting 1983 policy).

dominated by ranchers from the thinly populated but politically powerful east side of the state.[353] The DSL director who embraced the 1994 changes in the grazing regulations resigned under pressure.[354] The Board backed off from the "Proposed Asset Management Plan," which would have sold significant portions of the grazing lands to the highest bidder, instead opting for a restricted experimental sales program involving only a few small parcels.[355]

Further, the Legislature modified the state grazing law to be more favorable to ranchers. The statute, adopted in 1995 and still in force, codifies the 20/20 lease, establishes a leasing preference for the current lessee or landowners engaged in the livestock business, and prevents DSL from terminating a grazing lease without consent of the lessee unless the lessee is in default or refuses to comply with any management plan adopted by DSL.[356] The statutory changes also provide that when transferring state-owned property through sale or lease, the right of first refusal to purchase shall be offered, in order of preference, to the lessee of the land, to adjacent landowners, to residents within the region, and finally, to persons outside the region.[357] Finally, the Legislature established a temporary State Grazing Lands Fees Committee to develop and propose a formula to set grazing fees.[358] The Committee consisted of two grazing lessees, one county government representative from Lake, Harney, or Malheur County, one rangeland scientist, one rangeland economist, one representative of the beneficiaries, and one representative from DSL.[359]

c. The Mendieta *Saga Continued*

Despite the trial court outcome and subsequent legislative action, the *Mendieta* case lingered on. On June 25, 1997, the Oregon Court of Appeals reversed the trial court's judgment granting the longer lease terms, leaving the ranchers with their ten-year leases.[360] The court of appeals overruled two of its previous decisions to bring consistency to applying a state

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353 Cook Interview, *supra* note 344.

354 *Id.*

355 *Compare* OREGON DIVISION OF STATE LANDS, *supra* note 334 at V-33 ("*Rangeland will be actively marketed for sale or exchange.*") (emphasis added) *with* OSLB Meeting Minutes at 3 (Dec. 12, 1995) (on file with authors) (describing the plan as "emphasiz[ing] asset management, not disposal").

356 OR. REV. STAT. § 273.815(2)(a)–(d) (2001). Paul Cleary, Director of State Lands, Water Resources Board, contends that the statutes are the right fit for Oregon. Telephone Interview with Paul Cleary, Director of State Lands, Water Resources Board (Feb. 27, 2002) (on file with authors). Because Oregon has so few AUMs and its trust lands are scattered and difficult to access, there are not many prospective bidders. Thus, competitive bidding is simply not a viable practice. Because a value can be assigned to a right to renew, so long as the trust is compensated and the state retains the right to terminate, Paul Cleary maintains that a preference right may also be in the best interests of the trust.

357 OR. REV. STAT. § 273.825(1) (2001).

358 1995 Or. Laws ch. 813, §§ 2 & 3. The formula generated by the Committee can be found at OR. ADMIN. R. 141-110-0080 (2002).

359 1995 Or. Laws ch. 813, § 2.

360 *Mendieta*, 941 P.2d 582, 589–90 (Or. Ct. App. 1997).

administrative statute, ORS 183.490.[361] The court held that the statute empowers the court to compel agency action only where the agency has not yet acted,[362] but ORS 183.490 could not be used after an agency has already acted, which was how the plaintiffs were trying to use it—as a tool to force proper action by DSL.[363] Unfortunately for the plaintiffs, the trial court had already dismissed the claim under the proper provision, ORS 183.484(2), for review of agency actions, which turned out to be their sole legal avenue for redress.[364] Because the claim was filed more than sixty days after the state action granting the leases, the claim was barred by the statute of limitations.[365]

The appellate decision appeared to give the ranchers' valuation clause claim a chance of winning. Overturning the lower court, the Oregon Court of Appeals held that the plaintiffs' reformation claim could be heard under principles of contract law alone.[366] However, court-ordered contract reformation is subject to a difficult standard. A party must prove by clear and convincing evidence:

> (1) That there was an antecedent agreement to which the contract can be reformed;
> (2) That there was a mutual mistake or a unilateral mistake on the part of the party seeking reformation and inequitable conduct on the part of the other party; and
> (3) That the party seeking reformation was not guilty of gross negligence.[367]

For one group of plaintiffs, because there was no antecedent agreement between the parties, there was no opportunity to reform the contract.[368] But because Mendieta's and others' leases had long expired, there was simply no existing contract to reform.[369] The Oregon Supreme Court refused to hear the case on appeal.[370]

The dominant influence of BLM and United States Forest Service grazing programs is a more interesting element of the *Mendieta* case. One could argue that the heart of *Mendieta* rests on assumptions about BLM grazing permits. The ranchers argued, and the trial court agreed, that "the State *had* to gain the approval of the Federal lessees" for the exchange between BLM and DSL.[371] This is, of course, transparently false. The plain words of the Taylor Grazing Act[372] are sufficient to establish that the Act and

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361 *Id.* at 589.
362 *Id.* at 587.
363 *Id.* at 589.
364 *Id.*
365 *Id.* at 586.
366 *Mendieta*, 941 P.2d 582, 592 (Or. Ct. App. 1997).
367 *Id.* at 592 (quoting Allen & Gibbons Logging v. Ball, 756 P.2d 669 (Or. 1988)).
368 *Id.* at 592.
369 *Id.* at 593.
370 Mendieta v. Division of State Lands, 987 P.2d 510 (Or. 1999), *denying cert.*
371 Mendieta v. State, No. 94-04-10725-E at 10 (Or. Cir. Ct. Harney County Dec. 12, 1994) (emphasis added).
372 43 U.S.C. §§ 315, 315a–315f, 315h–315n, 315o-1 (2000).

the permits it offers create no right, title or property claims for the permittees.[373] Moreover, the Oregon exchanges postdate both *La Rue v. Udall*,[374] and the even more emphatic *United States v. Fuller*,[375] on the point that federal grazing permittees involved in land exchanges are entitled to compensation.[376] It does not, however, strain the imagination to envision a scenario in which BLM and the state were obliged by *political forces* to negotiate with ranchers to achieve public purposes that the ranchers opposed.

d. McKay

In *McKay v. State*,[377] the Rest the West team brought suit to air directly all of their complaints regarding grazing leases on trust lands. The plaintiffs raised numerous familiar complaints: All grazing leases entered into prior to July 1994 violated the trust because they were: for grazing only, entered into without competitive bidding, without attempting to obtain fair market value, and provided for automatic renewal.[378] Additionally, they charged that DSL violated its fiduciary duty by allowing the trust lands to deteriorate.[379] Because the case was ultimately dismissed for "timeliness" and other reasons, the Oregon Supreme Court has not issued an opinion regarding beneficiary standing or trustee duties on these state lands.[380]

As in Idaho and New Mexico, the issue of who is authorized to defend the trust is crucial. As yet, this is unresolved in Oregon, but it is quite clear that fundamental issues regarding the existence and nature of the trust lie just beneath the surface of the grazing program. Will the Oregon courts permit environmental groups standing to sue to enforce trustee duties? For that there is yet no answer.

However, the issue in Oregon may be framed to view the contenders—the ranchers, the environmentalists, and DSL—as presenting three different views of the trust. In spite of the legislative and administrative actions in late

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373 GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 786–87 (5th ed. 2002) (citing Red Canyon Sheep Co. v Ickes, 98 F.2d 308 (D.C. Cir 1938), for the proposition that the Taylor Grazing Act was meant to define and prevent interference with grazing rights).

374 324 F.2d 428 (D.C. Cir. 1963).

375 409 U.S. 488 (1973).

376 According to the authors,

> [t]he provisions of the Taylor Grazing Act quoted supra make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands. We find no such authorization in the applicable congressional enactments.

COGGINS ET AL., *supra* note 373, at 791–93 (citing United States v Fuller, 409 U.S. 488 (1973)).

377 (D. Or. 1994) (No. CV 94-1186-AS).

378 Amended Complaint, *supra* note 319, at 12.

379 *Id.* at 19.

380 Telephone Interview with Jim Coon, Plaintiffs' Attorney, Swanson, Thomas & Coon, Portland, Or. (Oct. 10, 2001) (on file with authors).

1995, the basic question remains: Does the DSL or the Legislature have the discretion to adopt regulations that violate the trustee's duty of undivided loyalty to the beneficiary? While the ranchers did not expressly argue that the trust does not exist, they do not ascribe much meaning to the fundamental principle of undivided loyalty. In the ranchers' view, the trust is not a barrier to DSL policies that effectively turn the lands over to the livestock industry for their exclusive benefit. Provisions that have been consistently rejected in other jurisdictions as contrary to the trust,[381] such as preference right leasing, and provisions deemed fundamental to the quest for maximum return to the beneficiaries, such as competitive leasing, do not fit in the ranchers' view of trust land management. The ranchers argue that the Legislature can bind DSL to pro-rancher policies without regard to the normal panoply of trust obligations.

On the other end, in *McKay*, the Rest the West team argued that the trust imposes absolutely hard and fast rules on DSL, and that they have no discretion on key points.[382] Rest the West sued to demonstrate that the 1994 pro-conservation buyer grazing rules were faulty because they 1) provided for oral auction, 2) gave the existing lessee the right to match the high bid in cases where sealed bidding was used, 3) set a minimum bid, 4) would charge "conservation users" of the lands for increased forage created by their efforts even though they could not profit from such forage, 5) required new lessees to compensate existing lessees for "improvements," thus reducing the marketability of leases, and 6) required new lessees to fence out cattle under Oregon's Open Range Law.[383] Rest the West alleged none of these provisions was in compliance with the trust because they "fail to obtain fair market value for the Common School Fund."[384] The environmentalists assert that DSL has no discretion under the trust.[385] DSL, taking what appears to be the reasonable middle ground, argues that it is bound by the trust but that it has discretion in how to best meet its requirements.

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381 *ASARCO*, 490 U.S. 605 (1989); *Lassen*, 385 U.S. 458 (1967); *Ebke*, 47 N.W.2d 520 (Neb. 1951); *Okla. Educ. Ass'n*, 642 P.2d 230 (Okla. 1982); *Skamania County*, 685 P.2d 576 (Wash. 1984).

382 Amended Complaint, *supra* note 319, at 16.

383 *Id.* at 13–14.

384 *Id.* at 14.

385 There is considerable dispute in a broad range of academic and applied circles about auction procedures that do, or do not, achieve "fair market value." The trust is not so binding a commitment to mere profit as some have argued; what constitutes fair market value and maximum returns are fairly ambiguous, leaving much room for trustee prudence. Moreover, the quest for returns must always be balanced against the trustee's obligation to protect the long-term productive capacity of the trust. *See* STATE TRUST LANDS, *supra* note 15, at 77–82. Interestingly, the point that the trustee must achieve maximum annual returns is typically made by the lessees. Seeking the fullest possible access to develop state lands, lessees assert that the trustee is obliged by the terms of the trust to lease every mountain and sell every stream to make money for the beneficiary. Over time, environmentalists have tended to argue against full profit to emphasize the stewardship arguments that characterize the *Selkirk-Priest Basin Ass'n* cases. *See supra* notes 160–63 and accompanying text; *see also* Souder et al., *supra* note 260, at 23–30.

3. Where We Are Now

Picking up the ball from *McKay*, a new firm is preparing a case on behalf of schoolchildren, their parents, and the Oregon Natural Desert Association (ONDA) to reform grazing lease practices on state trust lands.[386] This case seeks competitive bidding on all leases, an evaluation of the current state of the range, and a revamping of the management of state trust lands in general.[387] The complaint, filed in July 2002, does not skirt around the trust. Like the long-defunct *McKay*, the new case alleges the state violated its trust obligations by allowing the trust lands to deteriorate and by not performing an accounting since 1970.[388]

It may be years before we know whether the Oregon courts will grant environmental groups standing to enforce trustee duties. If we have learned anything from reviewing the trust cases in New Mexico, Arizona, and Idaho, we can only predict that change will be hard-fought and long-drawn-out.

III. THE CONSISTENT ISSUES

All these cases were defined, as noted at the outset, by the peculiarities of local law and culture. But if the trust as a land management mandate has any meaning at all, it should be possible to discuss its pros and cons more generally. Not surprisingly, when we set aside interpretations of specific state constitutional and statutory provisions, the fundamental questions are all closely related to defining prudence. The trustee is required by law to balance two frequently incompatible obligations: to make money for the beneficiary while simultaneously protecting the long-term productive capacity of the trust. In the state trust context, the "long term" element derives from the perpetual nature of the trust: The trustee is not allowed to prefer any generation of beneficiaries over any other.[389] When these two goals come into conflict, the standard the courts apply to decision-making is prudence.[390] Like its close cousin "reasonableness," prudence is often in the eye of the beholder and rarely an easy call, even in the financial management context where it is most frequently applied. In the highly complex suite of ecological and economic issues comprising range allocation, it is even less so. Moreover, the trustees undertake their deliberations regarding prudence in a deeply vexed political environment. We address the general issue of prudence in four areas: scattered parcels, administrative law, lease sale terms and conditions, and standing to sue.

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386 Telephone Interview with Gary Kahn and Timothy Murphy, Reeves Kahn & Hennessy, Portland, Or. (Mar. 12, 2002) (on file with authors).

387 *Id.*

388 Complaint at 10, Caramella v. State (Or. Cir. Ct. Multnomah County, July 2002) (No. 02C 18176).

389 *See* Souder et al., *supra* note 260, at 43 n.138 (discussing Okanogan County v Belcher, No. 95-2-00867-9 (Wash. Super. Ct. Chelan County, 1996)).

390 *See generally* Souder et al., *supra* note 17.

A. Scattered Parcel Problems

The section-by-section pattern of the original grants—combined with the admixture of ownership between and among Forest Service, BLM, private, and lessee holdings—creates major barriers to a free market in state grazing leases. For example, when the owner of land surrounding the state parcel is the state lessee, it is difficult to envision any, let alone several, rival bidders—as evidenced in the New Mexico Land Commissioner's comments.[391] Even when there is a rival bidder, the situation raises important questions of how someone other than the owner of the surrounding land would access, use, and monitor a land-locked parcel. How does the prudent trustee weigh the benefits of potentially higher rent on a donut hole parcel with the costs created by embedding a state lessee deep within the private holdings of a rival owner, and likely a rival bidder? Given the limited returns to grazing leasing, it is not clear that it is prudent for the trustee to invest significantly in such parcels. This does not necessarily resolve the issue in favor of the rancher, but the questions do complicate the matter of prudence.

Nor is the problem necessarily simplified if the surrounding landowner is a federal agency rather than a rival private owner. In Idaho, for example, the originally contested Herd Creed parcel is one of three state sections in a pasture of more than 20,000 acres. The state land is included as a part of a grazing allotment plan developed by BLM in cooperation with the state and the BLM permittee. Not surprisingly, the same person holds both the BLM permit and the state lease. As part of the process of bidding on a lease in Idaho, the potential lessee presents a notarized statement certifying that she or he will comply with the established BLM grazing plans operative on the allotment. This arrangement clearly limits the market to those interested in grazing, and further promotes leasing state and federal parcels to the same individual. Thus, it does not allow the state to act as independently as one might wish or anticipate regarding marketing and auctioning trust resources. However, it may be a prudent way to assure the coordinated management of an allotment and the presence of an on-the-ground steward for the entire area.

The scattered parcel issue is related to the "logical grazing unit" issue. Accustomed to leasing the lands for grazing, trustees are now asked to define defensible parcels or collections of sections that make sense to lease for uses other than grazing. Trustees and ranchers frequently assert that removing a parcel, or part of one, from a pasture would make the whole allotment less attractive to bidders/permittees and would thereby lower total returns to the trust. The counter argument to this is that there is no reason to presume any particular section or subsection will be leased for grazing. The implication of this argument is that the state agency ought to design logical *leasing* units rather than logical *grazing* units.

From the trust's standpoint, one impermissible permutation of this argument includes considering the impact on a rancher's operation of

391 *See supra* notes 254–56 and accompanying text.

removing some or all of a trust land lease. If so doing would endanger the rancher's operation and risk destabilizing the long-term stewardship required for protecting the trust sections, there may, nevertheless, be some prudential argument to favoring a higher bidder. This issue is frequently discussed as "cherry picking." Environmentalists interested in riparian protection tend to bid on parcels containing water. Is it prudent, the trustee must ponder, to cut the water out of a pasture, which may leave the rest unleasable at any price?

There is a simple answer to the essential parcel issue. When confronted in Idaho with the argument that a particular isolated parcel was absolutely essential to the rancher's operation, both for water and for access, the plaintiffs' attorney in *IWP I* suggested that perhaps the defendant ought to have bid on it.[392] Nevertheless, most of these landscape problems translate, in the manager's mind, into one of prudence. What configuration of parcels, uses, stability of use, destructiveness of use, and costs associated therewith (both in terms of impacts and in terms of marketing), constitutes prudent management?

B. Bidder Qualifications and Sale Terms and Conditions

Although the scattered parcels issues are most intractable, numerous other lease provisions affect lease market competitiveness. Important sale terms include the bidder qualifications, the nature of the lease sale itself (all the normal issues of sealed, as opposed to oral bids, operate here),[393] the right of the existing lessee to match the high bid, and the policy regarding disposition of improvements.[394]

It is normal and appropriate for the lessor to establish minimum criteria for bidders, simply to assure that the bidder can make the payments promised and proceed without harming the resource. Traditional bidder qualifications have focused on proven capacity to ranch or farm. These qualifications may limit the market, most obviously when bidders do not want to ranch. However, this does not answer the question of what constitutes a prudent bidder qualification.

Similarly, the issue of improvements at the end of a lease term is ubiquitous. In some states lessees may make improvements at their own expense, but must remove them at the end of the term unless they can sell the improvements to the new tenant.[395] In other states the new lessee is

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[392] Telephone Interview with Debra Kronenberg, Attorney for Idaho Watersheds Project, Boise, Idaho (Mar. 19, 1996) (on file with author). All these arguments about the essential nature of a particular parcel appear to have the same hole in the middle.

[393] The issue of sealed versus oral auctions was exhaustively aired after the National Forest Management Act was passed. The standard article on sealed and oral auctions and their impact on natural resource sales is Walter J. Mead, *Natural Resource Disposal Policy—Oral Auction Versus Sealed Bids*, 7 NAT. RESOURCES J. 194 (1967); *see also* A. A. Weiner, *Sealed Bids and Oral Auctions: Which Yield Higher Prices?*, 77 J. OF FORESTRY 353 (1979).

[394] *See* STATE TRUST LANDS, *supra* note 15, at 115–22.

[395] *Id.* at 122–23.

required to compensate the old tenant for improvements.[396] The state appraises the improvements and the successful bidder pays. In Colorado, all improvements become the property of the state when a lease is up.[397] This system might be a barrier to entry into the lease market. Bidders who do not intend to raise cattle may not want to buy improvements installed on the assumption the land will be used for grazing.

In numerous jurisdictions over many decades, the courts have been fairly clear that prudence does not include subsidizing ranching or farming communities or extend to forgoing a short-term advantage in order to maintain a stable economic environment for the ranching community or trust land leasing.[398] How those clear general rules apply to scattered sections and how useful their guidance to trustees in the scattered parcel landscape is less clear.

C. Administrative Law

Resource analysts and litigators from 1970 to 2000 grew up with the notion—much of it attributable to the National Environmental Policy Act (NEPA)[399]—that changes in outcome can be achieved through changes in process.[400] Advocates trying to pry open the door in an established culture put great stock in changing the process, or more specifically, in imposing on land boards, who frequently refuse to adopt them, standard Administrative Procedure Act[401] (APA)-like rules. Much of the material associated with the cases discussed above turns on very fine-grained reading of state administrative law. In spite of the numbing effect of their specific claims, two issues merit attention.

First, there is a fairly consistent complaint—and some evidence (particularly in Oregon, Idaho and New Mexico)—to suggest that the rules followed by the trustees are informal, difficult to locate, and different from the basic procedures of other state administrative agencies. The subtext is that the rules are easily bent to the advantage of one traditional category of participant. As noted by the District Court in Idaho, it is polite and arguably prudent to remind existing lessees to bid. However, at some point "common courtesies"[402] for the ranchers translate into an atmosphere of favoritism that imprudently limits the market for trust resources and skews the decision-making process in the direction of traditional users.

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396 *Id.*

397 *Id.*

398 The issue was squarely raised in *Ebke*, 47 N.W.2d 520 (Neb. 1951), *Okla. Educ. Ass'n*, 642 P.2d 230 (Okla. 1982), and *Skamania County*, 685 P.2d 576 (Wash. 1984). In each case, the long-time cozy relationships between state legislatures and trust land lessees were disallowed. What complicates the issue here, however, is the explicit invocation of the land-holding patterns.

399 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370d (2000).

400 *See generally* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT (1968); *but see* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

401 Administrative Procedure Act, 5 U.S.C. §§ 551–706 (2000). Of course, only federal agencies are subject to the federal statute, but state agencies are subject to their own APAs, many of which share similarities with the federal version.

402 *See supra* note 191 and accompanying text.

Second is the frequent awkwardness in judicial handling of trust issues because the land agency wears two hats. Depending on who is complaining, the courts treat the state land board either as an administrative agency and apply principles of administrative law to its adjudication of issues, or they treat the same agency, in other contexts, as a trustee and use trust principles to resolve similar issues. In almost all of the disputes above, the issues were framed in terms of a disappointed bidder challenging an agency's discretion—discretion to decide what is a logical unit to lease, discretion to select the best way of marketing a lease, discretion to deny the high bidder, and so on. When the issue of discretion is on the table, judges use some form of state and federal APA standards for review of administrative decision-making. This means courts defer to agency decisions in at least two ways. First, they give the agency wide latitude to interpret law and facts. Second, they allow agency decisions to stand unless they appear arbitrary and capricious. The field varies to be sure, but it clearly favors the administrator.[403]

Trust law puts an entirely different spin on issues of discretion, which it discusses in terms of prudence. The cases look very different when a disappointed beneficiary challenges the trustee. These cases are striking because the beneficiaries are absent; hence, the administrator, rather than the trustee, is on the carpet. Courts generally use a different standard of review when a trustee's administrative discretion (as a government agency) is challenged than when the beneficiary challenges the trustee on grounds of loyalty.[404]

Even if a party has standing to sue as a disappointed beneficiary, that person does not get all the advantages one normally might. When issues involving the trustee *as trustee* are involved, courts frequently venture into constitutional interpretation, raising deference issues in the form of higher and higher bars to declaring something unconstitutional.

However, it is notable that the beneficiaries are not up in arms about the grazing cases above. Perhaps they are less concerned than the issues might indicate because so little money is on the table. In all four jurisdictions, grazing use is extensive, but the grazing program is not lucrative. It also may be that the relevant beneficiaries, however defined, are deeply embedded in the political and social order of the range livestock community and are not willing to challenge their neighbors for the small increment that will dribble down to them. However, the beneficiaries' inattention is problematic for enforcing trust principles.

D. Standing

This issue of whether a challenge comes from a disappointed lessee or a disappointed beneficiary turns on who has standing to sue for what.

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403 *See generally* Jon A. Souder & Sally K. Fairfax, *Arbitrary Administrators, Capricious Bureaucrats and Prudent Trustees: Does It Matter in The Review of Timber Salvage Sales?*, 18 PUB. LAND & RES. L. REV. 165 (1997).

404 STATE TRUST LANDS, *supra* note 15, 33–34.

Standing defines not merely who can sue to enforce the trust, but in so doing, whether the trust will be enforced. Although the standing doctrine seeks to limit cases to real adversaries, once the courtroom door is open, plaintiffs are free to challenge state action without restriction as to their specific interest. *Selkirk-Priest Basin Ass'n* determined that Idaho does not grant standing to environmental groups or schoolchildren.[405] Nevertheless, IWP was still able to enforce important elements of the state's trust land management in court. IWP was permitted to challenge the anti-Marvel bill because it emphasized the health of the livestock industry rather than the beneficiary. However, the group ultimately defeated the statute with arguments that could have been, perhaps should have been, raised by the beneficiaries.

Suits by disappointed environmental bidders may ultimately lead to improved management of trust grazing lands. However, this backdoor method of trust enforcement is far from ideal. Many serious and significant trust breaches cannot be raised by bidders, who are limited to challenging a regulation or statute that has adversely affected them.

It would be easy, looking at the Idaho and New Mexico disputes, to become convinced that a less restrictive approach to standing would be an important element of trust grazing reform. The Oregon and Arizona cases provide an antidote to that wholly understandable quest for a simple solution. For many decades, the Oregon Legislature and DSL moved gradually, but with significant result, towards a modern trust grazing program, without litigation, and without serious dispute. And for many decades Arizona has had both the most welcoming notion of standing and undisputedly the lousiest grazing program in the west. However, it is also worth noting that when environmental plaintiffs did turn their attention to the Arizona grazing program, it seemed clear that the fundamental issues of rancher preference were easier to resolve than in Idaho, or on federal lands, because the goals of the trust were clear and controlling, and their constitutional status put them beyond the reach of an obviously less-reform-oriented legislature. If the trust is not a silver bullet, it is at least a pretty good tool.

IV. A CONCLUDING ESSAY: IMPLICATIONS FOR GRAZING POLICY REFORM

The stories and issues above directly bear on the future of state trust lands management and the likelihood of meaningful reform of federal and state land grazing programs. Trusts are an important part of that continuing dialogue. Randal O'Toole has advocated a wholesale redefinition of federal lands as trusts.[406] Long-term adversaries Johanna Wald and Karl Hess both conclude

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405 *Selkirk-Priest Basin Ass'n*, 899 P.2d 949, 951–52 (Idaho 1995).

406 *See generally* Randall O'Toole, Options for the Forest Service 2nd Century: A Report to the American People by the Forest Options Group, *available at* www.ti.org/2cfinal.html#RTFToC25 (last visited Mar. 10, 2003).

> [a]ll Americans should be free to acquire permits to federal grass and to use the lands to enhance wildlife, stabilize soils, protect endangered species, improve riparian areas or, if they prefer, raise red meat. This can be done if Congress eliminates base property requirements for permits, ends the "use it or lose it" rule for federal grass, and lifts restrictions on subleasing.[407]

Yet the stories above suggest state trust lands, which are generally not encumbered by the constraints afflicting BLM in the Wald/Hess telling, still encounter serious problems regarding open bidding on grazing leases.

Is the emerging consensus regarding auctioning federal grazing access misdirected? It may be. It is almost too obvious to mention that the arguments of many of the most ardent advocates of markets, efficiency, an end to subsidies, and a smaller role for federal government weaken when those principles threaten the advocates' own constituents and privileges. But, what of the trust: Is it a valuable component of the dialogue? Our discussion of the four state grazing disputes invites some reflections on the prospects for reform on both state and federal land.

A. Reform of State Trust Grazing Programs: A Mixed Assessment

A few comments about the state trust lands seem appropriate in the present context. The first relates to the nature of reform in general and the context of the trusts in particular. For much of the history of school trust lands management, the state trusts were managed much like the federal lands; that is, without regard to their trust status, and characterized by a close and mutually supportive relationship between the lessees and the managers. Following *Ebke*,[408] *Lassen*,[409] *Skamania County*,[410] and similar cases emphasizing the trust mandate and the trustee's obligations to the beneficiary, trust principles have become central to trust land management.[411] A few well-placed beneficiary-originated lawsuits have, present cases excluded, radically and quite rapidly altered the priorities in state trust land offices.[412]

It is noteworthy, if not downright odd, that environmental groups are going to the mat in defense of maximum economic returns. This is in part an artifact of the trust structure. The major imperative is to produce returns for the beneficiaries. However, the environmental groups' position puts them in the same camp as commodity developers. The last several decades have witnessed an odd and shifting *pas de deux* between the lessees and the beneficiaries. When they lost their privileged dominant position, the lessees began to argue in their own favor by asserting that maximum development

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407 Karl Hess, Jr. & Johanna H. Wald, *Grazing Reform: Here's the Answer*, HIGH COUNTRY NEWS, Oct. 2, 1995, at 5.

408 *Ebke*, 65 N.W.2d 392 (Neb. 1954).

409 385 U.S. 458 (1967).

410 685 P.2d 576 (Wash. 1984).

411 *See generally* STATE TRUST LANDS, *supra* note 15, at 33–37, 101–48, 285–300.

412 *See generally id.* at 33–36.

was required by trust principles.[413] Now the environmentalists are making approximately the same argument. This may reflect reasonable adaptation to the tone of the times. It also clearly reflects the growing success that environmental groups have achieved in fighting inefficient resource destruction programs—such as below cost timber sales.[414] However, it causes us to wonder what Messrs. Marvel and Tate will do when Mr. Marriott takes a shine to their restored sections.

The stories themselves do not represent the whole picture and do not tell a uniformly distressing tale about trust lands. These stories explore four cases that are familiar because of the unique, negative publicity they have generated. A fuller analysis would include state programs where diverse bidders have not encountered flak, and where environmentalists have not been forced to sue (and sue, and sue, and sue). Even if the trust is forced to stand or fall on these four cases, the four cases do not tell a consistently bad news tale about trust lands. After all, in Arizona, the trust did ultimately prevail.

The trust is enforceable in a particular context and forum. These cases suggest that the political climate of range policy is key. First, the variability of the trust from state to state has consequences for reform. It appears necessary to establish trust principles as controlling in each resource area in each state. New Mexico will not believe an Oklahoma court; it must hear the trust principles defined as applicable in New Mexico by a New Mexico court. Further, ranchers in Arizona will not accept as applicable to grazing principles adumbrated by an Arizona court regarding minerals development. Given the diversity of founding documents and current statutory language—regarding both the trust and state administrative law—if this does not make excellent or efficient sense, it is at least probably unavoidable. This is, of course, an important element of the political context of prudence. Land commissioners are not free to impose their view of trust law on a legislature

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413 *See* Souder et al., *supra* note 260 at 24–30 (discussing Okanogan County v. Belcher (No. 95-2-00867-9)).

414 The most obvious case is the Below Cost Timber Sale (BCTS) issue.

> Financial losses from Forest Service timber sales are a persistent condition. Current concerns about possible losses were first raised in the late 1970s by Tom Barlow, then with the Natural Resources Defense Council (NRDC). One report caught the attention of the House Appropriations Subcommittee on Interior and Related Agencies, which requested Forest Service data on timber sale revenues and costs. In 1984, several studies using these and other data confirmed the NRDC findings. The Committee attempted to constrain the losses, but accepted the argument that the existing data were inadequate for accurately measuring the losses, and agreed to review by the authorizing committees while directing the Forest Service to develop a new timber cost accounting system. Despite numerous hearings over the succeeding decade, and despite efforts to reduce the persistent Federal budget deficit, Congress has not acted to limit the financial losses from Forest Service timber sales.

ROSS W. GORTE, BELOW-COST TIMBER SALES: OVERVIEW, CRS REPORT FOR CONGRESS, 95-15 ENR, ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION (Dec. 20, 1994), *available at* http://www.cnie.org/NLE/CRSreports/forests/for-1.cfm.

headed in the opposite direction. They must wait for the courts to vindicate trust principles, in some cases over and over again.[415]

Looking back over a century of public resource policy, grazing appears to be an unusually fractious and emotional arena. Ranching frequently appears at the tip of Sagebrush Rebellion–type dust-ups,[416] only in part because other commodity interests have been quite happy to exploit the positive public image of the cowboy to press their advantage for less attractive exploitations, such as mining and clear cutting. Ranching seems more deeply tied to owner-operators than other commodity industries, and as a result, more deeply tied to communities and families. These connections are heightened by admixed land holding patterns and title arrangements that characterize trust land leasing. Ranchers also have proven relatively difficult to regulate and evince a long and successful history of "legalizing the illegal."[417] There is little in their experience with government landlords demonstrating any advantage to them in hastily complying with rules and regulations. To the contrary, much experience suggests that flouting authoritative orders is likely to have the order reversed or ignored.

Rancher expectations are mirrored in the expectations of federal range managers, who have also long found little incentive to assert federal priorities on public lands.[418] In states where the dominant expectations evolved in federal grazing programs—among both ranchers and managers—it is difficult for state managers to carve a different path. We hypothesize it is no coincidence, we hypothesize, that rapid turnarounds in state trust grazing programs occurred in Nebraska and Oklahoma where a federal grazing presence is nonexistent. Furthermore, it is expected that the best predictor of a rancher oriented trust grazing program is the degree of federal land ownership in the state.[419]

Nevertheless, based in part on these four cases, the state trustee is better positioned than the federal manager to deal with these contentious matters. Our four stories suggest, at the very least, that the trust provides norms and ground rules for those seeking policy reform, and at best, a pretty good tool. However, as we have seen, grazing is a hard case for the trust manager for more reasons that just the tough political environment in which all public grazing managers exist. The lynch pin of trust land enforcement is the beneficiary. The whole operation is based on the assumption that

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415 *See Skamania County*, 685 P.2d 576 (Wash. 1984) (holding the state law unconstitutional).

416 *See, e.g.*, Sean Whaley, *Land Rebellion Activist Dies*, LAS VEGAS REV.-J., Jan. 14, 2003, at B1, *available at* 2003 WL 4733321 (describing the life of Dick Carver, a Nevada rancher who "was a leader in Nevada's second 'sagebrush rebellion'" and who "bulldozed open a road closed by the U.S. Forest Service").

417 This pattern, a mainstay of author Fairfax's classes over the years, refers to the ability of many interest groups—from squatters to the present—to reverse previously stated federal policy towards the public domain. The classic example is the fences and other enclosures declared illegal by the Supreme Court and others in the late nineteenth century that emerged in the twentieth century as the basis for a claim of historic use preference under the Taylor Grazing Act.

418 *See generally* E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900–1950, at 247–79 (1951).

419 STATE TRUST LANDS, *supra* note 15, at 299–300.

beneficiaries are fully empowered and demonstrably capable of turning the tables when they sense their interests are not being served, and their assets are diluted.

Evidence from around the West suggests that if there is significant money on the table, beneficiaries will take risks and fight for adequate returns to the trust.[420] However, there is almost no incentive for the beneficiary to get involved in grazing issues. The financial and political costs of ending the trust's myriad services and subsidies to ranchers are not likely to be recouped by beneficiaries. Perhaps more significant, many of the beneficiaries—school children as well as school districts and superintendents—are part of the same political culture as the ranchers. It is little wonder that environmental interests, with limited regard for returns to the trust, nevertheless labor to improve practices on this most extensive of school trust land uses.

It is perhaps not merely Pollyanna-ish to view the four states in terms of some trajectory toward trust-based reform. In Oregon, the general picture of the past thirty years is tightly aligned with what trust advocates would have us believe:[421] that around the time of *Lassen*, Oregon started moving toward a more beneficiary-oriented approach to managing the lands. The trustee has encountered at numerous points real resistance from the ranchers, the legislature, and the governor. The original complaint in the *Mendieta* case arose from major reform efforts that have been ongoing for almost thirty years.

The current prognosis may not be uplifting for the Oregon trust. The reforms are apparently in hot water, and the decision to sell off money-losing grazing lands could not be implemented, but the story of the case generally reflects well on the trust. Without those principles, there would be no basis for raising the issues that have created the present brouhaha.

In Arizona, the same appears to be true. The advocates who earlier brought trust principles to state minerals management[422] remain involved in a grazing reform effort, a tougher culture to be sure. And despite a lengthy and acrimonious dispute, they have apparently prevailed. In New Mexico, although Forest Guardians has thus far been unsuccessful, the group is still at it. In Idaho as well, in spite of standing rules that preclude IWP from directly raising trust-related issues, and in spite of the backpeddling legislature, the process of redirecting grazing programs is ongoing.

In reflecting upon the glacial pace of these reform efforts, it is important to notice that westerners have been laboring to define appropriate ground rules for access to public grazing resources for more than a century. Even in the worst cases discussed herein, trust principles appear at least as effective as federal-level routes for raising basic questions of reform.

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420 The most notable example is probably the County of Skamania in Washington State taking on the timber industry, but every beneficiary suit requires the plaintiff to take financial and political risks in their own community. *Skamania County*, 685 P.2d at 576.

421 STATE TRUST LANDS, *supra* note 15, at 33–36.

422 *ASARCO*, 490 U.S. 605 (1989).

Nevertheless, no reform will work perfectly in the face of the determination by large and powerful interests to thwart the process. But the cases do demonstrate that institutional design is important. Different trusts operate differently and have different structural features. Most obviously, these cases demonstrate that standing for a broadly defined beneficiary matters: It is not effective to select an organizational scheme because it is enforceable and then disconnect the enforcement mechanism with narrow rules of standing. "Let's do a trust" has all the analytical force of Mickey Rooney and Judy Garland deciding to "do a show." Considerable thought and effort—and the assiduous study of relevant examples—is essential to an effective program.

Because of the incremental nature of reform, and the diversity of the states, it would be wrong, or at the very least premature, to conclude from the situations in these four states that trust principles are not working. They are not at work in precisely the timeframe and manner that environmental litigants seek relatively concise declarations of summary judgment. A more accurate reflection would be that trust principles are at work.

B. Reform of Federal Grazing Programs

We see little hope or danger, depending on one's denomination, that Congress will ever allow federally owned lands to function as trusts. Even in the cases where it appears a federal trust has been established, as in the Presidio Trust,[423] the reality of the "trust" is far more similar to a government agency or corporation than the term would suggest. So with apologies to our colleague O'Toole, we focus instead on the possibility of competitive leasing for federal grazing permits. Wald and Hess argue for an open market in grazing permits.[424] This can be achieved, they assert, if Congress alters two elements of federal grazing policy: first, if it eliminates the requirement that federal permittees own private land or a "base property" in order to qualify for a federal permit;[425] and if it ends restrictions on subleasing.[426]

The cases discussed above do not address those issues directly. All four states involved allow subleasing of leased grazing lands, and only one, Idaho, has a base property requirement.[427] It is worth noting as well that federal permits do not expire like state grazing leases do, hence it is not entirely clear when auctions would be held. Typically, there is a nominal lease term, but both BLM and the Forest Service tend to ignore those, allowing permits to change hands when the base property is sold. So, for most purposes, it is appropriate to think of the leases (as presently constructed) as an adjunct to the base property. Eliminating that requirement would require Congress to

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423 The Presidio Trust was established as part of the Golden Gate National Recreation Area Boundary Adjustment Act of 2000, 16 U.S.C. § 460bb (2000).

424 Hess & Wald, *supra* note 407, at 5.

425 The "base property requirement" is discussed in Leigh Raymond, *Localism in Environmental Policy: New Insights from an Old Case*, 35 POLICY SCIENCES 179 (2002).

426 Hess & Wald, *supra* note 407, at 5.

427 *See* STATE TRUST LANDS, *supra* note 15, at 114.

devise some process under which the permits—long tied to particular privately held ranches—would come into circulation.

That would not, of course, resolve many of the other issues presented in the state grazing cases. The issue of land-holding patterns—cherry picking, logical leasing units, and land locked parcels—would all occur in some permutation if federal permits were put up for bid. Would an allotment as presently defined simply be offered for bid, or would potential lessees petition the federal agencies to auction a particular configuration of desired land? Unlike most but not all state grazing leases, federal grazing lands are open to recreationists. Would that change if a group interested in restoration leased the land to make it available for a fee, or could recreationists be excluded if the new permittees want the area closed or rested?

The answers to these questions are not clear, but it is obvious that the answers would come in the same vexed political environment that defines the state trust land managers' options. The western range livestock industry has successfully deflected its critics for more than a century. It is difficult to foresee how auctions would be implemented on federal lands to anyone's advantage but the stock operators'.

Moreover, auctions have operated for mineral leases, timber harvest rights, hunting licenses, and a host of other state and federal resources for much or all of the twentieth century—and obviously without satisfying environmentalists' concerns. Auctions are no more a silver bullet on federal lands than are trusts on state land. Grazing, for all the reasons noted above, appears to be the hard case. And it seems prudent, therefore, not to ponder whether or not trust principles might be an effective management template, but to review experience and consider where and under what circumstances trust tools might contribute to improved grazing practice.