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The School Trust Lands: A Fresh Look at Conventional Wisdom

Part 1

by

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THE SCHOOL TRUST LANDS: A FRESH LOOK AT CONVENTIONAL WISDOM

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This article would not have been possible without the extraordinary cooperation of the state land commissioners, their staff, and attorneys who worked with us over the past 10 years. While they will not necessarily agree with everything we say, we all share a conviction that management of state lands deserves a broad, attentive audience.

I. INTRODUCTION

In 1803 Congress began granting sections of land to new states to support schools. Congress made the first such land grant to Ohio.[1] By 1912, when Arizona and New Mexico joined the Union, this process was fairly complete. Other than noting the initial grant to Ohio, most texts ignore the remaining details surrounding school trust lands.[2] This is a significant oversight because the policy of granting land to the states for support of schools evolved for over a century, and played an integral role in the westward movement and state-making process. This long history gives the lands a complex and fascinating story.

More importantly, the lands and the peculiar mandate under which they are managed are of great contemporary significance. Out of the 322 million acres originally granted to the states for school and related purposes, nearly 135 million acres of surface and 152 million acres of mineral rights continue to be held in state ownership.[3] Twenty-two different states manage these lands and they continue to contribute important financial support for education.[4] They also provide an enormous reservoir of experience for comparative analysis, and thereby, a unique window through which to explore alternative definitions of public resource management. This opportunity for illumination is enhanced by the fact that the state school lands are not subject to the same

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1. For a full story on the original grant to Ohio, see Henry Barnard, *Educational Land Policy of the United States: Land Grants for Educational Purposes within the State of Ohio*, 28 AM. J. EDUC. 979 (1878). Because it marks the beginning, Ohio is also discussed, occasionally in considerable detail, in all of the references cited *infra* note 17.

2. *See, e.g.*, SAMUEL T. DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY, ITS DEVELOPMENT IN THE UNITED STATES (2d ed. 1980) (devoting less than a page to state school land programs).

3. Regarding original grants, see PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 804 (1968). Current acreage data are based on the 22 states that contain the vast majority of the remaining school and institutional trust lands. WESTERN STATES LAND COMM'RS ASS'N, DIRECTORY (1988-1989).

4. WESTERN STATES LAND COMM'RS ASS'N, *supra* note 3. However, many people have argued that the lands have not contributed as much financially as they should have.

multiple-use standard that currently governs federal resource management.[5] Rather, the states hold the school land grants in trust. This makes a state's management programs interesting and comparisons with federal management particularly enlightening. Unfortunately, the trust mandate is insufficiently discussed and generally misunderstood.

The purpose of this Article is to suggest that the conventional wisdom about state trust lands is misleading. The basic notions are easily summarized: "any derived benefit from the school trust lands must be used in support of schools and may not be used to support or subsidize other public purposes. Any arrangement not ensuring full fair market value for either the use or the sale of the school trust lands violates the trust obligation mandated by Congress."[6] The purpose of the grants was to "enable states to produce a fund with which the states could support the public school system."[7] Therefore, "without exception, the principle goal—the overriding purpose—of the trust administrative agencies is to secure the highest monetary return."[8] This view is held by most state trust land managers,[9] and virtually all contemporary commentators.[10]

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5. *See* Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531 (1988); National Forest Management Act, 16 U.S.C. §§ 1600-1647 (1988); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1988).

6. Kedric A. Bassett, *Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act*, 9 UTAH J. ENERGY L. & POL'Y 195, 202 (1989).

7. *Id.* at 211.

8. WILLIAM C. PATRIC, TRUST LAND ADMINISTRATION IN THE WESTERN STATES 7 (1981).

9. Jon A. Souder & Sally K. Fairfax, Western States Trust and Sovereign Lands Survey Results (May 1, 1990) (survey results on file with Department of Forestry and Resource Management, Univ. of Cal., Berkeley).

10. *See, e.g.*, Basset, *supra* note 6, at 195; PATRIC, *supra* note 8, at 7. For an arguable exception, see Wayne McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525, 526. A recent Oklahoma case restates what is considered obvious:

> These acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict [sic] either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. The State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from the

In contrast to this view, maximum economic return is barely tolerated as the controlling notion, and is rarely practiced, even on lands privately held by corporations.[11] It may have no place at all in the discussion of publicly owned lands.

It is probably true that this approach to the management of state lands distresses fewer than it might: most citizens and school children, and many specialists in public land management, are not even aware that school lands exist. Yet, even given the general anonymity of state school lands, there has been surprisingly little public discussion of the trust notion. Nevertheless, pressure from environmentalists[12] and evolving notions of what constitutes ecologically sound and politically acceptable land management[13] have led some states to seek flexibility.

This Article puts these developments into a comprehensive context. It is aimed at starting a conversation rather than ending or even defining it. We argue that notions of trust law have been applied selectively, rather simplistically, and frequently inappropriately. Further exploration of basic trust concepts and management practice reveals more flexibility than the standard discussion has done so far. Trust land management is far less confined—both *to* and *by* economic maximization notions—than the conventional wisdom suggests.

To begin the conversation, this Article proceeds in four sections. Section II describes the lands and their history. It should

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use and disposition of the trust property.

Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 235 (Okla. 1982) (footnotes omitted). *But see* Clinton Beaver, *Management of Wyoming's State Trust Lands from 1890-1990: A Running Battle Between Good Politics and the Law*, 26 LAND & WATER L. REV. 69, 92 (1992) (The state's Senior Assistant Attorney General argues that the conventional wisdom as we describe it has not yet come to Wyoming: "When the trusts are viewed in the proper light, the public and state officials, *should* staunchly support management of state trust lands for the exclusive benefit of the named beneficiaries." (emphasis added)).

11. For general discussion on this and related points, see Joseph L. Sax, *The Claim for Retention of Public Lands*, *in* RETHINKING THE FEDERAL LANDS 125 (Sterling Brubaker ed., 1984).

12. *See* PATRIC, *supra* note 8; *see also* North Fork Preservation Ass'n v. Department of State Lands, 778 P.2d 862 (Mont. 1989); Conda v. Colorado State Bd. of Land Comm'rs, 782 P.2d 851 (Colo. Ct. App. 1989).

13. For instance, some writers argue that sound management must consider amenity and noneconomic values. For an analysis of laws adopting this approach, see McCormack, *supra* note 10, and Bassett, *supra* note 6.

leave the reader with a general appreciation of how the grant program evolved: how much land was granted, to whom, for what purposes, and how the lands and the associated funds are managed. It also gives a brief description of the granted lands: how much of the grants have been retained, who owns them, how much revenue they produce from which resources, and how much the permanent funds produce. Section II emphasizes three themes: first, that accession was a bargain between the joining state and Congress; second, that the particulars of the bargain, and the details of the school land grants, varied considerably over time; and third, that the bargains do not show a pattern of increasing congressional restrictions on use and disposition of the granted lands as is suggested by the prevailing wisdom.

Section III looks at 150 years of case law to frame and discuss several questions that are central to our quest for flexibility: what is the trust instrument; do we have a trust; what is the purpose of the grant and who or what is to benefit; what is the trust property; who or what is the trustee; and how can the trust be changed? There is too much law and policy surrounding the assertion that the school land grants constitute a trust for us to seriously argue the contrary. However, raising the question and asking why, how, and at what point does a trust interpretation of these grants become reasonable, who is bound by the notion, and to do what, reveals weaknesses in the analogy between state school lands and ordinary trusts. More room for flexibility exists than the conventional wisdom suggests.

Section IV emphasizes this concept of flexibility by looking at trust land management in practice. The discussion takes the oft-repeated trust term of "maximized return" and puts it in the context of economic theory and reality. A brief review of timber management on trust lands in four western states illustrates that there is flexibility. Anything more than the most casual perusal makes clear that different states are *doing* different things. They are pursuing different economic strategies and using different definitions of sustained yield, of fair market value, and of multiple use of forested lands. They use different funding mechanisms and different revenue distribution procedures, all within different institutional structures. This variability in management programs suggests that the trust doctrine is more flexible than supposed. Maximum economic benefit is a very flexible mandate. More important, the trust mandate to preserve the corpus of the trust

while making the trust productive permits more conservative management, and a broader range of social benefits, than the maximum benefits perspective at first implies.

We think that it is important to be systematic in analyzing this flexibility for several reasons. Since the first "environmental decade,"[14] several states have evolved planning and management programs for school lands that chip away at the conventional wisdom. Our impression from talking to land managers in these states is that each perceives his or her situation to be unique or nearly so. Moreover, there is sometimes a large difference between the school land management regime as defined by state statute and as described by the managers themselves. Among other things, this perspective renders each of the state innovations difficult to imitate or to understand as part of a general pattern; it also makes them potentially quite vulnerable. As we move into a second environmental decade, providing even a partial glimpse at the big picture may be beneficial to the evolution of state school land management.

Without adding unduly to an already lengthy introduction, we want to be careful to state our purpose. Our goal is not to erode either the trust obligation, or its emphasis on economic returns. We are not opposed in principle to achieving economic returns from publicly held lands, even if the result is the occasional or well-planned loss of amenity and environmental values. Nor are we opposed to environmentally responsible, even amenity-oriented management of the trust lands. Rather, we argue that the trust obligation provides an extremely useful, albeit misrepresented and underappreciated, context for public resource management. Indeed, those environmental and amenity values that appear diametrically opposed to the conventionally understood trust obligation may be better served by a more flexible and accurate definition of the trust concept. Critics of multiple-use land management as historically practiced by the federal land management agencies may find much that is salubrious in this new definition of the school lands, where they would be discouraged by the conventional wisdom. Similarly, lessees and beneficiaries will

14. In 1970, President Nixon declared that the nation would focus on environmental issues for the coming decade. Address by President Richard M. Nixon, State of the Union (Jan 22, 1970), *reprinted in relevant part in* COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: FIRST ANNUAL REPORT (1970).

not find continuing succor in traditional oversimplifications.

The school lands and state management programs merit attention. In the more complex and comprehensive picture we paint, there are models and approaches to enrich discussions of public resource management now dominated by desiccated and polarized issues arising at the federal level. We aim, therefore, to complicate things.

II. Evolution of the Grant Program and Overview of the Lands, Revenues, and Resources

A. *Evolution of the Grant Program*

1. *The Context*[15]

Although we must exercise the humility appropriate to studying a policy that has thirty-five distinctive variants and that began just after the nation was founded, it is important to note that the practice of granting land to support common schools is actually much older. One enthusiastic scholar discounts the program's colonial heritage, musing that land grants for schools perhaps began in ancient times. However, he was not able to trace them farther than Henry V.[16] For present purposes it is sufficient to note that the idea of granting, donating, or bequeathing land in support of schools was common throughout the colonial period. It was most characteristic of the northeastern states, especially Massachusetts, New York, Connecticut, and New Hampshire, where "it developed steadily in the direction of a public land grant

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15. This Section draws heavily upon, but recasts and corrects material found in Jon A. Souder & Sally K. Fairfax, The State School Trust Lands (Mar. 1990) (paper presented at the Annual Meeting of the Western Political Science Association, Newport Beach, Cal.).

16. Howard C. Taylor, The Educational Significance of the Early Federal Land Ordinances 12-22 (1922) ("The origin of the system of land grants for education has been traced by some back to the medieval church foundations in England. If all the facts were known, it is not impossible that the beginnings of land grants for schools would be found in ancient times."). Another scholar notes that, after the monasteries were destroyed by Henry VII, many grammar schools were lost in England and it became common for individuals to endow schools with land. Joseph Schafer, The Origin of the System of Land Grants for Education 8-10 (1902) (Bulletin of the University of Wisconsin at Madison, History Series No. 63).

system."[17]

The idea of land grants for schools was just one of a number of concerns that swirled about the western lands before, during, and after the Revolution. The need to resolve some of those issues was urgent. In the early 1780s several major events, the most pertinent being the acceptance of the Virginia land cession by Congress in 1783,[18] obliged Congress to announce some policies

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17. SCHAFER, *supra* note 16, at 11; *see also* COMMISSIONER OF EDUCATION, REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1895-96, at 267 (1897); CHARLES F. DIENST, THE ADMINISTRATION OF ENDOWMENTS WITH SPECIAL REFERENCE TO THE PUBLIC SCHOOLS AND INSTITUTIONAL TRUSTS OF IDAHO (1933); HENRY A. DIXON, THE ADMINISTRATION OF STATE PERMANENT SCHOOL FUNDS: AS ILLUSTRATED BY A STUDY OF THE MANAGEMENT OF THE UTAH ENDOWMENT (1936); FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860: A STUDY IN THE EVOLUTION OF DEMOCRACY (1966); BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924); GEORGE W. KNIGHT, HISTORY AND MANAGEMENT OF LAND GRANTS FOR EDUCATION IN THE NORTHWEST TERRITORY (1885) (Papers of the American Historical Association, Vol. 1, No. 3); FLETCHER H. SWIFT, HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES 1795-1905 (1911) [hereinafter COMMON SCHOOL FUNDS]; FLETCHER H. SWIFT, STUDIES IN PUBLIC SCHOOL FINANCE: THE WEST—CALIFORNIA AND COLORADO (1922); FLETCHER H. SWIFT, FEDERAL AND STATE POLICIES IN PUBLIC SCHOOL FINANCE IN THE UNITED STATES (1931). For a series of charts tracking different provisions in state constitutions circa 1930, see John W. Koch, Constitutional Provisions for Common School Funds in the Several States (1930) (unpublished M.A. thesis, Ohio State Univ.). Unfortunately for present purposes, Koch's thesis does not contain the original constitutions and therefore, is not a consistently reliable guide to the states' original agreements. The best general source on grants to the states is MATHIAS N. ORFIELD, FEDERAL LAND GRANTS TO THE STATES WITH SPECIAL REFERENCE TO MINNESOTA (1915). *See also* Thomas R. Waggener, The Federal Land Grant Endowments: A Problem in Forest Resource Management (1966) (unpublished Ph.D. Dissertation, Univ. of Wash.).

18. The original 13 colonies vigorously pursued enormous, overlapping claims to all the land between the Appalachians and the Mississippi. Following the Revolution, they ceded their claims gradually to the central government. Virginia's claim was the most extensive and the cession most central in the process under discussion here. *See* HIBBARD, *supra* note 17; ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936 (1942); GATES, *supra* note 3. Not unexpectedly, the Virginia cession and kindred phenomena are also the subject of much analysis. The terms of the Virginia cession are key to almost everything that follows in American political and social history. Among other things, the ceded land was to be laid out in states; the states formed were to have a republican form of government and were to be admitted to the Union; all land not taken up by military bounty claims was to be a "common fund for the use and benefit of all the states." TAYLOR, *supra* note 16, at 8-9 (describing the terms of the Virginia cession and stating that the deed is reprinted in the Journals of Congress for

regarding the disposition of the ceded lands. In two statutes remarkable for their brevity, durability, and dignity, Congress did so. The General Land Ordinance of 1785[19] provided for the rectangular survey[20] and sale of western lands. It also initiated the program of land grants for schools, providing that lot number sixteen in every township would be reserved "for the maintenance of public schools within the said township."[21]

March 1, 1784); *see also* GATES, *supra* note 3, at 52.

19. An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, 4 J. AM. CONG. 520-21 (May 20, 1785), *reprinted in* TAYLOR, *supra* note 16, at 129-35.

20. The survey organizes land into six-by-six mile townships divided into 36 sections of one square mile each. There is an enormous literature describing the survey. *See, e.g.*, HILDEGARD B. JOHNSON, ORDER UPON THE LAND: THE U.S. RECTANGULAR LAND SURVEY AND THE UPPER MISSISSIPPI COUNTRY (1976); PAYSON J. TREAT, THE NATIONAL LAND SYSTEM: 1785-1820 (Russell & Russell 1967) (1910) [hereinafter NATIONAL LAND SYSTEM]. Many recent authors discuss the survey in terms of straight lines, which nature abhors as much as vacuums. Property lines and fence lines followed these straight survey lines, and farmers plowed along the fence line. This unnatural arrangement has been identified as a possible cause of the dust bowl. Reality and the literature are more complex, but the general idea is clear.

More relevant here, Treat discusses the decision in terms of a regional sociological conflict (the South versus the New England states) and styles the survey and sale notion as a victory for the New England approach to ordering both land and community life. TREAT, *supra*, at 15-40; *see also* Payson Treat, *The Origin of the National Land System Under the Confederation*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1905 (1906). There are also whiffs throughout the literature that the southeast was not really wholly enthusiastic about common or free schools, preferring to concentrate resources on educating the sons of the aristocracy. Attitudes towards daughters everywhere are more ambiguous, and whether education for "all" includes girls depends considerably on where and when.

21. *Id.* The writers cited in note 17 are at great pains to correct a misconception, which apparently gained currency at the time of the centennial of the Northwest Ordinance of 1787, that the Northwest Ordinance rather than the 1785 Ordinance provided for public schools. They are quite correct. The Northwest Ordinance stated that "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of eduction shall be encouraged." An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. III, 1 Stat. 51, 52 n.a (1787). Thus, the Northwest Ordinance did not set out the plan for land grants. This was established instead by the Ordinance of 1785. There is also much in the early discussion to suggest that Thomas Jefferson wrongly claimed or was incorrectly given credit for having advocated or imposed the notion of land grants for schools. Jefferson did pen a pivotal 1784 report on what to do with the territories, but that document did not mention school land grants. TAYLOR, *supra* note 16, at 9.

The Northwest Ordinance, passed two years later, provided for establishing a system of territorial governance and transition to statehood that technically applied only to the states formed out of the ceded lands (Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota east of the Mississippi).[22] As the Northwest Ordinance was implemented, however, its principles and many of its key phrases became the template of all western expansion and a pervasive architectonic of American political and social life.[23] In a series of fits and starts, the Ordinance's simple commitment to grant land for schools was elaborated and expanded. It too became so woven into the warp and woof of both education and lands policy that it is, as noted above, scarcely seen today.[24]

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22. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 n.a (1787).

23. The most important of these principles is the "equal footing" doctrine, which holds that each state joins the union on an equal footing with the original states. This idea has become so ingrained that some people look for it, erroneously, in the Constitution.

24. Because the school land grant program is currently invisible, and because the terms and contours of current social science analysis were not live when it was visible, it is worth noting, if only in passing, the enormity of what transpired in a single sentence in a statute now considered interesting primarily to a small bunch of geographers and public land scholars. Under the Articles of Confederation, known and unloved for their allegedly sapless central government and powerful states, Congress actually imposed a uniform education policy and a means for funding it on the states. Common schools (that is, schools paid for by the government rather than the students) would be made available in all the new states. Originally the term meant grammar or preuniversity schools. The evolving concept of "school" can be read in the progression of detail in 19th century constitutions. *Compare* N.H. CONST. art. LXXXIII (1792), *reprinted in* 6 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2487 (1906), *reprinted as* H.R. DOC. No. 357, 59th Cong., 2d Sess. (1909) *with* UTAH CONST. art. X (1896), *reprinted in* 6 THORPE, *supra*, at 3720; *see also* School Dist. No. 20, Spokane County v. Bryan, 99 P. 28 (1909) (finding that a model training school is not within the meaning of "common schools"). Consensus is that the lands were granted because it was acknowledged everywhere that if common schools were obliged to rely on locally instituted property taxes, education would not be generally provided in the new territories. *See, e.g.*, COMMON SCHOOL FUNDS, *supra* note 17, at 165 (arguing that the idea of free schools was controversial even in Connecticut where the support for a permanent school fund was greatest). The idea motivating the grants was to avoid the need for taxes to support schools. For those who would argue that federal tentacles did not start to encroach upon the states until the Commerce Clause developed its many sets of wings, or that federal subsidies did not become significant until the Depression or the Civil War, it is interesting to note that the school lands tenta-

It is clear, both from its antecedents and from its early implementation, that the idea of granting land for education was broadly familiar. However, what the grantee was supposed to do with the lands in order to support the schools was not as well defined.

It should shock no one to learn that much of the land and its potential benefit were lost due to incompetence, indirection, and corruption. Much of the loss was connected to the states' consistent decisions to sell the lands rapidly to spur settlement and to support early schools.[25] This mismanagement is, however, easily and frequently overplayed.[26] Viewed from the perspective of the current value of the land and resources, it is reasonable to think that it would have been preferable to rent a given section rather than to give it in salary to the school teacher. Nonetheless, many of the policies that might have been more beneficial to current students would have probably deprived the earliest generations of school children of much of the benefit of the grants.[27]

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cle-subsidy antedates the Commerce Clause by half a decade, its wings by a hundred and fifty years, more or less, and the Civil War by almost a century.

25. Sale of the lands was originally not authorized, but the states soon discovered that, with so much free land for the taking, leasing the lands was not feasible. *But see* TAYLOR, *supra* note 16, at 123 ("It was never intended that the land should be held for the benefit of future generations more able to maintain schools than the pioneers. If the early settler could derive the greatest aid from the land grants by selling school lands, such sales were wise."). Early states provided explicitly for quick sale of the lands. *See, e.g.*, MINN. CONST. art. 8, § 2 (1857), *reprinted in* 4 THORPE, *supra* note 24, at 2009 (the best one-third of the land was to be sold in the first two years of sale); Segner v. State Inv. Bd., No. 587-489319, slip. op., at 6 (Ramsey County Dist. Ct., Aug. 11, 1988).

26. *See, e.g.*, Adreu A. Bruce, *State Socialism and the School Land Grants*, 33 HARV. L. REV. 401 (1920). For a better discussion, see Jon A. Souder, Economic Strategies for the Management of State and Institutional Trust Lands: A Comparative Study of Ten Western States (1990) (Ph.D. Dissertation, Univ. of Cal., Berkeley).

27. Section IV, *infra*, discusses the sell-lease-hold option in terms of evolution of authorities, and in the context of economic development and management options. This is not the place to evaluate the land grants-permanent school fund's contributions to education. It is of course true that if the resources had been handled differently at the outset, the funds might possibly be larger and more important now. However, the cost of imposing order would have been enormous. The general theme of the discussion seems to be that the grants were pivotal in getting things started. *See* DIXON, *supra* note 17, at 12. In addition Dixon muses that in Utah the dependency of statehood and the promise of grants for schools may have had the opposite effect, that is, the Utah settlers waited for the grants to start

2. *The Basic Grant Program*

This Section will describe the evolution of four central aspects of the grant program: (1) how much land was granted; (2) to whom; (3) for what purpose; and (4) how the lands were to be administered.[28] This fourth element includes the growth of and limits on state authority to dispose of land, the rise of the permanent fund as a concomitant of the land grants, and the evolution of the State Land Commission as the manager, and arguably trustee. In order to give an idea of the content of the diverse documents and the state and federal components thereof, this Section will trace the evolution from the early grant to Indiana to the final grant to New Mexico.

From this evolution three important observations emerge. First, new states joining the union had to bargain with Congress. States typically submitted offers and countered congressional offers, literally negotiating their way into the Union.[29] During the nineteenth century, the process became more generous to new states.[30] Hence the process of gaining statehood, which sometimes dragged on for decades, resulted in a literal contract, the terms of which the states had to accept in order to enter the Union.[31] Second, the grant process was marked by variation. Because the grant process altered significantly over time, different states now

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schools. *Id.* at 106. Although credible in the case of Utah, which was characterized by an unusually high degree of social cohesion, that point may be less applicable in other areas. Swift has argued the lack of a strong sense of community was a barrier to the establishment of schools. *See* COMMON SCHOOL FUNDS, *supra* note 17, at 115.

28. The major sources for this Section are THORPE, *supra* note 24; and SHEPARDS CITATIONS, INC., DIGEST OF PUBLIC LAND LAWS (1968). Other important sources include GATES, *supra* note 3, HIBBARD, *supra* note 17, and Koch, *supra* note 17.

29. *See* Sally K. Fairfax, *Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism as If States Mattered*, *in* FEDERAL LANDS POLICY (Phillup O. Foss ed., 1987).

30. In addition, the "old" states, and the early "new" ones insisted on partaking of increasing congressional generosity through retroactive land and cash grants and grants of "scrip," which entitled states where no public domain remained to select lands further west. *See* PAUL W. GATES, THE WISCONSIN PINE LANDS OF CORNELL UNIVERSITY (1943); *see also* ORFIELD, *supra* note 17 (analyzing the early congressional roll call voting to chronicle the emergence and growing power of older new (perhaps we could call them middle-aged) states).

31. *See* NATIONAL LAND SYSTEM, *supra* note 20.

operate under quite different mandates. Third, the variation arises out of changes in state, not federal policy.[32] Although the federal grant program over time became more specific about state responsibilities, there is no pattern of the federal government evincing increasing concern for the dissipation of the granted lands. Nor, contrary to the assertions of many court and scholarly discussions,[33] was there a pattern of Congress imposing a trust agreement on the states. Prior to 1910, the trust obligations that existed arose entirely from state commitments made in state constitutions. To illustrate these important points, we begin with the grants to Indiana, a typical set of early documents and circumstances.

3. *Indiana: A Typical Beginning*

a. *The Enabling Act and Acceptance*

In 1816, Congress passed an "Act to enable the people of the Indiana Territory to form a constitution and State Government, and for the admission of such State into the Union on an equal footing with the original states."[34] Section 6 of this enabling act contains the provisions that most interest us. In language and format that soon became standard, it begins:

> *And be it further enacted*, That the following propositions be, and the same are hereby, offered to the convention of the said Territory of Indiana, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States:

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32. Beginning in the 1850s and more dramatically after the Civil War, the old new states "lapped" the new ones, that is, before the process of writing new constitutions was completed, the old states substantially revised theirs. Hence, the process of writing constitutions for new states began to draw not only on previous new constitutions, but in addition, on document revisions undertaken in the older states. The current analysis focuses almost exclusively on the original constitutions. It also ignores statutory changes.

33. *See, e.g.*, Gladden Farms, Inc. v. State, 633 P.2d 325, 327 (Ariz. 1981); COMMITTEE ON TERRITORIES, AN ACT ENABLING THE PEOPLE OF NEW MEXICO AND ARIZONA TO FORM A CONSTITUTION AND STATE GOVERNMENT, ETC., S. REP. No. 454, 61st Cong., 2d Sess. 18-21 (1910) (accompanying H.R. 18166, 61st Cong., 2d Sess. (1910)).

34. Enabling Act for Indiana (1816), *reprinted in* 2 THORPE, *supra* note 24, at 1053.

> *First*, That the section numbered sixteen, in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.[35]

This is all that the Indiana Enabling Act says about school lands. There is no supplementary discussion of trusts, fiduciary obligations, restrictions on use to protect any trust, or any instructions regarding what constitutes "use of schools." This language, or something similar, was contained in every accession package until the accession era ended.

Section 6 of the Indiana Enabling Act continues, making a series of other grants. First, the salt springs (or saline lands) are granted to the states for use by the people.[36] Second, the statute

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35. *Id.* § 6, *reprinted in* 2 THORPE, *supra* note 24, at 1055.

36. *Id.* The saline grants are most fully discussed in ORFIELD, *supra* note 17, at 64. These grants, like the school grants, became a standard feature of accession statutes. Section 6 provides an important comparison with the school land grants:

> *Second*, That all salt-springs within the said Territory, and the land reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt-springs, not exceeding, in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said State, for the use of the people of the said State, the same to be used under such terms, conditions, and regulations as the legislature of the said State shall direct: *Provided*, The said legislature shall never sell nor lease the same for a longer period than ten years at any one time.

Enabling Act for Indiana, § 6 (1816), *reprinted in* 2 THORPE, *supra* note 24, at 1053, 1055.

Variants in this provision are repeated throughout the accession process, although the particular language here is important for two reasons. First, Congress made numerous specific provisions to protect the saline grants, and although the sum of the galaxy of trust paraphernalia is implicit, the salt lands were not and are not consistently viewed as trusts. The fact that land was granted for a specific purpose therefore should not be interpreted automatically as a trust, implicit or otherwise. Second, it suggests the kind of language that Congress used when it was concerned about the integrity and use of granted lands. From the beginning of the 19th century, Congress labored to protect the salt-land grants from abuse and dissipation. A hundred years later, the U.S. Supreme Court was inclined, while interpreting the language of 20th century enabling acts, to read a similar concern for school lands into early 19th century grants. *See* Lassen v. Arizona Highway Dep't, 385 U.S. 458, 463 (1967); *see also* United States v. 111.2 Acres of Land in Ferry County, Wash., 293 F. Supp. 1042, 1047 (1968), *aff'd*, 435 F.2d 561 (9th Cir. 1976). It is therefore interesting to note that language and provisions doing anything more than granting the lands did not appear in congressional acts until the statehood process was nearly over, beginning with Colorado in 1876.

reserves five percent of the net proceeds from the sale of lands, to be distributed in the following manner: three-fifths to the state for roads and canals within the state, and two-fifths to congress for roads and canals connecting the states. Third, the states received an entire township for use by a seminary of learning.[37] Finally, the states were given sections of land on which to build their state capitals.

Section 6 concludes:

> *And provided always*, That the five foregoing provisions, herein offered, are on the conditions that the convention of the said State shall provide by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of December next, shall be and remain exempt from any tax, laid by order or under any authority of the State, whether for State county, or township, or any other purpose whatever, for the term of five years from and after the day of sale.[38]

Indiana, like every other state, was required to formally accept the terms and conditions offered in the enabling act documents. Two months later, in June of 1816, the Convention of the Territory of Indiana met and did so.[39] In December of the same year, a congressional resolution took note of the Convention's June ordinance by accepting the terms and conditions and its July constitution.[40] The resolution stated that, "in conformity with the principles of the articles of compact between the original

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37. Enabling Act for Indiana, § 6 (1816), *reprinted in* 2 THORPE, *supra* note 24, at 1053, 1055. This provision led to the earliest of the school trust land cases, Board of Trustees for the Vincinnes Univ. v. State of Indiana, 55 U.S. 268 (1852). The Indiana Enabling Act provisions applied to the seminary grant in 1816 are similar to those that were attached to the school grants in the 1890s. *See supra* note 35 and accompanying text.

38. Enabling Act for Indiana § 6 (1816), *reprinted in* 2 THORPE, *supra* note 24, at 1056. This provision was designed to assist settlers purchasing land on credit. Thus, when the credit sales program was abolished in the 1840s, the provision dropped out of state constitutions, beginning with Arkansas and Michigan.

39. The document states that the convention does "for ourselves, and our posterity, agree, determine, declare and ordain, that we will, and do hereby, accept the propositions of the Congress of the United States, as made and contained in their act . . . " Ordinance Accepting Enabling Act (1816), *reprinted in* 2 THORPE, *supra* note 24, at 1056, 1056.

40. Resolution for Admitting the State of Indiana into the Union (1816), *reprinted in* 2 THORPE, *supra* note 24, at 1057, 1057.

States, and the people and States in the territory northwest of the river Ohio," that the State of Indiana was "admitted to the Union on an equal footing with the original States, in all respects whatever."[41]

b. The State Constitution

The Indiana Constitution contains two sections that refer to the school land grants. One part declares that:

> it shall be the duty of the General Assembly to provide, by law, for the improvement of such lands as are or hereafter may be granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands or from any other quarter to the accomplishment of the grand object for which they are or may be intended. But no lands granted for the use of schools or seminaries of learning shall be sold by authority of this State prior to the year 1820; and the moneys which may be raised out of the sale of any such lands, or otherwise obtained for the purposes aforesaid, shall be and remain a fund for the exclusive purpose of promoting the interests of literature and sciences, and for the support of seminaries and public schools.[42]

Although the "be and remain a fund for . . . schools"[43] may appear to be a nascent permanent school fund, it merely reiterates that the proceeds from the grant will be spent for the purpose intended.[44] Indiana provides a template against which to ex-

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41. *Id.*

42. IND. CONST. art. IX, § 1 (amended 1851), *reprinted in* 2 THORPE, *supra* note 24, at 1057, 1068-69.

43. *Id.*

44. An actual permanent school fund was added when Indiana revised its Constitution in 1851. The 1851 Constitution describes diverse sources of income for the fund, including the township fund "and the lands belonging thereto," the saline fund and lands, all lands and other estate that escheat to the state, and taxes that may be assessed. IND. CONST. art. VIII, § 2 (1851), *reprinted in* 2 THORPE, *supra* note 24, at 1073, 1086. The principal of the common school fund "may be increased, but never diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever." *Id.* § 3, *reprinted in* 2 THORPE, *supra* note 24, at 1086. Section 7 provides that "All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." *Id.* § 7, *reprinted in* 2 THORPE, *supra* note 24, at 1086. This language, or variations on it, was typical of the constitutions of the 1850s. Indiana unambiguously added the lands to a trust in its amended constitution. Many, but not all states did so as

amine four key points of programmatic evolution.

4. *Key Points in the Evolution of the Grant Program*

a. *How Much Land Was Granted?*

During the twentieth century, the courts and others saw in the evolution of the grants an increasingly concerned Congress guarding against alleged state misuse and malfeasance with ever more stringent enabling act provisions.[45] An examination of the actual evolution, however, shows a number of patterns. The most obvious pattern was the increasing congressional generosity to the states. Over the nineteenth century, school land grants to the states became larger and larger. Ohio and the other states admitted before 1850 received one section per township.[46] Starting with

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well, most typically beginning in the 1870s. *See* Sally K. Fairfax & Jon A. Souder, State Accession Documents Provisions Relating to the Grant of School and Related Lands, Working Paper 90-4 (1990) (on file with the authors).

According to George W. Knight the Indiana legislature had, however, paid considerable attention to the school lands well in advance of the 1851 Constitution. Beginning in 1821, with a report from a special Senate Committee appointed to "investigate the condition of the school lands," the legislature pondered how to make money off the lands. *See* KNIGHT, *supra* note 17, at 65. An 1824 statute incorporated the congressional townships for the purpose of "creating a controlling power over section sixteen." *Id.* Commissioners elected in each township were to control the lands therein and to "dispose of them in such manner as for the best interest of the schools." *Id.* at 66. There were no limits on the disposition. Because this program was leading to dissipation of the grant, the law was repealed, but one year later so that leases could not be given for more than 10 years. *Id.*

Numerous legislative enactments over the next several decades sought to protect the lands from dissipation by the commissioners, to little avail. A legislative effort to abolish the congressional townships and centralize management of the grants at the state level was challenged by Springfield Township and was held by the state court to be a violation of the original grant. *See* KNIGHT, *supra* note 17, at 71-72 (discussing State v. Springfield Township, 6 Ind. 83 (1854), which eventually gave rise to the more familiar Springfield Township v. Quick, 63 U.S. 56 (1859)).

45. *See, e.g.*, Lassen v. Arizona Highway Dep't, 385 U.S. 458, 463-64 (1967) (citing S. REP. No. 454, *supra* note 33, at 18); *see also* Deer Valley Unified Sch. Dist. v. Superior Court, 760 P.2d 537 (Ariz. 1988).

46. *See, e.g.*, An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, 4 J. AM. CONG. 520-21 (May 20, 1785), *reprinted in* TAYLOR, *supra* note 16, at 131. Although this discussion emphasizes, among other things, variation, there are several points on which there was none. Most notably, from first to last, Congress provided for "in lieu" selections, that is, when the

California and Oregon, all states received two sections per township. Then, at the Utah accession in 1896, four sections per township were granted. The four section grants continued through the 1910 grants to Arizona and New Mexico.[47]

This increasing generosity was manifest in related areas as well. Many of the land grants and donations that accompanied accession are relevant because the proceeds from their sale or use were added, at accession or by constitutional revisions, to the permanent school fund.[48] In 1841, 500,000 acres of land were granted

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granted lands were occupied by settlers, or squatters, in advance of the land surveys that identified the granted areas, the states were granted land in lieu of the identified section.

47. *See* GATES, *supra* note 3, at 303-15. Oklahoma, which joined in 1907, was "treated differently." *Id.* Oklahoma received sections 16 and 36 "for schools." Enabling Act for Oklahoma, § 7 (1906), 5 *reprinted in* THORPE, *supra* note 24, at 2960, 2966. In addition, when the Indian lands were opened to settlement, each section 13 was to be dedicated one-third to the University of Oklahoma and its associated preparatory school, one-third to normal schools, and one-third to an Agricultural and Mechanical school for black students. *Id.* § 8, *reprinted in* 5 THORPE, *supra* note 24, at 2967. Section 33 of the Indian lands was assigned to "charitable and penal institutions." *Id.* Arizona and Oklahoma also received five million dollars in lieu of the school sections which they would not have in the Indian Territory. *Id.* § 7, *reprinted in* 5 THORPE, *supra* note 24, at 2968. Oklahoma wound up with only 4.6% of its total acreage, *see* GATES, *supra* note 3, at 315, which compares unfavorably with the 11% it would have received if it had gotten four sections like the others. The Oklahoma lands, however, were likely to generate revenue much earlier than Arizona lands, because of their mineral deposits and because they were better for farms. GATES, *supra* note 3, at 314-15.

Alaska also was treated differently, but has a surprising analogue in Nevada. Both states ultimately received land selection rights rather than grants of specific sections. This disparity in the size of the grants does not tell the whole story, however. As the counsel for the Utah State Lands Commission notes: "the reason four sections were granted was due to the relatively poor quality of the lands rather than to increasing generosity." Interview with Steven F. Alder, Assistant Attorney General, Utah (Mar. 1, 1991); *see also* Bassett, *supra* note 6, at 197 (citing 26 CONG. REC. 182 (1893) (statement of Rep Rawlins)). This is also true today: grazing rates per animal unit month (AUM) for Kansas and Nebraska are four times those of Utah, Arizona, and New Mexico, and returns are further reduced by the limited number of AUMs per acre in the latter three states. Only minerals in the form of oil and gas have saved these states, and that was unintentional because mineral lands were originally excluded from the grants. Interview with Steven F. Alder, Assistant Attorney General, Utah (Mar. 1, 1991).

48. *See, e.g.*, OR. CONST. art. VIII, § 2 (1857), *reprinted in* 5 THORPE, *supra* note 24, at 2998, 3011; KAN. CONST. art. 6, § 3 (1861), *reprinted in* 2 THORPE, *supra* note 24, at 1241, 1252; NEV. CONST. art. XI, § 3 (1864), *reprinted in* 4 THORPE, *supra* note 24, at 2401, 2418-19; MISS. CONST. art. VIII, § 6 (amended

to each public land state that had not already received such land.[49] In 1862, land or scrip was granted to all old and new states "not in rebellion" for the purpose of endowing agricultural and mechanical colleges.[50] This program was extended, after the war, to the southern states.[51]

It is difficult to succinctly describe this pattern of increasing congressional openhandedness because grants to states were so munificent, and were frequently made retroactive.[52] Furthermore, many grants were made to the states to be regranted to developers of internal improvements, such as railroads.[53] Hence, it would be difficult to identify an appropriate set of programs for analysis. Though drawing lines is difficult,[54] and for present purposes unnecessary, there is no confusion about the pattern: over time the federal government gave more and more land to new and middle-aged states before and after accession. The states had become more effective bargainers in their own behalf.

Another component of the grant program, inconsistent congressional efforts to protect a growing federal interest in public domain lands, had the effect of increasing the extent of the grants. As national public domain policy shifted from disposition to retention, Congress tried sporadically to exempt federal land reservations for forests, parks, and Native Americans, from the school land grant process. For example, in the 1889 "Omnibus" Enabling Act for North Dakota, South Dakota, Montana and Washington, as well as in the 1896 Utah Enabling Act, Congress clearly stated that the provisions granting sections in every township did not apply to federal land reservations.[55] Arizona and

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1868), *reprinted in* 5 THORPE, *supra* note 24, at 2069, 2081.

49. *See* GATES, *supra* note 3, at 238 (discussing the 1841 Preemption Act, ch. 16, 5 Stat. 455 (1841)); *see also* ORFIELD, *supra* note 17, at 98-102.

50. GATES, *supra* note 3, at 335 (discussing the Agricultural College Act).

51. *Id.*

52. *See id.* at 319.

53. *See generally* GATES, *supra* note 3.

54. *See generally* ORFIELD, *supra* note 17; HIBBARD, *supra* note 17; Waggener, *supra* note 17. For an illustration of the composition of the institutional trust grants in just one state, see DIENST, *supra* note 17, at 4-10.

55. If sections 16 and 36 were located in areas that already had permanent reservations for national purposes, those sections were not subject to grants or in lieu selections. Enabling Act for Montana, § 10 (1889), *reprinted in* 4 THORPE, *supra* note 24, at 2289, 2293; Enabling Act for Utah, § 6 (1894), *reprinted in* 6 THORPE, *supra* note 24, at 3693, 3695-96. These restrictions were not included in

New Mexico were successful, in 1910, in having that provision specifically disavowed,[56] and were able to select land in lieu of sections contained in national forests.

Congress had the same difficulty achieving a consistent policy with regard to minerals: it did not specifically exempt mineral lands from the grant process until 1889. The Omnibus Enabling Act provided for land selections in lieu of mineral lands.[57] In

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the Idaho Enabling Act one year later. Act for Admission of Idaho (1890), *reprinted in* 2 THORPE, *supra* note 24, at 913, 914. As noted above, although differently stated, the same principle was applied to Oklahoma. *See supra* note 47; *see also* GATES, *supra* note 3, at 313-14. However, reduction in the actual amount of land granted to the Dakotas, Montana, Washington, and Utah was nowhere what it would have been for Arizona and New Mexico, wherein the restrictions did not apply. The Forest Reserve Act (ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified at scattered sections of 16 and 26 U.S.C.), which authorized the President to reserve forest lands, did not pass until 1891, and was not extensively implemented for almost a decade, much past statehood for those five. GATES, *supra* note 3. Therefore, there were few federally reserved lands in the five states.

56. The New Mexico Enabling Act stated:

> and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress [in lieu selections are to be made] . . . *And provided further*, That the grants of sections two, sixteen, thirty-two, and thirty-six, to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, for which no indemnity has been selected, may bear the to the total area of all the national forests within said State, the area of sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the treasury not otherwise appropriated.

Act of June 20, 1910, ch. 310, 36 Stat. 557, § 6, *amended by* Act of June 5, 1936, ch. 517, 49 Stat. 1477, *and* Act of June 2, 1951, 65 Stat 51. Compare this with the Utah Enabling Act's statement: "*Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act." Enabling Act for Utah § 6 (1894), *reprinted in* 6 THORPE, *supra* note 24, at 3693, 3696.

57. Enabling Act for Montana, § 19 (1889), *reprinted in* 4 THORPE, *supra*

1896, minerals were not mentioned in the Utah Enabling Act,[58] giving the U.S. Supreme Court the opportunity to opine that, whatever Congress had said, it *intended* to reserve minerals, not only in the Utah Enabling Act, but in *all* such grants.[59] In 1927 Congress enacted legislation to reverse the Supreme Court decision,[60] perhaps its last flourish of generosity of the accession period.[61]

b. To Whom Were the Lands Granted?

Although it is now common to list school lands under the heading "grants to the states," the issue of who should receive the grants was not easily answered at the outset. Congress resolved this issue in a number of different ways during the first half of the nineteenth century before settling into a standard pattern. When Ohio applied for statehood, it proposed an arrangement similar to the 1780s land sale contracts with the Ohio Company; that *the townships* receive section sixteen or equivalent for the use of schools.[62] Congress rejected that proposal and after a series of concessions and counter proposals, provided that all sections for the use of schools would be vested in the legislature of that state.[63] After Ohio, grants of land were made to the township for use of schools in the township. Then the lands were granted to benefit schools in the township but were to be managed by the county. Then the lands were granted to benefit schools in the township but to be administered by the state. Finally, in the mid-nineteenth century, Congress granted lands for the benefit of schools in the state to be administered by the state.[64]

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note 24, at 2289, 2296.

58. Enabling Act for Utah (1894), *reprinted in* 6 THORPE, *supra* note 24, at 3693.

59. *See* United States v. Sweet, 245 U.S. 563, 572-74 (1918); *see also* WILLIAM W. ROBINSON, LAND IN CALIFORNIA 190-91 (1948). For more detail regarding mineral lands, see Kent Shearer, *Federal Land Grants to the States; An Advocate's Dream; A Title Examiner's Nightmare*, 14 ROCKY MTN. MIN. L. INST. 185 (1968); William E. Colby, II, *Mining Law in Recent Years*, 36 CAL. L. REV. 371 (1948).

60. Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026 (codified at 43 U.S.C. §§ 870-871 (1988)) (commonly known as the Jones Act).

61. *See infra* note 238 (discussing the Utah indemnity land selection cases).

62. *See* TAYLOR, *supra* note 16, at 25-29 (discussing the Ohio Company and the negotiations surrounding Ohio's admission to the Union).

63. *See* HIBBARD, *supra* note 17, at 309-10.

64. *See* COMMON SCHOOL FUNDS, *supra* note 17, at 107 (providing a detailed

This shift from township to state ownership made sense for several reasons. First, the township was frequently a name for lines on a map and did not always exist as a government. In any event, the local level was not generally adequate to administer the resources.[65] Second, the townships were not equally endowed by the grants. In some townships the section was valuable or marketable land and provided support for schools in the township. In other areas, the resource was not marketable, but the township still needed support for schools. The gradual evolution ended in a congressional policy of granting land to the states to support the schools statewide.

c. *What is the Purpose of the Grants?*

From state to state, and more interestingly, even within one state, there is slight, but significant, variation in the language describing the purpose of the grants. All of the variations imply something just a little different concerning use of the resources. For example, typical enabling act language from Ohio forward grants the lands "for the maintenance of schools."[66] That phrase changed during the 1860s to read "for the support of common schools"[67] and shifted again in 1907 when Oklahoma was granted land "for the use and benefit of common schools."[68] California, atypically, received land in 1853 for "the purposes of public schools."[69] Even more confusing, perhaps, is the Omnibus En-

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discussion of this progression); *see also* HIBBARD, *supra* note 17, at 310; TAYLOR, *supra* note 16, at 115.

65. The problems encountered by townships are detailed in numerous sources. *See, e.g.*, COMMON SCHOOL FUNDS, *supra* note 17, at 116; TAYLOR, *supra* note 16, at 85 (noting that the earlier settlers' educational work was hampered by physical hardship, Native American hostility, general poverty, scarcity of money, scattered population, difficulty in getting teachers, and lack of social coherence).

66. *See, e.g.*, An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, 4 J. AM. CONG. 520-21 (May 20, 1785), *reprinted in* TAYLOR, *supra* note 16, at 133.

67. Enabling Act for Colorado, § 7 (1875), *reprinted in* 1 THORPE, *supra* note 24, at 470, 472.

68. Enabling Act for Oklahoma, § 7 (1906), *reprinted in* 5 THORPE, *supra* note 24, at 2960, 2966.

69. *See* GATES, *supra* note 3. However, the lands were granted three years after California attained statehood and therefore came apart from the normal context of provisos and quid pro quos that characterize other grants. *See id.* at 301-04. There is, accordingly, no compact, hence no basis for arguing that there is a

abling Act, which grants the school lands, again, "for the support of common schools,"[70] but authorizes in lieu selections of excluded mineral lands for the "use and benefit" of the schools.[71]

Variation in the language of the enabling acts is compounded by equally subtle shifts in language in other key documents. For example, Wyoming was among those states granted lands "for the support of common schools."[72] However, its Constitution formally accepted the grants, as was required by Congress, "for educational purposes."[73]

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trust agreement with the federal government attaching to the California school grants. The state has taken the position that its grant is honorary, rather than binding. For a fuller but still preliminary discussion of California's peculiarities, see GATES, *supra* note 3, at 301-04; *see also* Robert M. Philips, The Intermixed School Trust Lands: A Legal Perspective on Their Management 2-9 (1984) (unpublished M.A. Thesis, Univ. of Cal., Berkeley).

70. Enabling Act for Montana, § 10 (1889), *reprinted in* 4 THORPE, *supra* note 24, at 2289, 2293.

71. *Id.* at 2296.

72. Act for the Admission of Wyoming, § 4 (1890), *reprinted in* 7 THORPE, *supra* note 24, at 4111, 4112.

73. WYO. CONST. art. XVIII, § 1 (1889), *reprinted in* 7 THORPE, *supra* note 24, at 4117, 4147. Wyoming's Act of Admission provided that proceeds of lands should be a fund "expended in the support of said schools . . . ." Act for the Admission of Wyoming, § 5 (1890), *reprinted in* 7 THORPE, *supra* note 24, at 4111, 4113. But the lands were "reserved for school purposes only," which seems broader. *Id.* The Constitution accepted "the grant of lands . . . for educational proposes," which seems broader still. WYO. CONST. art. XVIII, § 1, *reprinted in* 7 THORPE, *supra* note 24, at 4117, 4147, *cited and discussed briefly in* Clinton Beaver, Comment, *Wyoming School Trust Lands Trapped Inside Grand Teton National Park—Alternative Solutions for the Commissioner of Public Lands*, 20 LAND & WATER L. REV. 207, 208-09 (1985); *see also* Beaver, *supra* note 10, at 78-82 (demonstrating apparent errors in interpreting Wyoming's Constitution in the legislature and the courts).

Nebraska, a state from the middle of the process (1867) provides useful illustration of the significant questions this verbal variation presents. An 1854 act authorizing the organization of a territorial government for Nebraska and Kansas reserved sections numbered 16 and 36 in each township "for the purpose of being applied to schools in said Territory . . . ." Territorial Government of Kansas Act, § 16 (1854), *reprinted in* 2 THORPE, *supra* note 24, at 1161, 1168. Nebraska's Enabling Act, ten years later, granted the same sections to the state "for the support of common schools." Enabling Act for Nebraska, § 7 (1864), *reprinted in* 4 THORPE, *supra* note 24, at 2343, 2345. The state Constitution, adopted in 1866, refers primarily to funds arising from lands granted for "educational and religious purposes." NEB. CONST. art. II, Education, § 1 (1866-67), *reprinted in* 4 THORPE, *supra* note 24, at 2349, 2358.

The variety in language presents questions for use and management of the grants. For example, can land management or permanent fund investment policies be designed to support schools by enhancing local property tax base from which the schools derive much of their funding? The answer would depend, in part, on whether the grant stated "for educational purposes," "applied to schools," "for the support of schools," or some combination of these options. Similarly, one recent commentator argued that "particular sections [of granted land] may have historical values that should be preserved to give future generations of school children the opportunity to observe land and the life it supports in a natural setting."[74]

For the present, it is sufficient to note that, although the goal of fostering education is apparent everywhere, the language stating the purpose of the grant varies subtly but significantly.

d. Evolution of Administrative Provisions

Questions concerning who receives the lands and for what purpose are closely related to practical questions of how they should be managed and by whom. One of the problematic aspects of interpreting the statutory language of the grants is that there was very little discussion of how they ought to be administered by the recipients. This gives rise to numerous questions: who is the owner, the manager, the trustee; how shall management expenses be paid; and what costs are legitimately charged against income? Here we shall discuss the evolution of three key aspects of school land administration: the recipient's authority to lease or sell; the evolution of a permanent fund, and the rise of State Land Boards or Commissions.[75]

(1) Lease, Sell, or Hold

It was not always clear that granted lands would be retained or managed. Although nothing is said in early enabling acts on this subject, the original assumption appears to have been that the townships would lease the lands and use the profits to sup-

74. McCormack, *supra* note 10, at 537.

75. The terms used to refer to the entity charged with administering the land vary. Hereafter we shall use the term Commission for generic references.

port schools. Indiana's Constitution, as quoted above, clearly contemplates "improving" the lands for leasing.[76] However, various leasing systems were tried in each of the five states of the old Northwest, and "in every case it was discarded as a failure."[77] In 1827, Ohio petitioned Congress for authority to sell rather than lease the lands,[78] and thereafter, school lands were generally sold.[79] The shift from lease-dominated to sales-dominated thinking occurred with little ado after the early painful experience with leasing.

For present purposes, the more interesting issues concern the evolution of restrictions on sales, and the gradual emergence of a policy of retaining the granted lands. The federal government did not impose sales restrictions as grant conditions until 1875, when the Colorado Enabling Act provided merely that school property had to be sold "at a public sale for not less than $2.50 per acre."[80] All states entering the Union after Colorado, with the exception of Utah, have done so with specific limits on their authority to sell the school allotments contained in their enabling acts.[81]

Over time, the provisions governing the sale of trust lands became more detailed.[82] This fact is apparently the origin of the argument that Congress, concerned about the lands, became increasingly more cautious in the granting process. The states, however, began imposing sales restrictions on themselves in their own

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76. *See supra* text accompanying note 42. Congress reserved school lands for Indiana in 1804. In 1808 the Indiana Courts of Common Pleas in various counties were authorized to lease the lands for not more than five years. Two years later, the courts were given even greater power when they were authorized to lease the lands under such restrictions as seemed best to them. The courts were required to apply the proceeds of the leases to the "support of common schools according to the true intent of the Act of Congress." Hence, six years before the lands had been granted and Indiana had become a State, there was a law establishing revenue for the schools, the plan to lease had been adopted without discussion. *See* KNIGHT, *supra* note 17, at 135.

77. TAYLOR, *supra* note 16, at 93.

78. *See* KNIGHT, *supra* note 17, at 139.

79. It is enlightening to note that the Indiana Constitution disallowed sales until 1820. IND. CONST. art. IX, § 1, *reprinted in* 2 THORPE, *supra* note 24, at 1057, 1068-69, *quoted supra* text accompanying note 42. Congress did not formally grant authority to sell land until 1828. *See* KNIGHT, *supra* note 17, at 139.

80. Enabling Act for Colorado, § 14 (1875), *reprinted in* 1 THORPE, *supra* note 24, at 470, 473.

81. HIBBARD, *supra* note 17, at 317; *see also* Koch, *supra* note 17, at 43-56.

82. HIBBARD, *supra* note 17, at 317, *see also* Koch, *supra* note 17, at 43-56.

constitutions much earlier. Further, the state restrictions imposed since the mid-nineteenth century were much more restrictive than the Enabling Acts *ever* became.[83] For example, the original Kansas Constitution, and several versions adopted thereafter between 1861 and 1868, provide for minimum sales prices.[84] In addition, the education article of the 1859 version provides that "the school-lands shall not be sold, unless such sale shall be authorized by a vote of the people at a general election . . . ."[85] This was still sixteen years before Congress enacted its first sales restriction in Colorado's Enabling Act.

A bouncing ball pattern is apparent in the evolution of sales restrictions provisions: a state adopts a restriction in its constitution; variations show up in subsequent state constitutions and occasionally in enabling acts; a subsequent state adopts variations on those conditions with further elaborations. This was all played out as a part of individual bargains with states at accession. The courts, however, viewed the evolving restrictions as federal punishment for bad state behavior.[86] Our data suggest that the courts have failed to understand the origin of the restrictions, and their rationale.

This misunderstanding, and general question of who authored or agreed to the provisions, is more significant than may first appear. As shall be discussed in more detail below, if the restrictions were part of the enabling act, then they bind the state and probably cannot be altered absent congressional approval. Moreover, if they were a part of the enabling act, they are also arguably binding on the federal government, and some would assert, cannot be abrogated without the consent of the state. If, however, the restrictions are self-imposed, the state, itself, can alter them and the federal government is less likely to feel bound or be held to be bound by them.[87]

In short, by the mid-1830s, the lease-only policy had given way in favor of sales, and the sales program gradually became

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83. *See* Fairfax & Souder, *supra* note 44.

84. KAN. CONST. art. 6, § 5 (1859), *reprinted in* 2 THORPE, *supra* note 24, at 1241, 1252 (amended 1861 and 1868).

85. *Id.*

86. *See, e.g.*, Lassen v. Arizona Highway Dep't, 385 U.S. 458, 463-64 (1967); Ervien v. United States, 251 U.S. 41, 47-48 (1919).

87. *See generally infra* notes 241-242 and accompanying text.

more restrictive. After that, a trend from sales to retention emerged. This shift was less explicit: there was no accompanying change in enabling act or constitutional language, and there was no plethora of states applying to the federal government for changes that would authorize the states to retain and manage the lands.[88]

How did the western states initiate the now dominant program of retaining and managing the granted lands? The shift to retention appears to have occurred gradually at the state level in much the same way it evolved at the federal level. Over time, the assumption that the federal government would dispose of all of the public domain lands eroded under a number of pressures.[89] Indeed, many states did not formally recognize retention as their

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88. We have located one case on the subject, which holds that the authority to sell clearly includes the authority not to sell. This is in accordance with normal trust management principles, but the court ties the conclusion instead to the conditions prevailing at the time of the grant, and the reasonable contemplation that they would change. *See* State *ex rel.* Koch v. Barrett, 68 P. 504, 507-08 (Mont. 1901).

89. This evolution was not explicit or final until 1976. Everything from the rise of science and scientific bureaucracies in government, the beginning of the Progressive era, and the closing of the frontier to the death of the last passenger pigeon is involved. *See* GATES, *supra* note 3; E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (1950); *see also* Sally Fairfax, *Coming of Age in the Bureau of Land Management: Range Management in Search of a Gospel*, *in* COMMITTEE ON DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT, NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT 1689 (1984). A key indicator that the federal government was going to retain far more extensive land holdings than the park and forest reservations previously authorized was the passage of the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at scattered sections of 30 U.S.C.). Because the lands had been withdrawn from entry and therefore from patent, leasing was necessary to access the resources, primarily coal. But the subtext, now frequently overlooked, is that the lands would be retained in federal ownership. *See* SALLY K. FAIRFAX & CAROLYN E. YALE, THE FEDERAL LANDS: A GUIDE TO PLANNING MANAGEMENT AND STATE REVENUES 59-62 (1987).

It is important to note that there are a number of issues arising in the discussion of the shift from a disposition policy to a retention policy at the federal level that are not applicable to state policy. Most states began with leasing as part of their mandate. Although leasing was justified primarily as a stopgap until the market stabilized so the property could be sold at a profit, it is different from the federal mandate. The federal government began with the expectation that it would dispose of its lands. These differences are not trivial. However, for the purposes of explaining why there are no clear road signs in this shift in policy from disposition to retention, the same facts are relevant.

official policy until the mid-1970s, the same as at the federal level.[90] States that joined the Union toward the end of the granting process did so as the sales program ebbed into retention—they retain and manage most of their lands. States that joined the Union earlier vary in the degree to which they held onto their grants.[91]

One consequence of this gradual and implicit evolution toward land retention is that the states continue to have a choice regarding whether to sell or retain the lands. Even today, like the federal government, the states continue to engage in land sales and exchanges.[92] Hence, the shift to retention does not imply that no state trust lands will ever be sold, but rather that the presumption is in favor of retaining rather than disposing of the lands.[93]

(2) Permanent School Fund[94]

The concept of a statewide fund and a process for disbursing receipts to local school districts was a logical concomitant of the shift from townships to states as grant recipients: there had to be a fund from which the state could disburse money to the school districts. This is true even though the permanent fund has a sep-

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90. The federal policy was embodied in the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2745 (codified at 43 U.S.C. §§ 1701-1784 (1988)).

91. *See infra* Figure 2 and accompanying text.

92. Literally every state is still selling land as part of its management activities. *See* Fairfax & Souder, *supra* note 9.

93. State trust land managers tend to maintain a portfolio of lands for investment and management purposes. The federal land managers seem much more concerned with holding onto the specific acres which are "theirs" to administer. California, Arizona, and Washington have recently established "land banks" to facilitate real estate transactions in their portfolio. All states except California engage in land exchanges to block in their scattered sections. Oregon and Arizona have moved particularly effectively in this direction. *See generally* Denise A. Dragoo, *The Impact of the Federal Land Policy Management Act upon Statehood Grants and Indemnity Land Selections*, 21 ARIZ. L. REV. 395 (1979); *see also infra* Figure 2 (showing the distribution of state trust land).

94. Not all states use the term "permanent school fund." Equivalent phrases include "perpetual fund for schools," "common school fund," "public school fund," and "state school fund." The nomenclature varies largely according to what the state's first constitution called it. *See* DIXON, *supra* note 17, at 3 (listing which states use which terms); *see also* Koch, *supra* note 17, at 7-22.

arate history apart from the land grants program. At the urging of numerous public and professional groups established to foster public education, even states that did not receive school sections soon established permanent funds for supporting schools. When states rather than townships began to receive the lands, the idea became ubiquitous and closely tied to school land management.[95] Increasingly elaborate state constitutional provisions detailed the content and management of the permanent school funds. The pattern of evolving permanent fund provisions is confused by the fact that old new states "lapped" the new ones: that is, long before the accession process was complete, the earliest states to join the Union rewrote their constitutions and included provisions that were then current in the accession process. For example, Louisiana, which had been admitted in 1812 without any school lands, revised its constitution in 1845 to govern the distribution of the proceeds of retroactive grants made by Congress.[96]

The whole operation was highly refined before Congress made its first reference to a permanent school fund in the school land grant provisions of the 1875 Colorado Enabling Act.[97] As in the case of restrictions on sales, the federal instructions were far less substantial than those that were then current in state documents: Congress merely required Colorado to set up a permanent fund, of which only the interest should be expended in the sup-

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95. States were soon making detailed provisions regarding how localities could qualify to receive what were then state funds. One of the first was that no school district that offered less than three months of schooling would qualify for what were by then state funds. *See, e.g.*, MICH. CONST. art. XIII, § 5, *reprinted in* 4 THORPE, *supra* note 24, at 1944, 1961. Some might wish that the federal government had not established a funding system that was centralized within each state. Nevertheless, with the school land grant program, it clearly did so.

96. Specifically, the new constitution provided that:

> the proceeds of all lands heretofore granted by the United States to this State for the use or support of schools, and of all lands which may hereafter be granted or bequeathed to the State . . . shall be and remain a perpetual fund *on which the State shall pay an annual interest of 6 per cent.*; which interest, together with all the rents of the unsold lands, shall be appropriated to the support of such schools, and this appropriation shall remain inviolable.

LA. CONST. tit. VII, art. 135 (1845), *reprinted in* 3 THORPE, *supra* note 24, at 1392, 1407 (emphasis added). These retroactive grants had been made at the insistence of older new states.

97. Enabling Act for Colorado, § 14 (1875), *reprinted in* 1 THORPE, *supra* note 24, at 470, 473.

port of schools.[98]

Interestingly, the permanent funds confuse a central issue that arose toward the close of the century: if there *is* a trust, what is the trust property or corpus? About the permanent funds, there is little question. If there is a trust, it clearly includes the funds. Many state constitutions specifically declare that their permanent funds are to be treated as a trust. Beginning with Michigan's constitution,[99] far fewer states have specifically included the lands in the trust. Since most of the specific requirements concerned investment of the funds, the management of retained lands is sometimes confused by provisions that never contemplated lands. We will return to these important issues in Section III.

(3) State Land Commissions and Commissioners

As noted above, very little arrangement was made at the time of the grant for administration of the trust. Considering that every state still holding school lands, and some that do not, has a variation on a State Land Commission or Board,[100] it is perhaps surprising that the congressional enabling acts never required establishment of such an agency. In addition, early state constitutions are mixed as to whether responsibility for the lands, and the permanent school funds, was vested in the legislature or in some commission.

Oregon appears to be the first to provide for a land commission. The 1857 Oregon Constitution established a Board of Commissioners, consisting of the governor, the secretary of state, and the state treasurer.[101] The Board was charged with selling the

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98. *Id. Compare* MICH. CONST. art. X, § 2 (1835), *reprinted in* 4 THORPE, *supra* note 24, at 1930, 1939.

99. MICH. CONST. art. X, § 2 (1835), *reprinted in* 4 THORPE, *supra* note 24, at 1930, 1939. Michigan's original Constitution is typical: "a perpetual fund, the interest of which, together with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the state." *Id.* (similar language appears at MICH. CONST. art. XIII, § 2 (1850), *reprinted in* 4 THORPE, *supra* note 24, at 1944, 1961).

100. *See* Jon A. Souder & Sally K. Fairfax, The State School Trust Lands (Mar. 22-24, 1990) (unpublished paper on file with the author).

101. OR. CONST. art. VIII, § 5 (1857), *reprinted in* 5 THORPE, *supra* note 24, at 2998, 3001.

school lands and investing the resulting funds.[102]

This pattern was adopted in other states that established such boards in their constitutions. The Colorado (1876),[103] South Dakota (1889),[104] Montana (1889),[105] Idaho (1890),[106] Wyoming (1890),[107] and Oklahoma (1907)[108] constitutions all established boards consisting of a collection of similar *ex officio* state officers. South Dakota included on its board the school superintendents of all its counties.[109] Although this pattern for boards became familiar, it was not uniformly adopted. Kansas (1857),[110] Nevada (1864),[111] Nebraska (1866-1867),[112] North Dakota (1889),[113] Washington (1889),[114] and Utah (1895)[115] all specifically directed in their constitutions that the legislature was responsible for providing for the school lands. Interestingly the states that came in under the Omnibus Enabling Act.[116] (North and South Dakota,

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102. *Id.*, *reprinted in* 5 THORPE, *supra* note 24, at 3001. In other states, *ex officio* boards were widespread and much complained of as a source of school land mismanagement. *See* KNIGHT, *supra* note 17.

103. COL. CONST. art. IX, § 6 (1876), *reprinted in* 1 THORPE, *supra* note 24, at 474, 495.

104. S.D. CONST. art. VIII, § 4 (1889), *reprinted in* 6 THORPE, *supra* note 24, at 3357, 3373-74.

105. MONT. CONST. art. XI, § 4 (1889), *reprinted in* 4 THORPE, *supra* note 24, at 2300, 2323.

106. IDAHO CONST. art. IX, § 7 (1889), *reprinted in* 2 THORPE, *supra* note 24, at 918, 937.

107. WYO. CONST. art. VII, § 13 (1889), *reprinted in* 7 THORPE, *supra* note 24, at 4117, 4136

108. OKLA. CONST. art. XI, § 4 (1907), *reprinted in* 5 THORPE, *supra* note 24, at 4271, 4320.

109. S.D. CONST. art. VIII, § 4 (1889), *reprinted in* 6 THORPE, *supra* note 24, at 3357, 3373-74.

110. KAN. CONST. art. XIV, § 2 (1857), *reprinted in* 2 THORPE, *supra* note 24, at 1201, 1214.

111. NEV. CONST. art. XI, § 3 (1864), *reprinted in* 4 THORPE, *supra* note 24, at 2401, 2418-19.

112. NEB. CONST. art. II, Education, § 1 (1886), *reprinted in* 4 THORPE, *supra* note 24, at 2349, 2358.

113. N.D. CONST. art. 9, § 161 (1889), *reprinted in* 5 THORPE, *supra* note 24, at 2854, 2874.

114. WASH. CONST. art. XVI, § 2 (1889), *reprinted in* 7 THORPE, *supra* note 24, at 3973, 4000.

115. UTAH CONST. art. X, § 1 (1895), *reprinted in* 7 THORPE, *supra* note 24, at 3700, 3720.

116. Enabling Act for Montana (1889), *reprinted in* 4 THORPE, *supra* note 24, at 2289.

Washington, and Montana) split on this key aspect of school land management, two setting up commissions and two not. Similarly, Arizona and New Mexico, which both joined under the same 1910 Enabling Act, also split on this issue.[117]

e. What Did this All Look Like at the End?

In the preceding discussion of Indiana's early accession and patterns of grant program evolution, we emphasized numerous points on which congressional language protecting granted lands was far less detailed than state language. The same observations apply to Arizona and New Mexico—the states imposed more rigorous requirements on themselves than Congress did. Indeed, it is also true that most of the later joining states restricted themselves more stringently than Congress restricted New Mexico and Arizona. However, twentieth century accessions are so different from early ones like Indiana's that we shall conclude this overview with a brief look at one of them. Taking New Mexico as an example, the conventional wisdom begins to make sense.

(1) The Enabling Act

Section 15 of the 1850 congressional act establishing the Territory of New Mexico reserves sections sixteen and thirty-six "for the purpose of being applied to schools."[118] Approximately sixty years later, a second enabling act was passed. In contrast to Indiana's brief provisions concerning school land grants, New Mexico's grants are the subject of six lengthy sections of the Enabling Act.[119]

The school lands figure most prominently in sections 6, 9, and 10. Section 6 grants sections two and thirty-two, in addition to the previously reserved sixteenth and thirty-sixth sections.[120] Mineral lands are excluded, and sections included in national for-

117. Act of June 20, 1910, ch. 310, 36 Stat. 557, *amended by* Act of June 5, 1936, ch. 517, 49 Stat. 1477, *and* Act of June 2, 1951, 65 Stat. 51.

118. Territorial Government of New Mexico Act of 1850, § 15, *reprinted in* 7 THORPE, *supra* note 24, at 2615, 2621.

119. Act of June 20, 1910, ch. 310, §§ 6-12, 18, 36 Stat. 557, 561-65, 568, *amended by* Act of June 5, 1936, ch. 517, 49 Stat. 1477, *and* Act of June 2, 1951, 65 Stat 51.

120. *Id.* § 6, 36 Stat. at 561.

ests are to be administered as part of the forest, with the appropriate portion of forest receipts going to the common school fund, until indemnity lands are selected.[121] Section 9, modelled on older provisions, grants five percent of the proceeds of sales of public lands lying within the state to the state. The money is to be paid to a "permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within the said State."[122] Section 10 specifically provides that lands granted to the state are held:

> in trust, to be disposed of in whole or in part only in [the] manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.[123]

New Mexico's Enabling Act further provides that disposing of any of the lands or money or other thing of value directly or indirectly for any object other than that for which the lands were granted or in any manner not in conformity with the act will be deemed a "breach of trust."[124] It makes numerous provisions regarding the manner of sale or lease, and about the manner of advertising the mandatory auction.[125] It further specifies appraisal and minimum prices.[126] Section 10 also provides that a separate fund shall be established for each of the several objects for which grants are made. It directs the state treasurer to invest the money in "safe interest-bearing securities," and it declares that any lease, sale, conveyance, or contract not in conformity with the provisions of the Enabling Act shall be null and void.[127] Finally, section 10 declares that it is the duty of the Attorney General of the United States to prosecute to enforce the provisions relative to the application and disposition of the lands, the products

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121. *Id.* § 6, 36 Stat. at 562.

122. *Id.* § 9, 36 Stat. at 563.

123. *Id.* § 10, 36 Stat. at 563.

124. Act of June 20, 1910, ch. 310, § 10, 36 Stat. 557, 563, *amended by* June 5, 1936, ch. 517, 49 Stat. 1477, *and* Act of June 2, 1951, 65 Stat. 51.

125. Sales must be "only to the highest and best bidder at a public auction." *Id.* Notice of the auction must include the nature, time, and place of the sale. *Id.*

126. Lands to the east of certain ridges are not to be sold for less than $5 per acre; to the west, not less than $3 per acre; irrigable lands, not less than $25 per acre. *Id.* § 10, 36 Stat. at 564.

127. *Id.*

thereof, and the funds derived therefrom.[128] Section 11 provides for surveys of the granted lands by a commission consisting of the governor, the surveyor general, and the attorney general of the state,[129] and section 12 confirms all grants of lands previously made by Congress.[130] Section 18 reserves all saline lands in the state from entry until Congress provides for their disposition.[131]

(2) The State Constitution

The New Mexico Constitution adds little to these lengthy provisions,[132] describing the management of the school fund in less detail than the Enabling Act.[133] It does establish a formula for distribution of the school fund. Article XIII, which treats public lands, is only two paragraphs long. Section 1 establishes a minimum price of ten dollars per acre for school lands not contiguous to other state lands, and prohibits their sale for ten years after statehood.[134] Section 2 provides for a Commissioner of Public Lands to have "direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law."[135] Article XXI contains a lengthy "compact" with the United States which adds nothing pertinent here.[136] The brevity of New Mexico's Constitution in comparison to its Enabling Act is striking. In

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128. *Id.* § 10, 36 Stat at 564-65. This provision is unique to Arizona and New Mexico and may partially explain why key U.S. Supreme Court decisions are therefore unusually likely to involve cases about those two states. Under general trust principles, once a trust is established the settlor has a very limited role in the administration of the trust. However, the U.S. Government is not a typical settlor and has played a much greater role in the management of the school lands than would be expected under a typical trust grant.

129. Act of June 20, 1910, ch. 310, § 11, 36 Stat. 557, 565, *amended by* Act of June 5, 1936, ch. 517, 49 Stat. 1977, *and* Act of June 2, 1951, 65 Stat. 51.

130. *Id.* § 12, 36 Stat. at 565.

131. *Id.* § 18, 36 Stat. at 568. Congress never did loose its grip on the saline lands. *See* ORFIELD, *supra* note 17.

132. Thorpe, published in 1909, does not contain the pertinent original Arizona and New Mexico documents. Here we rely on Secretary of State, The Constitution of the State of New Mexico Adopted by the Constitutional Convention Held at Santa Fe, N.M., from October 3 to November 21, 1910, and as Amended, November 6th, 1911 (1912).

133. N.M. CONST. art. XII, §§ 2, 7.

134. *Id.* art. XIII, § 1.

135. *Id.* § 2.

136. *Id.* art. XXI.

the New Mexico bargain, virtually all the restrictions and conditions are in the congressional statute.

f. Summary

The New Mexico Enabling Act and Constitution represent the end of the accession period. The early enabling acts simply granted the land, and the early state constitutions left major issues for the legislature to decide. In the mid-nineteenth century, the states merely provided for the establishment and preservation of a permanent fund whose income was to be devoted to the support of common schools. Later state constitutions made provisions regarding the sale price of school lands, the securities in which the proceeds of the sales could be invested,[137] the management of the fund, and the like.[138]

The pattern observed in the proliferation of both sales restrictions and the spread of permanent school fund and fund management requirements does not support the conventional picture of a concerned Congress acting ever more stringently to bring profligate states to heel. The restrictive provisions were literally initiated in state constitutions, and were initially elaborated at that level. Only at the very end of the process, specifically in the 1910 Arizona and New Mexico accessions, is something which might be called congressional vigilance apparent. That Enabling Act is peculiar because it is considerably longer than the state constitution. It shows us from whence the conventional wisdom emanates, and further supports the assertion that the grants vary considerably from state to state and over time. Although there is

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137. Investment policy in the states was, to use Dixon's word, "confused": "On the one hand existed the notion that the money was intended to be used to build up the state and develop her resources, while it was contended, on the other hand, that the purpose of the trust was to aid the institutions endowed." DIXON, *supra* note 17, at 92-93.

138. *See* COMMON SCHOOL FUNDS, *supra* note 17, at 124. Some of the impetus for protecting the permanent fund may have come from the fact that many of the funds were diverted for the conduct of the Civil War. In addition, many of the railroads and other internal improvements in which the funds were invested, especially in the South, were destroyed during the war. *Id.* at 150. Railroad investments lost in the Civil War and never replaced were the subject of a recent suit by school officials and school children in 23 northern Mississippi counties who claimed they were unlawfully denied the economic benefits of public school lands granted by the state of Mississippi. *See* Papasan v. Allain, 478 U.S. 265 (1986).

a clear core to the grant program, it evolved differently in the different bargains struck by various states.

B. The Land and Resources

This same variability is seen in decisions—both historic and contemporary—that different states have made regarding the management of the granted lands and the permanent funds arising therefrom. This Section will briefly introduce the current status of those resources by discussing two topics: first, land holdings and holding patterns; and second, resources and the revenues they produce.

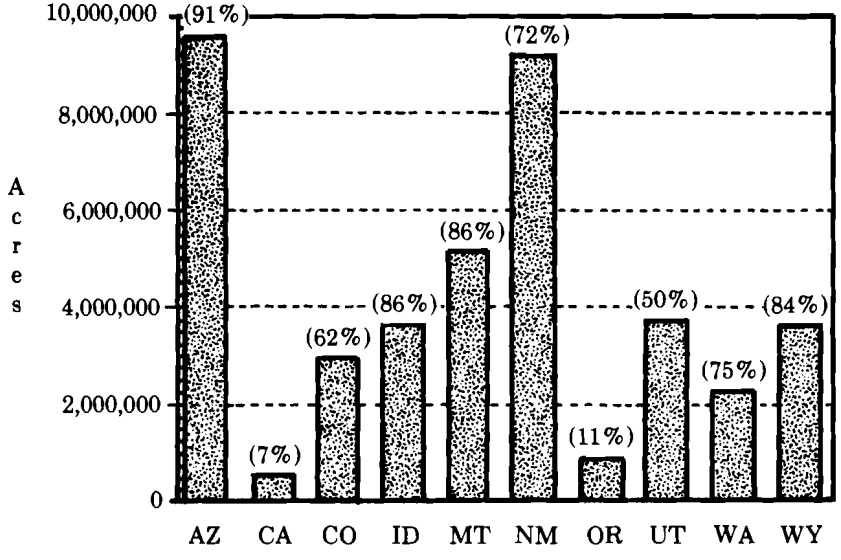
1. Land Holdings and Patterns

In the ten western states under consideration, approximately forty-one million acres are currently managed by states as part of the school land grants.[139] Three fairly distinct classes can be differentiated based on the extent of land ownership, as can be seen in Figure 1 below. First, clearly, the last two states to receive their trust lands, Arizona and New Mexico, still have the largest amounts—due largely to the fact that they received four sections per township, and that their lands were difficult to sell because of both constitutional limitations and the quality of the land. Those two states, plus Montana, each retain title to over five million acres, the vast majority of their original grants. Second, the middle group of six states includes three that have sold some or much of their lands (Utah, Montana, Colorado), and the three (Washington, Idaho, Wyoming) that have held onto most of the lands but were granted less land. Third, Oregon and California have sold most of their lands and, therefore, have the least. Both states

139. The 10 states are Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming. Nevada is a special case and therefore not part of this group. For reasons that are not too hard to understand, there was not a huge demand for school sections scattered in the desert. Twenty years after statehood, Nevada petitioned Congress asking to trade the four million acres of scattered sections for approximately two million acres of selection rights so that the resources could be concentrated where the demand was. Congress acceded to this request. Most of Nevada's land was taken up as a result of this opportunity to select desirable land, leaving only about 2000 acres of state trust lands remaining. *See* JOHN M. TOWNLEY, ALFALFA COUNTRY: NEVADA LAND, WATER AND POLITICS IN THE 19TH CENTURY 1-18 (1976)

began with enormous granted acreage and neither holds more than a million acres now.[140] Note that Oregon (652,000 acres) and Washington (622,500 acres) counties acquired large amounts of forest land (called forest board land) through tax reversions and purchases.[141] These lands are managed in trust for them by the state.

FIGURE 1
CURRENT STATE TRUST SURFACE LAND OWNERSHIP, WITH PERCENTAGES OF ORIGINAL GRANTS



Sources: Jon A. Souter & Sally K. Fairfax, Western State Trust and Sovereign Lands Survey Results (May 1, 1990) (survey results on file with Department of Forestry and Resource Management, Univ. of Cal., Berkeley); PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 806 (1968).

140. *See* ROBINSON, *supra* note 59, at 189-92 (describing the process whereby granted lands passed speedily into private hands in California).

141. Washington has purchased about 80,000 acres of Forest Board Purchase Lands with bond money. Interview with Nick Handy, Chief Counsel, Washington State Department of Natural Resources (Mar. 6, 1991).

Although total acreage held is important data, the *pattern* of land holdings is more significant. The shift from disposition to retention left the states holding many parcels that resemble much of the federal land now managed by the Bureau of Land Management; that is, they are still in public ownership not because anybody had intended to retain them but because they could not be marketed during the era when "disposition" was the goal.[142] For example, eighty-five percent of the remaining school lands in California are located in the California desert.

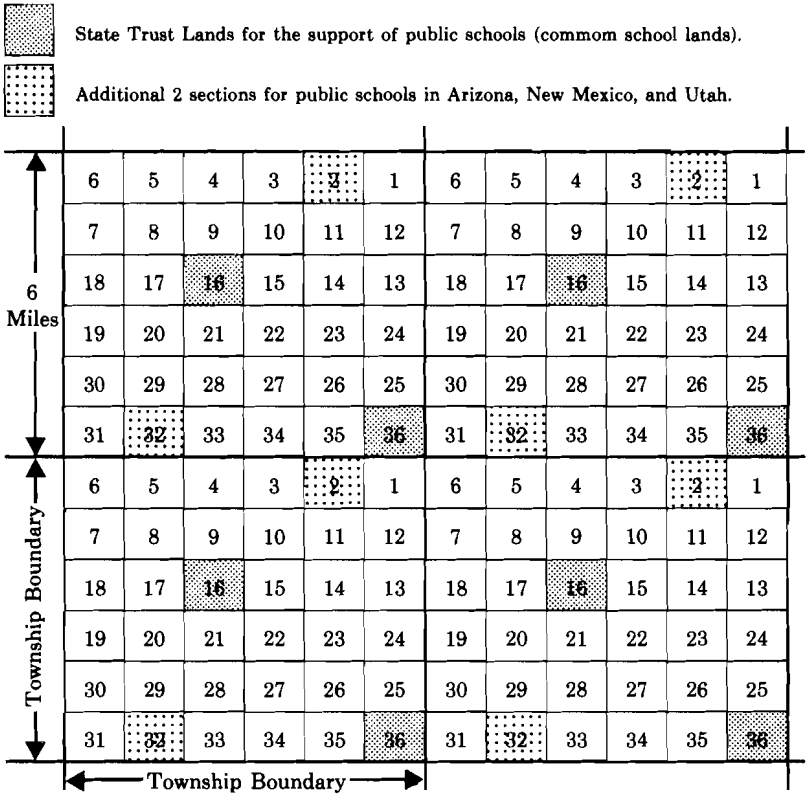
Moreover, many of the states continue to hold the majority of their lands in the dispersed pattern in which they were granted: two to four sections per township. This pattern is typical of the state school lands throughout the West, and has significant consequences for management of those *and other* lands. Most obviously, it is difficult to plan for and administer scattered parcels of land. This can be seen in detail in Figure 2. Even in Arizona, New Mexico, and Utah, which each received four sections per township for the public schools, no sections have common property lines. This scattering of state-owned parcels means that state granted lands are likely to be surrounded by neighbors—especially the U.S. Forest Service and Bureau of Land Management—who operate under a significantly different management mandate than the state, and who frequently do not share the states's priorities. This has been particularly difficult when state mineral lands are completely surrounded by federal wilderness study areas. Getting access to the parcel and pursuing conflicting goals has been an increasingly difficult problem for state school land managers.[143] Not surprisingly, many states pursue land sales and exchanges to "block in" their holdings by trading

142. Although commentators often say that the federal unreserved, unentered public domain was the dreck that nobody wanted, sometimes that was not the case. For many parcels, somebody was able to enjoy the benefit of the land without purchasing it and paying taxes on it. Similarly, by fair means (for instance, the state parcel happened to be completely surrounded someone's farm) or foul (for example, someone illegally fenced the state lands and took pot shots at all comers) many settlers successfully trespassed on state school lands for decades. Hence the lands remained in state ownership not because they were worthless but because they had been effectively stolen and title transfer would have been an expensive formality. *See* Fairfax, *supra* note 89.

143. *See, e.g.*, Utah v. Andrus, 486 F. Supp. 995 (1979).

sections with federal and private land holders to aggregate the sections into compact, efficient management units.[144] The original

FIGURE 2
STATE TRUST LAND OWNERSHIP PATTERNS
IN EACH TOWNSHIP FOR PUBLIC SCHOOL GRANTS



144. Utah's selection efforts were frustrated in Andrus v. Utah, 446 U.S. 500 (1980), which held that the Taylor Grazing Act gave the Secretary of the Interior authority to reject state land selections. *See* Peggy A. Tomsic, *The Loss of the States' Right to Indemnify Preempted School Land Grants on the Basis of Equal Acreage*, 1981 UTAH L. REV. 409. This led the Governor to propose a massive federal-state land exchange, known as Project Bold, which also failed. *See* Scott M. Matheson & Ralph E. Becker, *Improving Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, 33 ROCKY MTN. MIN. L. INST. 41 (1987).

scattering also means that many of the state parcels, once regarded as grazing or agricultural lands, are now surrounded by cities and are otherwise quite valuable for commercial development. Several states have evolved programs to exploit the commercial development potential of these lands.[145] For example, Utah is still in the process of selecting "in lieu" lands.[146]

2. *Resources and Revenues*

Revenues are received by state land offices from three basic sources: royalties from the sale of nonrenewable resources, usually oil, gas, coal, and minerals; revenues from the sale of granted trust lands; and revenues from the use of use of renewable resources, usually agriculture and grazing fees, timber sales, commercial or special purpose leases, and the surface rentals and bonus bids received for oil, gas, coal, and mineral leases.

Figure 3 shows annual receipts from state trust land management activities in ten western states. There is considerable variation in the annual revenues received by the states from trust lands. As shown in Figure 3, states can be divided easily into three categories: those that receive less than twenty million dollars per year in revenues (California,[147] Colorado, Idaho, Montana, and Utah); those that receive greater than twenty million dollars per year but less than sixty to eighty million per year (Arizona, Oregon, and Wyoming); and those that have very high levels of trust revenues (New Mexico and Washington). Alternatively, the states can be divided into only two categories, with New Mexico and Washington still in a category by themselves and all the other states in a single category.

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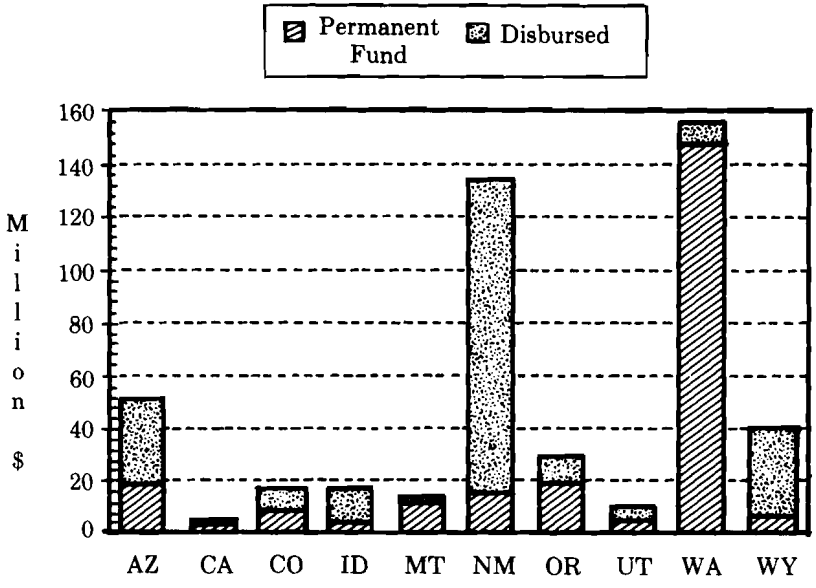
145. Arizona and Washington are among the most aggressive states in this area and Colorado appears to be developing a plan for entering the field. *See* Souder & Fairfax, *supra* note 9, at 54-56.

146. *See* Fairfax, *supra* note 29.

147. Sovereign lands managed by the State Land Office are not included as trust lands. California is somewhat peculiar, because, if you look at its total state land office revenues, California leads all other states with about $230 million annually. However, about $220 million of this is from oil and gas royalties and rentals on their sovereign lands in the Santa Barbara Channel.

FIGURE 3
ANNUAL RECEIPTS FROM STATE TRUST LAND MANAGEMENT ACTIVITIES, 1987-1988



Sources: Jon A. Souter & Sally K. Fairfax, Western State Trust and Sovereign Lands Survey Results (May 1, 1990) (survey results on file with Department of Forestry and Resource Management, Univ. of Cal., Berkeley).

3. Permanent Funds

State permanent funds are the repository of, among other things, revenues received from the sale of trust lands and from royalties on nonrenewable resources such as oil, gas, and coal leases. The annual interest from these funds is disbursed to beneficiaries, prorated according to the revenues their lands contributed into the fund. State constitutions vary considerably regarding what is included in the fund in addition to the revenues. For instance, Indiana's original constitution simply stated that money raised from the sale of the lands would "be and remain a fund for the exclusive purpose of promoting the interest of literature and

science."[148] Louisiana's 1845 revised constitution was the first to provide that the permanent fund would include all escheat land and property.[149] Wisconsin's fund includes fines, payments made in lieu of military service, all unspecified federal grants, and the five percent of receipts on sale of federal lands in the state which it was customary to grant the states.[150]

Figure 4 shows the extent of the permanent funds in ten western states. The states cannot necessarily be divided easily into groups according to how much money is in the fund. California has the smallest permanent fund because the fund was liquidated.[151] Utah has the next smallest permanent fund because in the early 1980s, faced with a large budget cut of one-third, the beneficiaries were allowed to liquidate a portion of their permanent funds to maintain their budgets.[152] New Mexico and Wyoming have large permanent funds due to oil, gas, and coal royalties.[153] The large fund in Arizona is less easily explained: the state has no significant oil, gas, or coal royalties, its mining royalties were set below fair market value until recently,[154] and it retains

148. IND. CONST. art. VIII, § 2 (1851), *reprinted in* 2 THORPE, *supra* note 24, at 1073.

149. LA. CONST. tit. VII, art. 135 (1845), *reprinted in* 3 THORPE, *supra* note 24, at 1392, 1407.

150. WIS. CONST. art. X, § 2 (1848), *reprinted in* 7 THORPE, *supra* note 24, at 4077, 4091; *see also* Fairfax & Souder, *supra* note 44. The five percent of sales receipts was customarily granted to the states.

151. All net income (both rentals and royalties) from school and in lieu lands is now placed in the state Teachers' Retirement Fund. CAL. PUB. RES. CODE § 6217.5 (West 1991); CAL. EDUC. CODE § 24762.9 (West 1991). Net receipts from land sales go into the State Land Bank to purchase replacement lands. CAL. PUB. RES. CODE § 6217.7. There are two exceptions to this division. First, royalties from the two state sections within the Elk Hills Naval Petroleum Reserve that the state claims, or their in lieu replacement, go into the State Land Bank. Only the interest from these lands goes into the Teachers' Retirement Fund. CAL. EDUC. CODE § 24702(1). Second, 50% of the income from geothermal indemnity lands income is given to the Geothermal Resources Development Account. This 50% is further subdivided: 30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions, and 40% to the county where the revenues were generated. The remaining 50% of the total income goes to the Teachers' Retirement Fund. CAL. PUB. RES. CODE § 3826.

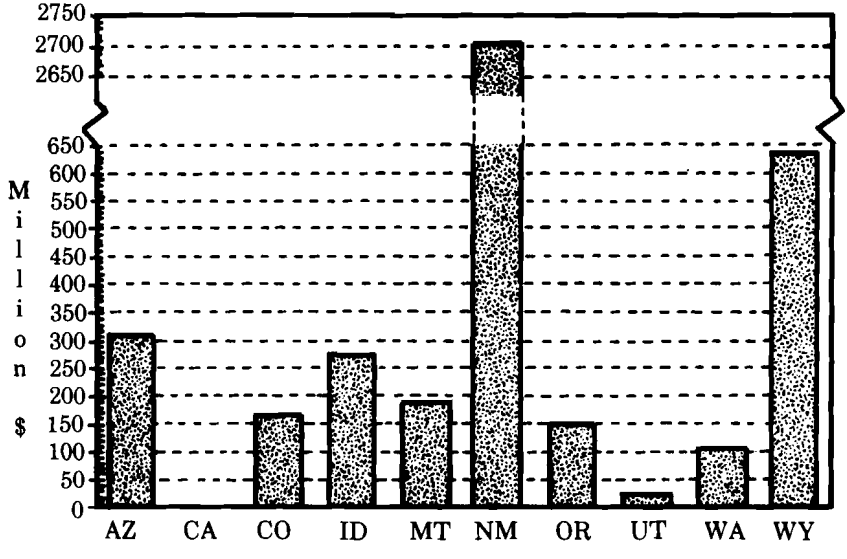
152. *See* Jensen v. Dinehart, 645 P.2d 32 (1982).

153. This information is drawn from annual reports generated by New Mexico and Wyoming from 1975 to 1990.

154. Souder & Fairfax, *supra* note 9, at 114, 128. For a discussion of Arizona's mineral leasing program, see ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

ninety-one percent of its originally granted lands. One contributing factor may be the almost twenty-four million dollars in land sales, mostly for lands surrounding urbanizing areas, received by Arizona in 1987 and 1988. Washington's case is similar; however, its permanent fund came primarily from early land sales. Its current policy of not decreasing its trust land base means that land sales receipts no longer are deposited in the permanent fund, but are used instead to purchase replacement property. The other states with smaller permanent funds have either sold many of their lands (Oregon), or have more limited amounts of royalty income than the top producers (Colorado, Idaho, and Montana).

FIGURE 4
STATE PERMANENT FUND LEVELS
1987-1988



Sources: Jon A. Souter & Sally K. Fairfax, Western State Trust and Sovereign Lands Survey Results (May 1, 1990) (survey results on file with Department of Forestry and Resource Management, Univ. of Cal., Berkeley); OFFICE OF FINANCIAL MANAGEMENT, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1987, at 22 (1987) (for the State of Washington only).

Differences among the states in the division of revenues are

primarily a result of their original constitutions.[155] The original reason for the creation of the permanent funds is that the permanent funds were considered just that—permanent—while the lands were expected to pass into private hands. Basically, the differences today in the sizes of the permanent funds is due to two factors: the amount of lands sold for low prices in the early days of statehood; and the amount of mineral royalty income accruing to the permanent funds.

The law governing sales before the 1927 passage of the Jones Act, which gave the states legal title to their school sections classified as mineral in character, also prevented the states from selling the mineral rights along with the surface lands.[156] Thus California, Colorado, Nevada, and Oregon sold whatever unknown minerals were on their lands, retaining no more than a one-sixteenth royalty right.[157] This problem was especially prevalent in states that had lands valued for surface uses, while the value of the subsurface resources was unknown, or masked for fraudulent purposes.[158] In the other states, where surface rights were not in demand, settlement and land claims did not occur on a large scale until either the restrictions on purchase of lands were stricter (New Mexico),[159] or after passage of the Jones Act (Utah and Wyoming). The Jones Act allowed states lucky enough to have lands that nobody wanted[160] to capture the mineral value of those lands for the trust. Most states took advantage of this opportunity after the OPEC oil embargoes in 1973 pushed the prices for petroleum products up and spurred demand for state leases.[161]

In sum, the tendency to treat the granted lands as if they were all the same is clearly inaccurate. As the program evolved, different states assumed different responsibilities for the care and

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155. For a complete enumeration, see Fairfax & Souder, *supra* note 44.

156. *See supra* notes 57-61.

157. *See* TOWNLEY, *supra* note 139; *see also* STEPHEN A. PUTER, LOOTERS OF THE PUBLIC DOMAIN (1908); *see also* FRANCOIS D. UZES, CHAINING THE LAND: A HISTORY OF SURVEYING IN CALIFORNIA (1977).

158. For the classic, first-hand account of fraud associated with state land selections, see PUTER *supra* note 157; *see also* UZES, *supra* note 157.

159. *See* ROBINSON, *supra* note 59, at 188-91.

160. Basically, if there was no water, nobody wanted the lands. *See* TOWNLEY, *supra* note 139 (describing Nevada's early problems with selling its trust lands).

161. *See* Souder, *supra* note 26, at 138 (discussing price trends in crude oil and coal and their effects on trust revenues going into permanent funds).

management of the land and the funds it produced. The resources granted vary even more strikingly—some states received apparently worthless desert that they could not sell and now are recognized as containing valuable minerals deposits. Better endowed states, such as California, now hold neither extensive lands nor significant permanent funds.

III. The Quest for Management Flexibility

We have seen that the grants do, or ought to, mean different things in different states. It is now possible to proceed with the main business of this Article: confronting and unwinding the idea that the management of the granted lands is narrowly constrained by economic maximization principles. This singlemindedness arises, as noted at the outset, from the deeply ingrained idea that school lands management is defined by basic trust notions.

This leaves us with two questions. First, are the school land grants appropriately viewed as a trust? Our "yes" on that issue has more qualifications and textures than the conventional wisdom, but leads nevertheless to the second query: does the trust bind school land managers to pursue economic maximization? The "no" response here includes two arguments: first, economic maximization is not the only component of trust management; second, economic maximization is not an inflexible mandate in any event. Neither of these questions have been adequately raised and discussed in the context of the school lands management, and there is profit, in terms of perspective and flexibility, in doing so now.

A. General Contours of the Case Law

Before we begin that discussion, a few words about the general contours of the case law are in order. This Section makes two kinds of observations about the 500 cases that were reviewed in the process of preparing to write it.[162] First, it discusses why, if a review of the historic documents reveals so much diversity among

162. *See* Sally K. Fairfax & James M. Phillips, State Lands Project & the Western States Land Commissioners Association Legal Committee, State Trust Lands Case Law and Attorney General's Opinions (Jan. 4, 1991) (unpublished draft report listing the 500 cases).

states, does the conventional wisdom, as embodied in these cases, appear so monochromatic?[163] Second, it characterizes the disputes and makes some preliminary comments about the cases as a group.

1. *Origins of Unanimity*

One of the things about reading the case law as opposed to the constitutions is that it rapidly begins to appear that the school land grants are all essentially the same. Why should case law present a picture so different from the diversity that actually exists in the grant program? Our answer begins with the routine observation that, in litigation, the issues are defined and interpreted by courts. Lawyers and judges have, not unpredictably, looked to familiar trust principles and previous decisions to unravel claims and counterclaims about the school lands.[164]

It is difficult to gather data on one state's situation, let alone gather enough to see patterns over time. This lack of information has blurred the distinctions between general trust principles and the public lands doctrine. Hence, the familiar trust law has dominated the unfamiliar peculiarities of public lands history and policy.

Further, normal deference to U.S. Supreme Court decisions has blurred the distinctions between traditional trusts and trusts

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163. It would be easy to overstate the consistency. We are describing, of course, the overriding and much cited themes rather than all the wild hares that ever ran through a single or a few decisions. Nevertheless, our colleague Nick Handy, Chief Counsel, Washington Department of Natural Resources, answers this rhetorical question differently. He asserts that similar terminology in different documents means essentially the same thing from one state to another, and that the courts have been "remarkably consistent" in interpreting those documents. Hence, he argues there is less diversity than we have alleged. Interview with Nick Handy (Mar. 6, 1991).

164. It will be argued below that the trust theme did not appear until relatively recently in land grant interpretation. One reason is the late arrival on the scene of the Arizona-New Mexico Enabling Act. The other reason may be that the trust notion itself did not emerge until the turn of the 19th century as a stable component of American law. A course in trusts was not taught in American law schools until a Professor Ames initiated the first course at Harvard in 1882. His casebook on the subject, first published in that same year, contained 200 cases, 175 of which were English cases. *See* Austin W. Scott, *Fifty Years of Trusts*, 50 HARV. L. REV. 60 (1936).

in the school lands setting. Cases from Arizona and New Mexico have dominated Supreme Court discussion of the school lands. These states, however, are not an accurate guide to grants in other states, because of the unusually detailed Arizona-New Mexico Enabling Act,[165] and because unique provisions in this enabling act authorize the U.S. Attorney General to enforce the provisions of the Act.[166] Nevertheless, precedents from Arizona and New Mexico have become central in interpreting the grants in other jurisdictions.[167] This pattern suggests, correctly, that the conventional wisdom, and the unanimity, are of relatively recent origin. Although a trust has been mentioned in connection with the lands since the 1850s, the frequency of the references and the dominance of the doctrine is most apparent as the twentieth century advances.

A representative case suggests the validity of those observations. A brief review of *County of Skamania v. State*[168] will

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165. Act of June 20, 1910, ch. 310, 36 Stat. 557, *amended by* Act of June 5, 1936, ch. 517, 49 Stat. 1477, *and* Act of June 2, 1951, 65 Stat. 51; *see also supra* notes 118-138 and accompanying text.

166. Act of June 20, 1910, ch. 310, § 10, 36 Stat. at 564-565. It is not clear how this provision contributed to the dominance of Arizona and New Mexico cases in the state trust land area. The first federal prosecution, Ervien v. United States, 251 U.S. 41 (1919), was not long in coming. The Supreme Court was explicitly reluctant to hold that a state law allowing use of trust receipts to advertise New Mexico lands generally was a "breach of the trust," but affirmed an Eighth Circuit opinion so stating. *Id.* at 47. The key case in the contemporary interpretation of the school grants, Lassen v. Arizona Highway Dep't, 385 U.S. 458 (1967), contains a more explicit discussion of trust obligations, but did not directly involve the U.S. Attorney General. The United States was, however, granted special leave to argue the case as an amicus curiae.

167. This is true in spite of the fact that the Court has been uncommonly careful to avoid sweeping generalizations and is uncharacteristically well informed about the grant process. It is interesting, however, that the Court noted in *Lassen* that it took the case "because of the importance of the issues to other states which received the grants." 385 U.S. at 461.

168. 685 P.2d 576 (Wash. 1984). The case involved a challenge to statutes allowing relief to purchasers of timber from the State Department of Natural Resources, which manages the school lands in part by selling harvest rights to timber on state lands. The purchase contracts were entered into between January 1978 and July 1980. At that time, purchasers expected the value of timber to rise and bid quite high for timber that, in the natural course of events they would harvest several years later. When timber prices plummeted, the Washington legislature passed a statute that, among other things, allowed the purchasers to terminate their contracts if they forfeited their original small deposit. *Id.* at 578-79. The legislature justified its action, vis-a-vis the trust, on the grounds that it acted in

demonstrate that the process of simplification is operational. Two aspects of this case interest us in this context: the court's reliance on decisions of diverse jurisdictions without adequately recognizing the differences in state obligations, and the court's treatment of Supreme Court decisions regarding Arizona and New Mexico as binding on other states, without apparent awareness that these cases apply only to Arizona and New Mexico and are particularly inappropriate in the *Skamania* case.

The *Skamania* court began by asserting the relevance of trust principles: "Every court," it asserted, "that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees."[169] The *Skamania* court drew our attention, "[f]or cases in which courts have applied private trust principles to federal land grant trusts,"[170] to cases from Oklahoma, Alaska, and Nebraska. Relying on these and other precedents, the court concluded that "divided loyalty constitutes a breach of trust," and argued that its holding was "consistent with a host of cases from other jurisdictions . . . . Every case that has considered similar issues has held that the state as trustee may not use trust assets to pursue other state goals."[171]

Trust principles in state A do generally resemble trust principles in state B, but the *Skamania* court drew an oversimplified picture of case law from other jurisdictions. This decision is representative of a problematic trend: that the similarities in trust

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both the long- and short-term interests of the trust—it protected the trust by preventing bankruptcies and disruption within the market for its assets. *Id.* at 581. Skamania County sued the state alleging that the Act was "a breach of the state's fiduciary duties to the trust and a violation of several state and federal constitutional provisions." *Id.* at 579.

169. *Id.* at 580. The matter is slightly more complex than that: according to its constitution, Washington's granted land may be "held in trust *for all the people*." WASH. CONST. art. XVI, § 1 (1889), *reprinted in* 7 THORPE, *supra* note 24, at 3973, 4000 (emphasis added). Hence the meaning of the provision vis-a-vis undivided loyalty to a particular beneficiary is less unambiguous than the court's discussion would suggest.

170. County of Skamania v. State, 685 P.2d at 580 (1984) (citing State v. University of Alaska, 624 P.2d 817, 813 (Alaska 1981); State *ex rel.* Ebke v. Board of Educ. Lands & Funds, 47 N.W.2d 520 (Neb. 1957)); Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 236 (Okla. 1982); State *ex rel.* Hellar v. Young, 58 P. 220 (Wash. 1899)).

171. *Id.* at 582.

law from state to state have been substituted for a clear understanding of the differences in the school land grant programs from state to state, and even for an awareness that differences in the program exist. The court's reliance on simplified versions of precedent from other states may be peculiarly inappropriate in this instance, but it is characteristic of the school lands cases in general.

This process has been exacerbated by reliance on decisions of the U.S. Supreme Court. In the case of land grants, this normal deference is likely to be misleading because the special role of the U.S. Attorney General defined in the Arizona-New Mexico Enabling Act gives rise to a disproportionate number of Supreme Court decisions interpreting that Act. Again, this is not a good guide to what was agreed to in other states. The problem is well illustrated by the *Skamania* court. For the notion that the trusts are real and enforceable and "impose upon the state the same fiduciary duties applicable to private trustees" the court relied on *Lassen v. Arizona*.[172]

In *Lassen*, the Supreme Court overturned a state court decision allowing an uncompensated taking of school lands for use by the state highway department.[173] The *Skamania* court embraced *Lassen* fully, noting that "[a]lthough *Lassen* involved a different enabling act, the principle of *Lassen* applies to Washington's Enabling Act."[174] This assertion was supported by reference to a Washington case, which presumably ought to be interpreting Washington law. However, that case, *United States v. 111.2 Acres of Land*,[175] merely cited *Lassen* again:

> There have been intimations that school land trusts are merely honorary, that there is a "sacred obligation imposed on (the

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172. *Id.* at 580 (holding that "the Supreme Court, interpreting the Arizona Enabling Act, held that Arizona could not transfer easements across trust lands without compensation to the trust. The Court stated that the Arizona Enabling Act 'contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." ' ") (quoting Lassen v. Arizona Highway Dep't, 385 U.S. 458, 467 (1967)). *Lassen*, as the *Skamania* court notes, was actually quoting Ervien v. United States, 251 U.S. 41, 47 (1919). Whether *Ervien* supports the *Skamania* court's point is unclear considering the subsequent paragraphs in the 1919 decision. *See supra* note 166.

173. 385 U.S. 458 (1967).

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

175. 293 F. Supp. 1047 (E.D. Wash. 1968).

> state's) public faith," but no legal obligation. These intimations have been dispelled by *Lassen v. Arizona* . . . This trust is real, not illusory.[176]

In Washington the trust is unquestionably real. Washington entered the Union under the Omnibus Enabling Act which did not establish a trust.[177] Washington's state constitution clearly did so.[178] Its specific provision is especially relevant to the issue of "undivided loyalty" about which the *Skamania* court was so emphatic: it states unambiguously that "all lands granted are held in trust *for all the people*."[179] That language does not justify use of trust resources to support stability among timber purchasers or in local economies. However, if the trust is to benefit all the people, it is not clear how undivided loyalty ought to be defined. The *Skamania* court never addressed the issue.

The point here is a simple one. Trust principles, especially those enshrined ambiguously in a relatively few Supreme Court cases,[180] have come to dominate judicial understanding of school

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176. *Id.* at 1049 (citations omitted). It is worth noting that both *111.2 Acres* and *Skamania* cite State *ex rel.* Hellar v. Young, 58 P. 220 (Wash. 1899). *Skamania* describes *Hellar* as a case "in which courts have applied private trust principles to federal land grant trusts." *Skamania*, 685 P.2d at 580. The court in *111.2 Acres* cited *Hellar* for the notion that "Section 10 of the Enabling Act and Article XVI, section 1 of the Washington Constitution constitute a declaration of trust." *111.2 Acres*, 293 F. Supp. at 1049. *Hellar* in fact does neither of those things. It does not mention the Enabling Act or § 1 of the Constitution, although it does discuss parts of § 5 on one page. *Hellar*, 58 P. at 221. Nor does it discuss trust principles or even mention the word trust beyond one simple sentence: "But the permanent school fund of this state must be regarded as a trust fund." *Id.* Rather, the decision holds that warrants drawn by the auditor of the state upon the state's general fund cannot be paid out of the permanent fund when there is no money in the general fund "legally available to pay the warrant." *Id.* at 220-21.

177. Enabling Act for Montana (1889), *reprinted in* 4 THORPE, *supra* note 24, at 2289.

178. WASH. CONST. art. XVI, § 1 (1889), *reprinted in* 7 THORPE, *supra* note 24, at 3973, 4000.

179. *Id.* Clearly "all the people" must remain within the context of the purpose of the grant as expressed in the Enabling Act. Don Lee Fraser, former Supervisor of the Washington Department of Natural Resources comments: "It was our impression that in earlier grants to other states . . . the 16's and 36's were to support school within the township. Washington's constitution made it clear that this was not the case." Interview with Don Lee Fraser by Sally K. Fairfax (Mar. 13, 1991). This issue is not peculiar to Washington. *See* Jerke v. State Dep't of Lands, 597 P.2d 49, 50 (Mont. 1979); *see also* Beaver, *supra* note 10.

180. Ervien v. United States, 251 U.S. 47, 48 (1919), appears to put little reli-

grants. The difficulty of obtaining alternative information has combined with the standard reliance on precedent and higher courts to erode appreciation of differences in state accession bargains. By citing a Washington state court decision that ultimately relies on *Lassen*, the *Skamania* court invisibly incorporated Arizona's statehood bargain into Washington's. This gradual process of accreting judicial decisions has rounded the angles and left us with the operating assumption that the grants are trusts and they are basically the same.

2. *A Note about the Cases More Generally*

All of the cases that involve school lands are not of equal interest, either because they involve issues that were of great moment in a previous era but are now considered resolved, or because they are beyond the scope of the present inquiry. For example, numerous early disputes between rival title holders center on determining at what point in the granting process the state, as opposed to the federal government, became qualified to sell or otherwise dispose of the lands.[181] That issue is now resolved, and although the discussion in some of the cases is interesting and occasionally still relevant to live issues, the specific issues are not. Similarly, much of the case law in Utah involves the issue of indemnity land selections, particularly as they are or are not applied to mineral lands.[182] That is still an interesting and important conflict, but it is the subject for another article.

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ance on trust principles and draws instead on the authority of the federal government to make specific grants for specific purposes. Further, the application of trust principles is also selective, emphasizing undivided loyalty and maximum returns, and rarely, if ever protection of the trust property. *See* Beaver, *supra* note 10, at 70.

181. *See, e.g.*, Jacobs v. Walker, 27 P. 48 (Cal. 1891); Middleton v. Low, 30 Cal. 596 (1866); Doll v. Meador, 16 Cal. 295 (1860); *see also* Board of Trustees for Vincinnes Univ. v. Indiana, 55 U.S. 268 (1852) (university grant case in which a township successfully defended its status as trustee against a state attempt to usurp the role).

182. Utah's Enabling Act is neutral about whether mineral lands are included in the sections designated as school lands. An early case, United States v. Sweet, 245 U.S. 563, 572 (1917), upheld the U.S. Department of the Interior's view that known mineral lands were excluded by implication in Utah's Enabling Act. Congress changed this by statute in 1927 and explicitly included mineral lands in the grants for schools. *See* Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026 (codified as amended 43 U.S.C. §§ 870-871 (1988)).

Aside from these minor issues, it is fair to say that the bulk of the cases concern the relationship between the State Land Commissioner and lessees who work the land.[183] Frequent issues include the legality and implementation of a preference right to renew a lease;[184] the Commissioner's discretion to reject or accept a specific bid;[185] and the right of the lessee to compensation for improvements made on leased land.[186] Over time, the trust doctrine has increasingly come into play in answering these questions. For example, if the lessee has a preference right to renew a lease, but another party offers a higher return to the trust, must the statutory preference right fail?[187] Or, is the Commissioner authorized to reject the high bid if he concludes that a lower bidder will be a better steward of trust resources?[188]

The cases are not always resolved by unalloyed reference to trust principles. Unlike a normal trustee, such as a bank, the State Land Commissioner is both a trustee and a government administrator. Hence two threads of judicial doctrine get intertwined.[189] The courts frequently appear to lay aside trust obligations to rely on deference that the courts traditionally pay to administrators exercising discretion in their area of expertise.

While there are exceptions, one can discern some general patterns in the courts' application of the two doctrines. When a Commissioner's decision is challenged by a beneficiary, trust obligations are the primary decision rule. Conversely, if the decision

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183. Like the federal government, the school land managers have generally relied on private entrepreneurs to cut the timber, explore for and extract the minerals, and manage the cattle on their lands. Recent efforts by some states to develop urban, waterfront, and other commercially valuable real estate holdings constitute a notable exception to this generalization.

184. *See, e.g.*, State *ex rel.* Huckfeldt v. State Bd. of School Land Comm'rs, 122 P. 94 (Wyo. 1912).

185. *See, e.g.*, Barber Lumber Co. v. Gifford, 139 P. 557 (Idaho 1914).

186. *See, e.g.*, Pettijohn v. State of Neb. Bd. of Educ. Lands and Funds, 281 N.W.2d 901 (Neb. 1979).

187. *Cf.* Jerke v. State Dep't of Lands, 597 P.2d 49 (Mont. 1979) (finding a preference right that went to a grazing district that was not using the land was unconstitutional because it did not further the policy of sustained yield).

188. *See, e.g.*, Caffall Bros. Forest Prod. v. State, 484 P.2d 912 (Wash. 1971) (finding statute allowing the commissioner to reject the highest bid if he acted in the interests of the state constitutional).

189. The two strands are especially clear in Jeppeson v. State Dep't of Lands, 667 P.2d 428 (Mont. 1983).

is challenged by a lessee, the decision relies on discretion. It is also true that disposal as sale is more likely to be scrutinized under strict application of trust principles than disposal as lease.[190] When leasing is involved, and the dispute is among lessees, discretion is likely to be an issue, if not the central issue. Indeed, the interplay between administrative discretion and trust obligations is one of the aspects of trust land case law that pulls one further and further into the morass.[191]

The most interesting disposal cases are those that involve a taking of school lands for a public purpose. There are three potential protagonists: a private corporation, such as a ditch company that has been granted a way of necessity; the state, for highways or other purposes; and the federal government, for park, road, or irrigation purposes. As shall be discussed in more detail below, early state cases permitted use of school lands in diverse contexts, and typically found no need to compensate the permanent fund for the use.[192] One sign that the trust concept was taking hold in connection with school lands management is to be found in the growing number of cases over time that prohibit takings and require compensation.[193]

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190. However, what real estate transactions constitute disposal is itself frequently the issue. *See, e.g.*, United States v. Fuller, 20 F. Supp. 839 (D. Idaho 1937) (holding that a grant of a right-of-way to the U.S. government was not disposal).

191. This trust-discretion issue is frequently expressed in questions such as "who is the trustee?" Administrator's decisions appear to have the least weight when they are undertaken in response to acts of the legislature, which is frequently viewed by courts as an outsider trying to protect an established industry. This was the scenario, as the court perceived it, in County of Skamania v. State, 685 P.2d 576 (Wash. 1984). The Oklahoma courts made similar observations. Note the tension in the following passage:

> While the Legislature does have the power to, and may, regulate the activities of the Commissioners [the Trustees] it can neither abridge nor impair their freedom to function in utmost good faith in the day-to-day discharge of their public obligation as managers of the trust estate and while acting on behalf of the State as Trustee.

Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 238 (Okla. 1982).

192. *See, e.g.*, Grosetta v. Choate 75 P.2d 1031 (Ariz. 1938) (state land department could grant right-of-way for public highway); Ross v. Trustees of the Univ. of Wyo., 222 P. 3 (Wyo. 1924) (approving grants of rights-of-way across university lands).

193. *See, e.g.*, Ebke v. Board of Educ. Lands and Funds, 47 N.W.2d 520 (Neb. 1951); State v. Walker, 301 P.2d 317 (N.M. 1956). Both cases held that the public lands commissioner could charge the state highway commission for easements

Another important pattern is that historically the beneficiaries have rarely been plaintiffs in trust land litigation. Beneficiaries have had a difficult time bringing complaints to the federal courts. The U.S. Supreme Court has long held that "Congress alone has the power to enforce the conditions of" grants it has made.[194] Further, until the state courts began to embrace trust principles, state litigation was not likely to be fruitful. The beneficiary's cause was not unlikely, however, to be defended by the trustee. When State Land Commissioners believe their authority is threatened, they will, under the right political circumstances, defend trust principles.[195] Conversely, the beneficiaries have apparently "lost" in many cases in which they were not a party—for example those which tend to put local economic development over the trust.[196] More recently, beneficiaries have been initiating litigation and become more successful.[197]

B. Is This a Trust?

Earlier, we raised the point that it is not clear that the trust notion is appropriately applied to school land grants until fairly late in the accession process, perhaps not until the very end. Both

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across state trust lands.

194. Emigrant Co. v. County of Adams, 100 U.S. 61, 69 (1879); *see also* Sterns v. Minnesota, 179 U.S. 223 (1900); Mills County, Iowa v. Burlington and Mo. River R.R. Co., 107 U.S. 557 (1881). In Essling v. Brubaker, 55 F.R.D. 360 (D. Minn. 1971), two minor school children attempted to challenge acts of the Commissioner as a breach of trust. The court denied the claim because it did not have jurisdiction over the subject matter. Similarly, in Segner v. State Inv. Bd., No. 587-489319, slip. op. (Ramsey County Dist. Ct., Aug. 11, 1988), Minnesota argued that the schools, not the school children were the beneficiary. Letter from Gail Lewellan & Andrew Tournville, Special Assistant Attorneys General for the State of Minnesota, to Sally K. Fairfax (Mar. 11, 1991) (on file with the authors).

195. County of Skamania v. State, 685 P.2d 576 (Wash. 1984), is apparently an example of the wrong political circumstances. Although the Department of Natural Resources was clearly on record opposing the legislation at issue and supported the county in court, it did not bring the case. *See also* Papasan v. Allain, 478 U.S. 265 (1986) (equal protection claim).

196. *See, e.g.*, Lassen v. Arizona Highway Dep't, 385 U.S. 458 (1967) (where the beneficiaries "won" without being a party); Manning v. Perry, 62 P.2d 693 (1936) (grazing lands lease dispute); *but see* Ervien v. United States, 251 U.S. 41 (1919) (finding that the use of trust funds to advertise the state was a breach of the trust).

197. *See, e.g.*, County of Skamania v. State, 685 P.2d 576 (Wash. 1984); Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 235 (Okla. 1982).

Congress and the states viewed the New Mexico and Arizona grants as trusts from the outset. Also, somewhere in the Indiana process, the state created a trust. But for the intervening states, the questions of who made the trust, and hence, who is bound by it are live and important issues.

We begin with definitions of fundamental terms:

> A *trust* is a fiduciary relationship with respect to property in which the person by whom the title to the property is held is subject to equitable duties to keep or use the property for the benefit of another. A *fiduciary relationship* places on the trustee the duty to act with strict honesty and candor and solely in the interest of the beneficiary. The *settlor* of a trust is the person who creates a trust. The *trustee* is the person holding property in trust is the trustee. The property held in trust is the *trust property*. The *beneficiary* is the person for whose benefit the trust property is held in trust. The *trust instrument* is the "manifestation of the intention of the settlor" by which property interests are vested in the trustee and beneficiary and the rights and duties of the parties (called the trust terms) are set forth in a manner that admits of its proof in judicial proceedings.[198]

When a trust is established, it invokes an enormous range of rules. These rules have been defined over centuries in British common law and more recently in American common law, codified with some state-by-state variations, and are enforceable in the courts. Most of the rules, and certainly the ones most pertinent here, define the obligations of the trustee. Without the deep veneer of case interpretation, the obligations sound not unlike the Girl Scout Oath:[199] to exercise prudence, skill, and diligence in caring for the trust; to proceed with undivided loyalty to the beneficiary; to deal with the beneficiary with fairness, openness, honesty, and disclose fully to the beneficiary; to make the trust productive; to preserve and protect the trust property; to defend the trust against the settlor and all others; to separate the trust property from all other properties. Where the duty to make the trust productive might conflict with the duty to preserve and care for

198. This definition is a fabric woven from the RESTATEMENT (SECOND) OF TRUSTS §§ 2-4 (1959), and the less turgid prose of GEORGE T. BOGERT, TRUSTS 1-2 (1987).

199. "On my honor, I will try: To serve God and my country, to help people at all times, and to live by the Girl Scout law." BROWNIE GIRL SCOUT HANDBOOK 5 (1986).