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The School Trust Lands: A Fresh Look at Conventional Wisdom

Part 2

by

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the trust, the rule is that the trustee must act as a prudent investor.[200]

Although it is not necessary to have a formal document or agreement which explicitly states that there is a trust,[201] the court will not presume that a trust is implied.[202] For example, neither the absence nor the presence of the word trust in whatever language is alleged to have established a trust is dispositive of the issue.[203] Nor will courts find an intention to establish a trust in mere "precatory words," that is, words that express "a suggestion or wish that the transferee should use or dispose of the property in a certain manner" or "impose merely a moral obligation."[204]

In order to have a trust, three elements must be present. First, there must be an expression of intent. No trust is created unless the settlor "manifests an intention to impose duties which are enforceable in the courts."[205] Second, there must be a beneficiary. "If the beneficiary cannot be ascertained, no trust is created."[206] Finally, there must be a property interest that is in existence or ascertainable and is to be held for the benefit of the beneficiary.[207]

There is no question about the last element. Congress clearly had title to lands that it could and did convey. The second element, the beneficiary, as described below, has been adequately identified.

The present issue is with the first element: the *intent* to establish a trust. Although courts will not require a settlor to make explicit identification of the trustee or the beneficiary, clarity about those things is an important indicator of intent, and "ambiguity in the description of the trust elements may tend to show

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200. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 170-183.

201. *Id.* § 24(1).

202. *Id.* § 24(2). We are not particularly interested in the notion of an implied trust here. With inconsequential exceptions, in the state land cases, the idea is that the accession documents are the trust instrument, and that no implication of trust is required. *See, e.g.*, Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230 (Okla. 1982).

203. RESTATEMENT (SECOND) OF TRUSTS § 24(2) (1959).

204. *Id.* § 25 cmt. b.

205. *Id.* § 25 cmt. a.

206. *Id.* §§ 112, 25 cmt. b.

207. BOGERT, *supra* note 198, at 5.

that no trust was intended."[208]

Furthermore, once a trust is found to be established, the description of the trust elements is central in deciding how it should be administered. Therefore, to determine whether a trust was established, and if so, how should it be administered, this discussion focuses on very basic questions: What is the trust document, who can alter it and how, what is the trust property, what is the stated purpose of the trust and who or what is the beneficiary, and who is the trustee? We do not explore every nook and cranny of these issues; rather, we point to general trends and issues that either are ripe for further exploration or that point, as this Section intends, toward greater management flexibility.

1. What Is the Trust Instrument?

"A state's obligations concerning school trust lands," intones one recent commentator discussing Utah, "stems from the state's enabling act and the state's constitution."[209] But the matter is far more complex. It is not atypical to find an enabling act that does not say the same thing as the state constitution, or a state constitution with conflicting provisions. So, while obligations may indeed stem from those documents, they are not defined by them. Moreover, the state's obligations are not the only ones that concern us. We also are interested to know what, if anything, obliges the federal government.

To be logically complete, this quest for a full definition of trust documents and trust obligations would have to deal with the full hierarchy of federal and state constitutions, amended state constitutions, federal and state statutes, and their relationship to each other and to trust principles.[210] Although we have discovered that questing after such completeness has some entertainment value, it is beyond the scope of the present undertaking. Fragments of the full hierarchy of questions will appear in subsequent Sections concerning trust purposes and the trustee. Herein we fo-

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208. *Id.* at 25.

209. Bassett, *supra* note 6, at 198.

210. We will ignore the issue of preemption here, having just recently pawed through it in a different but relevant context. *See* Richard R. Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 ECOLOGY L.Q. 375 (1988).

cus on the most obvious trust instrument issues: What accession language binds either the federal government or the state?

Even this small subset of the question has enormous practical significance. If the lands were granted by a trust agreement that binds both the state and Congress, it would be arguable that there would be some limits on subsequent federal programs that impede the state's ability to pursue trust objectives. Similarly, having bound itself to a trust in its constitution, the state would be restricted in its ability to enact subsequent statutes that violate the trust or limit the state's ability to pursue trust objectives. Finally, if state and federal government are mutually bound by a contract entered into at statehood, it would seem that neither can change the trust without the consent of the other.[211] Obviously, identifying the trust document is a central task.

a. The Trust Document

There are three points of departure for identifying the trust document. First, one could ignore the state constitution and argue that trust obligations are defined in the enabling act. Second, one could find the trust document in the combination of the enabling act and the state's acceptance of its provisions.[212] Finally one could argue that the "compact irrevocable" includes both the enabling act provisions and the initial state constitution provisions regarding management of lands and funds.[213]

The first option is most damaging to the conventional wisdom. If we are confined to interpreting enabling act language, it is difficult to describe anything other than Arizona and New Mexico school grants as a trusts. Not surprisingly, this position has considerable support in federal case law. When the Supreme Court reviews the grants, it interprets the enabling act requirements.

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211. It is also possible that neither party can change the contract at all. However, because they have been changed frequently, we will ignore that possibility.

212. This is the position expressed in Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 235 (Okla. 1982).

213. *But see* Regents of Univ. of N.M. v. Graham, 264 P. 953, 954 (1928) (acknowledging that the "intent of Congress is not to be discovered from the Enabling Act alone. Behind it lay the Ferguson Act. The two are in pari materia."). *Graham* is a university lands case, not a school lands case. Nevertheless, it gives support for what was suggested above, that the accession packages are far more comprehensive, hence sloppier, than the two parts focused upon herein.

Lassen speaks explicitly and exclusively of the enabling act requirements and the intent of Congress.[214] When the states interpret the school land grants they typically do not discuss the issue of whether an obligation was mutually agreed to, or subsequently and unilaterally assumed. States are, obviously, bound by their own constitutions.[215]

The third option[216] seems to be what the conventional wisdom implies. Including the full text of pertinent sections of each state's original constitution in a mutually binding contract would have the effect of imposing trust obligations earlier in time, and consequently, in more states. It would also be more restrictive on those states because it would involve the federal government in any changes in state constitutions affecting their mutual agreement. The argument in favor of the third position is that, in the process of accession, states presented their constitutions for congressional approval; in theory at least, and sometimes explicitly in the documents, it is stated that the constitution having been read and seen to be in conformity with republican principles, state X is admitted.[217] This could imply that there is some kind of elixir over the state constitution, or at least the lands provisions specifically offered and accepted, which binds the Congress.

b. Is the Federal Government Bound—To and by What?

If Congress were bound by the trust, one might argue that it was barred from enacting legislation or undertaking programs that would undercut the trust land's economic value. That point is likely to appeal to trust land managers currently confounded

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214. *See* Lassen v. Arizona Highway Dep't, 385 U.S. 458, 462 (1967). Note also that the Court appended to its decision § 28 of the Enabling Act and nothing from the Arizona Constitution. In addition, Ervien v. United States, 251 U.S. 41, 47 (1919), the other major Supreme Court case in this area, ignores both trust principles and the state constitution, concluding merely that the grantor of the lands can make conditions on the use of the grant and see that they are enforced.

215. *See* Deer Valley Unified Sch. Dist. v. Superior Court, 760 P.2d 537, 540 (Ariz. 1988).

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

217. *See, e.g., supra* notes 34-44 (discussing Indiana's accession).

by the presence of endangered species on trust lands.[218] Although this is unlikely to be a winning argument, it is worth exploring in order to determine the degree to which the federal agencies are or are not respectful of the trust notion. The best place to look for evidence of federal deference to a trust agreement would be in efforts by New Mexico or Arizona to thwart some apparent congressional violation of the trust. We have not found any such disputes at present writing. Therefore, we must look to other areas for support. In many other contexts, courts do not have a well-established tradition of finding the federal government bound by the contents of state constitutions.[219] However, these cases might be distinguishable because the school lands are, in fact, part of an explicit set of terms and conditions negotiated between Congress and each state, and it could be argued that the state constitutional provisions on those matters are therefore included in the specific compact irrevocable required by Congress. Thus, even if Congress is not bound by the entire program of a state constitution, where the bargaining was specific and the congressional insistence on state acceptance of a contract binding both parties was explicit, the mutuality is arguably weightier.

Although this argument is not without some logic, in reality little supports it. States have frequently made fundamental changes in constitutional provisions dealing with school lands, and these have only occasionally been of any interest to Congress.[220] Hence, there is no established practice that would support the idea that either states or the federal government have

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218. We need not speculate. The Endangered Species Act (ESA), 16 U.S.C. §§ 1531, 1544 (1988), and its protection of the desert tortoise and the spotted owl were the subject of a panel at the winter meeting of the Western States Lands Commissioners' Association, St. George, Utah, January 1991. The ESA also has motivated the State of Washington to sue the U.S. Secretary of Commerce on grounds that the Forest Reserves Conservation and Shortage Relief Act of 1990, Pub. L. No. 101-382, 104 Stat. 715 (1990), singles out logs harvested from state lands in banning timber exports, and that the export ban is a breach of the federal government's fiduciary obligation as trustor. The state alleges that the export ban provisions "unilaterally impair and amend the Trust Compact in a manner that is harmful to the trust beneficiaries." Board of Natural Resources v. Mosbacher, No. C90-5495, at 5 (W.D. Wash. Nov. 16, 1990).

219. The most interesting cases in this area are probably the reapportionment cases, especially Reynolds v. Simms, 377 U.S. 533 (1964), Baker v. Carr, 69 U.S. 186 (1962), and Coyle v. Smith 221 U.S. 559 (1911). All three are discussed in LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 300-06, 746-47 (1978).

220. *See infra* Section IV (discussing the forestry programs).

considered the state's constitutional provisions regarding state lands as part of a mutually binding pact.

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

The right-of-way cases involve agencies seeking uncompensated access across school lands. Over time the basic theme has altered dramatically from fairly unfettered rights-of-way without compensation or any reference to a trust to strict invocation of trust principles. In early state cases, such as *Grosetta v. Choate*[221] and *Ross v. Trustees of the University of Wyoming*,[222] state courts did not find either state constitutional *or* enabling act provisions regarding appraisals, public auction, or disposition of school lands to be a barrier to state agencies using school lands for state purposes. Further, the Arizona Supreme Court's decision in *State v. Lassen* is crystal clear about early state interpretation of the Enabling Act: "For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government."[223]

Early cases involving federal agencies seeking rights-of-way across school lands produced the same result. Two federal courts found the school land grants no barrier to an uncompensated state grant of right-of-way across school lands for federal irrigation projects. In *Ide v. United States*, the Supreme Court found that a Wyoming statute granting rights-of-way over "all lands of the state for ditches 'constructed by and under the authority of the United States' " to be lawful without ever referencing or discussing the trust notion.[224] Some years later, the District Court in Idaho reached the same result, noting an 1866 federal statute and a 1905 state statute that permitted the granting of rights-of-ways across school lands without regard to any restrictions on aliena-

221. 75 P.2d 1031 (Ariz. 1938).

222. 222 P. 3 (Wyo. 1924). Note that *Ross* is a university not a school lands case.

223. 407 P.2d 747, 747 (Ariz. 1965), *rev'd*, 385 U.S. 458 (1967).

224. 263 U.S. 497, 502 (1923) (quoting 1905 Wyo. Sess. Laws ch. 85).

tion of granted lands. The court argued further that the right-of-way is an easement that does not convey fee title. Again, the trust notion was not mentioned in resolving the issue.[225]

More recent cases reach the opposite conclusion. In *United States v. 78.61 Acres of Land in Dawes and Sioux Counties*, the court confronted exactly the same question: "whether the Nebraska Legislature had the power to grant to the United States a right-of-way over school lands without compensation."[226] Citing *Lassen* and invoking the trustee's duty of undivided loyalty to the beneficiary, the court concluded that "a sharing by the trust property in the general benefits to the state of an irrigation project is not sufficient compensation to the trust."[227] Further, the court concluded that the fact that the United States is the grantee does not "alter the principle that the *res* of the trust may not be depleted."[228] Similarly, in *111.2 Acres of Land in Ferry County*, the court held that the state could not donate school land to the federal government.[229]

This increased respect for school lands purposes does not provide a strong basis for arguing that the federal government must respect the trust. Although *111.2 Acres* clearly states that

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225. United States v. Fuller, 20 F. Supp. 839 (D. Idaho 1937).

226. 265 F. Supp. 564, 565-66 (D. Neb. 1967). The court noted that the Nebraska Enabling Act "did not contain the express restrictions which were incorporated in later, similar acts" and cites Lassen v. Arizona Highway Dep't, 385 U.S. 458, 462 (1967). *78.61 Acres*, 265 F. Supp. at 567. "Nevertheless," the court continues, "the grant was undoubtedly in trust for a specific purpose as was recognized by the Supreme Court of Nebraska." *Id.* But look at the language that the court cites for that conclusion. It contains nothing about trusts:

> The provision of the enabling act making the grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant . . . , and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants. . . . [T]he state was and still is under a contractual as well as a constitutional obligation to refrain from disposition or alienation of the use of this property except as allowed by the enabling act and the Constitution.

State *ex rel.* Johnson v. Central Neb. Pub. Power & Irrigation Dist., 8 N.W.2d 841, 847-48 (Neb. 1943) (quoting State *ex rel.* Ledwith v. Brian, 120 N.W. 916, 918 (Neb. 1909)). Thus, a contract regarding means of disposal is not a trust.

227. *78.61 Acres*, 265 F. Supp. at 567.

228. *Id.*

229. United States v. 111.2 Acres of Land in Ferry County, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (9th Cir. 1970).

the federal government is bound by what it agreed to in the enabling act, the decision turns on the state's inability to donate trust lands to the federal government. Similarly, although both the *78.61 Acres* court and the *111.2 Acres* court conclude that there is a trust, the trust in the analysis binds the state, not the federal government.[230]

Perhaps a more productive path for those seeking restrictions on the federal government is the access issue as discussed in a 1979 dispute in Utah, in which a federal district court[231] held that the Bureau of Land Management (BLM) must grant a holder of a state oil and gas lease access to a school land parcel wholly surrounded by a federal land in a wilderness study area.[232] At first blush, the result of the case appears to suggest that, having granted the lands as a source of profit for the state, the federal government cannot thereafter take or regulate away that profit-making potential. Although the result is subject to that interpretation, the text suggests that, to the contrary, the decision turns on general notions of property rather than on the land's trust status. The court discusses the land's trust status, but also notes that "traditional property law concepts support Utah's claimed right of access."[233] It employs standard takings analysis to conclude that the state's access rights "cannot be so restricted as to destroy the lands' economic value. That is, the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their *full* economic development."[234] This reasoning arguably gives the trust more than it would have received as a private land owner. However, that is clearly tied in the decision to congressional intent expressed in the grant as a limit on BLM discretion rather than to a trust notion restricting subsequent congressional action.

The *Cotter* court did specifically address the special status of the granted lands in two ways. First, in arriving at its conclusions about congressional intent of the grant, the court noted that "leg-

230. *Id.* at 1047; *78.61 Acres*, 265 F. Supp. at 564.

231. Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979) (*Cotter*); *see also* Sierra Club v. Hodel, 675 F. Supp 594 (D. Utah 1987) (suit by environmental groups regarding the same access dispute), *aff'd in part and rev'd in part*, 848 F.2d 1068 (1988).

232. *Cotter*, 486 F. Supp. at 1001-02.

233. *Id.* at 1002.

234. *Id.* at 1009 (emphasis added).

islation dealing with school lands has always been liberally construed."[235] That is, whereas a federal grant to a private person or railroad would be construed strictly, with nothing "held to pass to the grantee except that which is specifically delineated in the instrument of conveyance,"[236] school grants are liberally construed, following *Wyoming v. United States*.[237] Nothing in the *Cotter* case or the precedents it relies on suggests any tie to trust principles.

The second and more interesting and pertinent material on the lands' special status comes in the *Cotter* court's discussion of "special legislation."[238] Under rules of statutory construction, the court argued that special acts prevail over other, even subsequent acts, unless there is some indication that Congress intended to modify the special act.[239] *Cotter*'s application of the notion appears to be as far as any court has been willing to go in finding the state land trust obligatory on the federal government: Congress must indicate its intention to modify a special statute when violating the trust. Whether this argument would be useful in forestalling administrative actions not already vulnerable to the Fifth Amendment or congressional statutes is not clear. In addi-

235. *Id.* at 1001-02.

236. Utah v. Andrus, 486 F. Supp. 995, 1002 (D. Utah 1979) (*Cotter*).

237. 255 U.S. 489, 508 (1921) (citing Johanson v. Washington, 190 U.S. 179, 189 (1902), which cites Mr. Justice Field in Winona & St. P.R.R. Co. v. Barney, 113 U.S. 618, 625 (1884) (stating that "[t]o ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together")).

238. *Cotter*, 486 F. Supp. at 1009. A preliminary discussion of special legislation and fuller cites are found in an earlier indemnity lands selection case, Utah v. Kleppe, 586 F.2d 756, 768-69 (10th Cir. 1978), *rev'd*, Andrus v. Utah, 446 U.S. 500 (1980). The *Kleppe* court discussed the established rules of statutory construction regarding special legislation and likened the school lands to the "special preference and treatment of Indians recognized in *Morton v. Mancari*, 417 U.S. 535 (1974)." *Id.* at 769. An analogy to Native American lands would not seem to give the states much leverage in binding federal actions to strict trust principles. Nor would the *Kleppe* court's assertion that the "strict, continuing 'trust' obligations imposed by the Congress upon the 'public land' states . . . in the school land grant statutes" appear to give much support for the assertion that the federal government is bound in the same manner as the states. *Id.* at 769. Most damaging of all, the fulsome treatment given the special status of the state lands in *Kleppe*, although picked up soon after in the *Cotter* case, was totally ignored by the Supreme Court in its consideration of *Kleppe*. *See* Andrus v. Utah, 446 U.S. 500 (1980).

239. *Cotter*, 486 F. Supp. at 1009-10 (citing *Kleppe*, 586 F.2d at 768-69).

tion, *Cotter*'s analysis is weakened by its reliance on *Utah v. Kleppe*, because *Kleppe* was reversed by the Supreme Court.[240] Even if it were firmly rooted in Supreme Court prose, however, the notion of "special legislation" puts the finish line fairly close to the starting gate on trust obligations affecting the federal government.

c. Are the States Bound—To and by What?

Discussion of state obligations is less speculative. States are obviously bound by both their enabling acts and their own constitutions.[241] If the state binds itself to manage the funds or the lands as a trust, some management issues are clarified by trust principles. It is important to underscore that the topic here is state interpretation of state obligations. The federal government is obviously authorized, and in Arizona and New Mexico it is actively encouraged, to enforce the terms of the grant. However, in states that joined prior to Arizona and New Mexico's 1910 accession, there are relatively few federally defined grant terms, and state requirements are far more numerous and restrictive. Neither Congress nor the federal courts has evinced much interest in state changes in state requirements.[242]

The issue of what documents define state responsibilities is still important for at least two reasons. First, it is necessary to distinguish three different levels of control over state management: direction arising from statutes that can be changed by statute; directions embodied in the constitution that can be changed by amending the state constitution; and authority that can only be altered with permission of Congress. Second, given the inatten-

240. 446 U.S. 500 (1980). Not only did *Andrus v. Utah* ignore *Kleppe*'s reasoning, but the line of argument was also ignored by state amicus briefs in support of Utah. *See* Brief for Amicus Curiae, State of California, Arizona, Colorado, Montana, Nevada, New Mexico, Oregon and Washington, Andrus v. Utah, 446 U.S. 500 (1978) (No. 78-1522, October term). Although *Cotter* was not specifically overturned by *Andrus v. Utah*, *Andrus* does reflect on *Cotter*'s strength as precedent.

241. U.S. CONST. art. VI, § 2; *see also* Deer Valley Unified Sch Dist. v. Superior Court, 760 P.2d 537 (Ariz. 1988).

242. Although the courts have repeatedly held that enforcement of the grant conditions is an issue between federal and state governments, and that only Congress can enforce the conditions of the grant, the federal government has not been aggressive. *See* DIENST, *supra* note 17, at 105-06; ORFIELD, *supra* note 17, at 81, 119.

tion of Congress to administration of school lands, and the focus of most state constitutions on the management of the permanent funds rather than the granted land, it is also important to distinguish statutory direction regarding the lands from constitutional direction regarding the funds.

We take up two issues here. First, two recent Arizona cases underscore the importance of fully exploring differences and continuities between the Arizona Enabling Act, the Constitution and subsequent amendments, and subsequent statutes.[243] Second, it is important to inquire whether the state's ability to regulate the trust is limited by its initial agreement, as embodied either in its constitution or with the federal enabling act.

(1) Distinguishing the Enabling Act and the Constitution

The first issue is addressed in the case of *Deer Valley Unified School District v. Superior Court*,[244] which involved the effort by a school district to obtain trust lands for school construction purposes. When the State Land Department refused to hold a public auction at which the Deer Valley School District would have an opportunity to obtain the land, Deer Valley filed an action to condemn the proposed school site.[245] The District Court and then the Arizona Supreme Court held that "neither the state nor its subdivisions could condemn land held in the school trust."[246] In so doing, the Arizona courts rejected the U.S. Supreme Court's decision in *Lassen* as a guide to the State Land Commission's authority. *Lassen* had concluded that the form of the trust, rather than the specific requirements of the enabling act, must be respected, and that it was acceptable to sell lands to the state for highway purposes without the appraisals and auctions required by both the enabling act and the state constitution.[247] Under this reasoning Deer Valley had the authority to

243. *Deer Valley*, 760 P.2d at 537; Fair Land and Cattle Co. v. Hassell, 790 P.2d 242 (Ariz. 1990).

244. *Deer Valley*, 760 P.2d at 537.

245. *Id.* at 537-38.

246. Deer Valley Unified Sch. Dist. v. Superior Court, 760 P.2d 537, 538 (Ariz. 1988); *but see* Independent Sch. Dist. of Va. v. State, 144 N.W. 960 (Minn. 1914) (the school district condemned school lands for school purposes).

247. *See* Lassen v. Arizona Highway Dep't, 385 U.S. 458, 465 (1967).

condemn the land. The state court rejected this reasoning, stating "The Enabling Act, as interpreted in *Lassen*, merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more."[248]

The Arizona court noted that, although the Supreme Court took a "strict view of the full compensation provision of the Enabling Act," it did not "literally construe the public notice, public auction and high bid provisions of the same Act."[249] This was based on the Supreme Court's "belief that the public notice/public sale provisions of the Enabling Act were useless in an acquisition by a state agency because the state eventually could condemn the land in any event."[250] In *Deer Valley*, the state court rejected that conclusion. While noting that their view created "some divergence" between federal and state interpretations of "substantially identical provisions," nevertheless, the Arizona court concluded that "the state may not dispose of its school trust lands other than by compliance with the specific terms and conditions of the Arizona Constitution."[251] Although the U.S. Supreme Court interpreted the Enabling Act in *Lassen*, and held "that condemnation is a permissible method of disposal" of state school lands, the Arizona Supreme Court declined to "follow that case in interpreting the identical language in the Arizona Constitution."[252]

The logic of *Deer Valley* led to a sharp curtailment of the Commission's land exchange authorities in a subsequent case, *Fair Land and Cattle Co. v. Hassel*.[253] The Commissions authority to exchange is governed by 1934 Taylor Grazing Act,[254] which allowed states to exchange trust land located within a federal grazing district for other land. In addition, in 1936, Congress amended section 28 of the Arizona Enabling Act to "permit extended leases and exchanges of school trust land."[255] Arizona did

248. *Deer Valley*, 760 P.2d at 541.

249. *Id.* at 540.

250. *Id.* (citing *Lassen*, 385 U.S. at 464).

251. Deer Valley Unified Sch. Dist. v. Superior Court, 760 P.2d 537, 541 (Ariz. 1988).

252. *Id.*

253. 790 P.2d 242 (Ariz. 1990).

254. 43 U.S.C. §§ 315-316 (1988).

255. *Hassel*, 790 P.2d at 245 (citing Act of June 5, 1936, ch. 517, 49 Stat. 1477).

not amend its constitution to reflect the authority to exchange land, choosing to adopt the terms of the 1934 and 1936 congressional acts in a state statute.[256] Despite this statutory permission, in the wake of *Deer Valley*, the State Land Commission doubted its authority to make such exchanges. *Fair Land and Cattle Co. v. Hassel* confirmed the Commissioner's view reiterating the "two levels of protection" theme and rejecting the assertion that an exchange is not a sale.[257] Because the exchange was, in fact, a sale, the court required the Commission to comply with the constitutional restrictions.

(2) Determining the Effect of the Initial Bargain

Turning to the second issue, although we have looked in vain for promising paths that would impose limits on postgrant federal actions that would undercut the trusts, we have more success at the state level. There are numerous cases in which the school lands are found to enjoy exemptions from burdens or principles that would affect private land. Diverse jurisdictions have held, for example, that the school lands are exempt from local taxation,[258] adverse possession,[259] assessments for irrigation,[260] and assessments that allow taxation of lessees operating on state trust lands.[261] These cases occasionally produce some interesting lan-

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256. *Id.* (citing ARIZ. REV. STAT. ANN. § 11-1211 (1948)).

257. *Id.* A New Mexico state effort to have its land exchange authority amended in Congress succeeded. Act of Sept. 20, 1990, Pub. L. No. 101-386, 104 Stat. 739. However, this act was rejected in a statewide referendum in the November 1990 election. *See New Law Favors New Mexico Exchanges*, PUB. LANDS NEWS, Sept. 27, 1990, at 7.

258. *See, e.g.*, People *ex rel.* Dunbar v. City of Littleton, 515 P.2d 1121 (Col. 1973); Erickson v. Cass County, 92 N.W. 841 (N.D. 1902); *but see* Toole County Irrig. Dist. v. State, 67 P.2d 989 (Mont. 1937) (holding that irrigation assessments are not taxes and therefore state lands are not exempt from the assessments); *see also* Kelley v. Allen, 49 F.2d 876 (9th Cir. 1931) (finding that the state may tax purchasers of state trust land).

259. *See, e.g.*, Hellerud v. Hauck, 13 P.2d 1099 (Idaho 1932); Newton v. Weiler, 87 Mont. 164 (1930); Van Wagoner v. Whitmore, 199 P. 670 (Utah 1921). For a slightly different flavor, see Duchesne County v. State Tax Comm'n, 140 P.2d 335 (Utah 1943) (finding that lands acquired through foreclosures on loans made from the permanent fund were exempt from taxation).

260. *See, e.g.*, Southern Drainage Dist. v. State, 112 So. 561 (Fla. 1927); *Toole County*, 67 P.2d at 989.

261. Idaho Gold Dredging Co. v. Balderston, 78 P.2d 105 (Idaho 1938).

guage about the sanctity of trust lands,[262] but it is difficult to discern a theory under which the trust status of the land colors the reasoning or the outcome of the cases.

There is, however, another line of cases that merits attention. In discussions in several contexts and jurisdictions we find the assertion that legislative regulations that may impede maximum profit to the trust are impermissible. For example, in *Oklahoma Education Ass'n v. Nigh*, the Oklahoma Supreme Court sharply rejected what it characterized as respondent's contention that the Enabling Act authorized the legislature to "enact practically any rule or regulation it chooses with regard to selling or leasing the federally granted land."[263]

> For if Respondents are correct, then a potentially self-defeating incompatibility exists between the stated purpose and objective of the trust on the one hand, and the alleged unbridled authority granted the State Legislature to defeat that strategy by means of creative rules and regulations on the other hand.[264]

Instead, the court argued as follows:

> No Act of the Legislature can validly alter, modify or diminish the State's duty as Trustee of the school land trust to administer it in a manner most beneficial to the trust estate and in a manner which obtains the maximum benefit in return from the use of trust property or loan of trust funds.[265]

At issue in *Nigh* were statutes that the majority alleged provided for low-interest mortgage loans of trust funds to farmers and ranchers and low-rental leases of trust lands.[266] *Nigh* demonstrates that even when a state statute reflects constitutional priorities, the courts tend to disallow legislation when the provisions appear to violate the standard trust notions of undivided loyalty.

A more interesting question is how the court reviews the ability of the state to enact regulations that *indirectly* cut into the potential profitability of the trust lands. In *Department of State*

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262. *See, e.g.*, Department of State Lands v. Pettibone, 707 P.2d 948, 953 (Mont. 1985) (stating that "any restriction on the use . . . of school trust land that effectively devalues it cannot be sustained").

263. 642 P.2d 230, 237 (Okla. 1982).

264. *Id.*

265. *Id.* at 236.

266. *Id.* at 230.

Lands v. Pettibone,[267] a case about who owns water diverted or developed on school land, the Montana Supreme Court noted that the trusts created in the Enabling Act preempt state laws or constitutions. The court cited *Utah v. Andrus* for the conclusion that "*any* restriction on the use . . . of school trust land that effectively devalues it cannot be sustained."[268]

A more recent Montana case, *North Fork Preservation v. Department of State Lands*,[269] could be interpreted as applying the *Pettibone* logic when reviewing a Department of State Lands decision to approve an oil and gas lessee's operating plan without an environmental impact statement (EIS). The issue was whether the lower court had applied the correct standard of review. The Montana Supreme Court concluded that it had, thereby allowing the Commission's decision not to do an EIS.

> The Department in this case was carrying out its statutorily-imposed fiduciary duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands. The Department also had to carry out duties imposed by [the Montana Environmental Policy Act (MEPA)]. This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to the Department, not the courts.[270]

Although the court was clear that the Department's status as trustee does not exempt it from compliance with the MEPA, the special trust responsibilities, even though they are attributed to statute rather than to the constitution, appear to effect the calculus regarding the appropriate standard of review. Hence, it is not entirely clear whether the court's conclusion might arise from the special trust status of the school lands as opposed to discretion due to an administrative agency.

This theme is most explicit in a Colorado county challenge under state law to a State Land Board lessee.[271] State mine recla-

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267. 702 P.2d 948 (Mont. 1985).

268. *Id.* at 953 (emphasis added).

269. 778 P.2d 862 (Mont. 1989).

270. *Id.* at 867 (citing MONT. CODE ANN. § 77-1-202 (1989); *but see* Minnesota Pub. Interest Group v. Minnesota Envtl. Quality Council, 237 N.W.2d 375 (Minn. 1975).

271. Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd., 809 P.2d 974 (Col. 1991). Cases directly on point are rare, apparently for political reasons. At a 1991 Western State Land Commissioners' Association meet-

mation law allows counties to declare mining an "inappropriate use" of land.[272] Boulder County denied a permit to a school land lessee, because the leased parcel was in the county's designated open space and therefore the county classified it as unsuitable for mining. Both the lessee and the state argued that the county's denial of the permit was impermissible for numerous reasons,[273] including the interesting argument that county regulation was impermissible due to the special status of state trust lands. The state argued that "any statutory delegation of land use authority over state school lands would be unconstitutional"[274] because the State Land Board was supposed to manage the lands for the exclusive benefit of the beneficiaries. The state also asserted that, although the legislature has authority to make rules and regulations regarding trust lands management, that authority did not extend to determining the use to be made of state school lands. That right is the Board's exclusively, and reasonable legislative rules must be "limited to rules that regulate the manner in which the [Board's] land use decision is carried out."[275] Finally, the Land Board argued that the county's decision interfered with its constitutional duty to manage the land " 'in such manner as will secure the maximum possible amount' for the lands under its direction, control, and disposition."[276] The Colorado Supreme Court rejected that argument, simply asserting that the "constitutional grant of authority to the School Land Board . . . was not intended as a license to disregard reasonable legislative regulations simply because compliance with such regulations might reduce the amount of revenues otherwise available from the leasing of

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ing in St. George, Utah, a panel discussed the question "Should State and Trust Lands be Subject to Local Land Use Regulations?" Consensus was achieved: state trust lands are exempt from local regulation. However, rather than fight a locality, trust land officials will delay or alter their proposed action. Perhaps a more interesting issue is raised in a recent North Dakota Attorney General's Opinion applying state historic preservation regulations to school trust lands. Interview with Rick Larson, Minerals Management Director, N.D. State Land Department (1991).

272. *Colorado State Bd. of Land Comm'rs*, 809 P.2d at 977 (citing Colorado Mined Land Reclamation Act, COL. REV. STAT. § 34-32-109(6), 14 (1984)).

273. *Id.* at 980-81.

274. *Id.* at 987.

275. Brief for Appellant at 5, Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd., 809 P.2d 974 (Col. 1991) (No. 895c12).

276. *Colorado State Bd. of Land Comm'rs*, 809 P.2d at 985 (citing COL. CONST. art. IX, § 10).

school lands."[277] To do so, the court stated,

> would nullify the Constitutional authority of the General Assembly to impose reasonable legislative regulations on the State Land Board's direction, control, and disposition of school lands. Such exclusion would also contravene . . . express legislative policies . . . vesting counties, cities, and towns with the authority to regulate land use and development within their respective jurisdictions . . . .[278]

The court did not respond to the basic issue of the case, that is, whether the legislature is authorized under the constitution to allow counties to trump State Land Board decisions.

In sum, discussion of constraints on the state's ability to enact regulations that limit the value of the trust lands are certainly more robust and varied than the equivalent discussions at the federal level. Further, the state-level question seems less fully resolved by principles such as the Supremacy Clause. A grasping beneficiary would probably have more success pursuing this line of argument than a trustee, but the issue is interesting, important and likely to be resolved differently in different contexts and jurisdictions.

(3) Revisiting Oklahoma

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

At issue in *Nigh* were statutory provisions that appeared to the court to violate a trust principle of undivided loyalty to the

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277. *Id.* at 988 (citing *In re* Leasing of State Lands, 32 P. 986, 988 (Col. 1893)).

278. *Id.*; A similar issue is raised by Kitsap County, Washington's recent effort to regulate management of school lands in Washington. Interview with Pat McElroy, Washington State Department of Natural Resources by Sally K. Fairfax (Nov. 26, 1990).

beneficiary.[279] However, it is a question which deserves fuller explication and deeper thought than the decision provides. The Oklahoma Supreme Court simply asserted that the express "designation of the school lands and funds as a 'sacred trust' ha[d] the effect of irrevocably incorporating into the Enabling Act, Oklahoma Constitution, and conditions of the grant, all of the rules of law and duties governing the administration of trusts."[280] Second, the court defined, without reference to the documents, the "manifest objective of the Enabling Act provisions, viz., to assure the realization of maximal rents, profits and returns from the trust estate for the benefit of the school children of this State."[281] The court failed to note that it was the state constitution and specifically not the Enabling Act that characterized the grant as a trust. The court simply turned the whole set of documents into a single mush. Thus it misrepresents the state's own choices as conditions of the grant.[282]

Thus positioned, the court arguably made two serious misinterpretations. First, it dismissed out of hand the notion that there could be any justification for state school lands policies that appear to benefit the state's agricultural economy: "Just as a State may not use school land trust funds assets to subsidize its highway construction program, a State may not use school land trust assets to subsidize farming and ranching," the court asserted, citing *Lassen*.[283] The question is not so simply resolved, or at least it ought not to be.[284] Proper attention to the specific content of the

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

280. *Id.* at 236.

281. *Id.* at 237. Note that the Oklahoma court has muddied an issue that the Minnesota court has been careful to sort out, that is, it has brought in school children as beneficiaries in spite of the clear language of the constitution that it is the common schools which are to benefit. *See* Beaver, *supra* note 10 (discussing the Wyoming legislature's and courts' confusion on the issue of beneficiaries).

282. *Nigh*, 642 P.2d at 235-39.

283. *Id.* at 236 (citing Lassen v. Arizona Highway Dep't, 385 U.S. 458, 462 (1967)).

284. One of the more intriguing issues to arise in work related to the present study is whether the trust purpose of benefitting the schools is better served by managing the trust lands for profit from the lands, or by managing trust assets to support the local tax base that provides the overwhelming proportion of the school budget in most jurisdictions. In the present discussion we put aside that question and ask merely whether the terms of the trust document have or ought to have any bearing on this matter. Cases like *Nigh*, *Lassen*, and *Skamania* clearly reject the notion of enhancement, that is making trust assets more produc-

documents at issue would yield a different discussion entirely, and likely a different result in this instance.

There is, in fact, nothing in any of the pertinent Oklahoma documents that would suggest any thought at all by the state or the federal government regarding highway construction.[285] There is also nothing express or implied in any of the documents that favors maximized economic returns as the guiding theme of resource management. Indeed, the Oklahoma Constitution is explicit that "safety and permanency of investment"[286] rather than maximized returns is the guiding principle. There is, moreover, language in the Enabling Act that can be easily interpreted as support for stability in the agricultural community. Furthermore, the Oklahoma Constitution is explicit that investment in farming is the first priority of the trust portfolio. The Oklahoma Enabling Act says nothing about trusts. The only pertinent language in the Enabling Act gives lessees a preference right to purchase their leasehold at time of sale for the highest bid.[287] This provision was cited by defendants in *Nigh* as evidence of the trust purpose of supporting stability and preventing waste in the agricultural com-

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tive by allowing highways to be built or by supporting the local economy. We are here making a significantly different argument, that if the land is to be used in support of schools, perhaps the best way to do that is to use the trust assets, in part, to enhance the local tax base on which the local schools depend. This was discussed in a recent Minnesota case, where a school children's challenge to a sale of trust assets was rejected because, among other things, their claims

> assume that the permanent school fund is an end unto itself. The permanent school fund is only one facet, a relatively small one, of [the] Minnesota school finance system. The legislature has concluded that sale of lakeshore lots in this instance provides more overall benefits to school finance in Minnesota than indefinite leasing because, beside providing immediate investment cash for the permanent school fund, sale also immediately places title to the lots in the hands of private owners who are more likely to make significant new capital investments as owners rather than lessees. This consequence of sale will expand the local tax base, which experience demonstrates has provided the most economically healthy school districts . . . with a sound financial base.

Segner v. State Inv. Bd., No. 587-489319, slip. op. at 11 (Ramsey County Dist. Ct., Aug. 11, 1988).

285. OKLA. CONST. (1907), *reprinted in* 7 THORPE, *supra* note 24, at 4271; Enabling Act for Oklahoma of 1906, *reprinted in* 5 THORPE, *supra* note 24, at 2960.

286. OKLA. CONST. art. XI, § 6 (1907), *reprinted in* 7 THORPE, *supra* note 24, at 4271, 4320.

287. Enabling Act for Oklahoma of 1906, § 10, *reprinted in* 5 THORPE, *supra* note 24, at 2960, 2968.

munity.[288] That would seem a permissible but not mandatory reading of the phrase. Those provisions were interpreted in what the court characterized as the context of the overall text,[289] as part of analyzing rule-making authority granted to the legislature by the Enabling Act. The court concluded that the rule-making authority was intended "to promote rather than impede attainment of the manifest objective of the Enabling Act provisions, viz., to assure realization of maximal rents, profits and returns from the trust estate for the benefit of the school children of this State."[290]

Yet, the Enabling Act says nothing about either a trust or about economic returns. All of the language about trusts is, as was true of every state accession package prior to Oklahoma's accession, in the state's constitution. The state constitution is quite clear that it will establish a trust fund, and about the management priorities of the permanent school funds. The constitution, as originally written and as amended, expresses a priority on safe and permanent investment of the funds.[291] The court ignored the plain language and overrode that clearly expressed intent with an emphasis on "maximum return from the trust property" ostensibly derived from trust principles.[292] There, the court appeared to prefer an extreme statement of the trust principle to make the trust productive to both the plain language of the trust document and the explicit trust principle to preserve the trust.

It also dismissed constitutional provisions regarding investment priorities that have direct bearing on the question of what the court interpreted as "subsidizing farming and ranching."[293] The original Oklahoma Constitution directed that the school funds should be invested in "first mortgages upon good and im-

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

289. *Id.* at 237.

290. *Id.*

291. OKLA. CONST. art. XI, § 6 (1907), *reprinted in* 5 THORPE, *supra* note 24, at 4271, 4320.

292. *Nigh*, 642 P.2d at 237. The dissenters pointed to the conflict between safety of investment and maximizing economic returns. "The people could have adopted a provision requiring the state to obtain the maximum possible return, but they did not. It is obvious that they intended to forego some return in favor of more secure investments, such as mortgages and school bonds, etc." *Id.* at 243 (Sims, J., dissenting).

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

proved farm lands within the state," or in state, city, or county bonds, in school district bonds, or in U.S. bonds, preference in the order stated.[294] The constitution at the time of the litigation also included "promissory notes evidencing federal and state insured loans made to students under any federal or State of Oklahoma insured student loan program" as permitted investments.[295] It is not clear why the provisions of the document establishing the trust are not read as dispositive regarding the purposes of the trust. The framer's intention that trust assets be used to secure stability and economic development of farms is unambiguous. One could take issue with the implicit assumption that first farm mortgages, and more recently, student loans, are appropriate securities if the stated goal is safety and permanency of the investment. Nevertheless, it is difficult to justify brushing aside the stated intent of the trust document regarding support for the agricultural community in favor of imposing a conflicting and dubious duty to "maintain the maximum return to the trust estate from the trust properties under their control."[296]

The court is quite obviously correct that the state constitution and state statutes are constrained by the requirements of the Enabling Act. Even this cursory impression suggests several significant conclusions. First, carefully identifying and parsing the trust documents is not a fruitful way to find limits on federal activity. The broadest possible reading of the only thread obliging

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294. OKLA. CONST. art. XI, § 6 (1907), *reprinted in* 5 THORPE, *supra* note 24, at 4271, 4320.

295. *Nigh*, 642 P.2d at 238 n.13 (citing OKLA. CONST. art. XI, § 6).

296. *Id.* In contrast, in State v. Babcock, 409 P.2d 808 (Mont. 1966), the court sustained the Board's discretion to reject the high bid in favor of the low bid on trust principle grounds. The Board noted that the high bid was "considerably over the landlord's share prevailing in the area," and that good husbandry and sustained income required that they have a lessee who could complete the term of the lease while making enough profit to protect the leasehold:

> If a competing bid is considerably higher, there is danger that the lessee will not fulfill his term because of inability to make money or that he will cut corners on good husbandry practice. In the meantime, the qualified proven farmer may have gone out of business or left the area. As trustees charged with managing this land in a prudent careful manner, I do not believe we can take these risks.

Id. at 810. The court said that the Board's mandate to receive a sustained income coupled with full market value put them in an awkward position in circumstances such as this. However, it concluded that the Board had to have discretion to determine what will most benefit the public. *Id.* at 811-13.

federal deference to the trust gets us very little (if any) beyond the respect owed in our system to any private property, or to non-trust state-owned lands. The thread is not anything resembling a bright or fixed line, and the notion of "special legislation" does not provide much protection for the trust in any event. Second, regarding state obligations, careful identification and interpretation of the trust documents is more likely to identify standards regarding state authorities and obligations.

d. Changing the Trust

Questions about what the trust binds the states and federal government to do lead reasonably to questions about how one might alter the obligations. After all, this is a program that has been in operation for almost two hundred years; surely altered circumstances might give rise to pressures to alter its basic dimensions. The answers to these questions are surprisingly unenlightening. There are very few cases involving changes to the trust, and when the issue has been raised, it has been resolved without apparent reference to trust principles.

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

> any limitation upon the disposition of public land provided in the Enabling Act is absolutely binding on the state of Arizona, unless the Congress of the United States may consent to a change, and any statute or amendment to the state Constitution in conflict therewith is null and void.[297]

It is also true that, because Arizona and New Mexico have the most specific enabling acts, they are the most likely to seek acquiescence from Congress in the redefinition of their management authorities. Congressional approval is routine.[298]

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297. Boice v. Campbell, 248 P. 35 (Ariz. 1926).

298. Deer Valley Unified Sch. Dist. v. Superior Court, 760 P.2d 537, 539

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

> The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.[299]

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

> so as to secure the greatest permanent value of the lands to the whole people of the State of Oregon, particularly for the dedicated purposes of the lands and the common schools to which the resources of the lands are devoted.[300]

It would seem that the effect of this change was to broaden the definition of the trust to include the entire population of the state, not just the interest of the beneficiaries, while giving preferential treatment to the original purposes of the grants.[301] The criteria for securing the greatest permanent value of the lands is different from securing maximum benefit, especially if maximum benefit is thought of in present value terms.[302]

This is not to suggest, of course, that there are never controversies. The state supreme courts in both Utah and Oklahoma,

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(Ariz. 1988), notes numerous instances in which "Congress has periodically amended the Enabling Act to allow Arizona more flexible use of its school trust land."

299. Johnson v. Department of Revenue, 639 P.2d 128, 133 (Or. 1982) (quoting OR. CONST. art. VIII, § 5(2), *as amended by* House Joint Resolution No. 7, 1967 and adopted by the people May 28, 1968).

300. OR. REV. STAT. § 530.490(1) (1991).

301. Interview with William R. Cook, Assistant Attorney General, Oregon (Apr. 5, 1991). Cook suggests that the referendum of May 1968 constitutes approval by the beneficiaries of the change in the trust. *Id. See also* RESTATEMENT (SECOND) OF TRUSTS § 338 (1959) (discussing consent of beneficiaries to change a trust).

302. *See* Waggener, *supra* note 17, at 8. We shall return to this in detail in the next Section.

for example, have voided amendments to their state constitutions regarding expenditure of trust land mineral royalties because they were incompatible with the states' Enabling Acts.[303]

What is perhaps surprising about all of this is that trust principles providing for flexibility in the administration of trusts appear not to have been invoked in support of reasonable flexibility. Notably, the *cy pres* power, which may be applied when the court holds that it is impractical, impossible, or inexpedient to pursue purposes of the trust specifically as described by the settlor,[304] appears never to have been relied upon in resolving school lands cases. Similarly a principle that allows the courts to approve a trustee's "deviation"[305] from the mechanics of a trust in order to protect or achieve its goals seems not to have been relied upon. Finally, putting aside the exotica, the simple trust duty to preserve the trust property[306] is everywhere apparent in the discussions, but does not seem to be given much sway when juxtaposed with maximized economic returns.

Regarding the preservation of the trust or corpus principle, part of its absence from the discussion may be explained by the

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303. Williamson v. Commissioners of the Land Office, 301 P.2d 655 (Okla. 1956); Jensen v. Dinehart, 645 P.2d 32 (Utah 1982). In *Williamson*, the Oklahoma Education Association, as an amicus, argued that Congress was without authority to

> prescribe any such conditions operating to limit in the future the legislative powers of a new state over matters in their nature confined exclusively to the state as a part of their sovereign powers; that the establishment, maintenance and promotion of schools throughout the State is a matter of state concern and power and an exercise of sovereignty in a field reserved to the States, and that the Federal Government has no delegated powers in such field.

Id. at 658.

304. BOGERT, *supra* note 198, at 524-26. The *cy pres* rule allows the court to read liberally the terms of a charitable trust that is in danger of failing due to the impossibility of implementing the testator's specific directions. *See* RESTATEMENT (SECOND) OF TRUSTS § 399; *see also* EDWIN L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950). It is clear that *cy pres* applies only to charitable trusts. *See* RESTATEMENT (SECOND) OF TRUSTS § 349. Although we leave the details of this debate to the trust attorneys, we argue that state land grants are charitable trusts. Occasionally, the courts have used the term "charitable trust" to describe the land grants.

305. RESTATEMENT (SECOND) OF TRUSTS § 381. Sometimes called equitable deviation. *See also* BOGERT, *supra* note 198, at 518; C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 406 (1979).

306. RESTATEMENT (SECOND) OF TRUSTS § 176 (1959).

fact that, when the courts reject lessee's complaints and sustain Commissioner's efforts that might be characterized as "trust preservation," the courts describe this as respect for the administrator's discretion.[307] Therefore, one might argue, the idea is operative even if the nomenclature is missing. However, in the more difficult context, protecting the trust from beneficiary's demands, the principle is occasionally mentioned but never relied upon in preference to maximum returns.[308]

Approximately the same is true regarding deviation. One could argue that the deviation principle was relied upon if not endorsed by name in *Lassen* and its progeny. In *Lassen*, the Court held that, although the trust must be compensated for land allocated by the state to highway use, it was not necessary to go through the specific procedures of appraisal and auction in order to achieve that purpose.[309] The Supreme Court's conclusion is unevenly adhered to,[310] but apparently the trust principle has never been explicitly invoked. The classic *cy pres* case[311] suggests why it might be useful in protecting trust lands from over-exploitation by economic maximizers. It involved an 1861 bequest designed to support efforts to create "public sentiment that would put an end to Negro slavery" and to benefit fugitive slaves.[312] The settlor's heirs requested that the trust be dismantled when slaves were freed as a result of the Civil War. The court instead invoked the *cy pres* doctrine to direct use of the fund to support the broader purposes of the grant by helping the freed slaves with education and welfare programs.[313] More relevantly, a New York court applied *cy pres* to a bequest of land to a town to enable it to build a hospital.[314] The hospital was not needed and the court held that

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307. *See infra* notes 341-359 and accompanying text (discussing who is the trustee).

308. For recent cases, see Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230 (Okla. 1982), and less emphatically, County of Skamania v. State, 685 P.2d 576 (Wash. 1984).

309. Lassen v. Arizona Highway Dep't, 385 U.S. 458, 465 (1967).

310. *See, e.g.*, Deer Valley Unified Sch. Dist. v. Superior Court, 760 P.2d 537 (Ariz. 1988) (refusing to apply *Lassen* to the Arizona Constitution).

311. *In re* Will of Neher, 18 N.E.2d 625 (N.Y. 1939).

312. *Id.*

313. *Id.* at 626; *see also* BOGERT, *supra* note 198, at 526-27; Chester, *supra* note 305; Austin W. Scott, *Deviation from the Terms of a Trust*, 64 HARV. L. REV. 1025 (1931) (on general flexibility in trusts).

314. *In re* Will of Neher, 18 N.E.2d 625 (N.Y. 1939).

the testator's intent was actually to create a memorial to her husband; accordingly, the court allowed the land to be used for a memorial town administration building.[315]

The only state land grant case that mentions the *cy pres* doctrine did not rely on it.[316] A New Mexico case involving lands granted to establish and maintain a hospital for miners provides an example of how the doctrine might be applied.[317] As part of a reorganization of state hospitals, New Mexico downgraded its miners' hospital to an intermediate care facility and planned to provide surgical and other services at trust expense to miners at a central facility. This was disallowed, and the trial court refused to apply the doctrine of *cy pres*.[318] The appellate court noted that fact but did not discuss it while affirming and amending the decision.[319]

In sum, changing the trust appears less complex than one might have predicted. The idea of a "compact" does not have much meaning in this context. The federal government is bound by little, and the states are free to alter their management of the granted lands so long as they do not violate their enabling acts. Moreover, trust principles restricting changes to the trust have not been applied. The trust notions that have emerged in connection with the land grants seem fairly restricted to economic returns and undivided loyalty. Preserving the trust property, *cy pres*, and equitable deviation are rarely mentioned by the courts.

e. What is the Trust Property?

It is not initially obvious that identifying the trust property is more than a formality. The problems arise from the fact that when state constitutions declare that there is a trust, they are likely to mention only the permanent school fund and not mention the granted lands. This is because, as noted above, it was widely presumed during the accession period that public land ownership was temporary—that both the state and federal gov-

315. Chester, *supra* note 305, at 415 (discussing *In re* Will of Neher, 18 N.E.2d 625 (N.Y. 1939)).

316. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976).

317. *Id.* at 1326.

318. *Id.*

319. *Id.*

ernment would transfer their lands into private ownership. The concentration on the funds in most constitutional discussions of trusts could lead one to ask whether the granted lands are included in the trust. Certainly the answer is not obscure: the corpus of the trust includes both the lands and the funds arising from them.[320] Courts and statutes have made this absolutely clear. Why, then, do we bother with the topic at all, apart from emphasizing the point that it is helpful to read the specific documents in specific states? We do so because raising the issue allows us to dwell, albeit briefly, on a number of pesky little peculiarities that do, in fact, on occasion affect a significant portion of both recent case law and pressing contemporary policy issues. First, and most significant, the constitutional language regarding the trust funds varies, as does everything else, from state to state. Any attempt to analyze school land or fund management must begin by determining in each jurisdiction which funds arising from real estate transactions wind up in the permanent fund and elsewhere. The bulk of this Section will analyze this problem.

Two other points deserve mention. First, we hypothesize that the importance placed on fund management in constitutional discussion of trustees' duties appears to have created the emphasis on economic returns in discussion of trust obligations. This is, after all, the component of the conventional wisdom that we find most troublesome. So, while we cannot prove the point, we cannot resist making it.

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

Returning to the overriding question of the funds, we have

320. Not all lands that produce income paid into the trust are automatically part of the trust. For example, in Minnesota, "proceeds from minerals underlying navigable lakes are paid into the permanent school fund pursuant to MINN. STAT. SS 93.06—93.07." 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).

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

It is important to note that the exact path through which the money travels before reaching the beneficiaries varies in different states according to three factors: the source of the revenues, the beneficiary of the lands that produced the revenues, and the deduction for managerial expenses, which varies among land type and beneficiary. In Figure 5, solid lines with arrows denote the normal revenue flows that are common to all states; dashed lines with arrows represent flows in which variations are found in one or more states. The shaded area encompasses what can be thought of as the overall corpus. Contemporary policy analysts are enjoined to "follow the money." It is not easy to do this in the case of school lands, but it can be done.

Revenues from the first two categories, royalties and land sales, usually go into an "inviolate" permanent fund, with only the interest disbursed to the beneficiaries.[321] Receipts from surface and renewable resource leases, usually classed as rental income by land offices, are generally channeled directly to the beneficiaries. In some cases this does not happen until after the state land office deducts its operating expenses. Generally, these receipts do not go into the permanent fund. This is the flow on the left side of Figure 5. Receipts from nonrenewable resources, including land sales, are placed in permanent funds with only the dividends and interest from these funds distributed annually. This is the flow on the right side of Figure 5.

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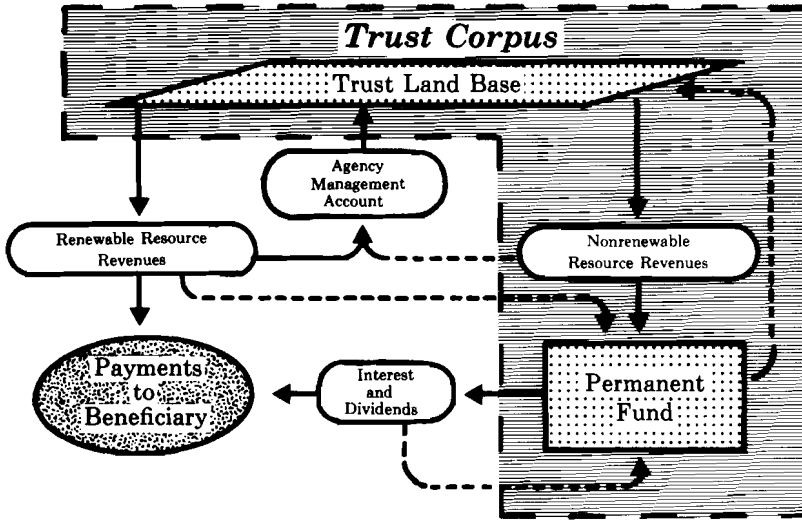
321. There are two exceptions to this generalization. First, in 1981 Utah allowed its beneficiaries to withdraw principal from their permanent funds in the face of a one-third cut in their appropriations from the legislature. *See* Jensen v. Dinehart, 645 P.2d 32 (Utah 1982). Second, states that have a land banking process, Arizona, California, and Washington, allow proceeds from the sale of trust lands to be retained in a special account, which is then used to purchase other lands for the beneficiaries.

FIGURE 5
GENERAL MODEL OF REVENUE FLOWS FROM
STATE TRUST LANDS TO BENEFICIARIES

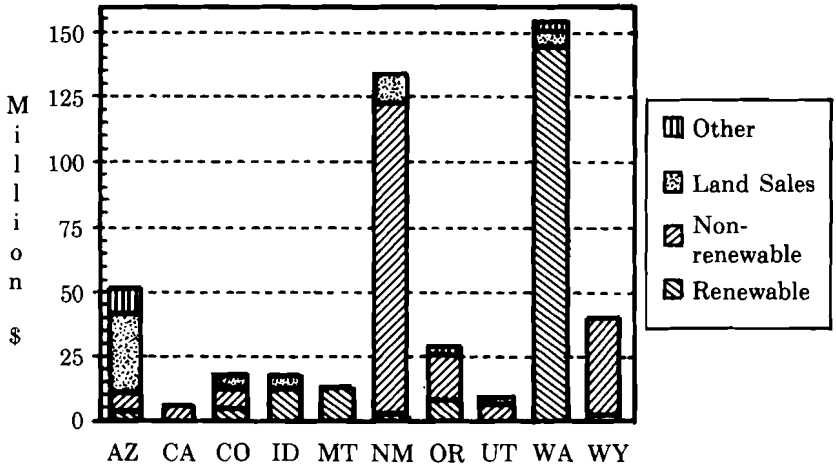


The levels of revenues, and their type, are significant because they may contribute to a different emphasis in resource management in different states. Some states emphasize management of their major revenue source (such as oil and gas in the case of New Mexico and California, and timber in the case of Washington and Oregon). Furthermore, if some resources return revenues to the operating expenses of the state land office, they may gain a priority in use compared to other uses.[322] For example, the land office may emphasize a use that returns operating funds to them (such as grazing) instead of a use that would return more to the trust even though it would involve selling the lands (such as commercial development). For this reason, the differentiation in Figure 6 between revenues going into permanent funds and those disbursed to beneficiaries may be significant. Distribution of reve-

322. Interview with Rick Lopez, Assistant Commissioner of Commercial Resources and Exchanges, New Mexico State Land Office (Aug. 2, 1988). This is also the case in Utah. Interview with Steven F. Alder, Assistant Attorney General, Utah (Feb. 25, 1991).

nues varies on a state-to-state basis. Whether the trust beneficiary is the county or the public schools and institutions also affects revenue distribution. Table 1 shows this variation among the ten western states. In all the states, renewable revenues from public schools and institutions are placed in permanent trust funds.

FIGURE 6
DIFFERENTIATION IN REVENUES BY CHARACTER RENEWABLE, NONRENEWABLE, LAND SALES, AND OTHER (PRIMARILY INTEREST AND FEES) IN 1988-1989



Sources: Jon A. Souder & 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).

TABLE 1
DIVISION OF REVENUES BETWEEN DIRECT DISBURSEMENT TO BENEFICIARIES (NET OF LAND OFFICE EXPENSES, IF APPLICABLE) OR PLACEMENT OF BENEFICIARIES' NET PERMANENT FUND

B = Disbursable to Beneficiary
LB = Land Bank
PF = Permanent Fund
OT = Other
? = Unknown

Revenue Source	AZ[a]	CA[b]	CO[c]	ID[d]	MT[e]	NM[f]	OR	UT	WA	WY
RENEWABLE										
Agriculture	B	B	B	B	B	B	PF	B	B	B
Grazing	B	B	B	B	B	B	PF	B	B	B
Timber	PF	B	B	B,OT	PF	B	PF	B	B	B
Water	PF	B	?	?	?	?	PF	?	?	B,PF
Commercial	?	B	B	?	B	B	PF	B	B	B
Other Noncommodity	?	B	B	?	?	B	PF	B	B	B
Non-renewable										
Minerals										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	?	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
Oil and Gas										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	PF	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
Coal										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	B	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
Geothermal										
Surface Rental	?	B,OT	?	?	B	B	PF	PF	?	B
Royalties	?	B,OT	?	?	PF	PF	PF	PF	PF	PF
Other Commodities										
Surface Rentals	?	B	B	PF	B	B	PF	PF	?	B
Royalties	?	B	PF	PF	PF	PF	PF	PF	PF	PF
Lands & Misc.										
Right-of-Way	B,PF	B	PF	PF	?	?	PF	PF	PF	PF
Land Sales										
Interest	B	LB	PF	?	?	?	PF	PF	LB	B
Income	PF	LB	PF	PF	PF	PF	PF	PF	LB	PF
Fees and Permits	B	B	?	B,PF	?	?	PF	B	B	OT

a. ARIZ. REV. STAT. ANN. § 37-521 (West Supp. 1991) for receipt placement into permanent fund.
b. California no longer has a permanent fund. CAL. PUB. RES. CODE § 6417.5 (West 1977) for the use of school and in-lieu lands, § 6417.7 for the sale of school and in-lieu lands. Geothermal revenues are divided differently with 50% net going to income fund and 50% in to the Renewable Resources Development Account which is divided into three categories: 30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions; and 40% to the country where the revenues were generated.
c. Based on COLO. REV. STAT. § 36-1-116 (1990). COLO. REV. STAT. § 36-7-202 says that 75% of timber revenues go to the income fund and 25% go to the county school fund for lands within designated state forests.
d. IDAHO CODE § 58-503 (Supp. 1991) for distribution of timber receipts on acquired lands: 50% net to general fund and 50% to county school fund.
e. MONT. CODE ANN. § 77-3-106 (1991) for metallic receipts distribution; § 77-3-318 for coal receipts; § 77-3-436 for oil and gas receipts; § 77-4-127 for geothermal receipts distribution. Note that only 95% of disbursable and 95% fund interest is

distributed, the remaining 5% in each category goes back into the permanent fund by MONT. CONST. art. X, § 5.
f. N.M. STAT. ANN. § 19-1-17 (1978).

Both renewable resource funds and the interest on the permanent funds from the public school trust lands go into the common school construction fund in Washington. This, until recently, was the only state source of funds for school building construction in Washington.[323] Funds from public school trust lands in the other states have an undesignated purpose, and comprise only a portion of the states' contribution to education, usually apportioned to the school districts according to the number of students in each district. Idaho is different from the other states in placing funds from the sale of timber, along with land sales, easements, and mineral royalties into a permanent endowment fund, with the interest distributed to the beneficiaries.[324] Montana differs from the other states in disbursing only ninety-five percent of the renewable resource revenues, and only ninety-five percent of the interest on the permanent funds to the permanent fund.[325] This variation is shown in Figure 5 by dashed lines from the renewable resource revenues to the permanent fund, and from the interest and dividends to the permanent fund.

f. Trust Purpose—What Were the Grants for and Who Is the Beneficiary?

It has already been noted that variations in language in the pertinent documents raises a broad range of potential purposes for the granted lands.[326] Nevertheless, trust purposes have been derived from generic statements rather than specific ones, and present greater clarity and uniformity than can be found in the documents and their definition of the beneficiary. Simplification in discussion of the beneficiaries derives from three basic themes. First, the trusts are for the schools; second, the trust principle of undivided loyalty prohibits any consideration being given to gen-

323. Washington Dep't of Natural Resources, Proposed Forest Land Management Plan 29 (1983). In recent years, the Legislature has given additional funds for school construction. Interview with Nick Handy, Chief Counsel, Washington Department of Natural Resources (Mar. 6, 1991).

324. IDAHO DEP'T OF LANDS, IDAHO FORESTRY OPPORTUNITIES, 1980-1990, at 3 (Bill Petcack et al. eds., 1988).

325. MONT. CONST. art. X, § 5.

326. *See supra* notes 66-74 and accompanying text.

eral benefits; and third, the benefit will be accrued by raising money for the schools.

Herein, we will suggest three alternative notions of beneficiary: (1) the direct use by the schools of the lands, in the form of (a) lands for the construction of schools or (b) for environmental preservation and education for the edification of school children or others; (2) the possibility that the school grants contemplated other benefits or beneficiaries than schools. If that is too far from what is now considered normal, we proffer a third category (3) indirect benefits, a redefinition of the "raise money" theme. We do not question the idea that the trustee owes a duty of "undivided loyalty" to the beneficiary. We simply believe that the plain language of the trust documents permits a broader definition of both who the beneficiaries are and what benefits them than is presently acknowledged.[327]

What appears to be the easiest inroad into the traditional definition of trust land uses involves direct use of the lands by the currently recognized beneficiary, the schools. *Lassen*, the basic case in the most restrictive state, does not preclude a broader definition of the beneficiary. *Lassen*, in fact, appears to presume that schools will make direct use of appropriately situated parcels.[328] The *Lassen* Court states that, in granting the lands, Congress never "supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes."[329] The court argued that Congress could scarcely have expected that many of the eight million acres of its grant "for the support of the common schools, all chosen without regard to topography or school needs, would be employed as building sites."[330] Congress intended some of the lands to be used as building sites for schools.

327. *See* Johnson v. Department of Revenue, 639 P.2d 128, 134 (Or. 1982).

328. *See* Lassen v. Arizona Highway Dep't, 385 U.S. 458, 463 (1969).

329. *Id.*

330. *Id.* There are two issues here. The first is whether the school district has a right to make use of the school lands. The second is, if yes to the first, must the school district compensate the trust. If there is no compensation to the trust, one could argue that state programs for spreading the benefit of the trust and permanent fund are trumped, and that one school has illicitly commandeered resources belonging to all.

However, this does not entirely resolve the issue. There may be, in some particular state, constitutional or statutory provisions that preclude this kind of a use of trust lands. Whereas the Washington[331] and Oregon Constitutions appear to raise no barriers, the Idaho Constitution arguably does. The Idaho Constitution clearly directs the State Board of Land Commissioners to treat the land "in such manner as will secure the maximum long term financial return thereof."[332] Hypothetically speaking, a thwarted school board might argue, depending on the cost of an alternative school site, and the return from the particular parcel it coveted for building, that the direct use as a building site was still the preferred use.

Much of the same logic applies to what appears to be a harder case: dedicating land of historic or ecological interest, as discussed in the opening section of this Article, for educational purposes. Again, state constitutions vary. Even if an Idaho school district could have prevailed with the economic return argument in the building site hypothetical, it is not clear that the same logic would apply to the biological preserve case.[333] However, if the precise wording in another jurisdiction was "maximum possible benefit" rather than "amount," the opportunities are far less constrained.

Part of this argument depends on whether the enabling act or the state documents permit a broader definition of the beneficiary than just the schools. If trust principles become operational only as a result of state commitments, then the content of the state document ought to have more weight than has been appar-

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331. Washington does currently

> use trust property as educational interpretive areas if [they will be] accessible equally to appropriate trust beneficiaries. On charitable, educational, penal and reformatory institutional trusts, [the state] allows the trust property to be used for construction of facilities usable by the beneficiary pursuant to advice of legal counsel.

Interview with Nick Handy, Chief Counsel, Washington Department of Natural Resources (Mar. 6, 1991).

332. IDAHO CONST. art. 9, § 8.

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

ent in post-*Lassen* interpretations. Wyoming provides a clear case. Although the lands were granted "for the support of schools," they were accepted "for educational purposes."[334] Arguably this would authorize use of land as an ecological or historical site. In Idaho the educational use might prevail as opposed to a grazing lease, but perhaps not as opposed to an oil well. The possibilities are not limitless, but they are far more varied than they appear at first blush.

In states with less detailed enabling acts than Arizona and New Mexico, the potential obstacle to broadening the definition of beneficiaries is not the enabling act's basic notion that the grants were to support common schools, but the trust principle of undivided loyalty. The Wyoming acceptance language, "for educational purposes,"[335] would not appear to provide much assistance for those arguing that land management programs and farming interests are acceptable purposes. In contrast, Oklahoma has a preferred position for agriculture.[336] However, language accepting the lands in trust "for all the people" as in Washington,[337] and the more recent language in Oregon,[338] might arguably do even more, or at least permit different things. At a minimum it would require that a court evaluate whether a specific use violated the enabling act rather than simply envelop the entire turf in a selective recitation of trust principles.

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

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

335. WYO. CONST. art. XVIII, § 1 (1889), *reprinted in* 7 THORPE, *supra* note 24, at 4117, 4147.

336. OKLA. CONST. art. XI, § 6 (1907), *reprinted in* 7 THORPE, *supra* note 24, at 4271, 4320.

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

338. *See infra* note 299.

resources?

As required by trust principles, modern courts have been quite unwilling to accept diversion of the trust resources to other purposes, such as highways. They may, however, have been excessively restrictive regarding the use of trust resources that arguably enhance the trust, but which also create a general benefit not exclusively enjoyed by the beneficiary.[339] In discussing *Nigh* we suggested that the court appears to have misread both the trust documents and trust principles to prevent a school land management regime that arguably benefits the agricultural community. But this is not necessarily the only or the major result. Other courts, with less emphatic maximum economic returns, have been willing to entertain the notion.[340]

g. Who is the Trustee?

All this potential variability in uses of the land ought to make us wonder about who is managing them: who is the trustee? Is the manager or managing agency the same as the trustee? Or is the legislature, governor, or state treasurer the trustee and the land commissioner merely the manager. Conventional wisdom suggests, with considerable authority, that the state lands com-

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339. The divided loyalty issue is not simply resolved. *Compare* Ervien v. United States, 251 U.S. 41, 47 (1919) (enjoining the use of money derived from the sale of trust lands to fund advertisements for the state) *and* County of Skamania v. State, 685 P.2d 576 (Wash. 1984) (rejecting state efforts to manage the fund to protect timber contractors and the state economy at the expense of the named beneficiaries) *with* Toomey v. State Bd. of Land Comm'rs, 81 P.2d 407 (Mont. 1935) (holding that the lands are held in trust for "the people."), *and* State *ex rel.* Thompson v. Babcock, 409 P.2d 808 (Mont. 1966) (holding that the steward can turn away the highest bid to protect the trust).

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

mission or commissioner is the trustee. For example, in a 1983 case, *Jeppeson v. Department of State Lands*, the Montana Supreme Court asserted that the

> lands granted by the federal government to the states for the support of public schools constitute a trust, and the state is trustee of those lands. Thus, a fiduciary duty is placed upon the Board of Land Commissioners and the Department of State Lands to manage the trust according to the highest standards. . . . The department, under the direction of the board, has responsibility for leasing, managing, and otherwise disposing of these lands, subject to the trust guidelines.[341]

This may be taken as the conventional wisdom on the subject, certainly as expressed by the land commissioners.[342]

When the courts deal with this issue, the response becomes slightly more complex. This question is typically a simple issue of whether a board's exercise of discretion can be justified. Many times, in these cases, it does not matter that the manager may also be the trustee. Frequently the trust plays little or no role in the court's evaluation of the administrator's decision. A Colorado court upheld a board's authority to cancel a grazing lease to accommodate a more recent coal lease even though doing so clearly exceeded the statutory criteria for when lease cancellation was authorized.[343] Without ever mentioning the notion of trusts or trustees, the court upheld the cancellation, concluding: "[i]n our view, the constitution mandates that, unless limited by express statutory regulations, the board shall enter into whatever leases it deems to be most beneficial to the state. It may therefore utilize any lease terms not prohibited by law."[344]

It is also common to find trust notions providing a minimum verbal flourish in what would otherwise be a standard deference decision.[345] Because the courts give themselves enormous latitude

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341. 667 P.2d 428, 431 (Mont. 1983) (citations omitted).

342. Fairfax & Souder, *supra* note 44.

343. Evans v. Simpson, 547 P.2d 931, 933 (Colo. 1976) (interpreting COLO. REV. STAT. § 36-1-131 (1973), which prohibits violations of lease provisions or making false statements in lease application).

344. *Id.* at 934.

345. *See, e.g.*, State v. Babcock, 409 P.2d 808 (Mont. 1966) (a case where trust principles provide a veneer rather than a central part of the analysis); *but see* Jeppeson v. Department of State Lands, 667 P.2d 428 (Mont. 1983) (less than 20 years later).

to take hard looks, or not, at administrative discretion, and use a wide range of demanding criteria to determine the appropriateness of agency action, it is not possible to identify cases where trust principles have clearly tipped the scales in favor of an agency action that would otherwise have been disallowed. The Montana Supreme Court, after referencing all the trust trappings cited above, appeared in *Jeppeson* to conclude without regard to them:

> this Court will not compel a state agency to make a particular decision with respect to a matter when that agency exercises its own judgment and discretion, and has not violated any statutory provisions or engaged in fraudulent action.
>
> . . . .
>
> In sum, we find no evidence of arbitrary and capricious action on the part of the department so as to justify the extraordinary relief requested by the appellant.[346]

However, it is also clear that the notion of the trust played a role in defining the scope of the discretion. For example, the court noted that the fact that "the statute and regulations did not include provisions respecting the evaluation of a party's willingness and ability to make timely payments does not remove them from the list of criteria that a fiduciary could consider when acting upon a proposed assignment."[347]

The question of how important the definition of a trust is to the manager-trustee's discretion is complicated by the fact that in cases which do not uphold the board's exercise of discretion the court is likely to simply redefine the trustee, hence the locus of discretion. When binding the board to the specific detail of the disputed statute, the court will frequently not decide that trust principles have been exceeded, distorted, or ignored. It will simply find that the legislature rather than the board is the trustee. For instance, upholding the legislature's decision regarding oil and gas lease terms, the Montana Supreme Court found that the legislature was in an awkward position because it "had the duty of discharging two trusts in disposing of state lands."[348] Yet, the

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346. *Jeppeson*, 667 P.2d at 433-34.

347. *Id.* at 433; *compare* North Fork Preservation Ass'n v. Department of State Lands, 778 P.2d 862 (Mont. 1989).

348. State *ex rel.* Strandberg v. State Bd. of Land Comm'rs, 307 P.2d 234,

two trusts conflicted: "There can be no sacrifice of the rental for additional royalty without, at the same time, violating § 1, Article XVII, as to the interest disposed of by renting."[349] Hence, the board was bound by the decision of the trustee, the legislature.

Other contenders for the role of trustee emerge from the fact that different parts of the trust are typically administered by different agencies: the state treasurer or auditor is frequently considered to be the permanent school fund trustee. Who decides when a warrant against the permanent fund is a legitimate use of trust assets and ought to be paid? In an early Colorado case, the State Board of Land Commissioner's efforts to comply with statutory direction regarding investment of public school funds in loans on "unencumbered cultivated farm lands within the State of Colorado" were thwarted by the refusal of the state treasurer to pay the amount of the loan as directed.[350] The treasurer asserted that he was authorized by the constitution to securely and profitably invest the school fund, and that the statute which the Land Commissioners were attempting to carry out was unconstitutional because it granted special privileges to farmers.[351] The legislature was identified as the appropriate constitutionally designated body to be making the final decisions, again without reference to any trust or trustees. The trustee was required to pay the warrant.[352] More recently, Idaho's long-time state treasurer has waged a similar, and similarly unsuccessful battle, to assert authority over trust funds against what she considered to be legislative and statutory frittering away of the assets.[353] Other jurisdictions have reached other conclusions on the same points.[354]

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236 (Mont. 1957).

349. *Id.* at 236-37.

350. People *ex rel.* Miller v. Higgins, 168 P. 740, 740 (Colo. 1917).

351. *Id.* at 742.

352. *Id.*

353. In a number of cases involving legislation allowing the Land Board to use up to 10% of receipts for expenses, and statutes defining how to calculate permanent fund losses that under the Idaho Constitution must be repaid, the legislature and not the state treasurer has been found to have authority. *See* State *ex rel.* Moon v. State Bd. of Examiners, 567 F.2d 858 (9th Cir. 1978); State *ex rel.* Moon v. State Bd. of Examiners, 662 P.2d 221 (Idaho 1978), *cert. denied*, 464 U.S. 992 (1983); Moon v. Investment Bd., 560 P.2d 871 (Idaho 1977); Moon v. Investment Bd., 548 P.2d 861 (Idaho 1976); Moon v. Investment Bd., 525 P.2d 335 (Idaho 1974).

354. *See, e.g.*, United States v. Swope, 6 F.2d 215 (8th Cir. 1926) (state of-

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

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

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

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ficers entitled to make expenditures out of funds derived from trust lands); *In re* Salaries of Comm'rs and Employees of State Land Bd., 133 P. 140 (Colo. 1913) (discussing administrative expenses); State *ex rel.* Bottcher v. Bartling, 31 N.W.2d 422 (Neb. 1948) (profits in the trust fund must be placed in a capital reserve to offset past losses).

IV. MANAGEMENT ON THE GROUND

This Section will take the discussion out of the realm of case law and onto the ground, combining economic theory and management reality to underscore imprecisions in the concept of economic maximization. While not wanting to assert that everything currently being practiced as putative trust land management is actually acceptable trust principles, the diversity of programs demonstrates that there is more variation than might be assumed. Forestry programs provide a clear example of the range of alternative roles that a state can play in the management of its trust resources. Even if we accede to conventional wisdom and accept managing the lands for maximum economic returns as the only possibility, there is still enormous flexibility. The state has a choice in managing these lands solely for the production of revenues, either in the short- or long-term, or the state can manage the lands so that other beneficiary concerns are incorporated into management strategies. For example, in those states and counties that have a high dependency on timber for jobs and public finance, the state managing agency may modify the revenue maximizing strategy to provide for long-term sustained yield, or to even out expected revenue fluctuations based on changing harvest levels, or to provide for the development of infrastructure such as roads as a part of the state forestry program. In each of these cases, the beneficiaries' concerns affect management of their lands and provide feedback to the trustee agency. This process is in contrast to other resources managed in trust by the state, such as grazing and nonrenewable energy resources, where beneficiary input in the states' managing decisions is not large.

The Section describes the context for state trust lands forest management. The origins of the timberlands and their extent are described for the ten western states with trust lands, with a subset of four major state trust timber producers selected for detailed examination. The organization of the state agencies responsible for management of trust lands is compared among these four states. Timber receipt flows from both school and "county trust lands"[355] are described. The second Section shows variations in how the states' trust responsibilities affect their timber management strategies.

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355. These are tax-forfeited lands not granted lands.

A. *Management Context*

In many cases, especially in the Northwest, the lands attractive for timber were sold, or the rights to those sections were claimed prior to accession or were within forest reserves that had been bought by speculators to use for selections of federal lands elsewhere in lieu of the state lands.[356] The state trust lands that passed into private ownership were frequently consolidated into large holdings by timber companies. The timber on these lands, and the federal lands privately obtained under the various land disposal acts, was then harvested as demand justified, and they were then either retained by the companies, sold to individuals to be converted to pasture lands, or allowed to revert to the counties for back taxes. This last option was frequently exercised during the depression and after forest fires wiped out any value that the lands might have had for timber production in the near future.[357]

In two states, Oregon and Washington, county forest lands managed in trust by the state are significant: 652,000 acres in Oregon and 622,500 acres in Washington.[358] These lands are of two types: lands forfeited by tax or other assessment defaults which are deeded by the county to the state and managed in trust for the county; and lands purchased with bond revenues by the state. The latter are managed by the state and net revenues are returned to the county but they are not considered trust lands. The difference in the trust mandates between these county forest lands and the forested state trust lands will be discussed at greater length below; suffice it to say here that these tax-reverted lands have a different trust mandate and different beneficiaries—and in Oregon even a different trustee—from those trust lands originally obtained by the state through federal grants.[359] In our subsequent references to these lands, the county tax-reverted and purchased lands with the county as beneficiary will be called the "county forest lands," while the forested school and institutional trust lands will continue be called the "state trust lands" to

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356. The best description of the processes used to fraudulently obtain timbered public lands (federal as well as state) in the northwestern United States is found in PUTER, *supra* note 157.

357. *See* PAUL A. LEVESQUE, A CHRONICLE OF THE TILLAMOOK COUNTY FOREST TRUST LANDS (1985).

358. Fairfax & Souder, *supra* note 44, at 46.

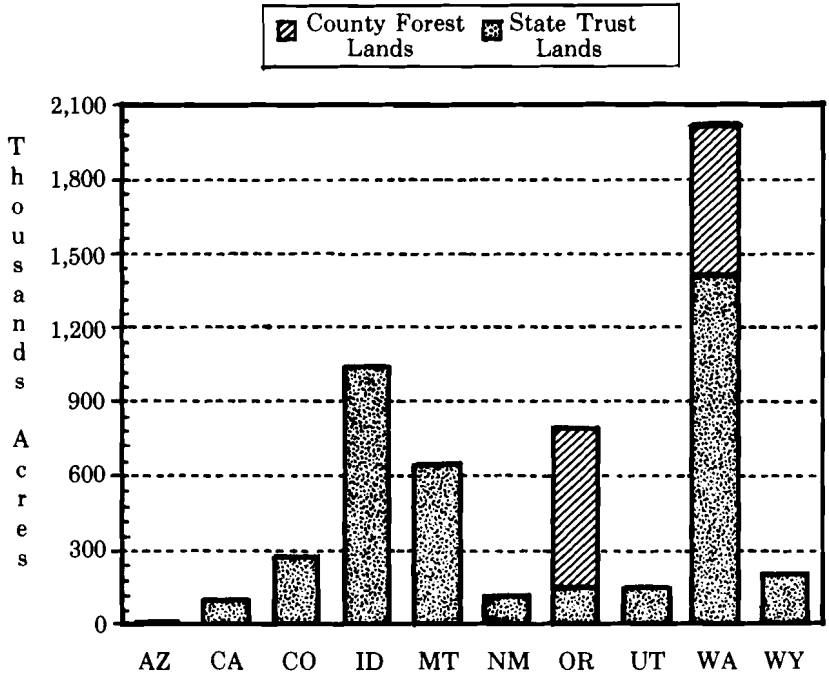
359. *Id.*

differentiate between these two types of trust mandates.

1. Forest Land Base

Forested lands and timber revenues form a significant part of state trust lands management in some states. Timberlands are defined as those lands that are producing, or are capable of producing twenty cubic feet per year per acre of industrial wood, and

FIGURE 7
STATE-OWNED OR MANAGED TIMBERLANDS
IN THE WESTERN UNITED STATES

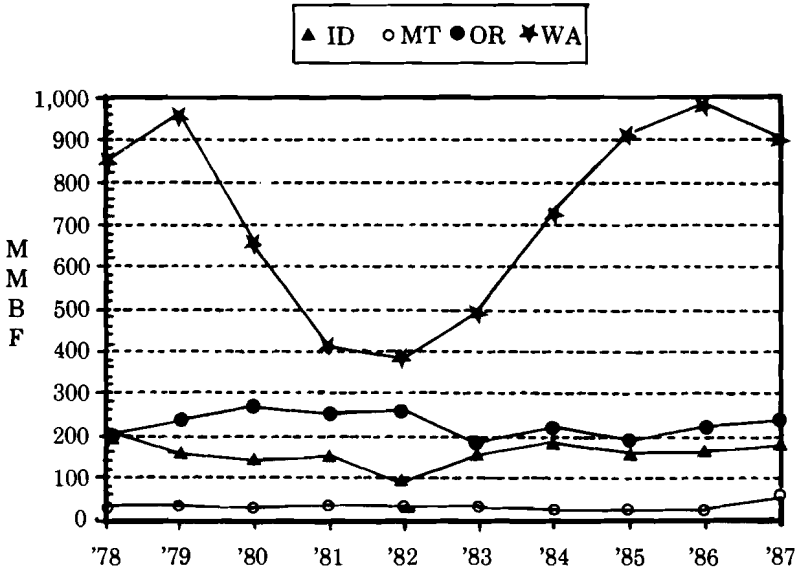


Sources: K. WADDELL ET AL., FOREST STATISTICS OF THE UNITED STATES, 1987 (1989) (Resource Bulletin PNW-RB-168, Pacific Northwest Research Station Forest Service, U.S. Dep't of Agriculture, Portland, Or.); Jon A. Souder & Sally K. Fairfax, Western States Trust and Sovereign Lands Survey Results (May 1, 1990) (survey results on file with Department of Forestry and Resource Management, Univ. of Cal., Berkeley).

that are not withdrawn from timber production by statute or administrative action.[360] Figure 7 shows these areas for the ten western states.

As Figure 7 demonstrates, there are three major categories of state timberland ownership. The largest holder is the State of Washington, with an ownership of slightly over two million acres. Medium holders include Idaho with over one million acres, Montana with 638,000 acres, and Oregon with 827,000 acres. States with smaller timberland holdings are Arizona with 12,000 acres, California with 95,000 acres, Colorado with 274,000 acres, New

FIGURE 8
TIMBER HARVESTED FROM THE LARGEST STATE TRUST TIMBERLAND OWNERS



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

360. BALL ET AL., FOREST STATISTICS OF THE UNITED STATES, 1987 (1989) (Northwest Research Station Resource Bulletin PNW-RB-168).

Mexico with 112,000 acres, Utah with 150,000 acres, and Wyoming with 203,000 acres.

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

The land base for both the state trust lands and the county forest lands, while not fixed in place, is not expected to be reduced. Washington has specific legislation allowing the state to sell lands, place the proceeds in a land bank, and use these bank funds to purchase other lands with natural resource or income-producing potential.[361] Oregon also has a policy of maintaining its county forest lands.[362] In 1969, the Oregon Land Board decided to stop selling state trust lands and instead to manage them for long-term income production, with the exception of scattered and isolated parcels.[363] No equivalent policies have been found for Idaho and Montana. However, Idaho will not sell more than 100 sections (64,000 acres) per year of all types of lands, and sells only to eliminate management and administrative problem areas.[364] On the other hand, Idaho exchanged approximately 50,000 acres of trust lands during 1985-1987.[365] The Montana State Land

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361. WASHINGTON DEP'T OF NATURAL RESOURCES, TRANSITION LANDS POLICY PLAN (1988). Land sales and land bank legislation is found in WASH. REV. CODE § 79.66 (1984).

362. LEVESQUE, *supra* note 357. The Oregon Department of Forestry operates under the provisions of OR. REV. STAT. ch. 526 (1991). Public Lands are regulated under *Id.* ch. 274.

363. Fairfax & Souder, *supra* note 44, at 54.

364. *Id.* at 53, 60, 63-64 (mandated by IDAHO CONST. art. 9, § 8).

365. During that period, Idaho deeded 51,231.36 acres and acquired 45,145.40 in exchange. This acreage was not predominantly forest land. Most current and anticipated exchanges involve nonforested BLM land. Personal communication to

Board has a policy of not selling state lands at the present time, while exchanges are made to acquire land of equal or greater value with high revenue generating potential and good access and site productivity, and to get out of isolated parcels and federal special management areas.[366]

2. *Institutional Structures for Forest Management*

Three institutional structures for the management of state forest trust lands are found in the four states. In Oregon, the Department of Forestry manages all the county forest lands, and manages the forested state common school and institutional trust lands under contract with the Division of State Lands.[367] The Oregon Board of Forestry is composed of seven public members, with the State Forester serving as secretary of the Board. In contrast, the Oregon State Land Board is composed of three elected officials: the governor, secretary of state, and state treasurer. Even though about twenty percent of the lands managed by the Department of Forestry are entrusted to the Oregon State Land Board, it does not have representation on the Board of Forestry; however the State Land Board has sole authority over policy issues on state trust lands, even when the lands are managed by the Department of Forestry.[368]

The separation of management responsibilities is not found in the other three states. In Washington, the Department of Natural Resources manages both the county forest lands and the state school and institutional trust lands.[369] A similar situation is found in Idaho and Montana. Although these states do not have county forest lands, the Department of State Lands in each of

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Sally Fairfax from Stephanie Balzarini, Office of the Attorney General of Idaho (Mar. 1991).

366. Fairfax & Souder, *supra* note 44, at 53, 55-60.

367. Logan Jones, *State Forest Land, in* ASSESSMENT OF OREGON'S FORESTS 49, 50 (Gary Lettman ed., 1988).

368. Personal communication with William R. Cook, Assistant Attorney General, Oregon (Mar. 1990).

369. Washington Dep't of Natural Resources, Proposed Forest Land Management Program 1984-1993, at v (Nov. 1983). The Department of Natural Resources manages the University of Washington trust lands but cannot sell them without the Regent's permission. WASH. REV. CODE § 79.01.184 (1983); Personal communication with Nick Handy, Chief Counsel, Washington Department of Natural Resources (Mar. 6, 1991).

these states manages both the forested and nonforested trust lands.

Along with the management of trust forest resources, each of the four state agencies administers other programs. All of the states have forest fire protection responsibilities.[370] Forest practices are regulated in all four states by the same agencies managing the trust forest lands. Extension forestry is also an administrative function of these offices. In addition, the states that manage the entire compliment of trust lands have grazing, commercial leasing and development, and sovereign lands programs within their jurisdiction.

3. Revenues Distribution and Management Funding Mechanisms

Revenue from timber sales goes either to the beneficiary or to the permanent fund after management expenses have been deducted. In Montana and Oregon, net receipts from state trust land timber sales go into the permanent fund. Net receipts from all other timber sales, from state trust lands in Idaho and Washington,[371] and from county forest trust lands in Washington and Oregon,[372] go directly to the beneficiary. The counties will not receive any revenues from the purchased county lands until the bonds are repaid.[373] Revenues from land sales and rights-of-way are also generated by county forest lands; these revenues are used to purchase replacement lands in Washington,[374] but are distributed directly back to the county of origin in Oregon.[375] The states' timber management expenses are funded by a number of different processes. Generally, a percentage of revenues from renewable resource receipts is deducted prior to distribution. In Oregon, only renewable resource revenues are used to fund the operations of the Department of Forestry for both state trust and

370. Fairfax & Souder, *supra* note 44, at 5; LEVESQUE, *supra* note 357, at 75.

371. Until 1966 net receipts from timber sales on state trust lands in Washington went into the permanent fund. Personal communication with Don Lee Fraser, former Supervisor, Washington Department of Natural Resources (Mar. 13, 1991).

372. OR. REV. STAT. § 530.110 (1991); WASH. REV. CODE § 76.12.120 (Supp. 1992).

373. OR. REV. STAT. § 530.210.

374. WASH. REV. CODE § 76.12.120.

375. LEVESQUE, *supra* note 357, at 751.

county forest lands. There is a difference in the split in revenue between county trust lands and state trust lands in Oregon. The Oregon Department of Forestry receives 36.25% of the revenues from the county forest lands, but recovers only administrative costs for forestry management on the common school lands.[376] In the case of county forest lands, receipts from land sales and rights-of-way are used to purchase other lands, or returned to the county of origin.[377]

In Washington, timber management expenses may also be funded through a percentage of nonrenewable resource receipts. The Washington Department of Natural Resources receives up to twenty-five percent of the revenues from both renewable and nonrenewable resources, including land sales, for its operational cost accounts for the state school and institutional trust lands.[378] In contrast, up to twenty-five percent of revenues from tax-reverted county forest lands, and up to fifty percent of revenues from those county forest lands obtained by gift or purchase by the board can be used for management expenses in Washington.[379] Proceeds from sales of Washington county forest lands are used to buy replacement lands.[380]

In Idaho and Montana, the majority of timber management expenses are funded directly from the state general fund, with small exceptions. Management cost recovery in Idaho includes a Forest Improvement Program to maximize the revenue production from state-owned forest lands by levying a ten percent fee on gross revenues from timber sales on these lands to fund the program.[381] The remainder of the funds are deposited into the per-

376. Oregon Dep't of Forestry, 59 Forest Log 6 (Aug.-Sept. 1989). Comparative percentages of sales are not discussed. Whether the cost recovery is on a sale-by-sale basis, by management area (75% of the forested state trust lands are in the Elliot State Forest in Clatsop County), or on a program-wide basis is not stated. Generally the deduction for management expenses has been 25%. Personal communication between Pam Wiley, Assistant Director, Oregon Department of Lands, and Sally K. Fairfax (Mar. 1991).

377. LEVESQUE, *supra* note 357, at 751.

378. Washington Dep't of Natural Resources, *supra* note 369, at 29.

379. *Id.* at 28.

380. WASH. REV. CODE § 76.12 (1983).

381. IDAHO DEP'T OF LANDS, *supra* note 324, at 9. IDAHO CODE § 58-140 (1991) requires that funds derived from specific activities, such as timber, be used only to improve the productivity and revenue generation of that activity. For timber, allowable activities are timber management, protection, and reforestation.

manent fund; timber management operations of the Idaho Department of Lands are funded from direct legislative appropriation.[382] Montana has a resource development program funded by an amount not to exceed 2.5% of the income received from trust lands, although it is primarily used in range and agricultural development projects.[383] An additional eleven dollars per thousand board feet of timber sold is retained from receipts for brush control, and another eleven dollars per thousand board feet is retained for timber stand improvement activities.[384] The remainder of Montana's forestry management activities are funded through direct legislative appropriations of general funds.[385]

B. Trust Responsibilities

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

1. Maintenance of Trust Land Base

Perhaps the most elementary question of trust land management is whether the trust lands will be retained or sold. Early state policies throughout the west encouraged the sale of trust

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382. IDAHO DEP'T OF LANDS, FOURTEENTH ANNUAL REPORT 1987-1988, at 7 (1989).

383. DEPARTMENT OF STATE LANDS, OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MONTANA, REPORT ON EXAMINATION OF FINANCIAL STATEMENTS, TWO FISCAL YEARS ENDED JUNE 30, 1983, REPORT 83-20, at 3-10 (1983). The program was established by the Legislature in 1967. MONT. CODE ANN. § 77-1-604 (1991). MONT. CODE ANN. § 77-1-605 allows funds to be used to improve productivity of timberlands.

384. MONT. CODE ANN. § 77-5-204(4) (1991).

385. DEPARTMENT OF STATE LAND, *supra* note 383, at 10. The "infusion of non-trust funds to support management and administration" adds weight to the argument that school lands are not quite a trust or a trust with a twist "Generally, a trust would use its own assets to pay its expenses." Personal communications with Gail Lewellan and Andrew Tourville, Assistant Attorneys General, Minnesota (Mar. 11, 1991); *see also* RESTATEMENT (SECOND) OF TRUSTS § 188 (1959).

lands, both for their revenues, and as an inducement to settlement.[386] Present state policies in Washington, Oregon, Idaho, and Montana mandate the maintenance of the forest land base on the state school and institutional trust lands, while allowing for sales and exchanges to rationalize the pattern of ownership. In Washington, exchanges may be facilitated by a Land Bank, where the Washington Department of Natural Resources temporarily places proceeds from the sale of lands while waiting to purchase other lands identified as having potential benefits to the trusts.[387] Isolated and fragmented sections of state trust lands that are not suitable for management in Oregon may be sold with the proceeds designated for purchase of replacement lands.[388] The policy with respect to Oregon county forest trust lands is to replace them within the same county, otherwise to return the proceeds from the original sale to the county of origin.[389] In Idaho, "all state-owned lands classified as chiefly valuable for forestry, reforestation, recreation, and watershed protection are hereby reserved from sale and set aside as state forests."[390] Proceeds from land sales in Idaho go into the permanent fund; however, forest lands may be acquired by the Department, with the acquisition cost being repaid by timber sale revenues.[391] Lands classified as timberlands in Montana are restricted from sale.[392] Land exchanges may

386. *See supra* note 25.

387. According to a state statute,

> The legislature finds that from time to time it may be desirable for the Department of Natural Resources to sell state lands which have low potential for natural resources management or low income-generating potential or which, because of geographic location, or other factors, are inefficient for the department to manage. However, it is also important to acquire lands for long-term management to replace those sold so that the publicly owned land base will not be depleted and the publicly owned forest land base will not be reduced.

WASH. REV. CODE § 79.66.010 (1984). The Land Bank is allowed to accumulate a maximum of 1,500 acres before transfer to a specific trust beneficiary. *Id.* § 79.22.020.

388. OR. REV. STAT. § 273.413(1)-(2) (1989). This applies only to state trust land managed by the State Land Board.

389. LEVESQUE, *supra* note 357, at 580.

390. IDAHO CODE § 58.133 (1991).

391. *Id.* § 58.504. This is not an active program. The "Idaho Department of Lands does not sell its timber land, nor has it sought to purchase any in the past 20 years." Personal communication with Stephanie Balzarini, Assistant Attorney General, Idaho (Mar. 1991).

392. MONT. CODE ANN. § 77-2-203 (1991).

be conducted with the approval of the county commissioners.[393]

2. *Management for Benefit of Trust*

Management for the benefit of the trust has three elements. First, there is the granting of the lands by the federal government to the states, with the states acting as trustees for the beneficiaries. Second, there is a requirement that the states attain fair market value for those lands and resources sold. And third, there is the concept of maximizing revenues from the sale and lease of the trust lands. The exact language in these documents varies depending upon when the state was admitted to the Union.[394] Some states have also petitioned Congress to modify their enabling acts and have amended their Constitutions to change the trust language. Because of this, the concept of the states' trust role has evolved over the years.

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

> (1) All lands of the state that have been . . . granted by congress . . . shall be public lands of the state. They shall be held in trust for the people . . . for the respective purposes for which they have been or may be granted.
> (2) No such land . . . shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state. . . .[395]

The language in the Washington Constitution is practically identical.[396]

In contrast, the Idaho Constitution requires securing the maximum possible gain for the beneficiary, stating:

> It shall be the duty of state board of land commissions to provide for the location, protection, sale or rental of all lands heretofore . . . granted to the state by . . . the general government, under such regulations as may be prescribed by law, and in such manner

393. *Id.* § 77-2-201.
394. *See* Fairfax & Souder, *supra* note 44, at 18.
395. MONT. CONST. art. X, § 11.
396. WASH. CONST. art. XVI, § 1.

> as will secure the maximum long term financial return . . . provided that no state land shall be sold for less than appraised value.[397]

These grants of lands by the federal government to Idaho were found in *Barber Lumber Co. v. Gifford*[398] to constitute a trust fund with the Board of Land Commissioners as the instrument to administer this trust. The principle that the board must act to secure the greatest measure of advantage to the beneficiary was also found to hold in *Barber*.[399]

Managing to attain fair market value for those products sold from the trust lands is operationally different from managing those lands to produce the maximum revenues from the lands. The former requirement is reactive, that is, if products such as timber are sold, they may not be sold for less than the fair market value. In contrast, revenue maximization may require managing lands in a specific manner before the resources are sold.[400] In forestry, this type of management may cause impacts to local communities, and may result in revenue fluctuations due to variations in the amount of timber being harvested from state trust lands, or in the type of product being grown, or because of the environmental consequences of timber harvesting.

Recent modification of the Oregon Constitution noted above[401] directs management of the forest resource under sound techniques of multiple use land management for the whole population of the state.[402] This has led to some differentiation in the trusteeship terms between the lands granted to the states in their

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397. IDAHO CONST. art. 9, § 8.

398. 139 P. 557 (Idaho 1914).

399. *Id.* at 557.

400. THOMAS WAGGENER, SOME ECONOMIC IMPLICATIONS OF SUSTAINED YIELD AS A FOREST REGULATION MODE 8 (1969) (Institute of Forest Prods., College of Forest Resources, Univ. of Wash. Report No. 6).

401. OR. CONST. art. VIII, § 5(2), *as amended by* House Joint Resolution No. 7, 1967 and adopted by the people May 28, 1968.

402. This constitutional requirement is implemented by OR. REV. STAT. § 530.490 (1989). Both the Department of Forestry and the State Land Board manage their lands under this policy. However, the application of this principal to state trust lands has never been tested in court, and thus its validity remains in doubt. These provisions do not apply to the county forest lands, which are managed solely for the benefit of the county where the land is located, subject to the police power provisions of the Oregon Forest Practices Act.

enabling acts and those lands which reverted to the counties through tax forfeiture. In the case of the federal grants, the trust responsibility is defined in the state's constitution and perhaps in its enabling act. In contrast, Oregon's county forest land trust responsibility results from state legislation. However, once the county land is accepted by the state, general trust principles apply.

3. *Long-Term Sustained Yield*

Both state and local communities are concerned with sustainability and fluctuations in log supplies from trust lands forestry.[403] The sustained-yield issue reflects concern for continuing revenues for the trust beneficiaries (and incidentally the state land office management accounts). The even flow of logs affects timber-dependent sawmills and local employment.

Washington's Multiple Use Act of 1974[404] directs the Department of Natural Resources to manage its lands capable of growing forest crops on a sustained-yield basis, which is defined as "management of the forest to provide harvesting on a continuing basis without prolonged curtailment or cessation of harvest, insofar as this is compatible with other statutory directives."[405] However, the implication is that this is only on a volume basis, without specifying grade, size, or species of timber.

In *Jerke v. Department of State Lands*,[406] the Montana Supreme Court upheld state legislation which provides that "full market value shall encompass the concept of sustained yield."[407] Sustained yield, it is believed in Montana, plays an important role in educational finance, resource stability, and in the state's

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403. Personal communication between William R. Cook, Assistant Attorney General, Oregon, and Sally K. Fairfax (Mar. 1991). *See also* Washington Dep't of Natural Resources, Press Release: Timberlands Acquisition Plan: Commissioner of Public Lands Brian Boyle-DNR request legislation-SB 65536 and HB 2804 (undated); Brian Boyle, Washington Dep't of Natural Resources, Free Trade, the Forests and the Future: A Position Paper on Log Exports by Washington Commissioner of Public Lands (Sept. 1989).

404. WASH. REV. CODE § 79.68 (1983).

405. *Id.* §§ 79.68.030, 79.68.040 (codification of Washington Dep't of Natural Resources, Forest Land Management Program 1984-1993 (proposed Nov. 1983)).

406. 597 P.2d 49, 51 (Mont. 1979).

407. *Id.* (citing REV. CODE MONT. § 81-401 (1947), currently MONT. CODE ANN. § 77-6-101 (1979)).

economy.[408] Accepting less than maximum income is allowed in the management of the state lands if the action will maintain the long-term productivity of the land and guarantee income to the beneficiaries in the long run.[409]

Sustained yield is not legislated in the Idaho statutes or Constitution. The constitution states that the endowment trust lands will be managed "in such a manner as will secure the maximum long term financial return to the institution to which granted."[410] A state forest management plan for one of Idaho's seven regions does mention sustained yield, however, when discussing achievement of harvest potential.[411]

Both Oregon's county forest land and state trust land forests are managed on a sustained-yield basis according to Department policy, although without direct statutory provision.[412] Beyond this, the timber harvest is constrained to prevent significant declines in future harvest levels when determining the maximum sustained yield from the trust forests.[413]

4. Management for Multiple Use

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

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408. Dan Jackson, Economic Returns and the Management of Montana's Forest Resources (Dec. 1983) (paper prepared at the request of the Joint Interim Subcomm. No. 2 of the Montana Legislature).

409. Forestry Division, Montana Dep't of State Lands, Forest Management Standards and Guidelines 1-3 (Mar. 1988).

410. IDAHO CONST. art. IX, § 8, *cited in* IDAHO DEP'T OF LANDS, *supra* note 324, at 3. Note however that the version of the Idaho Constitution printed in the annotated code does not have the phrase "long term" in § 8.

411. IDAHO DEP'T OF LANDS, *supra* note 324, at 11; *see also* David Gruenhagen et al., Idaho Department of Lands, Payette Lakes Area Forest Inventory Report, 1987 Remeasurement (May 1989).

412. *See, e.g.*, Oregon State Forestry Dep't, Long Range Timber Management Plan, Southern Oregon Region State Forests, Report 3-0-2-220 10 (Aug. 1987).

413. *Id.* at 10, 11.

Act, the basis for all subsequent multiple-use management in federal legislation and regulations, defines multiple use as:

> the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people . . . and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.[414]

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

> The legislature hereby directs that a multiple use concept be utilized by the department of natural resources in the management and administration of state-owned lands under the jurisdiction of the department where such a concept is in the best interests of the state and the general welfare of the citizens thereof, and is consistent with the applicable trust provisions of the various lands involved.[415]

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

> The management and administration of state-owned lands under jurisdiction of the department of natural resources to provide for several uses simultaneously on a single tract and/or planned rotation of one or more uses on and between specific portions of the total ownership consistent with the provisions of RCW 79.68.010.[416]

Similar language is found in the Oregon statutes, where fish and wildlife environment, landscape expanse, protection against flood and erosion, recreation, and production and protection of water supplies are allowed, again as long as these uses are not detrimental to the trust purposes.[417]

How then are these concepts applied in practice? Washington trust lands are open for hunting and fishing use unless posted with the approval of the department.[418] Another eleven uses are also identified as being compatible with the obligations of the de-

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414. 16 U.S.C. § 531(a) (1988).
415. WASH. REV. CODE § 79.68.010 (1991).
416. *Id.* § 79.68.020.
417. OR. REV. STAT. § 530.500 (1991).
418. WASH. REV. CODE § 79.01.244 (1979).

partment to fulfill its trusteeship obligations. Uses, including those listed, must be conducted without financial impact unless compensation is provided.[419] In Oregon, public access to state trust lands is assured, and there is also a requirement in statutes to give consideration to multiple values in the sale, exchange, and leasing of state trust lands.[420] However, lands cannot be dedicated to uses that preclude income generation.[421] Multiple-use management is allowed in Montana,[422] which includes grizzly bear habitat in its multiple-use management.[423]

Idaho, of the four states, is the only one without a multiple-use statute.[424] It has, however, reserved from sale "all state-owned lands chiefly valuable for forestry, reforestation, recreation, and watershed protection . . ." as state forests.[425] Within the Department of Lands' policies, the objectives for state forested lands "shall be . . . to improve timber productive capacity and assure maximum long-term financial returns to the endowment trusts without permanently diminishing other uses such as watershed, forage, recreation, wildlife habitat and enjoyment of the aesthetic quality."[426]

The trust responsibility with respect to the forest lands is bi-directional: nonrevenue producing uses are not allowed if they are deleterious to revenue producing uses. On the other hand, as seen in the Idaho policies cited above, and similarly interpreted in the

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419. *Id.* § 79.68.050.

420. OR. REV. STAT. § 273.051(2)(b) (1991). These requirements do not carry over to county forest lands.

421. *See* Fairfax & Souder, supra note 44, at 63 (discussing differentiation between state trust and county forest lands).

422. MONT. CODE ANN. § 77-1-203 (1991). Recommendations for enhanced multiple-use management are found in Office of the Legislative Auditor, State of Montana, Performance Audit: State-Owned and Leased Land (June 1983).

423. Forestry Division, Montana Dep't of State Lands, Interim Grizzly Bear Management Standards and Guidelines (Dec. 1988).

424. Fairfax & Souder, *supra* note 44, at 67.

425. IDAHO CODE § 58-133 (1991).

426. IDAHO DEP'T OF LANDS, OPERATION MANUAL O.M. 901 (1988), *cited in* Gruenhagen, *supra* note 411, at 46. The Operation Manual provides internal operational policies for staff direction. The Idaho Forest Practices Act (IDAHO CODE, §§ 38-1302 to 38-1314 (Supp. 1991)), applicable to state as well as private land, states that its policy is to maintain and enhance trees, soil, air, water, wildlife, and aquatic habitat by regulating forest practices. Personal communication between Stephanie Balzarini, Deputy Attorney General, State of Idaho, and Sally K. Fairfax (Mar. 1991).

other three states, revenue production is not allowed to generate negative externalities for other uses, including amenity values. This illustrates the longer term relationship between revenues and protection of the trust corpus, that is, one component will not be carried out to the detriment of the other component of the trust responsibility.

V. Conclusions

Revenue production for the beneficiaries is, we have taken some trouble to emphasize, just one aspect of granted land and permanent fund management. Beneficiaries are likely to look with increasing interest at these resources in times of budget crises and fiscal constraint. There is ample justification for this. Trust principles have, in the last half century, emerged as a dominant theme in trust land case law, and beneficiaries have been increasingly active and successful in pressing their claims in state courts. However, it is clear that the current emphasis on maximum economic returns is not an accurate or viable interpretation of either trust principles or of the trust documents. We have found the trust documents not in a federal-state compact, but in state decisions and state commitments. That, and a proper emphasis on the trustee's duty to protect the trust property, have led us to argue that there is more flexibility in trust land management mandates than might first appear. And, we have found a considerable degree of flexibility on the ground, in the management of trust timber resources in four states.

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

The principal conclusion is that, in making management decisions, the state land office must think clearly about who is the beneficiary of their particular trust, and of their actions. There is enormous variation in the definition of beneficiaries in state documents that gives the state considerable room for defining a variety of management regimes and priorities. Second, lest those of the environmentalist persuasion be put off by the duty to make

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

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

Similarly, the trust notion mandates that costs of management decisions are fully accounted for. Benefits of management actions are not apportioned or shifted to other users that do not pay for them. This prevents the creation of, for example, below-cost timber sales where putative recreational or wildlife benefits are charged against timber management programs. This means that trust notion provides a basis for scrutinizing and arguing against the cross-subsidization of outputs that plagues multiple-use management on federal lands.

The trust resources, and their peculiar and instructive mandate, ought to be studied and appreciated, for their rich and won-

derful history, the benefits their diverse management produces, and the lessons that comparative analysis can teach us about public resources and resource management.