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Closing the Book on the School Trust Lands

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NOTES

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I. INTRODUCTION

Public education in the United States faces a crisis. Financially strapped state and local governments find funding more and more difficult to supply; as a result, the quality of public education suffers.[1] Predictably citizens are concerned, yet they resist paying increased taxes to meet the rising costs.

School trust lands provide one potential source of extra revenue. Though their existence is not well known, these lands are tremendous assets held by most states other than the original thirteen.[2] In general, they have produced significant amounts of revenue for public education, yet historically state management of the lands has been marred by incompetence. Many of the original school trust lands have been sold or leased to private individuals for long terms at minimum values. Therefore, states have received or are receiving little return on these lands.[3]

Many states are seeking to increase revenue from the trust lands

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1. See Karl Bruhn, *Schools Shouldn't Need Charity; Education: Private Donations Will Lead to Zip Code Inequities. This is the Public's Bill to Pay*, L.A. Times B11 (Feb. 21, 1992).

2. See James B. Shows, *School Trust Lands in the United States* 204, 206 (1991) (unpublished Ed.D. dissertation, University of Southern Mississippi) [hereinafter, "Dissertation"] for a compilation of all states that received school lands, including the amounts of land received. The following states did not receive school land grants: Connecticut, Delaware, Georgia, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia. See id. See generally, Douglas Dunipace, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, 8 Ariz. L. Rev. 133 (1966); James Shiner, *State Mineral Leases on Arizona's School Lands*, 15 Ariz. L. Rev. 211 (1973). For an overview of the manner in which these lands were granted, see *Andrus v. Utah*, 446 U.S. 500, 522-28 (1980) (Powell dissenting).

3. See Part II.B (describing how the lands were lost). See generally Cal. Pub. Res. Code § 8702 (West 1977 & Supp. 1992) (reciting a history of California's poor management of its trust lands). Louisiana also suffers from having lost its lands—instead of having excess school land like many states, its legislature had to enact a special tax to create revenue to buy school lands. See La. Rev. Stat. Ann. § 33:2737.8 (West 1988).

they still retain by improving management of and legislation governing school lands.[4] In another effort to increase revenue, some states, such as Mississippi, are seeking to recover title to school lands that they have conveyed to private individuals.[5] The Secretary of State of Mississippi has filed numerous lawsuits seeking to recover lands that were sold for inadequate consideration and also has sought to renegotiate leases that were executed for inadequate consideration.[6] Although current attempts to recover school lands are not widespread, Mississippi has been successful,[7] and most states that were granted school lands have the capability to file these suits and recover their lands under the existing state of the law. As state budgets continue to tighten, these lost trust lands most likely will become the subject of more litigation and more controversy. Since original school trust lands comprise over 400 million acres, many of which are economically valuable for their minerals, an upheaval in land title will create serious consequences for many individuals and private companies. The occupants of these lands are vulnerable.

This Note argues that promoting stability in land title to school trust lands is more important and economically more productive than recovering improperly sold school lands. To achieve this end, this Note suggests that the current legal framework that governs school lands, especially the adequate consideration test, should be modified. Part II outlines the source and history of the school land grants and the nature of the states' trust obligations. Part III describes how these lands were sold improperly and how states now can seek to recover them by alleg-

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4. See Legislative Audit Committee, *A Special Report on Sixteenth Section Land Management* (1977) [hereinafter, "*Special Report*"] for an investigative report that led to reforms in statutory law governing Mississippi school lands. Most, if not all, states also have governmental departments and employees whose jobs are solely to manage school lands.

5. See *Hill v. Thompson*, 564 S.2d 1, 20-21 (Miss. 1989) (Hawkins dissenting) (asserting that the Secretary of State has instituted a campaign to "correct" conveyances of school land for less than adequate consideration).

6. See id. See also Letter from Secretary of State Dick Molpus to Members of the Mississippi Legislature and Members of the Boards of Education 1-2 (June 1, 1990) (on file with author) stating that:

> [T]he amount of revenue generated per acre from these lands has steadily increased . . . largely as a result of the renegotiation effort. . . . [I]f it had not been for the renegotiation of grossly inadequate lease rentals, the declines suffered due to outside economic pressures in minerals, timber, and agriculture would have had a catastrophic affect [sic] on the total revenue.

Rather than selling the land in fee simple absolute, Mississippi leased much of its school lands under long term leases. Conceptually, and for purposes of this Note, renegotiating a lease and recovering school land that was sold in fee simple absolute are identical.

7. For an example of a case in which the state successfully prevailed over a private citizen in a recovery of school land, see *Board of Educ. of Lamar County v. Hudson*, 585 S.2d 683 (Miss. 1991) (invalidating a lease for lack of adequate consideration when defendant's predecessor in title had leased 3.5 acres of land in 1956 for a term of 99 years for a one time fee of $150).

ing either that inadequate consideration was paid for the land, or that the land was not sold according to the applicable statutory procedures. Part IV discusses and assesses legal frameworks for eliminating or limiting recovery of school lands. This Note proposes that courts limit recovery of school lands by applying statutes of limitation, estoppel, laches, or marketable record title statutes against the states. This proposal would stabilize title to school lands, but is also sympathetic to the states' interests in the lands and would allow the states a limited recovery. Most importantly, the proposed framework is fair, allowing bona fide purchasers, to retain their interests in school lands.

II. SOURCE AND HISTORY OF SCHOOLS LANDS

A. The Grants

In its western expansion, the United States sought to encourage public education by reserving land in each township[8] in new territories and states to produce revenue for education.[9] For instance, in the Land Ordinance of 1785, Congress provided for the sale and survey of the Northwest Territory[10] and reserved the sixteenth section in every township[11] for the maintenance of its schools. Title to these sixteenth sections vested in the states once a federal survey was completed and approved by Congress,[12] and the state had a binding obligation as a trustee to use the lands to support the public schools.[13]

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8. See Appendix A for an illustration of a township and section. Land in the Northwest Territory and in the West was surveyed according to a rectangular system. Lands were divided into blocks of 36 square miles called townships. Townships were further divided into one-square mile sections containing 640 acres. See Kedric A. Bassett, *Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act*, 9 J. Energy L. & Pol. 195, 196-97 (1989). See generally, Jack H. Ewing, *Mississippi Land Descriptions*, 18 Miss. L. J. 381 (1947). In the Northwest Territory, Section 16 was reserved in every township for public schools. *Turney v. Marion County Bd. of Educ.*, 481 S.2d 770, 783 (Miss. 1985). In the West, some states received as many as four sections in each township. See, for example, Arizona Enabling Act, ch. 310, §§ 24-30, 36 Stat. 572 (1910).

9. See *Andrus v. Utah*, 446 U.S. 500, 522-28 (1980) (Powell dissenting) (providing a historical overview of school land grants in the United States).

10. The Northwest Territory included all land west of the original 13 states, north of the Ohio River, east of the Mississippi River, and south of Canada. These five states emerged from the Northwest Territory: Ohio, Michigan, Indiana, Illinois, and Wisconsin. *Turney*, 481 S.2d at 783 n.2.

11. See Appendix A and note 8. For a more detailed and precise explanation of how surveys were conducted, see William E. Colby, *Mining Law in Recent Years*, 36 Cal. L. Rev. 355, 360-62 (1948).

12. See, for example, *United States v. Aikins*, 84 F. Supp. 260 (S.D. Cal. 1949), aff'd sub nom. *United States v. Livingston*, 183 F.2d 192 (9th Cir. 1950) (holding that grant of public lands to California for school purposes prior to survey of the land did not become effective until lands were identified by actual survey).

13. *Andrus*, 446 U.S. at 523. See also Section II.A (describing the nature of the trust).

In Mississippi and Alabama, which were not part of the Northwest Territory, the same kind of withholding occurred. Georgia originally owned Mississippi and Alabama but ceded these two territories to the United States in 1802 with the condition that when they eventually achieve statehood they have the same privileges and rights granted to inhabitants of the Northwest Territory by the Northwest Ordinance of 1789,[14] including the provision mandating that sixteenth section lands in each township be reserved for the benefit of public schools.[15]

States west of the Mississippi River secured school land grants from Congress, through individual statutory acts reserving certain sections of land in each township for public schools.[16] These congressional grants were generous. For example, Utah, under its enabling act, received four sections in each township.[17] Similarly, Arizona received over 10.5 million acres[18] and Nevada over 3.9 million acres.[19] The enabling acts retain importance today because through them Congress has dictated conditions for state management and disposition of school trust lands.[20] These enabling acts are prior in time to and controlling over the individual states' constitutional and statutory provisions addressing the management and disposition of the lands.[21]

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14. *Turney*, 481 S.2d at 783-84.

15. Id. For a history of Mississippi's school lands, see Semmes Luckett, *Mississippi's Sixteenth Section School Lands*, 33 Miss. L. J. 281 (1962).

16. See, for example, Arizona Enabling Act, ch. 310, §§ 24-30, 36 Stat. 572 (1910) (granting school trust lands to Arizona). See also note 2 and accompanying text. Texas is an exception: that state had almost no federal land but did grant 4,162,320 acres of state land for the support of public schools. Dissertation at 43 (cited in note 2).

17. *Andrus*, 446 U.S. at 502 (stating that Utah received the following sections in each township: two, 16, 32 and 36). For a general discussion of Utah's grant see Bassett, 9 J. Energy L. & Pol. at 196-98 (cited in note 8); *Jensen v. Dinehart*, 645 P.2d 32 (Utah 1982) (discussing the Utah Enabling Act and the purpose of the school land grants therein).

18. Dissertation at 206 (cited in note 2).

19. Nev. Rev. Stat. § 321.596 (1986). For other excellent histories of school land grants in the West, see *Andrus*, 446 U.S. at 502-13 and *United States v. Morrison*, 240 U.S. 192, 198-202 (1916).

20. See *State ex rel. Conway v. State Land Dept.*, 62 Ariz. 248, 156 P.2d 901 (1945) (discussing the limits that were placed on the divestment of Arizona's land).

21. See *State Land Dept. v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 469 P.2d 85 (1970), vacated 481 P.2d 867 (1971) (holding a lease invalid when the state leased mineral rights to an individual prior to appraisal of the land, an act proper under state law, but contrary to the Enabling Act). See also *Kadish v. Arizona State Land Dep't*, 155 Ariz. 484, 747 P.2d 1183, 1185 (1987), aff'd as *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989) (asserting that neither the legislature nor people of the state may amend school trust provisions contained in the Enabling Act without Congressional approval).

In spite of the apparent simplicity of these generous land grants, they were neither entirely simple nor uniform. Because of Indian territories, irregular sized sections, and settlements on school lands by individuals prior to federal survey of the land, peculiarities and inconsistencies developed that today make it more difficult to apply standard rules and management techniques to the governance of school lands. For example, in 1817, Congress authorized the formation of the state of Mississippi, the survey of its lands, and the reservation of sixteenth sections for school

In all jurisdictions, the well-settled law is that states hold school lands in trust for the benefit of the educable children of the township.[22] States are not excepted from the general rule that trustees have a fiduciary duty to use the trust property to maximize the benefit to the beneficiary of the trust.[23] Every state realizes its obligation to lease and sell school lands at fair market value and that failure in this regard is a breach of the fiduciary duty owed to the beneficiaries.[24]

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purposes. *Papasan v. Allain*, 478 U.S. 265, 271 (1986). Title to much land in North Mississippi, however, belonged to the Chickasaw Indian Nation, so sixteenth sections in this territory could not be reserved. Id. The Chickasaw Nation eventually ceded its territory to Mississippi in 1832, but under the treaty, all of the Chickasaw Session lands, including sixteenth sections, were sold to private parties, and the proceeds were given to the Chickasaw Nation. Id. To remedy this problem, Congress allowed Mississippi in 1836 to select lands, thereafter called lieu lands, to compensate these counties for not having sixteenth section lands. Id. at 271-72. The Chickasaw lieu lands comprised 174,555 acres in five different counties. The lieu lands were sold, beginning in 1852, and the proceeds were invested in eight percent loans to the state's railroads. Unfortunately, the investment was lost when the railroads were destroyed in the Civil War. Id. at 272. The Mississippi Legislature, for over 100 years, has paid interest on the lost principal to these counties, but this amount does not come close to equaling the income other counties in the state receive from school lands. Id. at 273. Because of situations similar to the Chickasaw Session problem, many states have unequal funding of schools throughout their counties and townships. This issue has been the subject of litigation: in *Papasan*, 478 U.S. 265 (1986), citizens of the Chickasaw session lands argued that counties should receive the total income collected from school lands by the state in equal proportions. The legal issue was framed under an equal protection analysis; no settled answer as to how to treat these problems exists.

22. See, for example, *Oklahoma Educ. Ass'n, Inc. v. Nigh*, 642 P.2d 230, 235-36 (Okla. 1982). Courts do not always correctly articulate the exact nature of the trust; perhaps they do not completely understand it. See *Turney*, 481 S.2d 770, 777 (stating that the inhabitants of each township are the beneficiaries of the trust). See also *Madison County Bd. of Educ. v. Illinois Cent. R.R.*, 939 F.2d 292, 303-04, 306 (5th Cir. 1991) (stating that the trust is an honorary one and is only a moral obligation to use the property for the schoolchildren, and is not solely for the benefit of the schoolchildren). The *Turney* and *Illinois Central* courts misstate the law. See *County of Skamania v. State*, 102 Wash.2d 127, 685 P.2d 576, 580 (1984) (finding that "[t]here have been intimations that school land trusts are merely honorary, that there is a 'sacred obligation imposed on (the state's) public faith,' but no legal obligation. These intimations have been dispelled by *Lassen v. Arizona*. . . . This trust is real, not illusory") (citations omitted). Query whether the legal analysis in *Illinois Central* is simply a method for making an equitable decision—the Railroad landowner had occupied the land since its grant in 1882, so perhaps the court felt compelled to allow the Railroad to keep the land. See Part IV.B.5 (proposing that a marketable record title act is the better solution that would save courts from having to twist the law).

23. See *Skamania*, 685 P.2d at 580-81. See also *Bartels v. Lutjeharms*, 236 Neb. 862, 464 N.W.2d 321, 324 (1991) (stating that "school lands are held in trust by the state for educational purposes, and as trustee of the lands and the income therefrom, the state is subject to the standards of law applicable to trustees acting in a fiduciary capacity").

24. See, for example, *State ex. rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 596, 47 N.W.2d 520, 522-23 (1951) (concluding that the trust is breached when a trustee knowingly handles the property of the trust estate for the benefit of any person at the expense of the trust estate).

B. *The Loss of the Lands*

Quite possibly, before the middle of the twentieth century nobody could gauge the immense cost that public education would demand. Perhaps this lack of foresight or lack of expertise explains why states did not protect their trust lands. In any event, due to any combination of incompetence, lack of foresight, fraud,[25] or strategic decisions, states have retained only a small percentage of their original school trust lands.[26]

States have squandered much of their property in sales to individuals for grossly inadequate consideration. For example, in *Mauldin v. Molpus*,[27] five private claimants sued the Secretary of State seeking an injunction prohibiting him from renegotiating their leases of school lands.[28] Each plaintiff held a twenty-five-year lease running from 1974 to 1999. Mauldin's lease was for 100 acres at $20 per year; Todd had leased 1.81 acres for $1 per year; Cobb, 15 acres for $3 per year; Herrington, 5 acres for $1 per year; and Martin, 1 acre for $1 per year.[29] This type of leasing and selling of school lands occurred often.[30] Losing school trust lands in these types of transactions is repulsive since the loss of income from these lands has a direct and adverse impact on the schoolchildren of the state.

Some states sold school lands because they thought investing the proceeds in permanent investment accounts would produce more income than holding and managing the lands.[31] Debate still exists as to

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25. This Note does not focus on fraudulent transfers of school land. The author has located no reported cases in which a state seeks land recovery or lease renegotiation due to a fraudulent transfer. Usually, the state alleges that the sale is invalid because the purchaser did not pay adequate consideration. See Part III.B (dealing with states seeking recovery of school land because consideration paid was inadequate).

26. One commentator has observed, "In most of the states . . . there was a mad political scramble to purchase these lands outright, and they were sold for a mere pittance of the amounts that could have been realized had a wise and conservative plan of disposal been adopted." Colby, 36 Cal. L. Rev. at 377 (cited in note 11). See also Dissertation at 204, 206 (cited in note 2) (reciting the amounts of school trust lands states initially received and ultimately retained).

27. 647 F. Supp. 891 (S.D. Miss. 1986).

28. Id.

29. Id. at 892. The court invalidated the leases and allowed the state to renegotiate them.

30. Colby, 36 Cal. L. Rev. at 366-67 (cited in note 11). Colby notes that this incompetence sparked Congress to pass enabling acts that contained strict conditions concerning the disposition of school trust lands for Arizona and New Mexico. Id. at 377.

31. Every state but Mississippi authorized the sale of their lands to create permanent funds. See, for example, S.D. Const., Art. VIII, § 11 (outlining rules for the investment of permanent school funds that would be generated from the sale of school lands). Texas lost $2.5 million in poor investments prior to the Civil War, and, due to the loss, the types of investments that the state currently may make with money from school lands is subject to constitutional guidelines. See Tex. Const., Art. VII, § 4. Mississippi also lost large amounts by investing in railroads that were subsequently destroyed in the Civil War. *Papasan*, 478 U.S. at 272. See also note 21.

whether holding the lands or selling them to create permanent funds reaps the greater harvest.[32] But even states that consciously decided to sell lands to create permanent funds ultimately sold vast amounts of land for inadequate consideration.[33]

C. *Statutory Schemes for Protecting and Managing School Lands*

States now view their school lands as important assets, and they seek to maximize the financial return from them. Every state has taken special measures to protect its lands, making sure that it receives adequate compensation when its lands are leased or sold.[34] Furthermore, complex and sophisticated management schemes govern the lands as states seek to squeeze every dollar from their assets.[35] Because of the important contribution school lands can make to education funding, most states, if not all, distinguish school lands from other types of state lands,[36] ensuring that school lands receive special protection.[37] This distinction is evident in statutes and case law and, as a practical matter, is important knowledge for any lawyer dealing with school lands.

Most states have similar statutory systems that govern the management and disposal of their school lands, although differences can be found from jurisdiction to jurisdiction. Generally, the federal act that granted the lands to the state in trust is more controlling than are the state's own constitutional and statutory provisions.[38] In many situations the federal acts contain various provisions relating to how the lands may be sold in order to ensure that the states receive high return. For example, New Mexico's Enabling Act demands that the lands be sold only to the highest bidder at a properly noticed public auction.[39] Obvi-

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32. Dissertation at 175-77 (cited in note 2).

33. Every state but Mississippi made the decision to sell their school lands, and these lands "were sold for a mere pittance of the amounts that [the states] could have realized." Colby, 36 Cal. L. Rev. at 376-77 (cited in note 11).

34. See, for example, *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948, 954 (1985).

35. See generally *Special Report* (cited in note 4) (recommending legislation that will maximize state revenue from school trust lands).

36. Another type of state land is tideland. Tidelands are comprised of lands between the high and low water marks of navigable bodies of water. States generally do not monitor the sale of tidelands as closely as they oversee the sale of school lands, although states usually hold tidelands in trust for the people of the state. For an introduction to tidelands and applicable law, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

37. See *Pettibone*, 702 P.2d at 955 (noting that "Congress did not intend that the [school trust] lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people") quoting *United States v. Ervien*, 246 F. 277 (8th Cir. 1917), aff'd, 251 U.S. 41 (1919).

38. See note 21 and accompanying text.

39. New Mexico Enabling Act, ch. 310, § 10, 36 Stat. 557, 563 (1910).

ously, the purpose of this provision is to ensure that the state obtains a high return for leases and sales of the land. State constitutions, for the same reason, often provide similar provisions as those that are set forth in the federal acts.[40]

The land itself was granted either to the state or to the inhabitants of each township for governance.[41] The significance of who received the grant matters only to the extent that the receiver had ultimate responsibility for managing the lands. Regardless of whether the counties or states managed the lands, states typically passed legislation to establish policies for their management.[42] Consider, as an example, Mississippi's legislation governing school lands. The local Boards of Education exercise dominion over the school lands and are responsible for ensuring that the state receives adequate compensation when it leases or sells trust lands.[43] The Board of Supervisors must approve all dispositions of school land, and if the Board refuses to approve a transaction then the land must be appraised so that an appropriate value at which to alienate it can be determined.[44] The purpose of this rigid procedure is to ensure that the state receives the maximum price for the lands.[45] Mississippi classifies school lands into the following categories: forest, agricultural, industrial, commercial, farm/residential, residential, recreational, or other.[46] Once classified, the state may lease or sell the lands by following the applicable statutory procedures governing the disposition of the applicable category of school lands. Upon disposal of the land, any recorded lease in substantial conformity with the law is

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40. See, for example, Ariz. Const., Art. X, § 1-2 (providing that school lands should be disposed of according to the Enabling Act and any unauthorized disposition of the lands is a breach of the trust). Other states, especially those that obtained school land under the provisions of the Northwest Ordinance, could rely on the federal act granting the land for guidance although the act provided no details for managing the land. Even so, many of these state constitutions have provisions designed to ensure the protection of school lands. For example, see Miss. Const., Art. IV, § 95 (providing that school lands cannot be donated to private individuals). Mississippi is subject to the provisions of the Northwest Ordinance. See notes 14-15 and accompanying text.

41. For example, Ohio's grant was to the state. Dissertation at 16-17 (cited in note 2). Florida's grant was to the inhabitants of each township. Id. at 32. See also Letter from H. James Schroeer, Deputy Commissioner for Educational Facilities, to Maison Heidelberg (Feb. 21, 1992) (on file with author) (stating that "[t]he state of Florida does *not* hold in trust for its school children land that generates revenue. All land used for public education is owned by the respective county school boards") (emphasis in original).

42. See generally, Dissertation at 50-58.

43. Miss. Code Ann. § 29-3-1 (1990).

44. Id.

45. For the same reason, many states demand sale by public auction. See, for example, Neb. Rev. Stat. § 72-212 (1990).

46. See Miss. Code Ann. § 29-3-33 (1990).

prima facie valid.[47] If the land is leased, the current lessee has an option to re-lease the land when the lease expires.[48]

All of the states subject alienated school land to taxes,[49] and many states reserve mineral interests in the lands.[50] Leases and sales of school land not obtained according to standards set out in these statutory schemes are void;[51] therefore, those individuals seeking to obtain an interest in school lands must exercise care to comply with state statutes and state constitutions.

The sophisticated statutory schemes now in existence in most states are nothing more than measures legislatures have taken to ensure that the trustee seriously regards its fiduciary duty. These statutes specifically define the duty of the trustee and, in a way, codify common-law trust principles. The common law of trusts does not set forth precise obligations that the trustee must fulfill in order to satisfy his or her fiduciary duty—it generally articulates that the trustee has a duty to act with ordinary skill and diligence[52] and in the best interest of the beneficiaries.[53] State statutes now define what acting in the best interests of the beneficiaries means. Because of past incompetence in managing school lands,[54] legislatures decided to specifically define the duty of the trustee by mandating that the trustee follow particular procedures in managing school lands.[55]

The question remains whether states should have left the protection of school lands to the common law of trusts. At least one state, Georgia, employs a more hands-off approach and does not dictate rigid procedures for the disposal of school lands. Perhaps this hands off ap-

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47. Id. § 29-3-52. The statute, however, says that this should not prevent a challenge on the grounds of inadequate consideration. Id.

48. Id. § 29-3-63.

49. See, for example, id. § 29-3-71. The land that is used for public schools, however, is not taxed. See, for example, Cal. Const., Art. XIII, § 1; Cal. Rev. & Tax Code § 202 (West 1987). But some states have blundered and sold these lands for school boards' failures to pay taxes on them. See *Askew v. Sonson*, 409 S.2d 7 (Fla. 1981).

50. See, for example, Okla. Stat. Ann. tit. 64 § 13 (West Supp. 1992).

51. See, for example, *Womack v. Nobles*, 382 S.2d 1081, 1083 (Miss. 1980) (declaring lease void since it was not submitted for approval to the city school authorities as demanded by Miss. Code § 29-3-1).

52. George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees* § 541 at 446-47 (Vernon, 2d ed. 1960). For example, the common law of trusts would not dictate that a trustee sell land at public auction as Neb. Rev. Stat. § 72-212 (1990) demands. See note 55.

53. Bogert and Bogert, *Trusts* § 543 at 473-74.

54. See Part II.A (describing the concept of the trust).

55. The trustee's duty is not simply a general duty to act in the best interest of the schoolchildren; it includes constitutional and statutory procedures enacted by the legislatures. See *Nigh*, 642 P.2d at 235-36 (suggesting that the duty of the trustee incorporates enabling acts, state statutes, and state constitutions). See also *Pettibone*, 702 P.2d at 953 (describing the concept of the trust).

proach is more efficient since it is uncomplicated and arguably makes analysis of whether a state fulfilled its trustee's duty less confusing. The Georgia Supreme Court has articulated such an approach by stating that the Board of Education has broad discretion, which will not be questioned unless manifestly abused, in selling school property.[56] Since manifest abuse historically has been a problem, however, additional statutes protecting school lands seem to serve a useful purpose.

Future problems of unwise disposal of school lands seemingly will be solved by these thorough statutes and competent management schemes. But problems of the past linger. When should a state be allowed to recover lands that were sold in noncompliance of statutory procedures or for inadequate consideration?

III. Recovering School Lands

Historically, states have recovered school lands in one of two related ways: 1) the state claims that the statutory procedures for selling the lands were not followed, and therefore the conveyance is invalid; or 2) the state claims that adequate consideration was not paid for the lands thereby making the conveyance void or voidable. States also could allege that the lands were fraudulently transferred, but rarely, possibly never, has a state asserted and actually litigated this allegation.[57]

A. Noncompliance with Statutory Standards for Selling School Lands

One way a state can recover school land is by challenging the adequacy of the sale's method. Enabling acts, state constitutions, and statutes usually set forth rigorous procedures for selling school lands.[58] If these procedures are not followed, states can seek nullification of the conveyance. Many courts demand strict compliance with statutory and constitutional standards. For example, in *Farr Land & Cattle Co. v. Hassell*,[59] rather than selling the school land at public auction as the

56. *Veal v. Smith*, 221 Ga. 712, 146 S.E.2d 751, 753 (1966). See also *Anderson v. Board of Educ. Lands and Funds*, 198 Neb. 793, 256 N.W.2d 318, 321 (1977) (stating that the Board does not, in all circumstances, have to obtain highest return on school lands—only reasonable return is absolutely necessary).

57. The legal analysis for recovering fraudulently conveyed lands is beyond the scope of this Note. Even with school lands that were fraudulently transferred, the need for stability in title would still exist; therefore, at some point in time, title in this land should vest in an occupant of the land. For public policy reasons, however, perhaps the state, without any time limitation, should be able to recover fraudulently transferred land from the original purchaser of that land. See also note 25.

58. See Part II.C (describing the structure of governance of school lands).

59. 163 Ariz. 587, 790 P.2d 242 (1990).

relevant statute demanded, the state exchanged the land.[60] Even though the state apparently received adequate consideration for the land, the Arizona Supreme Court ruled that the sale was invalid and that title to school trust lands had never vested in the individuals but rather still belonged to the state.[61]

Other courts are more lenient, disregarding minor departures from statutory procedures. In *Martin County v. Magnolia Petroleum Co.*,[62] the Texas Court of Civil Appeals allowed the private claimants to keep school lands despite the possible existence of procedural irregularities in the conveyance of the land.[63]

Demanding rigid compliance with exacting statutes helps ensure that a fair return will flow from the trust lands. If a state has received a fair return, however, is there reason to demand that the transaction conform to every provision of a meticulous statute? A more lenient approach seems more in tune with common-law trust principles since trustees generally are expected only to use the res profitably for the beneficiaries and are not commanded to dispose of the res or to manage it in any particular way.[64] One may argue, however, that statutory schemes dictating how the state, as trustee, must manage the school land have been incorporated into the trust agreement, actually becoming part of the trust.[65] In essence, any statute passed by a legislative body concerning duties of the state, as trustee, should be a binding obligation, regardless of whether it modifies common-law principles of trusts. In addition, given the abuses of the past, these rigid statutes are a helpful precaution for protecting school lands. Further, demanding strict compliance with the statutes is an easily administered rule; when statutory procedures have not been met, courts never reach the difficult question of whether adequate consideration was paid for the land—they simply invalidate the transaction.

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60. Id. See also *Gladden Farms v. State*, 129 Ariz. 516, 633 P.2d 325 (1985). The Arizona Enabling Act is particularly rigorous. Congress wanted to make sure Arizona and New Mexico did not throw away school lands as had the other states that received grants from Congress. Colby, 36 Cal. L. Rev. at 377 (cited in note 11).

61. *Hassell*, 790 P.2d 242. See also *Womack v. Nobles*, 382 S.2d 1081 (Miss. 1980) (declaring a lease of school land void where the lease was not submitted for approval to the school district and the statute demanded this approval). Contrast *Valvoline Oil Co. v. Concordia Parish Sch. Bd.*, 216 S.2d 702 (La. Ct. App. 1969) (confirming title to school land in individuals even though the citizens of the township violated law by not voting on whether to sell the land).

62. 252 S.W.2d 266, 270 (Tex. Ct. App. 1952).

63. Id.

64. See notes 52-53, 55 and accompanying text.

65. See *Nigh*, 642 P.2d at 235-36 (suggesting that state statutes combine with trust law to define the duties of the trustee).

B. The Payment of Inadequate Consideration

States also may recover school trust lands by asserting that the conveyance is void[66] because the private claimant did not pay adequate consideration for the land.[67] The states' obligations to receive adequate consideration for school lands is in addition to, and independent of, the duty to alienate school lands according to proper statutory procedures. Obtaining adequate consideration for the lands is of particular interest to the taxpayers of the state because if school lands produce additional revenue, states need less tax revenue to support public schools.[68]

1. What is Adequate Consideration?

Adequate consideration in typical land transactions can often be nominal since courts generally refuse to inquire into the fairness of the price.[69] Courts inquire more deeply into the adequacy of consideration, however, when they assess contracts, deeds, or leases of school lands. This deeper inquiry is necessary since school lands are trust lands, and since the state, as a trustee, cannot dispose of the land unless it receives fair value.[70]

In the alienation of school lands, one tension is whether reasonable economic return is adequate consideration or whether adequacy of consideration is only satisfied if the state obtains maximum economic return.[71] The law usually mandates that the trustee obtain maximum return for the trust property.[72] Some states, however, employ the multiple-use approach. This approach allows the state itself to purchase school land by paying a reasonable price for the land rather than obtaining maximum economic return from a private party and then to use

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66. In *Hill v. Thompson*, 564 S.2d 1 (Miss. 1989), the dissenting justice argued that these sales were voidable, rather than void. Id. at 25-26 (Hawkins dissenting).

67. La. Rev. Stat. Ann. § 41:640 (West 1990) states that if the land was sold for too little, the state can recover it. See also id. 41:961 and 41:964 (West 1990) (concerning actions to recover title to sixteenth section land in this regard). Mississippi purposely is very active in seeking to recover school land. See notes 6 and 7.

68. See, for example, *Edwards v. Harper*, 321 S.2d 301 (Miss. 1975) (denying intervention by taxpayers in a suit in which plaintiff sought to quiet title to 75 acres of school land for which he had apparently paid grossly inadequate consideration). See also Part III.C for other reasons justifying the need to receive adequate consideration for the land.

69. See, for example, *Morris v. Johnson*, 219 Ga. 81, 132 S.E.2d 45, 49 (1963) (asserting that "One Dollar and Other Valuable Considerations" is adequate consideration for a deed conveying land).

70. See Part II.A (describing the nature of the trust).

71. See Bassett, 9 J. Energy L. & Pol. at 202 (cited in note 8) (asking "how much flexibility should be allocated to the states as they attempt to beneficially use these lands?").

72. See, for example, *Anderson v. Board of Educ. Lands*, 198 Neb. 793, 256 N.W.2d 318, 320-21 (1977); *Land Commissioners v. Mineral Land Reclamation Bd.*, 809 P.2d 974, 976 (Colo. 1991) (holding that Colorado has a constitutional duty to receive maximum compensation for its school trust lands).

the land for the public benefit. California law, for example, allows the state to purchase and use school lands for reforestation, range conservation, environmental rehabilitation, recreational trails, and other purposes.[73] Most agree that selling school land without receiving a fair value for it is a breach of the fiduciary obligation of the trustee,[74] but does a state breach its duty by selling the land without receiving maximum value for it? California's multiple-use approach has not been condemned.

Whether the multiple-use theory could be applied to a state conveyance of school land to a private party is an unsettled issue. Consider the following hypothetical: Hooverville holds title to unleased and unsold school trust land in its city limits. Hooverville suffers from a severely depressed economy; therefore, all lands in the city limits, including this tract of school land, are worthless and, for all practical purposes, unconveyable. However, Perry Mason, a local attorney, has law offices on the lot adjacent to the school land, and he is interested in expanding his offices onto this tract. If Hooverville conveys or leases the land to Mason, they will collect property taxes that are needed to help improve the city's economy. Mason is only willing to pay nominal consideration for the property, however, since he could just as easily move his offices to another section of town.[75] Hooverville should not convey the land to Mason for nominal consideration. Courts should not stretch the multiple-use theory far enough to allow Mason's transaction because even though the conveyance of this land would benefit Hooverville, it would bring no benefit to schoolchildren who are the beneficiaries of the trust.[76] If nominal consideration were a true measure of the land's value, however, conveying this land would not be a breach of fiduciary duty, even though one could argue that the state has an obligation to wait for the property value to rise before conveying it. Under common-law trust principles, holding the land arguably would be an obligation in these circumstances.[77] Any multiple-use approach strains the principle that school trust lands are solely for schoolchil-

73. See Cal. Pub. Res. Code § 6201.5 (West Supp. 1992).

74. See Bassett, 9 J. Energy L. & Pol. at 203 (cited in note 8) (stating that without fair market value the payment would possibly violate Congressional intent for granting the lands).

75. For a case with a similar fact pattern, see *Hill v. Thompson*, 564 S.2d 1 (Miss. 1989).

76. See, for example, *Nigh*, 642 P.2d at 235-36 (stating that the trust is for the exclusive benefit of the beneficiaries). See also *Kanaly v. State*, 368 N.W.2d 819, 823-24 (S.D. 1985) (holding the federal enabling act and state acceptance of educational lands pursuant thereto dictates that the beneficiaries of the trust are the various educational institutions of South Dakota; beneficiaries do not include the general public, other governmental institutions, or the general welfare of South Dakota).

77. See Bogert and Bogert, *Trusts* § 541 at 446-47 (cited in note 52) (stating that trustees have the obligation to use ordinary skill and diligence in managing trust property).

dren, but so long as it is not stretched to the degree that the school trust fund is being cheated immensely, courts probably will allow it.

Some states have used the trust lands not to protect the economy of particular towns, nor even for the benefit of the public generally, but rather for the benefit of particular private parties that contribute significantly to the state's economy. For example, Wyoming has used school lands to benefit ranchers.[78] The Wyoming Supreme Court allowed this use of the lands since the legislature had not yet mandated that the state receive maximum economic return on the land.[79] The Supreme Court reasoned that, because the legislature had not mandated that the state obtain maximum economic return, the Board of Education had increased discretion in managing the trust lands.[80] This Wyoming decision is contrary to accepted law — to benefit any party at the expense of the schoolchildren violates the trust by making the private party the beneficiary of the trust.[81]

In summary, the adequate consideration test is satisfied if the state obtains highest economic return for school lands, regardless of who the purchaser is. The law tolerates reasonable economic return from the lands when the general public benefits, but, in theory if not always in practice, it demands highest economic return when private parties are the purchasers.

2. Chances of Recovering School Lands

When courts have found that private claimants paid inadequate consideration for school lands, they generally have been willing to return the lands to the states.[82] The courts that are quick to grant recovery of school land to the state are meticulous in analyzing whether the state received adequate consideration. For example, in *Board of Education v. Hudson*,[83] the Mississippi Supreme Court found consideration

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78. In *Frolander v. Ilsley*, the Wyoming Supreme Court refused to condemn the practice of leasing school lands to ranchers for nominal consideration. 72 Wyo. 342, 264 P.2d 790 (1953).

79. Id. at 793-94.

80. Id. See Bassett, 9 J. Energy L. & Pol. at 204-05 (cited in note 8), for an explanation and criticism of the manner in which Wyoming courts have interpreted the school lands trust.

81. See note 76. See also *Lassen v. Arizona Highway Dep't*, 385 U.S. 458 (1967) (ruling that Arizona had to compensate the school trust fund when obtaining a right of way over school land to build a road). Compare *Kanaly*, 368 N.W.2d at 819 (holding that legislation which changed a university into a minimum security prison and transferred control of the prison to the Board of Charities without payment to the trust fund violated provisions of the permanent trust fund created by the Enabling Act and Constitution) with *Hill*, 564 S.2d at 17 (Hawkins dissenting) (arguing courts should consider factors other than consideration paid).

82. See, for example, *Nigh*, 642 P.2d 230.

83. 585 S.2d 683 (Miss. 1991). See also *Coleman v. Dear*, 212 Miss. 620, 55 S.2d 370 (1951) (ruling that consideration paid by the original purchaser was grossly inadequate where state sold timber on one section of school land for $500 in 1945 and purchaser subsequently sold the timber

inadequate when a lessee paid $150 in 1956 for a ninety-nine year lease of 3.5 acres of school land.

Some courts, however, are slower to allow state recovery and they decline opportunities to analyze whether consideration was adequate. The Texas Supreme Court, in *Martin v. Magnolia Petroleum Co.*,[84] did not inquire into the adequacy of consideration even though ninety-five individuals paid only seventy-five cents per acre for 17,712 acres of school lands in 1895.[85]

3. The Test's Inadequacy

In many of these recovery cases, because few states choose to apply marketable record title statutes[86] or statutes of limitation against themselves,[87] courts must discern whether consideration that was paid as many as 100 years ago was adequate.[88] This task is too difficult for any court.[89] Consequently, these cases produce results that are ad hoc and not accurate on a consistent basis. Also, the adequate consideration test is subject to changing judicial ideology since the definition of consideration that is or is not adequate is malleable.[90] Further, litigating these cases wastes judicial resources.

a. The Test's Inaccuracy and its Ad Hoc Application

Inevitably, courts cannot place themselves into the time and location of prior conveyances of school lands.[91] Since what is or is not adequate consideration is easily manipulated, results of the cases seem to be whatever the courts want them to be,[92] thereby subjecting individuals to unfair results in some cases. Unfair results usually occur in cases

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rights for $4000.00).

84. 252 S.W.2d 266 (Tex. 1952). One could argue that Texas's trust obligations are less stringent since Texas received no federal school lands.

85. Id. at 267.

86. See Part IV.B.5.a.

87. See Part IV.B.2.

88. See, for example, *Lambert v. State*, 211 Miss. 129, 51 S.2d 201 (1951) (considering the validity of a sale of school land by a deed dated in the year 1862).

89. See *Hill*, 564 S.2d at 16 (1989) (Hawkins dissenting) (arguing that "[t]his finding [that consideration was inadequate] is 30 years after the fact, when there is no possible way the majority can know the conditions, reasons or circumstances under which these leases were executed").

90. In some areas of the law, such as constitutional law, it may be desirable that the law be subject to changing judicial views, but title to real property is not such an area. Because citizens invest so heavily in real property and rely upon clear title to their land, much need for consistency and stability exists in this area of the law.

91. See note 89.

92. Compare *Frolander v. Ilsley*, 72 Wyo. 342, 264 P.2d 790 (1953) (holding that paying no consideration is an adequate amount) with *Board of Educ. v. Hudson*, 585 So.2d 683 (Miss. 1991) (holding that paying $150 in consideration for a 99-year lease of 3.5 acres is not an adequate amount).

involving allegedly bona fide purchasers. These purchasers claim to be innocent of wrongdoing because they paid adequate consideration to an original purchaser who failed to pay adequate consideration to the state for the school lands. In *Hill v. Thompson*,[93] the Mississippi Supreme Court stripped land from William Thompson, an allegedly bona fide purchaser, asserting that one who acquires real property takes it subject to whatever claims lie against it.[94] The Supreme Court explained that Thompson was not a bona fide purchaser because even a "slight investigation" would have given him knowledge of the low consideration that his predecessor in title had given for the lease.[95] In a bitter dissent, Justice Hawkins argued that the economy in the county was so depressed during the time of lease that the consideration was fair, and that because of the depression-like conditions the lot actually had a negative value to the original lessee.[96] In support of his contention, he noted that 441 leases in that area during that time were executed for the same price.[97] Justice Hawkins criticized the majority for acting as factfinders in reversing the lower court's decision,[98] and he advocated a threshold good faith test before the court addresses the matter of adequate consideration.[99]

The *Hill* decision, whether correct or incorrect, shows that the adequate consideration test is ad hoc and difficult for courts to apply in a fair manner.[100] No court can know with certainty the value of a useless

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93. 564 S.2d 1 (Miss. 1989).

94. Id. at 10.

95. Id. at 10-11. In 1985, at a foreclosure sale, Thompson had purchased the leasehold on a single lot of school land in Forrest, Mississippi, for $7000. Id. at 11. Seventy-five years remained on the 99-year lease for which the original purchaser had paid $7.50 in 1960. Id. at 3.

96. Id. at 21 (Hawkins dissenting).

97. Id. at 16, 20 (Hawkins dissenting).

98. Id. at 16 (Hawkins dissenting).

99. Id. at 25 (Hawkins dissenting).

100. See also *Hudson*, 585 S. 2d 683. In *Hudson*, the Lamar County Board of Education filed suit seeking to void Hudson's lease of sixteenth section land. Hudson was not the original lessee; the original lessee acquired 3.5 acres of land for a 99-year term beginning in 1956 for $150. Id. at 684. Hudson acquired 2.5 acres of this tract for the remainder of the term from the original lessee for a one time fee of $45,000 in 1979. Id. The majority ruled that the original lease was void for lack of adequate consideration and that Hudson was not a bona fide purchaser because he had constructive knowledge of the inadequate consideration in the original lease. See id. at 687-88. Essentially, the Supreme Court remanded the case so that the lower court could determine present market value that the original lessee should have paid. Id. at 689. Therefore, Hudson, after an appraisal of the land, would have the opportunity to pay for the land a second time if he desired to keep it; i.e., he is responsible for the fee that his predecessor failed to pay. The Supreme Court held that the state could be equitably estopped in some cases but not in this case because "no estoppel may be enforced 'against the state or its counties where the acts of their officers were unauthorized.' " Id. at 688 (quoting *Oktibbeha County Bd. of Educ. v. Town of Sturgis*, 531 S.2d 585, 589 (Miss. 1988)). See Part IV.B.3 for a discussion of estoppel.

The dissenting justice noted that 99-year leases were originally instituted in 1944 to encourage investment in towns that rested on sixteenth section land, and he noted the good faith of the

lot in rural Mississippi in 1960. Further, and most importantly, recovering these lands often penalizes bona fide purchasers[101] who were in no way on notice of any defects in title since states generally have not demanded that adequate consideration be paid for school lands for some 100 years.[102]

b. The Test's Subjectivity

A problem related to the inaccuracy of the adequate consideration test is that it is so easily manipulated that it is subject to changing judicial views. Courts can inquire aggressively into the adequacy of consideration or they can give lip service to this analysis and, for all practical purposes, bypass it. Therefore, a malleable legal doctrine of this sort encourages judges to legislate from the bench.

c. The Test's Drain on Resources

Finally, using the adequate consideration test wastes judicial resources. The *Hill* opinion covers thirty pages, and evidence introduced at trial included the market conditions in rural Mississippi in 1960,[103] a survey of the disputed lot, and a history of the chain of title to the lot.[104] If the courts employ the adequate consideration test, trials will be fact intensive, consuming precious judicial resources in already crowded state courts.

C. Advantages and Disadvantages of Recovering School Lands

The most obvious advantage in recovering school lands is that more revenue will be available for the school system. But other more subtle benefits exist: state governments bring legitimacy to themselves by correcting the evils of the past, and justice is served when one who has received land for a nominal sum is forced to return the land to the rightful beneficiaries, the schoolchildren of the state.

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politicians, the appraisers, the Board of Education, and the purchaser. Id. at 690. He articulated that the board had never expressed dissatisfaction with the lease from 1956 to 1979 and that the timing of the complaint was ironic—occurring just after Hudson had built $183,000 improvements on the property. Id. at 691.

101. See note 100 (*Hudson* involved stripping land from an allegedly bona fide purchaser).

102. Had states refused to accept nominal consideration for school lands, potential purchasers would have notice that purchases for nominal consideration were invalid. See *United States v. Mississippi*, 476 F.2d 941, 942 (5th Cir. 1973) (stating in dicta that paying nominal consideration for school lands is allowed). See also note 100 (noting that the bona fide purchaser in *Hudson*, for example, had no notice that the original lessee had not obtained a valid interest in the land).

103. See *Thompson*, 564 S.2d at 10 (referring to market conditions in Forest, Mississippi, in 1955 and 1960).

104. See id. at 3-4.

Despite these benefits, the recovery of school lands creates instability in land titles. The current legal analysis governing the recovery of school lands is somewhat in a state of flux. This uncertainty in the law, which in turn leads to uncertainty as to which land titles are actually vested in occupants of former school lands, decreases the value of school lands. The uncertainty also discourages potential investment in the property. Since at least one section in every township in thirty-three states is current or former school land[105] and since even the rural land is often valuable for its minerals[106] and therefore is conveyed actively, the uncertainty in the law affects tremendous amounts of land. The upheaval and uncertainty in land title caused by the states' seeking recovery of school lands already has produced problems in Mississippi. Mississippi Valley Title Insurance Company, the largest title insurer in Mississippi, no longer writes title policies for sixteenth section land that insure the occupant against losses incurred due to nominal consideration being paid to the state for the land.[107]

Additionally, since states have tolerated sales of school land for nominal consideration for many years,[108] many individuals acquired school land not knowing of any wrongdoing. Therefore, recovering land from these individuals is contrary to manifest justice. Finally, allowing recovery potentially could spark attorney malpractice actions. All title lawyers who advised bona fide purchasers that they had clear title to school lands or original purchasers that they could buy for nominal consideration may be subject to liability.[109]

For all practical purposes, states have had no laws requiring that they receive adequate consideration for school lands since their trust obligations generally have not been enforced. Therefore, recovering

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105. See Dissertation at 204, 206 (cited in note 2).

106. For examples of suits over mineral rights on school land, see *Chevron U.S.A., Inc. v. State*, 578 S.2d 644 (Miss. 1991); *Kadish v. Arizona State Land Dept.*, 155 Ariz. 484, 747 P.2d 1183 (1987), aff'd sub nom *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).

107. Telephone interview with Carolyn Freeman, Vice President, Mississippi Valley Title Insurance Company (March 12, 1992). Mississippi Valley Title will write policies insuring school land, but the contracts must contain multiple restrictions protecting the company from any losses that could occur as a result of the Secretary of State's efforts to recover school lands. Mississippi Valley Title employs these restrictions as a result of the state's push to recover school lands. Id. The conclusion to be drawn is that, for all practical purposes, one cannot obtain title insurance on school lands from Mississippi Valley Title.

108. This tolerance is readily apparent. Most school land is no longer vested in the states, the permanent school funds are not large, and this author has located less than fifty school lands recovery cases.

109. See *Hill*, 564 S.2d at 16 (Hawkins dissenting) (stating that 441 other leases of parcels of sixteenth section land in the late 1940s and 1950s paid the exact same rent, $7.50, as did the purchaser of this lease). This fact vividly demonstrates how many attorneys could face potential liability for counseling purchasers of school land that nominal consideration transactions were lawful.

school land, in effect, is identical to enacting new legislation demanding that adequate consideration be received for school lands and giving that legislation retroactive effect. Obviously, retroactive application of legislation is problematic—in fact, it is constitutionally suspect.[110] Therefore, the law should eliminate or limit the recovery of school land, and states should seriously consider the consequences of recovering school lands. Public trust in the government is more important than recovering school trust lands, and governments build this trust when they maintain policies in a stable fashion.

IV. Alternative Legal Frameworks

Because every state that received large land grants for education has disposed of a large percentage of them, every state conceivably could reclaim vast tracts of land that were not sold according to proper procedures or that were sold for inadequate consideration.[111] For this reason, this area of the law is vulnerable to unrest. Hence, state legislative enactments to improve the legal framework of the law governing school trust lands are imperative. This legislation should settle title to school lands in a manner fair to the states and to the current occupants of the land. It also should clarify ambiguities that exist in the current system.

A. Eliminating the Application of the Adequate Consideration Test

Essentially, courts could almost entirely eliminate the recovery of school lands by ceasing to apply the adequate consideration test. If courts eliminate this test, recovery would only be allowed if the state could prove that the sale was fraudulent or that statutory procedures for alienating the land were not satisfied.

1. Good Faith Test

One way courts could eliminate the adequate consideration test is by employing a good faith test. The party seeking nullification of the conveyance would bear the burden of showing bad faith by the trustee or purchaser, and, if no bad faith were shown, then the court would deem the sale valid. In other words, if the transfer was not fraudulent,

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110. See Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692-93 (1960).

111. The remainder of this Note primarily focuses on the adequate consideration test since it is the subject of so much fluctuation in this area of the law. Compliance with statutory procedures is a more objective analysis that generally is less troublesome.

then the transaction is valid. Some judges advocate this framework, but no court has yet employed it.[112]

The advantage of the good faith test is that it promotes fairness by allowing transactions that were conducted in good faith to stand. The disadvantage, however, is that it is as ad hoc as the adequate consideration test—good faith tests are inherently subjective and susceptible to manipulation. More importantly, the good faith test disregards the essential purpose of the school trust lands—that the trust exists for the benefit of the schoolchildren. Just because a transaction was conducted in good faith does not mean that the school children benefitted from the transaction. Therefore, the good faith test is not the optimal alternative to the adequate consideration test.

2. Statutory Compliance Test

Courts could also eliminate the adequate consideration test by holding that transactions are valid if statutory requirements for the sale were fully satisfied. Proponents could argue that the statutory compliance test, by eliminating the adequate consideration test, would eliminate subjectivity in the analysis of school lands recovery cases, thereby giving certainty and stability to the law. Like the good faith test, however, this analysis fails to consider whether the state received fair value for the trust lands. Also, some subjectivity would still exist in the analysis of whether the statutory demands were fully satisfied, and in fact, courts might be encouraged to search the statutory procedures aggressively to create noncompliance.[113] For these reasons, the statutory compliance approach is not an optimal replacement for the adequate consideration test, and most courts have refused to adopt it.[114]

The issue of whether statutory procedures were followed should, however, be a factor that helps the court decide whether consideration was adequate. For example, if the statutory procedures were met, then a presumption of the validity of the transaction should be created, and the party seeking to nullify the transaction should have the burden to overcome that presumption.

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112. In *Hill*, 564 S.2d at 29 (Hawkins dissenting), Justice Hawkins stated that the majority should not act as factfinders to determine adequate consideration but should allow good faith transactions to stand. He argued: "This Court might exercise a little humility and acknowledge that the leasing policy of sixteenth section town lots, when done honestly and in good faith, is a matter best left entirely in the hands of the people who live there, who after all, will either be enriched together or suffer together." Id. (Hawkins dissenting).

113. Any court that desired to invalidate a school land transaction could meticulously analyze the transaction and find noncompliance with some part of the applicable statute.

114. See *Bragg v. Carter*, 367 S.2d 165, 166 (Miss. 1979) (stating that the statutory compliance test "does not, and indeed could not, override the mandates of the constitution," which demands that adequate consideration be paid for school lands).

B. Limiting the Recovery of School Lands

Since receiving fair price for the school lands is integral to the nature of the trust, the adequate consideration test should not be completely eliminated. Courts should still apply the test either when the lessee or purchaser was, or should have been, on notice that nominal consideration was not adequate or when the lease or deed is relatively current.[115] Statutes of limitation, estoppel, laches, and marketable record title acts are four legal theories that courts can employ to limit the application of the adequate consideration test. Nonetheless, courts rarely apply these legal doctrines against states.

Before these legal theories for limiting the recovery of school lands can be considered, the issue of sovereign immunity must be examined. Sovereign immunity often plays into the analysis in school land recovery cases, and has been used as a justification for not applying the above mentioned legal mechanisms against states.

1. Sovereign Immunity and its Role in Suits to Recover School Lands

a. *Sovereign Immunity from Suit*

Typically, a state sues a private holder of school land in state court to quiet title to school lands, rather than the private holder suing the state. Since the state usually is the plaintiff, whether the state is immune from suit is not an issue. But at times individuals sue the state to quiet title to former school trust lands, and many states have contended that they cannot be sued in these situations.[116] The law varies by state; some states have waived sovereign immunity wholly,[117] others keep sovereign immunity for themselves as sovereigns but do not extend it to agencies or arms of the state,[118] and still others keep immunity for both

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115. If the deed or lease is relatively current, the court would have an accurate indication as to what constitutes adequate consideration.

116. See, for example, *Terrebonne Parish Sch. Bd. v. St. Mary Parish Sch. Bd.*, 131 S.2d 266, 267 (La. Ct. App. 1961), aff'd, 138 S.2d 104 (La. 1961). The Terrebonne school board sued the St. Mary school board seeking to establish its rights to minerals under school lands, and the St. Mary school board alleged that it was immune from suit. Id. at 267.

117. See generally 81A *C.J.S. States* § 298 (West 1977).

118. See *Terrebonne*, 131 S.2d at 268, where the First Circuit Court of Appeals of Louisiana stated: "(a) The jurisprudence of this state is established to the effect a state agency is not ipso facto entitled to the same immunity as the state itself (b) Legislative consent was never required for suits against the state in certain fields or areas of law and the withdrawal of consent previously given does not affect those instances where no consent or waiver of immunity is required." See also George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476 (1953).

the state as a sovereign and for its agencies and arms.[119] Most states have retained sovereign immunity to some extent.[120]

The distinction between states as sovereigns and state agencies can factor into the analysis of suits for the recovery of school lands because agencies often act on the state's behalf to administer the trust lands. Since Congress sometimes granted title to school lands to the inhabitants of the township,[121] local entities, rather than the state, often administered the trust lands.[122] So, if an owner of an interest in school land decided to sue to quiet title in his land, and the state agencies or local municipalities were not protected by sovereign immunity, he strategically could decide to sue the respective state agency or local municipality in order to avoid encountering a problem with sovereign immunity. The extent to which individuals can avoid sovereign immunity in this manner varies by jurisdiction.[123]

Sovereign immunity has the potential not only to protect states from suit in their own courts but it usually protects them from suit in federal courts as well. The Eleventh Amendment to the U.S. Constitution, as interpreted by the Supreme Court, protects a state from suit by one of its own citizens in federal court unless the state consents to jurisdiction.[124] A state may be sued in federal court, however, even without consent if the private claimant raises a constitutional claim for prospective relief. In *Mauldin v. Molpus*,[125] which involved an action to quiet title over sixteenth section lands, the state argued that under the Eleventh Amendment it could not be sued in federal court by the alleged owners of interests in sixteenth section land.[126] The district court, relying on Supreme Court precedent, ruled that an unconsenting state is immune from suits brought in federal court by its own citizens save one exception—a federal court may hear a petition for prospective relief enjoining a state official from unconstitutional conduct.[127]

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119. See *City of Kenosha v. State*, 35 Wis.2d 317, 151 N.W.2d 36, 39 (1967) (holding that both the state and its arms are sovereignly immune from suit).

120. See, for example, *Washington v. Fireman's Fund Ins. Co.*, 68 Hawaii 192, 708 P.2d 129 (1985) (allowing the state to assert sovereign immunity as a defense but not allowing state officials to use the defense when a plaintiff attacks their conduct on the grounds of unconstitutionality). See also James G. Hamill, *The Changing Concept of Sovereign Immunity*, 13 Defense L. J. 653, 664-76 (1963) (listing the status of sovereign immunity in each state).

121. See note 41 and accompanying text.

122. See, for example, Dissertation at 162-63 (cited in note 2).

123. Theoretically, this scenerio should not be a recurring problem because: 1) the state may wish to consent to suit if it believes it can win (being sued would save it the difficulties of initiating suit), and 2) the state may consent to suit because it has an interest in knowing who holds the title to the land.

124. See, for example, *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 828 (5th Cir. 1971) (ruling that Eleventh Amendment immunity applies unless the state consents to jurisdiction).

125. 647 F. Supp. 891 (S.D. Miss 1986).

126. Id.

127. Id. at 893. The district court took jurisdiction over the suit because the claim was based

b. The Diminished Need for Sovereign Immunity

The most persuasive justification in support of the doctrine of sovereign immunity is that it protects deep-pocketed state governments from continual lawsuits.[128] This justification, however, is not persuasive in quiet title actions because one must have a color-of-title claim to school lands in order to sue the state. Therefore, unlike the number of people who potentially could sue the state in tort, the number of people who are eligible to bring this type of suit is limited.

Sovereign immunity also rests on the need for orderly administration of government, which would be disrupted if the state could be sued at the insistence of every citizen.[129] Again, this concern is minimal because citizens rarely sue the state in school lands cases; usually, the state sues the citizen to recover the land.[130] Further, if courts apply statutes of limitation or marketable record title acts against the state,[131] private owners will have even less threat of state recovery of their school lands and therefore less reason to sue the state. When citizens want to quiet title to school lands, however, they should have the opportunity to bring suit and should not have to wait for the state to sue them in order to know whether their interest in the land is vested. The state can and should consent to jurisdiction in school lands cases.[132]

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landmark case *Ex parte Young*, 209 U.S. 123 (1908). See also *Papasan*, 478 U.S. at 276-79 (explaining the *Young* decision).

128. See, for example, *Berek v. Metropolitan Dade County*, 396 S.2d 756, 758 (Fla. Ct. App. 1981) (stating that sovereign immunity protects "the public against profligate encroachments on the public treasury") approved in result, 422 S.2d 838 (Fla. 1982).

129. See id. (stating that sovereign immunity protects "the need for orderly administration of government").

130. See note 116 and accompanying text.

131. See Parts IV.B.2 and IV.B.5, respectively.

132. See Robert A. Seale, Jr., Note, *Mineral Rights—Title Controversies with the State and Its Agencies—Sovereign Immunity from Suit*, 27 La. L. Rev. 124, 134 (1966) (advocating termination of the use of sovereign immunity in the area of title controversies). In some situations, the United States waives sovereign immunity, allowing citizens to sue it in quiet title actions. See Martin M. Heit, Annotation, *Real Property Quiet Title Actions Against United States Under Quiet Title Act (28 USCS § 2409a)*, 60 A.L.R. Fed. 645, 650 (1982). For a history of the origin of the doctrine of sovereign immunity, see Pugh, *Sovereign Immunity*, 13 La. L. Rev. 476 (cited in note 118). The doctrine itself has been much criticized as an outmoded concept. See, for example, William E. Dawn, Note, *Sovereign Immunity in Colorado and the Feasibility of Judicial Abrogation*, 35 U. Colo. L. Rev. 529 (1963).

2. Statutes of Limitation

State recovery of school lands and the application of the adequate consideration test can be limited by applying statutes of limitation to school land disputes. States can expressly allow for statutes of limitation to run against them, but they usually do not subject themselves to this restraint.[133] In fact, because state immunity from limitations is so firmly embedded in the law, private individuals rarely raise limitations of actions as a defense when the state seeks to recover school lands from them. Alabama initially applied its statute of limitation against itself in school land suits.[134] Today, however, Alabama specifically exempts itself from the application of a statute of limitation in school land recovery cases.[135]

Some might argue that state immunity from statutes of limitation is justified. Consider by analogy *Oneida County v. Oneida Indian Nation.*[136] In *Oneida*, the Oneida Indians sued New York to recover land that they had sold to the state immediately after the American Revolution.[137] New York had obtained the land for far less than fair market value, and the Oneidas argued that the contract was illegal because it violated a federal statute.[138] New York, however, argued that it could not be sued by the Oneidas because the statute of limitation had run.[139] The Supreme Court held that enforcing a statute of limitation against the state would be contrary to federal policy.[140] Policy arguments against the application of statutes of limitation, also can be made on behalf of schoolchildren who, via their respective states, seek to recover school lands. The interests of schoolchildren in receiving an education are as important as those of Indians in receiving their native lands. Furthermore, just as the Oneidas were victims of New York's unfair acquisition of their lands, school lands in many instances have been unfairly taken from schoolchildren.

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133. For example, compare *Mississippi State Highway Comm'n v. New Albany Gas Systems*, 534 S.2d 204 (Miss. 1988) (holding that statutes of limitation do not run against the state) with Utah Code Ann. §§ 57-9-1 to 57-9-10 (1990) (holding that Utah subjects itself to a statute of limitation in school land recovery cases).

134. See *State v. Schmidt*, 180 Ala. 374, 61 S. 293, 294 (1913) (declaring: "We see nothing in the terms of the grant of the sixteenth section lands, or in any binding act of Congress to which we have been referred, that presented or presents an obstacle to the valid application of the statute of limitations . . . to [school] lands"), aff'd, 232 U.S. 168 (1914).

135. See Ala. Code § 6-2-31 (1977).

136. 470 U.S. 226 (1985).

137. Id. at 229.

138. Id. The Oneidas alleged that the conveyance violated the Trade and Intercourse Act of 1793, ch. 19, § 8, 1 Stat. 329.

139. *Oneida*, 470 U.S. at 233.

140. Id. at 241.

The preceding arguments are powerful; however, countervailing concerns should prevail. Stability in land titles is essential to making school lands commercially valuable. The Oneida lands are but one tract, while original school land grants comprise over 400 million acres in thirty-three states[141] and involve countless individual contracts, deeds, and leases. Most states divested themselves of title to a large percentage of these lands more than seventy-five years ago; therefore, allowing states to recover high percentages of this land could destroy much economic investment and public confidence. By stabilizing the title to school land divestments of the distant past, states can ensure that the remaining lands will increase in value.[142]

Furthermore, states cannot justify the failure to apply statutes of limitation against themselves under a protection of the state treasury rationale that justifies the doctrine of sovereign immunity. By recovering school lands, states are seeking to add to the treasury; they are not simply protecting the treasury from being looted by citizens. States long ago voluntarily divested themselves of large portions of the school lands which, at that time, enhanced the state treasury. For all practical purposes, the states knew when they sold the lands that the lands no longer belonged to them, and they have operated under this presumption for a century.

The states were wrong to sell these lands for inadequate consideration, and, arguably, individuals were wrong to buy the land. But the states must accept the brunt of the blame since they were the trustees. Also, many potential recovery suits would not even be brought against the original purchaser, so the subsequent purchaser who has watched the state sell school land for nominal consideration for many years is not to blame for purchasing the land. To allow the state to recover the land when the state is to blame for wrongfully disposing of it would be an injustice.

The state must be held accountable for its actions. Perhaps Congress should have penalized states for inadequately disposing of the lands during initial conveyances since the Enabling Acts and the North-

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141. See Dissertation at 204, 206 (cited in note 2). A total sum can be derived from these two charts.

142. In M. Patrick McDowell, Note, *Limitation Periods for Federal Causes of Action After the Judicial Improvements Act of 1990*, 44 Vand. L. Rev. 1355, 1367-68 n.107 (1991), the author explains that statutes of limitation "protect parties from being subject to indefinite threats of lawsuits, . . . protect the judicial system from having to consider cases where relevant evidence has been lost or forgotten, and . . . protect society in general by helping to preserve stability in commercial relations." See generally, Neil Sobol, Comment, *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 Sw. L. J. 895, 897-99 (1987) (listing the purposes of statutes of limitation).

west Ordinance contained mandates concerning proper disposal.[143] Nonetheless, the opportunity for holding states accountable should not again be bypassed. If the need for state accountability to its citizens is minimized or overlooked entirely, the state will have less incentive to act properly since no practical nor political costs will accompany its breaches of fiduciary duty. How will state governments ever act responsibly when they can correct their flaws of the past by unjustly recovering school trust lands? By stopping states from regaining this land, a higher political cost will attach to government incompetence as the public demands that the government act in a competent manner—politicians will lose votes for leasing sixteenth section land for inadequate consideration.

An argument can be made that adequate consideration will now be paid for school lands since superior statutory schemes govern management of the lands and since their importance is now so well known that no need for accountability exists. While this assertion may be true, it fails to address the principle that the state must be accountable in its role as trustee. That is, receiving a fair price for school lands in the future is not the only concern—in a theoretical sense, citizens need governments that continually and consistently are forced to act in the citizens' best interests, and the framework of the law should always work toward this end. Accountability is one mechanism that drives the private sector to act efficiently. The public sector should operate similarly. If states are not allowed to recover school lands that were sold for inadequate consideration, they, like the private sector, will yield the fruits of efficiency and productivity that accompany being held accountable.

Schoolchildren do need income from school lands. But what schoolchildren need even more than this income is a government that will be accountable to them. After all, the damage has been done; school lands revenue never will comprise anywhere close to a majority of funding for state schools.[144] By limiting state recovery of school lands, legislators can ensure that the state is and will continue to be accountable to its citizens for its actions.

Admittedly, citizens must use the law to hold their state governments accountable. Citizens have acted, but not frequently. In *Holmes v. Jones*,[145] citizens of Rankin County, Mississippi, sued the state for failing to perform its duties to the schoolchildren of the county by leas-

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143. See generally note 39 and accompanying text.

144. Dissertation at 2 (cited in note 2). New Mexico derives the highest percentage of any state, 21%, of its school revenue from school lands. Texas also gains great sums from school land. In 1989, that state contributed over $600 million to schools from land management and interest on its permanent fund. Id. at 177.

145. 318 S.2d 865 (Miss. 1975).

ing school lands for inadequate consideration.[146] The Mississippi Supreme Court ruled that the Board of Supervisors was liable to the schoolchildren for unconstitutionally leasing 150 acres of school land to C.W. Jones, the Superintendent of Education in Rankin County. Jones had leased the lands to himself for a twenty-five year term payable at $37.50 annually.[147] Citizens should have filed more suits like this one over the past one hundred years. By filing these suits, citizens can act in concert with the proposed framework of the law to hold states accountable for their management and disposition of school lands.

An added enticement for limiting state recovery of school land is that it is a way to demand state accountability with no real costs. States divested themselves of this land long ago, so any recoveries they now receive are windfalls. In other words, states do not presently own the lands, so if courts refuse to allow states to recover the lands, they are merely preserving the status quo.

3. Equitable Estoppel

Another way courts can limit recovery of school lands is by applying equitable estoppel against the state. A state may be equitably estopped from asserting its rights if it has caused another party to rely on its conduct such that the other party has changed his or her position in reliance and will suffer injury if the state is allowed to repudiate its conduct.[148] Private claimants often argue that the state is equitably estopped from recovering school lands; however, they rarely win since most states' common law immunizes the state and its municipalities from equitable estoppel principles.[149] Sovereign immunity and the theory that the state must be protected seem to have manifested themselves in states' refusals to apply estoppel against themselves.

Estoppel can be effectuated against the state by legislative enact-

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146. Id. at 866.

147. Id. at 866-67. The citizens, in addition to their allegation that inadequate consideration was not received, possibly could have alleged that a fraudulent transfer occurred. This issue was not raised. In situations where transfers of school land are marred by fraud, countervailing policy considerations may support state recovery of this land more frequently than in cases where the only allegation is that the lands were not sold for adequate consideration. See generally notes 25 and 57.

148. See, for example, *Peplinski v. Campbell*, 37 Wash.2d 857, 226 P.2d 211, 213 (1951).

149. See, for example, *Hill v. Thompson*, 564 S.2d 1, 14 (Miss. 1989) (holding that estoppel may not be enforced against the state or its counties when acts of their officials were unauthorized). See also *The Texas Co. v. State*, 267 S.W.2d 456, 463 (Tex. Civ. App. 1954) (holding that "administration of the Public Free School Lands is a governmental function against which equitable estoppel does not apply"), aff'd in part, rev'd in part, 154 Tex. 494, 281 S.W.2d 83 (1955). Contrast Paul L. Westcott, Note, *Florida Supreme Court Renews "Public Trust" in Florida Legislature and Trustees*, 16 Stetson L. Rev. 959, 970-72 (1987) (noting that estoppel may be applied against the state in Florida).

ments,[150] and at least one state has enacted this legislation.[151] But many states refuse or are reluctant to apply equitable estoppel against themselves.[152] Therefore, whether a private claimant will benefit from the doctrine of equitable estoppel largely depends upon the jurisdiction within which he is litigating. The Mississippi Supreme Court, which has long refused to apply estoppel against the state,[153] recently has done so. In *Board of Trustees v. Rye*,[154] the court, in disallowing state recovery of school lands, applied equitable estoppel against the state since the Ryes' grant was ninety-three years old and the Ryes had farmed, fenced, leased, cut timber, and paid taxes on the land for the entire period.[155] The court found the payment of taxes on the land particularly important since the private claimant relied on his title to the lands by virtue of the state's continual acceptance of his taxes.[156]

Just as statutes of limitation would be valuable in promoting fairness by limiting state recovery of school lands, the application of estoppel against states would be a beneficial addition to the law. States would not have to fear that estoppel would annihilate all of their claims to former school trust lands; it could never defeat these claims when an individual was on notice of the invalidity of his title at the time he acquired the school land. That is, estoppel, by definition, only protects an individual when he or she has cause to rely. Estoppel would apply, however, to situations in which states had sold land for nominal consideration for long periods of time and an individual, in reliance on this practice, had bought the land during that time.

The primary reason equitable estoppel is not applied against states is to protect the public's interest. That is to say, estoppel is not available as a defense against the government when the public's interest would be unduly damaged by applying estoppel principles.[157] Even though applying estoppel against the states in school lands cases would cause the public to lose income, the greater public interest is that the

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150. See, for example, *Lee v. Lang*, 140 Fla. 782, 192 S. 490, 491 (1939).

151. See id. at 491-93.

152. See, for example, *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671 (Utah Ct. App. 1990) (stating that as a general rule, estoppel is not assertable against the state and its agencies except in unusual circumstances when plain justice requires it).

153. See *Cinque Bambini Partnership v. State*, 491 S.2d 508, 521 (Miss. 1986) (noting that the Mississippi Supreme Court was not aware of any case involving the dispute of real property in which equitable estoppel had been applied), aff'd sub nom. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

154. 521 S.2d 900, 908-09 (Miss. 1988).

155. Id.

156. See id. (holding that the county ignored whatever claims to title it had by accepting taxes).

157. See *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973).

state be accountable to its citizens.[158] Public trust in the state is more valuable than income from school trust lands. If the state has caused the individual to rely on his or her title to school land, it is only just that the doctrine of estoppel be available to him or her.

4. Laches

Courts also could use the doctrine of laches to limit recovery of school lands. The doctrine of laches is similar to estoppel in that it would allow private parties to allege that the state inexcusably delayed in bringing the suit to recover the school land. If the individual were prejudiced due to that delay, state recovery would be precluded.[159] As the law presently stands, the doctrine of laches is useless to a private claimant in title disputes with the state over school lands. As with statutes of limitation,[160] equitable estoppel,[161] and marketable record title acts,[162] states generally are immune from the application of laches.[163]

The policy considerations in applying laches are similar to those with regard to statutes of limitation and equitable estoppel,[164] and they favor using laches in school land recovery cases. One might argue that the application of laches, statutes of limitation, and estoppel is a drastic change in the law that would have a devastating impact on state governments. The answer is twofold. First, states are slowly abrogating their practices of immunizing themselves from these doctrines so the change would not be sudden.[165] Second, the application of these doctrines against states can be limited to quiet title suits over school lands.

5. Marketable Record Title Statutes

Finally, and perhaps most importantly, marketable record title statutes could be used to limit state recovery of school lands. Essentially, there are two types of marketable record title acts: those that create vested property rights and those that operate as a statute of limi-

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158. See text accompanying notes 143-47.

159. See *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30-31 (1951). See generally McDowell, 44 Vand. L. Rev. at 1369-71 (cited in note 142); Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127, 1141-46 (1979) (providing a general discussion of the history, use of, and advantages of the doctrine of laches).

160. See Part IV.B.2.

161. See Part IV.B.3.

162. See Part IV.B.5.

163. See, for example, *Cinque Bambini*, 491 S.2d at 521 (ruling that the state can never lose its title because of laches).

164. See text accompanying notes 136-47, 157-58.

165. See generally James G. Hamill, *The Changing Concept of Sovereign Immunity*, 13 Defense L. J. 653 (1963).

tation and only bar remedies.[166] Florida is one state that applies its marketable record title act against itself. Florida's legislature designed its marketable record title act to create vested property rights in addition to serving as statute of limitation.[167]

Marketable record title statutes are perhaps the single best solution to problems concerning state recovery of school lands.[168] These acts would stabilize title to school lands but also would allow states to recover previously divested lands so long as the imperfect conveyance occurred within a reasonable time.[169] Courts never would be required to engage in an analysis of the adequacy of consideration for a conveyance that occurred in the distant past. Consider how a marketable record title act would have affected the result in *Madison County Board of Education v. Illinois Central Railroad.*[170] In *Illinois Central*, a school lands recovery case, the Fifth Circuit stretched and arguably misstated the law in order to award the former school trust lands to the railroad. In 1882, Mississippi had granted a right of way in fee simple absolute

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166. Note, *Marketable Record Title Legislation—A Model Act for Iowa*, 47 Iowa L. Rev. 389, 391-93 (1962). Statutes of limitation are discussed fully in Part IV.B.2.; this section of the note considers only the type of marketable record title statute that creates vested property rights.

167. See *Sawyer v. Modrell*, 286 S.2d 610, 612 (Fla. Ct. App. 1973) (declaring that "[t]he purpose of the Marketable Record Title Act was to simplify and facilitate land transactions by letting interested parties rely on the record title." The Act extinguishes "*all claims* of a given age. . . . *[I]t nullifies all interests which are older than the root of title*"), quoting *Marshall v. Hollywood, Inc.*, 236 S.2d 114, 119 (Fla. 1970). The Florida Supreme Court later stated:

> The Marketable Record Title Act is a comprehensive plan for reform in conveyancing procedures. It is a curative act in that it may operate to correct certain defects which have arisen in the execution of instruments in the chain of title. Curative statutes reach back on past events to correct errors or irregularities and to render valid and effective attempted acts which would be otherwise ineffective for the purpose the parties intended. They operate to complete a transaction which the parties intended to accomplish but carried out imperfectly.
>
> The Marketable Record Title Act is also a *statute of limitations* in that it requires stale demands to be asserted within a reasonable time after a cause of action has accrued. It prescribes a period within which a right may be enforced.
>
> The Marketable Record Title Act is also a *recording act* in that it provides for a simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished.

Askew v. Sonson, 409 S.2d 7, 13 (Fla. 1981) (quoting *City of Miami v. St. Joe Paper Co.*, 364 S.2d 439 (Fla. 1978)). For a positive comment and explanation of the MRTA and its purpose, see Ralph E. Boyer and Marshall S. Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. Miami L. Rev. 103 (1963).

168. Their advantage over statutes of limitation is that they actually vest title to the land.

169. Florida's act sets the reasonable time at 30 years; Utah, which also applies its MRTA against itself, has a 40 year statute. See Utah Code Ann. §§ 57-9-1 to 57-9-10 (1990). Because the purpose of applying the MRTA against the state in school land cases is to avoid the analysis of the adequacy of consideration in old conveyances, 30 years, but no more, is an appropriate time limitation. Nebraska, which exempts the state from MRTA application, has a 22 year period. See Neb. Rev. Stat. §§ 76-288 to 76-298 (1990).

170. 939 F.2d 292 (5th Cir. 1991).

for no cash compensation to Illinois Central's successor in title.[171] If ever there were an abuse of fiduciary duty, this was the case. Yet the Fifth Circuit did not find an abuse of fiduciary duty, and it awarded the land to Illinois Central. The court ruled that the state's duty to the schoolchildren was only an honorary trust or a moral obligation[172] and that the schoolchildren were not the sole beneficiaries of the trust.[173] This view is not traditionally recognized law.[174] Even Mississippi precedents do not support this conclusion.[175] Had it been employed, a marketable record title statute would have enabled the Fifth Circuit to use a valid legal theory to vest title in Illinois Central rather than having to stretch or misstate the law.[176] Marketable record title acts can relieve courts from straining the law in their attempts to reach equitable solutions in school land recovery cases. Although many states have marketable record title statutes, they rarely apply the acts against themselves.[177]

a. Applying the Marketable Record Title Statute Against the State—Florida

Florida law states that any person who holds title, either alone or with his predecessors, for thirty years or more has marketable title to

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171. Id. at 294.

172. Id. at 303-04. Some support exists for the court's conclusion. See id. at 302-03 (citing cases that lend support); *Alabama v. Schmidt*, 232 U.S. 168, 172-74 (1914) (stating that trust obligation is honorary). But well-settled law views the trust obligation as binding. See Part II.A. In addition to the honorary trust rationale, the Fifth Circuit sought to justify its decision on the grounds that "it [was] unlikely that in 1822 the Congress intended to place binding restrictions on how a state might dispose of its own lands." *Illinois Central*, 939 F.2d at 303. But Congress's stringent conditions on the use of the school land in the Arizona and New Mexico Enabling Acts flatly contradicts this rationale. See Colby, 36 Cal. L. Rev. at 377 (cited in note 11) (explaining that the reason for these restrictions was to "make sure that these school lands would be more wisely administered").

173. *Illinois Central*, 939 F.2d at 306.

174. See Part II.A.

175. See, for example, *Keys v. Carter*, 318 S.2d 862, 864 (Miss. 1975) (ruling that school lands held in trust should be dealt with according to "the rules applicable to trusts and trust property generally").

176. For another example of when a marketable record title statute would have been effective, see *Valvoline Oil Co. v. Concordia Parish Sch. Bd.*, 216 S.2d 702 (La. Ct. App. 1968). In *Valvoline Oil*, a patent on school land was granted to an individual in 1861. The Registrar of State Lands revoked the patent in 1917. Id. at 704. The revocation, however, was invalid, the court held, since the only way to get a revocation was to secure it through court proceedings. Id. at 708. In any event, the land had been sold for taxes in 1897, and this court found the sale to be valid since it went unchallenged for five years. Even though equity favored the school board since they had been on the land for a long time, fenced it, etc., the private claimant who traced his title through the invalid tax deed won. The private claimant had not even known of his potential interest in the land until 1966 when he was approached about leasing the minerals under the land.

177. See, for example, Neb. Rev. Stat. § 76-298 (1990).

the land, free and clear from all claims.[178] This statute applies against the state as well as against private individuals.[179] The application of the Marketable Record Title Act (MRTA) to state lands was innovative, unusual, and controversial, but the Florida Supreme Court has ruled unequivocally that the MRTA does apply against the state in school lands cases. In *Askew v. Sonson*,[180] the state sought recovery of school land that the private claimants had held on record and unchallenged for over thirty years.[181] The disputed land, along with other sixteenth section lands, had vested in the state of Florida in 1845, the year that Florida was admitted to the Union.[182] But Florida had inadvertently sold this tract when the owner failed to pay taxes on the land in 1922;[183] neither party disputed that the tax sale was invalid since school lands in the state's possession are not subject to taxes.[184] Even so, the Florida Supreme Court, in holding that the MRTA may divest the state of title to school lands, stated that the Florida Constitution does not prohibit the Florida legislature from subjecting the state to the same laws that it imposes on the citizens of the state. The Florida Supreme Court also held that the legislature had made the MRTA applicable to the state.[185] The court remarked that if the state needs this particular tract, it can acquire it through eminent domain proceedings.[186]

In a lively dissent, Justice Overton argued that the MRTA, as applied to sixteenth section lands, is contrary to the state's trusteeship over the lands—that the sixteenth section lands must be protected.[187] The state itself had forcefully argued to this end, alleging that it would be unconstitutional to apply the MRTA to sixteenth section lands.[188]

In spite of *Sonson*, Justice Overton's dissent may have won the day in Florida. *Sonson* has not yet been overruled, but its reach is questionable after *Coastal Petroleum v. American Cyanamid*.[189] In *American Cyanamid*, the state allegedly conveyed lands beneath navigable waters

178. See Fla. Stat. Ann. § 712.02 (West 1988).

179. See, for example, *Sonson*, 409 S.2d at 13 (holding that in the MRTA the legislature had defined the term "person" to include the state and any political subdivision or agency; therefore, the MRTA expressly applied against the state).

180. 409 S.2d 7 (Fla. 1981).

181. Id. at 7-8. See also *Board of Trustees v. Stevens*, 472 S.2d 1287 (Fla. Dist. Ct. App. 1985), rev'd on other grounds, 495 S.2d 167 (Fla. 1986) (holding that the MRTA applies to submerged lands but not to sovereignty lands).

182. *Sonson*, 409 S.2d at 8.

183. Id.

184. See id. (the lower court held that the tax sale was invalid).

185. Id. at 13.

186. Id. at 14 (citing *Odom v. Deltona Corp.*, 341 S.2d 977, 989 (Fla. 1977)).

187. Id. at 15 (Overton dissenting).

188. Id. at 12.

189. 492 S.2d 339 (Fla. 1986).

to a private party in 1883. Lands beneath navigable waters are commonly known as sovereignty lands, and they are for public use, not to be conveyed to individuals.[190] The private claimant argued that the MRTA applied against the state to divest it of these sovereignty lands and vest the lands in him.[191] In light of the Florida Supreme Court's ruling in *Sonson* that the MRTA did apply against the state, the argument seemed persuasive. The court, however, ruled that the legislature "did not intend to make [the] MRTA applicable to sovereignty lands."[192] Oddly, the MRTA as originally enacted in 1963 did not exempt sovereignty lands from its application, yet in 1978, the Florida Legislature amended the statute expressly exempting sovereignty lands from being divested out of the state under the MRTA. Therefore, the prevailing view must have been that the MRTA did apply against sovereignty lands before 1978. The lower courts in Florida certainly had held this view. In *Internal Improvement Trust Fund v. Paradise Fruit Co.*,[193] the Fifth District refused to give retroactive effect to the 1978 amendment exempting sovereignty lands from MRTA application.[194] This ruling necessarily means that the Fifth District understood that the MRTA did apply against sovereignty lands until the 1978 amendment. Consider that the Second District interpreted the Fifth District's ruling in *Paradise Fruit Co.* as follows: "The [F]ifth [D]istrict concluded that [the] MRTA, as apparent from its plain language prior to the 1978 amendment, could perfect private ownership of sovereignty lands in applicable cases."[195] Arguably, prior to the 1978 amendment, in *Odom v. Deltona Corp.*,[196] the Florida Supreme Court also had ruled that the MRTA applied against state sovereignty lands.[197] Justice Boyd,[198] who dissented in *American Cyanamid*, believed that the MRTA, prior to the 1978 amendment, was meant to apply against the state in cases to recover sovereignty lands.[199]

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190. Id. at 342.

191. Id. at 343-44.

192. *Coastal Petroleum*, 492 S.2d at 344.

193. 414 S.2d 10 (Fla. Dist. Ct. App. 1982).

194. Id. In other words, all sovereignty lands that had vested in private individuals between 1963 and 1978 would remain private land.

195. *Stevens*, 472 S.2d at 1289.

196. 341 S.2d 977 (Fla. 1976).

197. Id. at 989-90 (stating that "ancient conveyances of sovereign lands in existence for more than thirty years. . .clearly vests marketable title in the grantees"; i.e., the state loses its claim). Contrast *Stevens*, 472 S.2d at 1290 (Bentley concurring in part, dissenting in part) (characterizing the Supreme Court's statement in *Odom* as dicta).

198. Justice Boyd was a member of the majority in *Sonson*, 409 S.2d 7.

199. *American Cyanamid*, 492 S.2d at 349 (Boyd dissenting). Justice Boyd convincingly justified his view as follows:

> The MRTA was intended to apply and should apply to all real estate claims without an

One wonders if the Florida Supreme Court might overrule *Sonson* by declaring that the MRTA was never intended to apply to school lands. After all, one justification for the Court's decision in *American Cyanamid* was the Court's concern that the state would lose much sovereignty land if the MRTA applied against it,[200] and former school lands probably comprise more acreage than do sovereignty lands.[201] Additionally, funds for school children arguably are as important as are the state's needs to own lands beneath navigable waters.

Given this uncertainty about the MRTA's application to state lands and, in particular, to school lands, the MRTA's purpose in Florida is thwarted for the time being. The element of certainty is what the MRTA was intended to create, and stability in land title and confidence for real estate purchasers depends upon this certainty.

b. Policy Arguments Concerning the Application of Marketable Record Title Statutes Against States

Perhaps the gravest fear in applying an MRTA against state school lands concerns the permanency of the decision. Florida's MRTA creates vested rights in property. That is, if a claimant has held title uncontested for over thirty years, he has clear title to that land. Therefore, any state claim to the land is completely extinguished, and once the land has vested in the individual, the state cannot successfully allege that it holds a valid lien on the land. The state's recovery of land under these circumstances would be a constitutional violation of the Due Process or Takings Clause,[202] and eminent domain, which obviously costs the state money, would be its only recourse.[203] Although the effect of an

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exception for those of the state. Under [the] MRTA, the claims of the state in these cases are asserted too late and cannot be revived. If private claimants were to seek to call into question the deeds of an ancestor given over one hundred years ago, based on mistakes, reservations or infirmities not preserved by re-recording under the statute, such claims would be barred under [the] MRTA. The same rule should apply against the state because of the overriding interest in the stability and marketability of land titles.

Constitutional protection of private property rights is an essential feature of our form of government and our society. Whenever the awesome power of government is used to extract from people their lives, liberties, or property, their only refuge is in the courts.

Id. (Boyd dissenting).

200. See id. at 341 (noting that the court took this case for the reason that it was of "great public importance," apparently meaning that the public could be affected adversely if sovereignty lands were divested out of the state).

201. Florida's original grant was approximately 975,000 acres. See Dissertation at 204 (cited in note 2).

202. See Hochman, 73 Harv. L. Rev. at 693-94 (cited in note 110) (stating that "retroactivity is a ground for holding a statute void . . . if it contravenes a specific provision of the Constitution").

203. See David L. Powell, Comment, *Unfinished Business—Protecting Public Rights to State Lands From Being Lost Under Florida's Marketable Record Title Act*, 13 Fla. St. U. L. Rev.

MRTA is grave, this effect is exactly what proponents of these statutes desire. The MRTA is intended to vest property in any individual who has a root of title to the land that has been uncontested for thirty years. The MRTA should extinguish old, stale claims to the land, producing a clear, uncontested title. An uncontested title yields stability in title, and stability in title brings value and investment to land. Any economic investors, whether they be oil companies or real estate investors, will be wary of investing in former school lands if the state can potentially nullify their title. Since the MRTA is a thirty year statute, the state has ample time to give notice of its interests in former trust lands—especially if the state has well defined and certain interests.

One might argue that enforcing an MRTA against the state will bring a heavy administrative burden since states will have to file notice of all of their interests in trust lands every thirty years. However, most states, due to the increased interest in school lands, now are keeping excellent records.[204] Furthermore, most states have sold a high percentage of their school lands so there is less land of which to keep track. An MRTA encourages states to discover their interests and file suit quickly to settle and quiet these interests in school lands. Finally, the application of an MRTA will eliminate the ability of the state to search for speculative interests in valuable school lands in order to produce instant revenue.[205]

From the standpoint of fairness, an MRTA also provides an excellent solution. The state's recovery of land that clearly belongs to it is equitable and fair, and nobody should receive a windfall at the expense

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599, 620-32 for a discussion of when vesting of school land occurs. The significance of the time of vesting is that at that point the state cannot take the land back. For example, the state could not enact legislation repealing its MRTA and give this new law retroactive effect.

204. See, for example, South Dakota Office of the Commissioner of School and Public Lands Annual Report (1990) (a detailed report of the status of school lands in South Dakota).

205. It is no secret nor surprise that former school lands of extraordinary value attract much attention from states. In *Haag v. State*, 219 N.W.2d 121 (N.D. 1974), the state sought to nullify a 1951 deed selling lands to an individual since coal had been discovered under the land. The North Dakota Constitution prohibited the state from selling school trust lands that had coal under them, yet the Supreme Court of North Dakota ruled that, in the absence of fraud or bad faith, the state was bound by its original determination that the lands did not have coal under them. Id. at 126-27. The North Dakota Supreme Court, however, did allow the state to recover some mineral interest in the land. See id. at 131. Similarly, in *Andrus v. Utah*, 446 U.S. 500 (1980), Utah was allowed to select lieu lands to be taken instead of the original school land grant which had been partially lost to preemption (that is, federal claims allowed the federal government to retain its interest in the land, thereby nullifying the state interest) and private entry prior to the federal survey of the lands (not until the survey did land vest in the state). Id. at 500. Utah chose "extremely valuable oil shale lands," but the United States would only allow Utah lands of relatively the same value as those lands that they had lost. Id. For more cases showing states' interests in valuable lands, see *Valvoline Oil*, 216 S.2d 702; *Martin County v. Magnolia Petroleum Co.*, 252 S.W.2d 266 (Tex. Ct. App. 1952); *Chevron U.S.A. v. State*, 578 S.2d 644 (Miss. 1991).

of the state. But, by the same token, recovery should be made within a reasonable amount of time so as to create as little instability in land title as possible. If the state can recover hundred-year-old divestments of school land that are no longer in the hands of the original purchaser and that it has long since written off as sold, the state would be receiving a windfall at the expense of the individual who owned the land.

V. CONCLUSION

The handling of school trust lands by states and their respective agencies has been a disgrace. If wise management plans for the land and insightful investment of its proceeds had been priorities long ago, states today would have tremendous revenues to invest in public education.[206] Because of these dismal failures of the past, one understands why states are seeking, or may seek, to salvage some value from this immense asset by recovering school lands to which they still retain some, albeit speculative, interest. The time has come, however, to close the book on the school trust lands. Recovering school lands because proper statutory procedures were not followed is unfair to occupants who have relied on clear title to the land for long periods of time. Furthermore, recovering school lands because the purchaser did not pay adequate consideration is a subjective, manipulable test that potentially threatens private property ownership and borders on a constitutional violation. When the divestment is relatively young and when the purchaser obtained his conveyance with notice that it did not satisfy state statutory or constitutional procedures for the sale, however, the state should be able to recover. Therefore, applying statutes of limitation, estoppel, laches, marketable record title acts, or a combination of these solutions against states is practical, equitable, and sensible.

This legal framework will ensure stability in land title to former school lands, thereby increasing their value and their investment potential. Furthermore, this framework is fair. Many individuals purchased school land from original purchasers who purchased the land when states were openly accepting nominal consideration for these lands. These individuals paid fair value to the original purchaser; they should not be forced to pay again to acquire clear title. Finally, limiting recovery of school lands is an opportunity to make states live with the consequences of their earlier actions. All citizens have an interest in state accountability since accountability will force state governments to be

206. See Dissertation at 161-62 (cited in note 2) (stating that income from school lands provided a major source of revenue in some states as late as the early 1900s).

efficient and productive, causing them to protect citizens from blunders like the school trust lands fiasco of the past.

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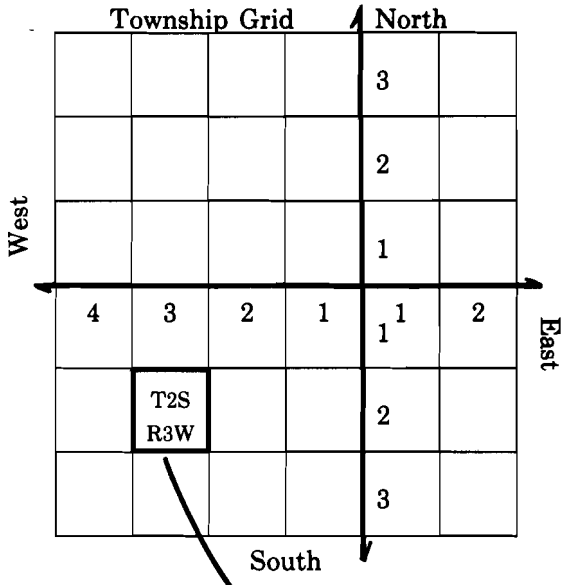
APPENDIX A
ILLUSTRATION OF A TOWNSHIP AND SECTION

Copied from Note, *Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act*, 9 J. Energy L. & Policy 195, 198 (1989).



Section 16

640 acres in a section

Township 2 South, Range 3 West

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36