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**A Battle of Public Goods: Montana's Clean and
Healthful Environment Provision and the
School Trust Land Question**

by

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A BATTLE OF PUBLIC GOODS: MONTANA'S CLEAN AND HEALTHFUL ENVIRONMENT PROVISION AND THE SCHOOL TRUST LAND QUESTION

Alex Sienkiewicz*

*All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.*¹

Montana's Constitution guarantees its citizens "the right to a clean and healthful environment."² This article explores whether Montana's constitutional guarantee of the right to a clean and healthful environment conflicts with the federal and state mandates of revenue generation from state trust lands for the support of public institutions such as common schools. What is the nature of the tension between the two mandates? Do citizens retain any guarantee that there are no conflicts of interest? How might state policy mitigate existing tensions?

I. INTRODUCTION

In the latter half of the twentieth century, environmentally-minded citizens moved to constitutionalize environmental values.³ Wisconsin Senator Gaylord Nelson, prior to the first Earth Day (1970), proposed a constitutional amendment guaranteeing an "inalienable right to a decent environment."⁴ Some people have suggested that Nelson's proposal failed because an affirmative guarantee of environmental quality does not comport with the limited nature of the United States Constitution.⁵

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1. MONT. CONST. art. II, § 3.

2. *Id.*

3. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 157-58 (2003).

4. *Id.*

5. *Id.* at 158.

Nonetheless, Montana embraced the notion of elevating a baseline of environmental quality to fundamental right status. Interestingly, the “right to a clean and healthful environment” stands atop the Montana Constitution’s list of “inalienable rights.”⁶ Delegates to Montana’s Constitutional Convention (1971-72) saw fit to place the right to a clean and healthful environment among such rights as: *life’s basic necessities, liberty, property, health, safety, and others.*⁷ Indeed, the right to a clean and healthful environment is listed among what the framers held to be natural or higher laws—fundamental rights.

Notable political philosophers, including Thomas Hobbes, John Locke, and Thomas Paine, have acknowledged the tendency of some in society to deprive others of natural rights.⁸ Thus, by including mention of a clean and healthful environment among higher rights or natural laws, Montana’s constitutional framers evinced an intent to protect the natural environment from those who would despoil it.

The Montana Constitution does not include public education or state trust lands in the list of inalienable rights. Though not in the list of inalienable rights, Article X of the Montana Constitution addresses education as follows:

- (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.
- (2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.
- (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the basic elementary and secondary school system.⁹

Montana’s system of public education depends heavily upon revenues generated from its state-owned trust lands. Trust land revenue is meant to support “worthy objects helpful to the well-being of the people of [Montana] as provided in The Enabling Act.”¹⁰

6. MONT. CONST. art. II, § 3.

7. *Id.*

8. JACK FRUCHTMAN, JR., THOMAS PAINE AND THE RELIGION OF NATURE 30-32 (1971).

9. MONT. CONST. art. X, § 1.

10. MONT. CODE ANN. § 77-1-202 (2005).

The state trust lands generate revenue through resource extraction, among other activities. The intensity of resource use and extraction from state trust lands implicates the constitutional right to a clean and healthful environment. This implication arises because an inverse relationship often exists between resource extraction and environmental quality. Beyond a minimum threshold, incremental gains to one of these ends usually cause incremental losses to the other. Optimal social utility requires a reasonable equilibrium point. Nonetheless, finding the appropriate balance between such contradictory forces comprises a ubiquitous puzzle within law, public policy, social theory, and political philosophy.

In essence, a tension arises whereby funding gains for one auspicious policy goal (quality education) are sometimes achieved to the detriment of another auspicious policy goal (a clean and healthful environment). This tension exists because negative environmental externalities are associated with resource extraction and intensive land use.¹¹ As an advocate for ecological integrity, Larry Campbell of *Friends of the Bitterroot* has noted of post-fire trust land management in Montana: "If you're ever going to leave a forest alone to heal and ensure future productivity, it should be done after a fire."¹² Mr. Campbell's comment suggests that the priority of revenue generation on state trust lands works to undermine ecological integrity and other environmental values. In response to such critiques, Montana Department of Natural Resources and Conservation ("DNRC") silviculturist, Jon Hayes, has noted that: "[u]nfortunately, concerns with wildlife don't generate the type of revenue the logs do. . . . We're required by state law to make money off these lands. A lot of times we're not able to do the maximum for wildlife."¹³

At what point do "worthy objects" relating to the funding of public institutions, such as the state's public universities, schools for the deaf and blind, the veterans home, the common schools, and other beneficiaries of the trust lands, infringe upon the constitutional right to a clean and healthful environment? Incentives

11. Negative externalities include habitat degradation and loss with regard to certain species of flora and fauna, erosion, diminished aesthetic and recreational value, proliferation of invasive weeds, and diminished water quality. Positive externalities include benefits to extractive industries and to local and regional economies, as well as income to the school trusts.

12. Mark Matthews, *Montana Gets a Taste of Old Time Logging*, HIGH COUNTRY NEWS, April 9, 2001, at 5.

13. *Id.*

for institutional growth are built into American society. Thus, state trust land managers may have both overriding legal and institutional incentives to favor revenue generation over environmental values. Where institutional trust land beneficiaries and Montana's state lands are concerned, an important policy paradox emerges.

II. TRUSTS

A. *Trust Lands ≠ Land Trusts ≠ The Public Trust Doctrine*

It is important to realize that *trust lands* are distinct from *land trusts*, although the underlying legal doctrine of trusts applies to both designations. Trustees manage trust lands for the primary goal of generating revenue for institutional, public beneficiaries. Land trusts are also trusts in a legal sense. However, land trusts are typically associated with non-government organizations or private entities that acquire land (or easements) to be managed for specific goals, often relating to conservation. The primary distinction lies in the notion that land trusts could have any reasonable end guiding land management, such as the preservation of elk habitat. In contrast, trust lands are guided primarily by the principle of perpetual revenue generation. The important and conspicuous difference between the two relates to the overriding purpose of the trust.

Discussions of state trust lands sometimes include, intentionally or erroneously, the Public Trust Doctrine ("PTD").¹⁴ PTD is a legal doctrine that grants citizens ownership of shorelands, wetlands, tidelands, tidewaters, navigable fresh waters, and biota within these environments.¹⁵ PTD holds that individual states are trustees of these resources. Some PTD resources are said to have dual-title; the broad public holds dominant trust title (*jus publicum*) to these resources, while individuals and entities might also hold private proprietary title (*jus privatum*).¹⁶ States cannot

14. PTD can be traced to the Institutes of Justinian and the accompanying Digest. These documents collectively form Roman civil law as codified under Roman Emperor Justinian between 529 and 534 AD. Justinian's Institutes remain the touchstone of today's PTD. Justinian's Institutes granted a Roman citizen freedom to "approach the seashore, provided that he respect[ed] habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations." DAVID C. SLADE, ESQ., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK xv, xvii (David C. Slade ed., 1990) (quoting non-cited translation of Institutes of Justinian).

15. *Id.* at xxi.

16. *Id.* at xxi-xxiii.

convey or alienate *jus publicum*, because doing so would constitute a violation of the public trust.¹⁷ PTD tends to protect such rights as navigation, commerce, and fishing.¹⁸ Though traditionally applied to aquatic resources, some seek to extend the doctrine to terrestrial resources such as trust lands.¹⁹

B. The Trust Relationship

The Montana Land Board ("Land Board"), as a trustee, manages state trust lands under fiduciary duties to the trust beneficiaries. DNRC executes management plans handed down by the Land Board and thus may be considered a co-trustee. Within the state trust land system are multiple trusts, each with a different public beneficiary. These include the University of Montana Trust, the Common School Trust, and the Veterans Home Trust, among others.²⁰ The trust lands themselves are said to be the *trust property, body, or corpus*. Thus, the trust's assets, whether pecuniary, real property, or both, comprise the body of the trust.

The Land Board and DNRC, as trustees, must give undivided loyalty to the beneficiaries, exercising prudence, skill, and diligence in administering the trust and making it perpetually productive. The fiduciary duties owed by trustees to beneficiaries can be divided into four general principles: clarity, accountability, enforceability, and perpetuity.²¹ The trustees' duties are enforceable to these ends, allowing beneficiaries to sue trustees to enforce the terms of a trust.²² Perpetuity of trust duties relates to the notion that the goals of the trust to which a trustee must aspire are not limited in time, but instead are perpetual. Hence, many state trusts are called *permanent or perpetual funds*.²³

17. *Id.* at xxii.

18. *Id.* at xxi. An example of PTD is Montana's Stream Access Law: "[A]ll surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." MONT. CODE ANN. § 23-2-302(1) (2005).

19. SLADE, *supra* note 14, at xxii.

20. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, REVENUE GENERATED FOR THE TRUSTS AND PERMANENT FUND BALANCES IN FISCAL YEAR 2004 (2005), available at http://dnrc.mt.gov/trust/about_us/revenue.asp.

21. JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 3 (University Press of Kansas 1996).

22. *Id.*

23. *Id.* at 4.

III. THE LAND BOARD

The Land Board oversees management of more than five million acres of Montana trust lands.²⁴ The attorney general, governor, state auditor, secretary of state, and superintendent of public instruction comprise the Land Board.²⁵ Each of these officials is elected. The Land Board guides management on the trust lands, which consists primarily of the following activities:

- grazing and farming leases;
- timber-harvesting leases;
- leases for oil, gas, and mining operations;
- easements for projects (i.e., power lines, roads and private driveways);
- fees for recreational use;
- cabin site leases;
- land sales and exchanges, and;
- commercial development.²⁶

DNRC carries out the management decisions of the Land Board through its Trust Land Management Division.²⁷

The Montana Code outlines the Land Board's duties as follows:

(1) The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to . . . secure the largest measure of legitimate and reasonable advantage to the state

(2) It is consistent with the powers and duties provided in subsection [one] (1) that the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation.

(3) When acquiring land for the state, the board shall determine the value of the land after an appraisal by a qualified land appraiser.²⁸

24. *Montana Trust Land*, TRUST LAND: A LAND LEGACY FOR THE AMERICAN WEST, Oct. 28, 2005, <http://www.trustland.org/state/state-mt.cfm>.

25. *Id.*

26. MONT. CODE ANN. §§ 77-1-202 to -204, 77-1-208 to -209 (2005).

27. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, LAND BOARD INFORMATION (2005), available at <http://dnrc.mt.gov/commissions/Default.asp>.

28. MONT. CODE ANN. § 77-1-202 (2005).

In 1992, the Montana State Legislature added to the Montana Code's education title the following preamble:

WHEREAS, the Legislature recognizes that timber on school trust lands is a finite renewable resource to be managed on a sustainable yield basis by the Department of State Lands [now Department of Natural Resources and Conservation].²⁹

The Legislature communicates, through this amendment, the unequivocal message that trust land timber resources must be managed sustainably, such that each successive generation of trust beneficiaries might reap a comparable benefit with regard to relative volume of extracted timber. Thus, no generation of trustees holds a right to the trust corpus that supersedes that of any future generation.

IV. EMERGENCE OF TRUST LANDS

The history of state trust lands can be traced to the Revolutionary War era.³⁰ In 1785, Congress enacted, along with the Articles of Confederation, the General Land Ordinance of 1785.³¹ This law surveyed territory west of the 100th meridian, and placed it into a grid system.³² The General Land Ordinance of 1785 provided for the sale of western lands and, in addition, established a land grant program for the support of public schools in the new western states.³³ Within each township, section number 16 was to be "reserved for the maintenance of public schools within the said township."³⁴

In 1787, Congress passed the Northwest Ordinance.³⁵ This law provided a logical progression by which western territories could gain entrance to the Union as states.³⁶ Western regions

29. *Id.* § 20-9-601.

30. SOUDER & FAIRFAX, *supra* note 21, at 17 & 302-03 n.1. Souder and Fairfax note that, actually, the notion of granting lands to support public schools derives from ancient times. Scholarly work exists, discussing the concept as manifest during the reigns of Henry V, Henry VIII, and Edward VI in England. The latter of these kings destroyed many monasteries. Grammar schools were lost as a consequence. In response, individuals began to endow schools with land. In the American Colonial Period, granting, bequeathing, and donating land to support schools was common - particularly in the Upper Mid-Atlantic and New England. *Id.* at 302-03 n.1.

31. *Id.* at 17-18 & 304 n.5.

32. *Id.* at 18 & 304 n.6.

33. *Id.* at 18.

34. SOUDER & FAIRFAX, *supra* note 21, at 18. Depending on the date of accession, incoming states might receive between one and four sections per township. *Id.* at 27.

35. *Id.* at 18 & 304 n.5.

36. *Id.* at 18 & 304 n.7.

were explored first, then settled, and finally, "organized" by an act of Congress.³⁷ Upon "organization," a region would officially become a territory.³⁸ The President of the United States would then appoint a governor, secretary, and three judges to each territory.³⁹

When a territory's population of free adult (non-Native American) males reached 5,000, the territory could elect a legislature and send a delegate to Congress.⁴⁰ Congressional rules allowed territorial delegates to speak, but not vote.⁴¹ When a territory's population reached 60,000, it could, given popular support, petition Congress to enter the Union as a state.⁴² Next in the process, Congress accepted territories into statehood by passing an enabling act, which authorized a constitutional convention in the petitioning territory.⁴³ Conventions would then draft a constitution, pass it by popular referendum, and submit it for congressional approval.⁴⁴ If Congress approved, the petitioning territory gained statehood on equal footing with existing states.⁴⁵ State constitutions addressed the distribution of public (state) lands within each state.⁴⁶

Montana gained statehood under an omnibus enabling act, under which North Dakota, South Dakota, and Washington were also admitted into the Union.⁴⁷ In 1889, the United States granted Montana 5,198,258 acres of state trust lands to support various public institutions, thus establishing multiple, separate trusts.⁴⁸ The Montana Constitution provides that all lands granted to the state by the federal government shall be "held in trust for the people" and are to be disposed of only for the purposes for which they have been granted.⁴⁹ Under Montana's Enabling Act, these purposes relate directly to maintenance and support of schools and institutions.⁵⁰

37. *Id.* at 18.

38. *Id.*

39. SOUDER & FAIRFAX, *supra* note 21, at 18.

40. *Id.*

41. *Id.* at 18 & 304 n.8.

42. *Id.* at 18 & 304 n.9.

43. *Id.* at 18.

44. *Id.*

45. SOUDER & FAIRFAX, *supra* note 21, at 18 & 304 n.10.

46. *Id.* at 18-19.

47. Enabling Act, 25 Stat. 676 (1889). By 1848, the federal government was granting nascent states two sections per township. This would increase to four sections in later admissions to the Union. SOUDER & FAIRFAX, *supra* note 21, at 27.

48. SOUDER & FAIRFAX, *supra* note 21, at 20-21.

49. MONT. CONST. art. X, § 11, cl. 1.

50. Enabling Act, § 11, 25 Stat. 676, 679 (1889).

The Enabling Act notes further:

And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.⁵¹

This language indicates that the Legislature is to decide the particular methods and nuances by which the trust corpus is managed for trust beneficiaries. Interestingly, neither the Enabling Act nor the Constitution makes reference to a land board or committee. The existence of Land Board-management of trust lands indicates the Montana Legislature and judiciary have taken some license with, and projected some flexibility onto, the original enabling language.

V. OWNERSHIP

A. Public Lands?

Trustees and state land managers face the daunting task of reconciling concepts that are ambiguous and contradictory when applied to natural resource management: clarity, accountability, enforceability, prudence, and perpetual revenue maximization.⁵² In the context of public schools and public lands, ecological and socio-political complexity confounds trust land management at every step. Importantly, state trust lands are not *public* in the conventional sense, as are, for example, United States Forest Service or Bureau of Land Management lands.

Some people hold that trust lands are public only in the sense that trust beneficiaries are public institutions.⁵³ Others contend that trust lands are more literally public, where interests common to all of a state's citizens may override the need to use a particular parcel of land as a revenue source.⁵⁴ The jurisprudence of state trust lands tends to support the former opinion.⁵⁵ Nonetheless, individual states, such as Colorado, have passed laws and amended respective state constitutions to effect the latter perspective.

51. *Id.* at 681.

52. SOUDER & FAIRFAX, *supra* note 21, at 3.

53. Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 NAT. RESOURCES & ENV'T. 39, 41-42 (Summer 1997).

54. *Id.* at 45.

55. *See, e.g.,* *Lassen v. Arizona Highway Dep't.*, 385 U.S. 458, 462-63 (1967); *County of Skamania v. State* 685 P.2d 576, 580 (Wash. 1984).

B. A Broad, Multi-Faceted Trust? Colorado's Amendment 16

In 1996, the citizens of Colorado passed a ballot initiative known as Amendment 16, which amended the Colorado Constitution's provisions regarding the management of Colorado's trust lands.⁵⁶ Amendment 16 directed the "State Land Board to establish a long-term preserve of up to 300,000 acres" to protect and enhance beauty and the natural values of land, open space, and wildlife habitat.⁵⁷ Such a management program, perforce, does not maximize monetary revenue for trust beneficiaries.⁵⁸

Colorado's Amendment 16 does, however, promote other important public policies. These policies include natural resource and wildlife protection, as well as intergenerational provision of ecological, recreational, spiritual, and other market and non-market natural values. Several Colorado school districts challenged Amendment 16 in the Court of Appeals for the Tenth Circuit on the grounds that it breached the trust between Colorado and the United States as created by the Colorado Enabling Act.⁵⁹

Colorado's Attorney General ("AG") supported Amendment 16, arguing that the federal grant of trust lands to Colorado did not create a trust. Further, the Colorado AG contended that:

[T]he courts of many states with enabling acts like Colorado's have erroneously and unnecessarily grafted upon their enabling acts a trust relationship with the federal government by following the reasoning of the United States Supreme Court in cases interpreting the New Mexico-Arizona Enabling Act. Although these state courts have succeeded in eliminating the squandering of school lands and their resources, they have placed their states in a straightjacket. They cannot manage their school lands except as developers of the lands and their resources to produce a monetary return for public schools. They must ignore, and therefore destroy, other values these lands possess.⁶⁰

The court sustained Amendment 16.⁶¹ It did not, however, adopt the Colorado AG's position. Instead, the court concluded there is a federal trust mandate, but that Amendment 16 did not violate this mandate.⁶² In finding that the management of Colorado's trust lands is subject to a federal trust, the federal court validated the

56. Hager, *supra* note 53, at 39.

57. *Id.* at 45.

58. *Id.*

59. *Branson Sch. Dist. v. Romer*, 161 F.3d 619 (10th Cir. 1998).

60. Hager, *supra* note 53, at 45.

61. *Id.* (citing *Romer*, 161 F.3d at 643).

62. *Id.* (citing *Romer*, 161 F.3d at 633, 643).

expansion of federal authority over state trust land management policies.⁶³

VI. NATURE OF THE TENSION BETWEEN THE TWO MANDATES

A. *The Hobson's Choice of Trust Land Management*

Scholar Sean O'Day notes that many trust land management boards across the West face the classic Hobson's choice.⁶⁴ Trust land managers, ostensibly, have little choice but to focus management on revenue maximization. Despite acknowledging the paradoxical nature of maximizing revenue while trying to manage for sustainability, land boards tend to err on the side of short-term revenue maximization with full knowledge of environmental consequences.⁶⁵ The modern "School Land Trust Doctrine" tends toward this manner of trust land management.⁶⁶ Further, political, legal, demographic, and social forces pressure trustees to glean greater and greater revenue from the trust lands. What is the point at which trustees are squeezing blood from a stone? At what point are the beneficiaries of the future being denied their rightful flow of benefits? What is the nature of trust obligations to the broad public, if any?

B. *Perverse Incentives: Annual Budgets vs. Ecological Uncertainty*

The government fiscal year complicates trust land economic activity. Governments, agencies, and school districts all operate according to annual or semiannual budgets. Because the Land Board and DNRC are the trustees of the state's granted lands, they must produce revenue for trust beneficiaries on a regular basis. Short-term budget cycles create an incentive to manage tim-

63. *Id.*

64. A Hobson's choice is no choice at all. One must take that which is offered or nothing. Trust land management is perhaps akin to a Hobson's choice because the land manager has little choice but to manage to maximize benefit for trust beneficiaries. Historically, this trust obligation has resulted in school trust land managers placing a priority on revenue maximization at the expense of other considerations such as resource protection. Sean E. O'Day, Student Article, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?*, 8 N.Y.U. ENVTL. L.J. 163, 164 (1999). The phrase derives from Thomas Hobson (1544-1631) of Cambridge, England. Hobson rented horses, giving customers one choice, that of the horse nearest the stable door. See COLES CONCISE ENGLISH DICTIONARY (1979).

65. O'Day, *supra* note 64, at 164.

66. *Id.* at 170.

ber resources for annual or short-term output.⁶⁷ This tendency runs counter to long-term sustainability of renewable resources such as timber. Ecological factors such as long-term drought may exacerbate this tension as forest productivity declines over time.⁶⁸

Importantly, the National Oceanic and Atmospheric Administration's National Climatic Data Center notes the following:

Most of Montana has experienced persistent drought conditions since 1999. Precipitation in the northwest part of the state . . . since September 2000 has totaled 84% of the 60-month normal (based on 1950-2000). . . . While only about one-quarter of the annual precipitation in northwest Montana falls during the summer growing season (June-August), this summer moisture, or lack thereof, has a disproportionate influence on both human activities and ecosystem processes. For example, extremely dry conditions in the summer of 2003 led to the ignition and spread of very large wildfires in northwest Montana.⁶⁹

In his 2005 book, *Collapse*, scholar Jared Diamond notes that the recent increase in [western wild] fires is at least partly due to climate change and the trend toward hotter, drier summers.⁷⁰ Montana's trust land jurisprudence largely ignores such ecological realities.

Thus, if prices are up, and the timber (or other resource) market is stable, extraction from state trust lands is deemed worthwhile. If prices are down and extraction is economically inopportune, DNRC must harvest and extract more extensively in order to produce revenues comparable to those of a *good year*. Furthermore, when elections loom, Land Board members have an incentive to maximize resource extraction and revenue generation.⁷¹ In the context of grazing (as opposed to extracting timber or minerals), trust land managers have an incentive to maximize AUMs (Animal Unit Month/grazing intensity).

The *Tragedy of the Commons*, by Garret Hardin, illustrates the environmental externalities associated with the grazing of a common-pool resource such as trust lands.⁷² Although trust lands

67. Alex Sienkiewicz, *Washington Trust Land Management: History, Stakeholders, & Differing Aspects of Sustainability* (2000) (unpublished Master's thesis, University of Washington) (on file with Daniel J. Evans, School of Public Affairs).

68. JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 50 (Viking 2005).

69. National Climate Data Center, *Climate of 2005 - August Montana Drought*, Sept. 15, 2005, <http://www.ncdc.noaa.gov/oa/climate/research/2005/aug/st024dv00pcp200508.html>.

70. DIAMOND, *supra* note 68, at 43.

71. Sienkiewicz, *supra* note 67.

72. Garrett Hardin, *The Tragedy of the Commons*, *SCIENCE*, Dec. 13, 1968, at 1243.

do not comprise a tragedy of the commons in the strict economic sense,⁷³ Hardin's model applies nonetheless. The same ilk of externality abounds: incentive for private gain to the detriment of public values, diminishing marginal returns for public lands, free-ridership, and uncompensated negative externalities.

C. *Budget Scarcity, Increasing Demand, Quality Public Education*

Although Montana is among the least populous states in the nation, its population is growing at approximately 13% per decade.⁷⁴ Certain Montana counties, such as Gallatin and Missoula, are growing by approximately 20-30% per decade.⁷⁵ During the early years of statehood, trust land revenues were likely sufficient to fund the state's share of education costs. However, beneficiaries increasingly argue that trust land revenues have fallen behind education funding needs as dictated by K-12 enrollment, depreciation of capital assets, and other criteria. Rising education costs thus diminish the effect of the state's funding contributions. As education costs to school districts rise, the state share of funding will diminish as a percentage of total school district budgets, unless, of course, trust land revenue generation is increased at a rate commensurate with rising education costs.

These circumstances beg the question of whether trust land resources should be called upon to meet ever-increasing demand for monetary resources, or whether the Legislature should further supplement trust land income in order to meet the ever-growing demand of trust beneficiaries. The Enabling Act and Constitution do not indicate that trust lands must provide a certain percentage or minimum threshold of school funding forever. Montana law provides only that trust lands are "held in trust for the support of education and for the attainment of other worthy objects helpful

73. Hardin's model of the commons entails *open access*. That is, resource users are not restricted as to their use of the common resource. See *id.* at 1244. Trust lands, to the degree a permitting system limits access, are limited as to who uses them and how intensively they are used. Enforcement, however, is a separate issue.

74. CENTER FOR THE AMERICAN WEST, PEOPLE IN THE WEST: MONTANA POPULATION TRENDS, http://www.centerwest.org/futures/archive/people/population_mt.html (last visited Jan. 24, 2006).

75. Paula Wilmot, *It's Official: Great Falls Slips to Third*, GREAT FALLS TRIBUNE ONLINE (Mar. 22, 2001), available at <http://www.greatfallstribune.com/communities/census2000/20010528/618017.html>.

to the well-being of the people of [Montana] as provided in The Enabling Act."⁷⁶

D. Beneficiaries' Incentives, Trust Lands As Subsidy

Some citizens concerned with resource conservation have charged that trust land management has been conducted to the detriment of natural values relating to intact ecosystems and habitat. Such charges put beneficiaries on the defensive. Management goals other than those of revenue maximization threaten to reduce trust land revenues on which beneficiaries have historically relied. Like holders of water rights, trust beneficiaries are acutely aware of the economic and political value of the trust lands from which they benefit, and will not readily concede them to conservation or other competing interests. These sentiments are often fervently held because, like water rights, trust revenues comprise a subsidy. This subsidy exists to the degree that beneficiaries receive a flow of benefits without having to absorb costs. That is, trust beneficiaries are not made to account for external environmental costs or downstream effects of trust land management on other public resources.

As public institutions, trust land beneficiaries do not possess unlimited financial resources. Nonetheless, they wield much leverage over trust land management by virtue of an ability to sue trustees. This, indeed, is not an infrequent occurrence. Land Board members, of course, take great measures to avoid being sued, sometimes to the detriment of the trust lands.

While they did not sue trustees directly, a Montana plaintiffs group composed of multiple school districts recently sued the state for failing to provide a basic system of free, quality public elementary and secondary schools.⁷⁷ The court held that the State of Montana had violated the State Constitution by failing to provide adequate funding to its public schools.⁷⁸ This holding places significant legal and political pressure on the Land Board and DNRC managers to amplify resource extraction from trust lands in order to bolster school funding.

Importantly, the holding does not address trust land revenue. Nonetheless, legislators will likely look to the trust lands to bol-

76. MONT. CODE ANN. § 77-1-202(1) (2005).

77. *Columbia Falls Elementary Sch. Dist. v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257.

78. *Id.* ¶ 31.

ster inadequate budgetary allocations. Furthermore, trust land revenues displace general funds, thus freeing sought-after, unallocated monies for other purposes. This dynamic provides an added incentive for political figures to promote an agenda that maximizes short-term resource extraction from the trust lands. Trust beneficiaries tend to support short-term revenue maximization, in spite of its incongruity with the trust mandate of perpetuity.

E. Beneficiaries As Power Brokers

Trust land jurisprudence generally favors the trustees. In Montana, trust beneficiaries perhaps hold the balance of power among the diverse trust land stakeholder groups. With education and other popular public goods as their cause célèbre, and with school children to use as media fodder, the trust beneficiaries are formidable political players. Trust land beneficiaries have used this power effectively to pressure Land Board members to increase trust land revenues. To this effect, the Land Board recently unanimously approved a 26% increase in the annual timber harvest from state-owned forests.⁷⁹

Trust beneficiary incentives for self-interested economic behavior will lead to increased resource extraction from trust lands. Beneficiaries have little incentive to advocate otherwise unless they might gain economically from doing so. Occasionally, beneficiaries have supported land trades or sales wherein the trusts are compensated directly as a result.

F. Ignorance Exacerbates Tensions

Scholars Souder and Fairfax note that "state trust lands exist in a quiet corner of public resource management."⁸⁰ As this statement suggests, many are ignorant of the nuances, and even the general principles, that guide trust land management. This ignorance tends to exacerbate political tension between conservation advocates, those in the extractive industries, and trust beneficiaries. In October of 2004, former Montana State Senator Duane Grimes (R-Clancy) urged Montana State Auditor John Morrison and the other Land Board members to approve increased timber harvest from the trust lands. Grimes urged the Land Board to

79. Bob Anez, *Land Board to Boost Timber Harvest by 26 Percent*, MISSOULIAN, Oct. 19, 2004, at B1.

80. SOUDER AND FAIRFAX, *supra* note 21, at 1.

"send a message of support to the logging industry."⁸¹ This statement suggests ignorance of the trust mandate whereby trustees are (legally) unable to manage the trust lands for purposes other than those manifest in the Enabling Act and Constitution. The trust structure is designed to insulate the trust corpus from political pressures such as those manifested in Grimes' statement. Nonetheless, the political character of the Land Board undermines the idea that the trust lands should remain insulated from political pressures.

G. *The Political Nature of the Land Board*

While many citizens are aware that trust land management is not meant to "send messages" one way or the other, the Grimes anecdote illustrates the paradox of a Land Board that is composed completely of elected officials, who may or may not have tendencies antithetical to those of the beneficiaries and the public. Revenue generation is likely to be at the forefront of the political agendas of Land Board members. This results in a perverse incentive to maximize revenue in the short-term. This contradicts the trust principle of holding perpetual or long-run revenue to be paramount. Importantly, the temporal aspect of trust land management is ambiguous and remains undefined with regard to what manner of trust land management is appropriate. Nowhere do the Enabling Act, Constitution, and Montana Code define with specificity the temporal aspects of the trust mandate.

H. *The Checkerboard Legacy*

The legacy of the General Land Ordinance's grid system is a checkerboard pattern of public and private ownership, whereby large single-owner tracts of contiguous acreage are few. The norm, as in all western states, entails disjointed checkerboard holdings across the state. This pattern manifests in political boundaries, but tends to ignore ecological boundaries. Importantly, the Enabling Act requires that all sales or exchanges of trust land must be at market value and must be at public auction.⁸² In simple terms, the framers meant to keep land dealings honest. Many historians of the American West suggest that the terms *honesty* and *land dealings* have little business being in the

81. Anez, *supra* note 79, at B3.

82. Enabling Act, §§ 10-18, 25 Stat. 676, 679-82 (1889).

same sentence. Others might argue, however, that times have changed. In the interest of efficient and appropriate use of public land, various trade and transfers are occurring more frequently. The increasing popularity in land trades is, in large part, an effort to mitigate problems born of the grid pattern by which lands were allocated upon statehood.

The checkerboard legacy of property ownership has actuated a host of ecological ramifications. Scientists are now aware that wildlife suffers when intact ecosystems are not available for habitation.⁸³ Isolated plots of forest and waterway do not support natural systems that must operate over vast spatial and temporal scales.⁸⁴ The landscape matrix must have connectivity through which materials and organisms might move or be conveyed. Some public holdings in Montana are less ecologically significant than others. Trust lands should be classified as to ecological value so that land exchange policies might be pursued with an eye toward the public natural values left unaddressed by trust land law and commodity markets.

VII. A CONFLICT OF INTEREST?

Does the state and federal legal mandate to provide revenue from state trust lands for the support of public state institutions, such as the common schools, conflict with Montana's constitutional guarantee of the right to a clean and healthful environment? The answer to this question varies depending on circumstances. The practical application of any law and policy to actual circumstances must, of necessity, be driven by the facts of each particular case. To be sure, a significant tension exists between the goals of maximized revenue generation to benefit specific beneficiaries and resource conservation per Montana's constitutional guarantee of a clean and healthful environment. Whether or not citizens retain a legal remedy depends in great measure upon the fact pattern at issue.

Because the tension is largely inevitable, trustees of the school lands must, at least, be held to those minimum standards which would protect the broad public's right to a clean and healthful environment. These standards include process-related laws

83. See generally DAVID B. LINDENMAYER & JERRY F. FRANKLIN, *CONSERVING FOREST BIODIVERSITY: A COMPREHENSIVE MULTISCALED APPROACH* (2002).

84. *Id.*

such as the Montana Environmental Policy Act⁸⁵ ("MEPA"), as well as the general body of law directly addressing the trust lands.

A. *Relevant Law*

Montana law provides that the state trust lands and funds "are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act."⁸⁶ Montana law also provides that the Land Board shall manage state trust lands in order to maximize "legitimate and reasonable advantage to the state."⁸⁷ The Administrative Rules of Montana provide further, that:

The board, as established by the constitution of Montana (Article X, section 4) . . . has the authority to issue leases for agriculture, grazing, mineral production, cabinsites, and other uses under such terms and conditions as best meet the duties of the board to the various trusts and the state of Montana. The board also has the authority to sell timber and other forest products. The board shall administer state land under the concept of multiple-use management. . . . The department has the authority to make management decisions to protect the best interests of the state.⁸⁸

The Montana Supreme Court has adopted three overriding principles, first articulated by the United States Supreme Court, to govern school trust lands:

- (1) Enabling acts created trusts similar to a private charitable trust, not to be abridged by the states;
- (2) enabling acts are to be strictly construed according to fiduciary principles, and;
- (3) enabling acts preempt state laws and constitutions.⁸⁹

In accepting states into the Union, Congress imposed upon states a binding and perpetual obligation to use state trust lands for trust beneficiaries.⁹⁰ Further, an interest in trust lands cannot be alienated unless the trust is adequately compensated.⁹¹

With regard to the right to a clean and healthful environment, Article IX section 1 of the Montana Constitution provides in part:

85. MONT. CODE ANN. § 75-1-201 (2005).

86. *Id.* § 77-1-202(1).

87. *Id.* § 77-1-202(1)(a).

88. MONT. ADMIN. R. 36.25.103 (2005).

89. *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 369, 702 P.2d 948, 953 (1985); see also *Andrus v. Utah*, 446 U.S. 500, 520, 523 (1980).

90. *Pettibone*, 216 Mont. at 369, 702 P.2d at 953.

91. *Id.* at 371, 702 P.2d at 954.

(1) The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. . . .

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.⁹²

In *Butte Community Union v. Lewis*, the Montana Supreme Court held: "If a fundamental right is infringed or a suspect classification established, the government has to show a 'compelling state interest' for its action."⁹³ A government action or law implicating a fundamental right receives strict scrutiny analysis, requiring the compelling state interest (1) be both closely tailored to effectuate the compelling government interest, and (2) be the least onerous path possible to achieve the State's objective.⁹⁴

The court affirmed that delegates to the Constitutional Convention intended to provide language and protections that both anticipated and prevented environmental degradation: "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked."⁹⁵

B. Analysis

Neither Montana statutory nor common law directly addresses the tension between trust land obligations and the right to a clean and healthful environment. Moreover, there exists very little law addressing the constitutional right to a clean and healthful environment. Constitutional claims must address a government law, action, or omission. Although Montana case law acknowledges the prospective nature of constitutional environmental protections,⁹⁶ there is simply no qualification in statutory or common law as to how these protections are to interact with the trust land mandate. Montana law, nonetheless, clearly indicates that a compelling state interest likely overrides the liability that attaches to environmental degradation.⁹⁷

92. MONT. CONST. art. IX, § 1.

93. 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986).

94. *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 1999 MT 248, ¶ 83, 296 Mont. 207, ¶ 83, 988 P.2d 1236, ¶ 83 (Leaphart, J., majority opinion, specially concurring).

95. *Id.* ¶ 77 (majority opinion).

96. *Id.*

97. *Butte Cmty. Union*, 219 Mont. at 430, 712 P.2d at 1311.

Critically, the federal trust mandate exhibits all of the trappings of an issue of federalism, implicating the balance of power as between state and federal governments. There was, upon accession to the Union, a contract that nascent states and the burgeoning Nation consummated, each exchanging promises and valuable consideration. The various enabling acts and state constitutions bolstered and qualified these contracts, clarifying, to some extent, duties owed and the relationship between the federal and state governments. Enabling acts and constitutions confirmed the public nature of each of the trust land beneficiaries. The very mention of the beneficiary institutions in the founding documents would likely lead any court in the nation to find that trust land beneficiaries qualify as a compelling state interest. The likelihood of this outcome suggests the federal-state trust mandate would, as a compelling state interest, trump any but the most egregious cases of environmental degradation and public harm.

Thus, while the right to a clean and healthful environment retains an almost sacrosanct place in the Bill of Rights of the Montana Constitution, there is no guarantee that other compelling state interests will not, in specific instances, override the citizens' right to a clean and healthful environment. Indeed, if a court would consider any interest to be a *compelling state interest*, it would be that of supporting public institutions such as schools, universities, and prisons. Is this result good or bad? That is for Montanans to decide, though the issues are in need of clarification.

VIII. CITIZENS RETAIN NO GUARANTEE STATE TRUST LAND MANAGEMENT WILL NOT CONFLICT WITH MONTANA'S CONSTITUTIONAL GUARANTEE OF THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

There is, and will likely always be, a tension between trust land revenue generation and conservation of natural values on Montana's trust lands. Under a legal theory that claims violation of existing trust land law, citizens retain the right to change the law through their representatives or to sue trust land managers.⁹⁸ This is the only manner of guarantee citizens retain.

Montana trust land jurisprudence is undeveloped, but tends toward the narrow, traditional, single goal interpretation of trust

98. See *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985).

obligations.⁹⁹ The notion that public education is a compelling state interest bolsters the single focus management paradigm. This paradigm, in turn, suggests that challenge of traditional trust principles under a constitutional theory is dubious. Thus, should Montana's citizens desire to enforce a broad trust addressing natural values, they would likely need to amend the state's Constitution as Colorado did. Citizens might also sue trustees under the theory that broad trust obligations exist and have been violated with regard to a failure to protect specific public natural values; but there is no law in Montana that clearly supports such a claim. While citizens could sue trustees claiming that a specific management action was unreasonable and imprudent, that is, violative of "the best interest[s] of the state," vagaries in Montana's trust land jurisprudence suggest any such attempts are unlikely to succeed.¹⁰⁰ Moreover, trust land jurisprudence leaves little to collaborative processes.¹⁰¹

IX. HOW MIGHT STATE POLICY MITIGATE EXISTING TENSIONS?

A. *Re-Examine Statutory Language*

Single purpose trust land management excludes a broad set of public values. This exclusion underlies much of the tension behind state trust land management. Federal and state trust land jurisprudence suggests there is room for broad conservation goals within trust land management, so long as a state's constitution and laws are amended to allow a broad reading of the trust mandate. As occurred in Colorado in 1996, a specific amendment that clearly outlines desired management actions, such as the creation of forest reserves, will beget less challenge and dissatisfaction over time than would a broad declaration promulgating inclusiveness. Montana should begin by addressing, through statute, the interaction between the trust mandate and the constitutional right to a clean and healthful environment. For example, statutory definitions of "clean" and "healthful" would do much to clarify matters. Because there is so little common law addressing Montana trust land management, stakeholders are in need of the legal guidance that comes of statutory interpretation, or court-made law. State legislatures and legislators, who are sometimes loathe

99. *See id.*

100. MONT. ADMIN. R. 36.25.103 (2005).

101. *See Andrus v. Utah*, 446 U.S. 500, 520, 523 (1980) (affirming a narrow, overriding purpose inherent to trust land management).

to stand accountable for controversial policies or progressive legislation, may perpetuate trust land tensions. Thus, trust land jurisprudence in Montana would benefit from well-timed, thoroughly-researched litigation.

B. De-Politicize the Land Board

The Land Board is composed completely of elected officials. The political dynamic that favors short-term revenue maximization would be tempered by diversifying the Board's membership. In Washington State, for example, the Dean of the University of Washington's College of Forest Resources, sits on the Board. The Land Board would benefit from scientists, administrators, and, in general, a more diverse cast of decision-makers and incentives.

C. Active Pursuit of (Informed) Land Trade Policies

Because of the checkerboard ownership legacy, it is in the interest of public land managers as well as private land owners to continually transfer, trade, and sell off disjointed parcels where appropriate. The many auspices of doing so include creating wildlife corridors, consolidating holdings, maneuvering lands most suitable for resource extraction away from the ecologically sensitive plots, and bolstering economic viability of present land holdings. Such land transfer policies hold the potential for positive market application to trust land resources. In such exchanges, there is potential for all parties to gain utility.

Importantly, the state should continue to identify critical habitat and resource values among trust lands and sell, exchange, or otherwise transfer these critical parcels to other agencies for management as reserves, or to private entities where appropriate. Such transactions can occur without diminishing the trust funds. On the other hand, such transfers are highly sensitive. The potential for dishonesty and fraud is present as land appraisals are highly variable, and, at bottom, subjective. Such interactions also bear potential for public misunderstanding. Nonetheless, with sufficient planning, the land exchange holds great potential as a trust land policy mechanism.

D. Room For Collaboration?

Although trust land jurisprudence ignores collaborative processes, Montanans would do well to create law allowing

broader input and participation into trust land policies. Washington State has taken such initiatives, holding conferences and facilitating a broad discussion. While conferences are far from active policy measures, efforts at collaboration will begin to ameliorate tensions and begin to clarify trust land issues for all stakeholders.