

## STATE TRUST LANDS: STATIC MANAGEMENT AND SHIFTING VALUE PERSPECTIVES

BY  
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*States hold in trust some 46 million acres of land for purposes established by federal grants in statehood acts. These trust purposes remained largely unenforced until the early twentieth century when the United States Supreme Court, in *Lassen v. Arizona Highway Department*, interpreted the Arizona–New Mexico Enabling Act to impose strict management duties on the State. Even though no other statehood act included the detailed requirements contained in the Arizona–New Mexico Enabling Act, somewhat surprisingly, a number of state courts proceeded to interpret their statehood acts to impose similar restrictions. This Article examines the evolution of management restrictions imposed on federally granted state lands as a result of recent state trust land litigation. The Article concludes that devoting state trust land to activities at below market value—for example, grazing leases—violates the trust. On the other hand, managing trust lands for recreation and wildlife purposes does not necessarily violate the trust so long as these purposes generate the greatest revenue over the long run, and courts seem willing to defer to state decisions emphasizing long-term value over short-term economic gain.*

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## I. INTRODUCTION

At statehood, the federal government granted lands to each state to manage for various purposes such as supporting public education and other important public institutions.<sup>1</sup> State trust lands now comprise approximately 46 million acres of land in twenty-four states, located primarily west of the Mississippi River.<sup>2</sup> States hold these lands in a perpetual, intergenerational trust to support a variety of beneficiaries, and it is the states' responsibility to actively manage these lands for the benefit of the trust.<sup>3</sup> State trust lands are one of the most commonly overlooked categories of trust land.<sup>4</sup> Decisions regarding the use and disposition of these lands have greatly influenced the development of the United States, particularly in the western states, where land managers have leased many lands for grazing and agricultural uses.<sup>5</sup>

Early statehood grants of federal land issued under the General Land Ordinance of 1785<sup>6</sup> and the Northwest Ordinance of 1787<sup>7</sup> vaguely described the purposes of the grants.<sup>8</sup> Under these loosely worded grants, the states lost a large percentage of the granted lands due to decisions to sell the lands as rapidly as possible, often below market value, to encourage westward settlement and to support the early schools.<sup>9</sup> In response to these perceived

<sup>1</sup> See JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE* 26 (1996).

<sup>2</sup> PETER W. CULP ET AL., *TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW AND POLICY ASSESSMENT* 2 (2005), available at <http://www.lincolnst.edu/subcenters/managing-state-trust-lands/publications/trustlands-report.pdf>.

<sup>3</sup> See SOUDER & FAIRFAX, *supra* note 1, at 32–33, 35–36.

<sup>4</sup> See CULP ET AL., *supra* note 2, at 2.

<sup>5</sup> See Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 LAND & WATER L. REV. 1, 1, 4–5 (1994).

<sup>6</sup> See 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 375 (John C. Fitzpatrick ed., 1933).

<sup>7</sup> See 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 342–44 (Roscoe R. Hill ed., 1936) (reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50).

<sup>8</sup> See, e.g., Act of April 30, 1802, ch. 40, § 7, 2 Stat. 173, 175 (stating that the federal government would grant to Ohio the 16th section in every township “for the use of schools”). Other states early in the accession process were admitted under similarly vague language, including Indiana, Alabama, and Mississippi. See Wade R. Budge, *Changing the Focus: Managing State Trust Lands in the Twenty-First Century*, 19 J. LAND RESOURCES & ENVTL. L. 223, 226 (1999).

<sup>9</sup> See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 97 (6th ed. 2007); see also SOUDER & FAIRFAX, *supra* note 1, at 32 (“The early enabling acts . . . left major

misuses of the grants, Congress began placing more restrictive language in the statehood acts for those states admitted to the Union after 1850, particularly New Mexico and Arizona.<sup>10</sup> These new specifications included 1) directing the states to manage lands for income production, 2) proscribing the disposition of trust lands except when full value is received, and 3) often imposing procedural safeguards such as public notice and auction sales.<sup>11</sup>

The dominance of trust principles in the management of these lands did not become clear until after the Arizona and New Mexico accession in 1912, under the Arizona–New Mexico Enabling Act.<sup>12</sup> Arizona and New Mexico entered the Union under the same enabling act, which contained “uncharacteristically lengthy” management requirements by comparison to preceding enabling acts.<sup>13</sup> In 1966, the United States Supreme Court relied on the restrictive language in the Arizona–New Mexico Enabling Act in *Lassen v. Arizona ex rel. Arizona Highway Department*,<sup>14</sup> holding that the requirements in the Act established an enforceable trust relationship between the State and the intended beneficiaries of the land grant—the state school fund.<sup>15</sup> *Lassen* established the notion of a trust in state-managed federal land grants, and state courts from all over the West relied on the Supreme Court’s reasoning to find a trust in other statehood grant lands,<sup>16</sup>

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issues to the [state] legislature to sort out, providing merely for the establishment and preservation of a permanent fund whose income would be devoted to the support of common schools.”); Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 807 (1992) (discussing the early problems states faced in the management of statehood grant lands, including finding anyone willing to lease the lands).

<sup>10</sup> See COGGINS ET AL., *supra* note 9, at 97 (noting that Congress implemented stronger language in enabling acts over time in response to states’ mismanagement of statehood grant lands). But see Fairfax, Souder & Goldenman, *supra* note 9, at 809 (suggesting it is a widespread misconception that it was Congress tightening restrictions in enabling acts and that instead, the increase of requirements on trust lands was due largely to efforts by the states themselves to include more restrictions on the management of trust lands in their state constitutions).

<sup>11</sup> See COGGINS ET AL., *supra* note 9, at 97.

<sup>12</sup> Act of June 20, 1910 (Arizona–New Mexico Enabling Act), ch. 310, 36 Stat. 557; see SOUDER & FAIRFAX, *supra* note 1, at 33.

<sup>13</sup> See SOUDER & FAIRFAX, *supra* note 1, at 25–26.

<sup>14</sup> 385 U.S. 458 (1967).

<sup>15</sup> *Id.* at 463.

<sup>16</sup> See, e.g., Nat’l Parks & Conservation Ass’n v. Bd. of State Lands, 869 P.2d 909, 920–21 (Utah 1993) (discussing how the State, as trustee, must maximize the economic return from school lands in the “long run” for the beneficiary school); State Bd. of Educ. Lands & Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985) (holding, although not explicitly relying on *Lassen*, that school lands are held in trust by the State and the State must act in a fiduciary capacity, despite the absence of such clear language); Dep’t of State Lands v. Pettibone, 702 P.2d 948, 953–54 (Mont. 1985) (citing *Lassen* to support the assertion that an interest in school land cannot be alienated unless the trust receives adequate compensation); Okla. Educ. Ass’n v. Nigh, 642 P.2d 230, 235–36 (Okla. 1982) (stating that the State holds in trust school land for the “exclusive benefit of the trust beneficiaries”); State v. Univ. of Alaska, 624 P.2d 807, 813 (Alaska 1981) (stating that the ultimate conclusion of *Lassen* was that the beneficiaries of the Act were to receive the full benefit of the grant).

even in states whose enabling acts did not contain the restrictive language of the Arizona–New Mexico Enabling Act.<sup>17</sup>

As a result of this enforceable trust in statehood land grants, there has been a fair amount of litigation over whether state management of the trust lands satisfies the conditions established by the various statehood acts.<sup>18</sup> The Supreme Court's *Lassen* decision raised several issues concerning natural resource management activities on state trust lands,<sup>19</sup> which have since included whether statehood acts require the state to obtain fair market value for natural resource management, and whether a state may take into account the long-term value of activities when making land management decisions.<sup>20</sup>

State trust lands historically have provided significant financial benefits from natural resources management, including oil, gas, mineral extraction, timber production, and grazing.<sup>21</sup> However, as extractive natural resource industries have declined, public valuation of open space, watershed protection, wildlife, and recreation has increased.<sup>22</sup> This change led to questions concerning trust land management, especially the value of traditional natural resource production activities, including their worth over the long term to trust beneficiaries and their effect on conservation.<sup>23</sup> Nevertheless, despite changing social, political, and environmental needs and conditions, state land management today continues largely in the same manner and for the same purpose as it has for the last century.<sup>24</sup> The static nature of state trust land management raises concerns as to whether state management can adapt to changing circumstances, including managing for long-term value instead of short-term income production, without violating the fiduciary duty owed under the trust.

This Article examines recent litigation over state trust land management and discusses the implications of these decisions for future management of the trust lands. Part II provides a brief history of the state trust lands, including the evolution of enabling act requirements. Part III looks at the specific requirements in the Arizona–New Mexico Enabling Act because the Supreme Court relied on this statute to establish a federal trust

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<sup>17</sup> See, e.g., *Cnty. of Skamania v. State*, 685 P.2d 576, 583 (Wash. 1984) (holding that although *Lassen* involved a different enabling act, the principle of *Lassen* applied to Washington's Enabling Act).

<sup>18</sup> See CULP ET AL., *supra* note 2, at 29.

<sup>19</sup> *Lassen*, 385 U.S. at 468–69 (enforcing the “full value” requirement of the Arizona–New Mexico Enabling Act by requiring the State to fully compensate the trust for the value of the trust land on which the State built a highway).

<sup>20</sup> See *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 982 P.2d 367, 370–71 (Idaho 1999) (holding that state law excluding conservation interests from bidding on grazing leases on state land violated the state constitution by removing potential bidders who might provide the “maximum long term financial return” to the schools).

<sup>21</sup> See CULP ET AL., *supra* note 2, at 2.

<sup>22</sup> See *id.* at 3.

<sup>23</sup> See *id.*

<sup>24</sup> See Bruce & Rice, *supra* note 5, at 21–22 (describing the continued leasing of these lands for grazing and agriculture at below market value, even though revenue from these uses does not contribute significantly to state grant funds).

in state trust lands. Relying on the opinion of the Supreme Court, this Part examines the nature of the trust formed by these requirements, and includes a discussion of the role of trustees, beneficiaries, and the trust corpus. Part IV surveys recent state trust land litigation, including cases from Idaho, Arizona, Colorado, Montana, and New Mexico, which illustrates that courts have interpreted the fair market value requirement narrowly and that there has been a policy shift towards recognizing long-term values in trust land.

Part V concludes that case law indicates leasing lands for grazing at below market value violates the trust requirement that state managers demand fair market value for trust land in virtually all states. Finally, Part VI argues that the requirement that these lands be managed for income production does not necessarily prohibit management of state trust lands for recreation, wildlife, and wilderness values as long as the management produces the most income for the trust. However, the choice between managing for long-term values and short-term production is left to the management agencies, who are required only to show that they considered both uses when making management decisions.

This examination of state trust law reveals: 1) the almost exclusive focus of state managers on income production has led to widespread violation of the fair market value requirement through grazing leases;<sup>25</sup> and 2) the recent decisions of several courts approve a shift away from management practices emphasizing immediate economic production and encouraging consideration of long-term management values.<sup>26</sup> This Article maintains that although courts increasingly conclude that issuing grazing leases below fair market value is a violation of the trust and consequently allow managers to consider long-term values in their management decisions, judicial review still affords managers too much discretion in their administration of trust lands. The result is that courts will not interfere with trust land management decisions if managers demonstrate consideration of the potential long-term benefits of leasing activities and no reliance in their decision making on impermissible factors, such as the benefit of leasing activities to the grazing industry.

## II. A BRIEF HISTORY OF STATE TRUST LANDS

The first of two pieces of legislation that allocated federal land grants to states in the western territories was the General Land Ordinance of 1785.<sup>27</sup> Under this land ordinance, which established the township system of laying

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<sup>25</sup> See, e.g., William Snape III et al., *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Desert Example*, 41 WASHBURN L.J. 14, 44 (2002) (noting the Arizona State Land Department's persistent practice of leasing state trust lands for rates below fair market value); see generally Sally K. Fairfax & Andrea Issod, *Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases*, 33 ENVTL. L. 341 (2003) (discussing situations in Arizona, Idaho, New Mexico, and Oregon where grazing leases were challenged as not meeting the fair market value requirement).

<sup>26</sup> See *infra* notes 142–44, 162–66, 194–97 and accompanying text.

<sup>27</sup> SOUDER & FAIRFAX, *supra* note 1, at 18.

out townships in grids, states held section 16 in every township in trust for the state schools.<sup>28</sup> In 1787, Congress passed the Northwest Ordinance, which established the procedure by which territories could become states and enter the Union.<sup>29</sup> The Northwest Ordinance of 1787 authorized Congress to pass an enabling act that would allow a territory to create a constitution.<sup>30</sup> Once both the territory and Congress approved a state constitution, the United States would make an offer to the new state and, if the state accepted, the new state became part of the Union.<sup>31</sup>

In 1803, Ohio became the first state to receive a grant of school trust lands.<sup>32</sup> In exchange for the grant, Ohio gave what has since been understood to be an honorary, but unenforceable, promise to use the school land grants for education.<sup>33</sup> Congress subsequently admitted Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri, and Arkansas in substantively the same manner as Ohio's admittance.<sup>34</sup> Under these early trust land grants, a large amount "of the land and its potential benefit were lost due to incompetence, indirection, and corruption."<sup>35</sup> Most of the loss was connected to states' persistent decisions to sell the lands rapidly to encourage settlement and to fund schools.<sup>36</sup> The early land grants did not actually authorize sale of the state lands, but states found that leasing state trust lands was not an economically feasible choice because land in the new states was otherwise cheaply and widely available.<sup>37</sup> Both Congress and those states admitted later to the Union made gradual changes to the trust land grant process as a result of the perceived trust land mismanagement issues.<sup>38</sup>

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<sup>28</sup> See COGGINS ET AL., *supra* note 9, at 66 fig. Due to the fact that the townships were set out uniformly without regard to the nature of the land, and section 16 was always set aside as common school trust land, there was a large amount of variance in the character of the school trust lands from township to township. See *id.* at 65–66. For example, some lands possessed greater natural resources like minerals and gas, and therefore possessed greater earning potential for the trust. As the land grants evolved, Congress eventually changed the system to grant two sections out of every township to the common school trust. See, e.g., Act of March 3, 1875, ch. 139, § 14, 18 Stat. 476.

<sup>29</sup> See SOUDER & FAIRFAX, *supra* note 1, at 18.

<sup>30</sup> Northwest Ordinance of 1787, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 342 (Roscoe R. Hill ed., 1936) (reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50).

<sup>31</sup> See SOUDER & FAIRFAX, *supra* note 1, at 18.

<sup>32</sup> See *id.* at 24.

<sup>33</sup> *Id.* In decisions considering the status of lands granted to the states in the early years of the state accession process, the United States Supreme Court took the position that although the grants were clearly intended by Congress to support public education, the grants did not create any binding obligations on the states. See, e.g., *Alabama v. Schmidt*, 232 U.S. 168, 173–74 (1914) (holding that the terms of the grant imposed a sacred obligation, but this obligation was only "honorary" in nature); *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 181–82 (1855) (holding that although the grant "for the use of schools" constituted a "sacred obligation imposed on its public faith," the limitation was not enforceable against the state).

<sup>34</sup> Budge, *supra* note 8, at 226.

<sup>35</sup> Fairfax, Souder & Goldenman, *supra* note 9, at 807.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 807 n.25.

<sup>38</sup> See *infra* notes 39–44 and accompanying text.

When Congress admitted Michigan in 1837, a substantive change occurred in the trust land grant practice.<sup>39</sup> Michigan was the first state to strengthen its commitment to use the school trust land grants for education by including in its state constitution restrictions on the use of the revenues from the sale of school lands.<sup>40</sup> The Michigan Constitution also contained a provision requiring the State to place revenues from the sale of school lands into a permanent fund, which would hold the proceeds from the sale of school lands and provide a source for the operation and maintenance of the common schools.<sup>41</sup>

The next major change in the land grant process took place in 1875, when Congress passed the Colorado Enabling Act.<sup>42</sup> This was the first time “a federal enabling act included language requiring the establishment of a permanent fund for revenues derived from the school land grants.”<sup>43</sup> The effect of this language has been debated,<sup>44</sup> but in 1998 the Tenth Circuit held, in *Branson School District RE-82 v. Romer (Branson)*,<sup>45</sup> that the conditions in the enabling act, including setting a minimum price for sale of the lands and limiting use of the income from the sale of the lands, “create[d] a fiduciary obligation for the state of Colorado to manage the school lands in trust for the benefit of the state’s common schools.”<sup>46</sup>

Although there remains some uncertainty as to whether the Colorado Enabling Act, and those enabling acts that followed, actually created a federal trust,<sup>47</sup> the Arizona–New Mexico Enabling clearly created a federal trust.<sup>48</sup> The Arizona–New Mexico Enabling Act not only contained the first express declaration by Congress that a state must hold school lands in

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<sup>39</sup> See SOUDER & FAIRFAX, *supra* note 1, at 31–32.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* The inclusion of the permanent fund language was significant because the fund, as an aspect of the trust corpus, increased the assets of the trust. See *id.* at 32 (discussing the strategy of investing in first farm mortgages or government bonds).

<sup>42</sup> Act of March 3, 1875 (Colorado Enabling Act), ch. 139, 18 Stat. 474.

<sup>43</sup> Budge, *supra* note 8, at 228; see also SOUDER & FAIRFAX, *supra* note 1, at 32 (describing the development of increasing restrictions in state enabling acts, and noting that the Colorado Enabling Act was the first to establish a permanent fund); Act of March 3, 1875, ch. 139, § 14, 18 Stat. 476.

<sup>44</sup> Compare Fairfax, Souder & Goldenman, *supra* note 9, at 830 n.128, 850–51 (recognizing that the Arizona–New Mexico Enabling Act contains unique provisions “which may partially explain why key U.S. Supreme Court decisions are therefore unusually likely to involve cases about those two states” and that it is “not clear that the trust notion is appropriately applied to school land grants . . . [except that] Congress and the states viewed the New Mexico and Arizona grants as trusts from the outset”), with Budge, *supra* note 8, at 228 (discussing the *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), decision in its interpretation of the Colorado Enabling Act as establishing a federal trust).

<sup>45</sup> 161 F.3d 619 (10th Cir. 1998).

<sup>46</sup> *Id.* at 634.

<sup>47</sup> The Tenth Circuit in *Branson* held that the permanent fund requirement, as well as several other requirements in the Colorado Enabling Act, created a federal trust. *Id.* at 634. However, Souder and Fairfax maintain that the only enabling act that actually contained the notion of a federal trust was the Arizona–New Mexico Enabling Act, which was the first enabling act to contain express trust language. See SOUDER & FAIRFAX, *supra* note 1, at 33–35.

<sup>48</sup> Act of June 20, 1910, ch. 310, § 28, 36 Stat. 557, 574; see SOUDER & FAIRFAX, *supra* note 1, at 34–35.

trust,<sup>49</sup> but it also contained some of the most detailed and restrictive school land grant language.<sup>50</sup> The Act contained stipulations that 1) Arizona and New Mexico could not sell their trust lands at below market value, 2) trust lands could not be “leased, in whole or in part, except to the highest and best bidder at a public auction,” and 3) included specific procedures that Arizona and New Mexico had to follow when leasing or selling the lands.<sup>51</sup>

As Part II illustrated, the trust lands process evolved over time, with increased restrictions added as both Congress and the states learned from earlier mistakes in the admissions process.<sup>52</sup> However, as Part III shows, despite these differences in various statehood acts, courts have interpreted all statehood acts in a fairly uniform matter, reading all the trusts as subject to the same management requirements.<sup>53</sup>

### III. THE TRUST FORMED BY THE ARIZONA–NEW MEXICO ENABLING ACT

The Arizona–New Mexico Enabling Act is central to any discussion of state trust lands for two reasons: 1) it is the most detailed and restrictive enabling act, and the only one to contain an express declaration that the lands are held in trust; and 2) despite its unique language in comparison to the other enabling acts, courts relied on its restrictive language to impose similar requirements on other states with far less restrictive enabling acts.<sup>54</sup> This Part explores the trust established by the Arizona–New Mexico Enabling Act, as well as the two Supreme Court decisions that became the authority upon which state courts relied heavily when interpreting their own state enabling acts.<sup>55</sup>

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<sup>49</sup> § 28, 36 Stat. at 574 (stating the land “shall be by the said State held in trust”).

<sup>50</sup> Sean E. O’Day, Note, *School Trust Lands: The Land Manager’s Dilemma Between Education Funding and Environmental Conservation, a Hobson’s Choice?*, 8 N.Y.U. ENVTL L. J. 163, 185 (1999). The Arizona–New Mexico Enabling Act included restrictions on to whom the land could be sold and in what manner:

[A]ll lands hereby granted . . . shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same. . . . Said lands shall not be sold or leased . . . except to the highest and best bidder at a public auction . . . .

§ 28, 36 Stat. at 574; *see also* SOUDER & FAIRFAX, *supra* note 1, at 34 (discussing the *Lassen* interpretation which characterized the Act as restricting funds to serve only the purposes included in the land grants).

<sup>51</sup> § 28, 36 Stat. at 574; *see* SOUDER & FAIRFAX, *supra* note 1, at 34–35.

<sup>52</sup> *See supra* notes 38–43 and accompanying text.

<sup>53</sup> *See infra* note 86.

<sup>54</sup> *See infra* notes 86, 93–102 and accompanying text.

<sup>55</sup> *See infra* notes 86, 93–102 and accompanying text.

*A. Elements of the Trust*

A trust under which state trust lands are held is like any other trust, in that there are trustees, beneficiaries, and a trust corpus. The trustees of state trust lands are the state land offices, which act as managing trustees for the land and resources as well as the managers of the permanent funds.<sup>56</sup> Each state varies in how it organizes this management.<sup>57</sup> The beneficiaries of the trust are the people for whose benefit the trust property is held. Often the state trust lands support the common school fund.<sup>58</sup> For these lands, the beneficiaries are the public school system and public school students. The trust corpus of the state trust lands consists of two elements: 1) the federally granted lands and resources that remain in state ownership, and 2) the permanent funds established—often at statehood—to hold in trust the receipts from land sales and the leases of trust land resources.<sup>59</sup> Congress established the trust management system of state trust lands to fulfill three trust goals: 1) generate revenues for the beneficiary, 2) protect the corpus of the trust, and 3) make the assets of the trust productive.<sup>60</sup>

Recognition that the lands Congress granted under the statehood acts are held in trust is a fairly recent development.<sup>61</sup> State courts in the 1920s and 1930s did not interpret either the enabling acts or state constitutional provisions to establish land disposition requirements barring state agencies from using school lands for diverse state purposes.<sup>62</sup> However, two United States Supreme Court cases concluded that the Arizona–New Mexico Enabling Act established that statehood land grants are subject to trust requirements.<sup>63</sup>

*B. Early Cases Recognizing the Trust*

In *Ervien v. United States*,<sup>64</sup> New Mexico sought to use the trust land revenues to advertise the advantages of living in New Mexico to both settlers and investors.<sup>65</sup> In 1919, the United States filed suit to enforce the federal

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<sup>56</sup> SOUDER & FAIRFAX, *supra* note 1, at 39–40.

<sup>57</sup> *Id.* at 40.

<sup>58</sup> *Id.* at 31–32.

<sup>59</sup> *Id.* at 47.

<sup>60</sup> *Id.* at 61.

<sup>61</sup> *Id.* at 33.

<sup>62</sup> *See, e.g.,* *Grossetta v. Choate*, 75 P.2d 1031, 1031–32 (Ariz. 1938) (holding that the state land department could grant a right-of-way for a public highway over state school lands to a county board of supervisors because the restrictions in the Arizona–New Mexico Enabling Act were only “intended to prevent their sacrifice and to obtain for the institutions to be benefited to the best and highest price obtainable,” not to prevent necessary highway construction); *see also* *Ross v. Trustees of Univ. of Wyo.*, 222 P. 3, 5–8 (Wyo. 1924) (holding that the state land department could grant a right-of-way over university lands, which were placed in the same category as state trust lands by the state constitution, without being required to compensate the trust beneficiaries).

<sup>63</sup> *See infra* Part III.B.

<sup>64</sup> 251 U.S. 41 (1919).

<sup>65</sup> *Id.* at 42.

trust provision in the Arizona–New Mexico Enabling Act prohibiting the use of “money or thing[s] of value directly or indirectly derived therefrom, for any object other than that for which such particular lands . . . were granted or confirmed.”<sup>66</sup> The District Court of New Mexico found for the defendant Land Board Commissioner, holding that the Commissioner did not violate his fiduciary duties by using trust land revenues to finance the advertising campaign.<sup>67</sup> The United States appealed to the Eighth Circuit, which reversed on the ground that the Commissioner violated the narrow restrictions the Arizona–New Mexico Enabling Act imposed on the disposition of the funds from the trust lands.<sup>68</sup> The Supreme Court affirmed, holding that the Arizona–New Mexico Enabling Act prohibited New Mexico from spending trust funds on anything other than the identified beneficiaries, which in this case were the public school system and public schoolchildren.<sup>69</sup> Rejecting New Mexico’s argument that traditional trust principles allowed it to spend trust revenues prudently if the expenditures could reasonably bring more money into the trust, the Supreme Court held that the express trust language of the Arizona–New Mexico Enabling Act forbade such expenditures, even if they were prudent.<sup>70</sup> The *Ervien* decision established the practice of strictly interpreting the federal trust obligation, which ensuing courts have followed.<sup>71</sup>

In 1967, forty-eight years after *Ervien*, the Supreme Court, in *Lassen*, addressed Arizona’s practice of building highways over school trust lands without compensating the trust for the loss of the land occupied by the roads.<sup>72</sup> *Lassen* concerned a rule adopted by the Arizona Land Commissioner (Land Commissioner), which provided that the Arizona Highway Department (Highway Department) had to pay for any rights-of-way over state trust lands.<sup>73</sup> The Highway Department, seeking to prohibit application of the rule, argued that the highway added value to the lands and that there was a presumption that the value from the road enhancement outweighed

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<sup>66</sup> *Id.* at 45 (“[I]t is further provided that the ‘disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.’” (quoting Act of June 20, 1910, ch. 310, § 10, 36 Stat. 557, 563)).

<sup>67</sup> *Id.* at 47.

<sup>68</sup> *United States v. Ervien*, 246 F. 277, 279–81 (8th Cir. 1917), *aff’d sub nom.*, 251 U.S. 41 (1919).

<sup>69</sup> *See Ervien*, 251 U.S. at 47–48.

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g.,* *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 306, 311 (1976) (holding that under the Arizona–New Mexico Enabling Act, at the time of disposition of trust lands, the land must be appraised at its “true value” and cannot be leased or sold at less than that value); *see also* *United States v. New Mexico*, 536 F.2d 1324, 1327–28 (10th Cir. 1976) (holding that New Mexico could not use income from a federal land grant to support a “miners’ hospital” for disabled miners for the purpose of underwriting a consolidation of state hospitals, which then served to change its miners’ hospital into a more limited facility that did not provide surgical services and made disabled miners eligible to receive care at other institutions).

<sup>72</sup> *See Lassen*, 385 U.S. 458, 460 (1967).

<sup>73</sup> *See id.* at 459–60.

the value of the land occupied by the road.<sup>74</sup> The case was brought against the Land Commissioner by the State of Arizona on behalf of the Highway Department as an original proceeding in the Supreme Court of Arizona.<sup>75</sup> The state supreme court agreed with the Highway Department that “it may be conclusively presumed that highways [built] across trust lands always enhance the value of the remaining trust lands in amounts at least equal to the values of the areas taken,” holding that the Land Commissioner had no authority to require payment by the Highway Department for right-of-ways over trust lands.<sup>76</sup> The United States Supreme Court reversed, rejecting the presumption and stating that in order to fulfill the purposes of the Arizona–New Mexico Enabling Act, the beneficiaries must receive the full benefit as granted under the Act.<sup>77</sup> The Court therefore ruled that the Highway Department had to pay the school trust fund the full value of the land that the newly constructed road now occupied, without considering the enhancement in value added to the affected parcel from the highway.<sup>78</sup>

The *Lassen* Court did not discuss the potential implications of the decision for states with enabling acts that contained less restrictive language. However, in a subsequent case, *Papasan v. Allain*,<sup>79</sup> the Court stated clearly that the determination of whether a trust existed in a particular state required a case-by-case analysis of the language of each state’s enabling act and constitution.<sup>80</sup> In *Papasan*, the Court considered a challenge brought by school officials and schoolchildren to dispositions of Mississippi’s school trust lands; the dispositions were an alleged breach of the trust because of disparity in the distribution of the funds among the school districts.<sup>81</sup> Although the Supreme Court decided the case on other grounds and declined to rule on whether the State of Mississippi was subject to a trust responsibility,<sup>82</sup> the Court noted in the opinion that the character of the trust grants differed noticeably between the states.<sup>83</sup> The Court observed that although the Arizona and New Mexico grants explicitly imposed a trust responsibility, earlier land grants imposed only “honorary” restrictions, and

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<sup>74</sup> See *id.* at 465.

<sup>75</sup> State *ex rel.* Ariz. Highway Dep’t v. Lassen, 407 P.2d 747, 747–48 (Ariz. 1965), *rev’d*, 385 U.S. 458 (1967).

<sup>76</sup> *Lassen*, 385 U.S. at 460, 465; see also State *ex rel.* Ariz. Highway Dep’t v. Lassen, 407 P.2d at 752.

<sup>77</sup> *Lassen*, 385 U.S. at 468.

<sup>78</sup> See *id.* at 468–69.

<sup>79</sup> 478 U.S. 265 (1986).

<sup>80</sup> See *id.* at 289 n.18.

<sup>81</sup> See *id.* at 267–68, 274.

<sup>82</sup> *Id.* at 275, 282. The Court held that 1) the claim seeking to require state officials to provide appropriate trust income was barred by the Eleventh Amendment; 2) the claim that unequal distribution of school land funds violated equal protection was not barred by the Eleventh Amendment; and 3) the allegation that Mississippi’s distribution of benefits from public school lands violated equal protection was sufficient to state a claim if it was determined that such differential treatment was not rationally related to a legitimate state interest. *Id.* at 280–82, 289.

<sup>83</sup> See *id.* at 279.

it was “not at all clear that the school lands grants to Mississippi created a binding trust.”<sup>84</sup>

However, following the *Lassen* decision, other state courts, especially in the West, started interpreting their own state’s enabling acts in an unusual way.<sup>85</sup> Instead of looking at the plain language of the individual state’s enabling act, as the Supreme Court did in *Ervien* and *Lassen*, the state courts interpreted the restrictions and language in the Arizona–New Mexico Enabling Act into their own states’ enabling acts.<sup>86</sup> One prominent example of a state applying the *Lassen* trust principles, rather than the specifics of its own enabling act, occurred in the Washington Supreme Court case, *County of Skamania v. State (Skamania)*.<sup>87</sup>

At issue in *Skamania* was the Forest Products Industry Recovery Act,<sup>88</sup> a law the legislature enacted to excuse timber companies from paying fees they owed for trust land timber contracts.<sup>89</sup> Concerned that trust payments on timber contracts would harm the state’s economy, the State passed a bill canceling the contracts.<sup>90</sup> The trial court held that the Act was invalid as a breach of the State’s trustee duty of undivided loyalty to the trust beneficiaries, and the state supreme court granted direct review.<sup>91</sup> The Washington Supreme Court affirmed, holding that the Act violated the principle that the “state as trustee may not use trust assets to pursue other state goals,” since the primary purpose of the statute was to benefit the timber industry, and the state economy in general, at the expense of the trust beneficiaries.<sup>92</sup> Instead of basing its reasoning on state law, the state supreme court concluded that “[a]lthough *Lassen* involved a different enabling act, the principle of *Lassen* applies to Washington’s Enabling Act,”<sup>93</sup> and effectively incorporated the Arizona–New Mexico statehood bargain into Washington’s bargain.

Washington is not the only state where courts read the trust requirements of the Arizona–New Mexico Enabling Act into their own enabling act. For example, in *Oklahoma Education Ass’n v. Nigh*,<sup>94</sup> the Oklahoma Educational Association brought an original action in the Oklahoma Supreme Court against the Commissioners of the State Land

<sup>84</sup> *Id.* at 279, 289–91 n.18 (quoting *Alabama v. Schmidt*, 232 U.S. 168, 174 (1914)) (comparing the honorary restriction in the Alabama grant to the express obligations imposed in more recent grants like the Arizona–New Mexico Enabling Act).

<sup>85</sup> See SOUDER & FAIRFAX, *supra* note 1, at 34.

<sup>86</sup> See *id.* at 35; see also *Nat’l Parks & Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 920–21 (Utah 1993); *Dep’t of State Lands v. Pettibone*, 702 P.2d 948, 953–54 (Mont. 1985); *Okla. Educ. Ass’n v. Nigh*, 642 P.2d 230, 235–36 (Okla. 1982); *State v. Univ. of Alaska*, 624 P.2d 807, 813 (Alaska 1981).

<sup>87</sup> 685 P.2d 576, 580 (Wash. 1984) (en banc).

<sup>88</sup> Ch. 222, 1982 Wash. Sess. Laws 917, *invalidated by Skamania*, 685 P.2d 576 (Wash. 1984).

<sup>89</sup> *Skamania*, 685 P.2d at 578–79 (citing Forest Products Industry Recovery Act, ch. 22, §§ 6–7, 1982 Wash. Sess. Laws at 919–20).

<sup>90</sup> See *Skamania*, 685 P.2d at 578–79.

<sup>91</sup> *Id.* at 579.

<sup>92</sup> *Id.* at 581–82.

<sup>93</sup> *Id.* at 580; Act of February 22, 1889, ch. 180, 25 Stat. 676.

<sup>94</sup> 642 P.2d 230 (Okla. 1982).

Office, challenging the constitutionality of state statutes that provided for low-interest mortgage loans of school trust land funds to farmers and ranchers, and low-rental leases of trust lands to farmers and ranchers.<sup>95</sup> The court invalidated the statutes, concluding that they violated the trust under which Oklahoma holds those lands.<sup>96</sup> Although the court did discuss the Oklahoma Constitution and the Oklahoma Enabling Act<sup>97</sup> throughout its analysis, it cited to *Lassen* for the proposition that “[t]he State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from the use and disposition of the trust property.”<sup>98</sup> Just like the court in *Skamania*, the Oklahoma Supreme Court interpreted *Lassen* to impose a trust in the granted lands, even though the *Lassen* decision was based on an interpretation of the Arizona–New Mexico Enabling Act.

The Utah Supreme Court also relied on *Lassen* to find the existence of a trust in *National Parks & Conservation Ass’n v. Board of State Lands*,<sup>99</sup> where the court considered whether the State properly approved an exchange of state school land with Garfield County. The County wanted State school land lying within Capitol Reef National Park to complete the paving of the Burr Trail, and it offered the State some income-producing lands that it owned in exchange for the school lands.<sup>100</sup> After the Board of State Lands voted to proceed with the land exchange, and the Division of State Lands and Forestry (Division) approved the exchange, the National Parks and Conservation Association (NPCA) filed a writ of review in the Utah Supreme Court, challenging the Division’s rulings on the grounds that the exchange violated its trust duties by refusing to give priority to “scenic, aesthetic, and recreational values.”<sup>101</sup>

The Utah Supreme Court affirmed the Division’s approval of the exchange, and rejected NPCA’s contention that school trust lands are impressed with a public trust that requires protection of their long-term environmental value for the benefit of the public at large.<sup>102</sup> The court held that the State administers State school trust lands as a trustee, and that the Division satisfied its primary objective “to maximize the monetary return of school trust lands” because the exchange would produce a monetary return for the school land trust.<sup>103</sup> Noting that the State acts as a trustee over State school lands, the court cited to *Ervien* and *Lassen*, as well as judicial decisions from states other than Arizona and New Mexico that relied on

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<sup>95</sup> See *id.* at 233–35.

<sup>96</sup> See *id.* at 238.

<sup>97</sup> Act of June 16, 1906 (Oklahoma Enabling Act), ch. 3335, 34 Stat. 267.

<sup>98</sup> *Oklahoma Educ. Ass’n*, 642 P.2d at 236.

<sup>99</sup> 869 P.2d 909 (Utah 1993).

<sup>100</sup> *Id.* at 911.

<sup>101</sup> See *id.* at 912, 916–17.

<sup>102</sup> *Id.* at 918–20.

<sup>103</sup> *Id.* at 920–21.

*Lassen* to find an express trust, including *Skamania* and *Oklahoma Education Ass'n*.<sup>104</sup>

Although the vast majority of states continue to rely on the reasoning in *Lassen* to find the existence of a trust in state school lands, several courts have reexamined the question of whether their enabling acts were explicit enough in their restrictions to create a trust. For example, in *Branson*, the Tenth Circuit, which affirmed the lower court's dismissal of a challenge to an amendment to the state constitution, considered whether Colorado's state trust lands were held in trust.<sup>105</sup> The court held that the language in the Colorado Enabling Act,<sup>106</sup> which provided that the lands were "granted to said State for the support of common schools,"<sup>107</sup> was insufficient to create a trust in isolation because it was no more specific than the language in the Michigan and Alabama land grants that were previously interpreted to create only 'honorary' obligations on the part of the states.<sup>108</sup> But the court observed that the Colorado Enabling Act also contained a series of specific restrictions on the State's management and disposal of the lands, supplementary to the honorary obligation, and noted that the Act was the first act to include these types of restrictions.<sup>109</sup> The court decided that these additional restrictions were sufficient evidence of intent to create a trust because they identified specific duties that were obviously imposed to ensure that the lands would be used to further Congress's "goal of providing a sound financial basis for the 'support' of the state's common schools in perpetuity."<sup>110</sup>

In 2000, two years after *Branson*, the Tenth Circuit revisited the extent of the trust obligation in *District 22 United Mine Workers of America v. Utah (District 22)*.<sup>111</sup> In *District 22*, a group of miners challenged Utah's use of 100,000 acres of trust land, which had been conveyed by the federal government for a state miners' hospital,<sup>112</sup> and use of revenue from that land

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<sup>104</sup> *Id.* at 918 (citing, for example, *State v. Univ. of Alaska*, 624 P.2d 807, 813 (Alaska 1981); *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 953, 957 (Mont. 1985); *Okla. Educ. Ass'n v. Nigh*, 642 P.2d 230, 235 n.6 (Okla. 1982); and *Skamania*, 685 P.2d 576, 580 (Wash. 1984)).

<sup>105</sup> *Id.* at 625.

<sup>106</sup> Act of March 3, 1875 (Colorado Enabling Act), ch. 139, 18 Stat. 474.

<sup>107</sup> § 7, 18 Stat. at 475.

<sup>108</sup> *Branson*, 161 F.3d at 634 (citing *Alabama v. Schmidt*, 232 U.S. 168, 173-74 (1914); *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 182 (1855)).

<sup>109</sup> *Id.* at 634. These restrictions included that the lands could only be disposed of at public sale, that they must be sold at a price not less than \$2.50 per acre, and that the proceeds had to be put in a permanent fund to benefit the common schools. § 14, 18 Stat. at 476.

<sup>110</sup> *Branson*, 161 F.3d at 634.

<sup>111</sup> 229 F.3d 982 (10th Cir. 2000).

<sup>112</sup> *Id.* at 986. The pertinent section of the Utah Enabling Act provides:

[T]he following grants of land are hereby made to said State for the purposes indicated, namely:

... for a miners' hospital for disabled miners, fifty thousand acres. . . .

... The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act; 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 legislature of the State may provide.

for the benefit of the general public instead of disabled miners.<sup>113</sup> The district court dismissed the case, finding that the lands were not held in trust.<sup>114</sup> The Tenth Circuit affirmed the lower court's holding that no trust was created pursuant to the Utah Enabling Act,<sup>115</sup> but reversed the lower court's holding that no trust was created by the Utah Constitution.<sup>116</sup> The court first examined Utah's Enabling Act grant of 50,000 acres for the state miners' hospital and held that this language, when taken alone, was insufficient to create a trust based on the previous interpretations of the Michigan and Alabama land grants.<sup>117</sup> The court also observed that, unlike the Colorado Enabling Act, the Utah Enabling Act did not place any explicit restrictions on the management of the lands, instead providing only that "the lands . . . shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature' may provide."<sup>118</sup> Taking this language into consideration, the court ruled that the Utah Enabling Act had explicitly given the legislature full discretion over the management and disposal of these lands, and under general trust principles, this discretion "militates against the creation of a trust."<sup>119</sup> Nonetheless, the court held that the explicit trust language in the Utah Constitution was sufficient to conclude that the lands were "held in trust pursuant to the Utah Constitution."<sup>120</sup>

The Wyoming Supreme Court reached a similar conclusion three years later concerning the requirements of the Wyoming Enabling Act<sup>121</sup> in *Riedel v. Anderson*.<sup>122</sup> *Riedel* involved a challenge by an unsuccessful bidder to a state statute that granted the holder of an agricultural lease on state trust lands a preferential right to renew the lease.<sup>123</sup> Analyzing the evolution of the Wyoming Enabling Act in light of the Tenth Circuit's decisions in *Branson* and *District 22*, the court noted that the Wyoming Enabling Act, while similar to the Colorado Enabling Act, was different in two important ways. First, it did not specify any minimum sales price for state trust lands;<sup>124</sup> and second, it expressly authorized the leasing of trust lands "in any manner the

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Act of July 16, 1894, ch. 138, § 12, 28 Stat. 107, 110. Congress granted an additional 50,000 acres in 1929. Act of February 20, 1929, ch. 280, § 1, 45 Stat. 1252.

<sup>113</sup> *District 22*, 229 F.3d at 986.

<sup>114</sup> *United Mine Workers of Am., Dist. No. 22 v. State*, 6 F. Supp. 2d 1298, 1307 (D. Utah 1998) *aff'd in part, rev'd in part*, 229 F.3d 982 (10th Cir. 2000).

<sup>115</sup> Act of July 16, 1894 (Utah Enabling Act), ch. 138, 28 Stat. 107.

<sup>116</sup> *District 22*, 229 F.3d at 992.

<sup>117</sup> *Id.* at 988–90 (citing *Alabama v. Schmidt*, 232 U.S. 168, 173–74 (1914); *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 181–82 (1855)). For the relevant portion of the Utah Enabling Act, see Act quoted *supra* note 112.

<sup>118</sup> *District 22*, 229 F.3d at 990 (quoting Act of July 16, 1894, ch. 138, § 12, 28 Stat. 110).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* The Utah Constitution specifies that the state public lands "shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted." UTAH CONST. art. XX, § 1.

<sup>121</sup> Act of July 10, 1890 (Wyoming Enabling Act), ch. 664, 26 Stat. 222.

<sup>122</sup> 70 P.3d 223 (Wyo. 2003).

<sup>123</sup> *Id.* at 226.

<sup>124</sup> *Id.* at 231 (citing Act of March 3, 1875, ch. 139, §14, 18 Stat. 474, 476 and § 5, 26 Stat. at 223).

state legislature provides.”<sup>125</sup> The Wyoming Supreme Court held that the broad discretion extended to the Wyoming Legislature by this provision “militates against the creation of an express trust.”<sup>126</sup> The court reached the same conclusion after considering the land management requirements associated with the Wyoming Constitution.<sup>127</sup> But the court proceeded to find a trust pursuant to Wyoming state statutes, pointing to specific trust language in the 1997 amendments to the leasing statutes<sup>128</sup> and holding that “[t]he use of such explicit trust language . . . indicates the legislature’s intention that the land grant be subject to a trust.”<sup>129</sup> In light of these recent decisions in Utah and Wyoming, it appears that other western states may revisit their adoption of the trust doctrine with regard to the management and disposition of their state lands and potentially discover that their management restrictions under the trust doctrine are not as limiting as previously thought.<sup>130</sup>

The courts’ reliance on the Arizona–New Mexico Enabling Act requirements to impose the same trust duties on all state trust lands is noteworthy because the state courts have been willing to voluntarily impose stricter trust requirements on their trust lands, thus creating more uniformity in the treatment of these lands from state to state than would probably exist otherwise.<sup>131</sup> Reliance on the Arizona–New Mexico Enabling Act also raises questions concerning what procedures states must follow in the future should they want to alter the restrictions on their trust land. If the trust restrictions are self-imposed by the state constitution, then can a state alter these requirements without the federal government’s involvement?<sup>132</sup> Where a state court has incorporated the Arizona–New Mexico statehood bargain into its own state’s enabling act, it appears as though the Arizona–New Mexico Enabling Act would have to be altered as well—which would

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<sup>125</sup> *Id.* (citing § 5, 26 Stat. at 223).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 232 (“[T]he express latitude given the legislature, combined with the limitation of the express trust language to the proceeds from the lands, militate against a constitutionally-created trust in the school lands by the terms of the Wyoming Constitution.” (emphasis omitted)).

<sup>128</sup> *Id.* at 232–33 (noting the legislature’s broad management authority over the trust lands included the authority to “statutorily declare a trust”). The amendments to the statutes included requirements that management of the trust lands focus on protecting the corpus for the long term, that there was no mandate to sell any trust asset to maximize revenue in the short term, and that all leases of trust land must assure a return of at least fair market value. Act of Mar. 14, 1997, ch. 200, § 3(a)(ii)–(iv), 1997 Wyo. Sess. Laws 547, 558 (1997).

<sup>129</sup> *Riedel*, 70 P.3d at 233.

<sup>130</sup> *But see* CULP ET AL., *supra* note 2, at 36 (suggesting that states may be reluctant to revisit the issue of the origin of the trust because “the notion of the trust is now ‘thoroughly embedded,’” particularly in the western states, but also noting that although the trust doctrine is probably here to stay for the foreseeable future, it may not necessarily be as restrictive as land managers believe (quoting O’Day, *supra* note 50, at 193–94)).

<sup>131</sup> *See* State v. Univ. of Alaska, 624 P.2d 807, 813 (Alaska 1981); *see also* State Bd. of Educ. Lands & Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985); Dep’t of State Lands v. Pettibone, 702 P.2d 948, 953–54 (Mont. 1985); Okla. Educ. Ass’n v. Nigh, 642 P.2d 230, 235–36 (Okla. 1982); Nat’l Parks & Conservation Ass’n v. Bd. of State Lands, 869 P.2d 909, 920 (Utah 1993); SOUDER & FAIRFAX, *supra* note 1, at 33–36.

<sup>132</sup> *See* Fairfax, Souder & Goldenman, *supra* note 9, at 822.

require a congressional amendment—unless the source of the trust is state law, as is the case in Colorado, Utah, and Wyoming.

It seems clear under the case law that state trust lands are all subject to similar trust requirements.<sup>133</sup> However, the types of management activities that satisfy these trust requirements are less clear, and there have been numerous challenges to the state management of state trust lands. Part IV surveys some of the recent state trust land litigation.

#### IV. RECENT STATE TRUST LAND LITIGATION

This Part examines recent litigation relating to two trust land requirements articulated by the *Lassen* court: 1) the trustee must produce full market value from leases and sales; and 2) the trustee must manage the lands for maximum economic production. This Part considers whether courts have strictly enforced the former requirement, and whether the latter requirement preempts management of trust lands for preservation, recreation, and wildlife values.

##### *A. Changing Management Through Constitutional Amendment*

At issue in *Branson* was whether the voters of the State of Colorado could change the management principles guiding the State's trusteeship of school trust lands without violating the terms of the trust established when Colorado entered the Union.<sup>134</sup> Prior to the 1998 amendments to the Colorado Constitution, it was the "duty of the . . . [b]oard . . . to provide for the location, protection, sale or other disposition . . . in such manner as will secure the maximum possible amount therefor,"<sup>135</sup> but the constitution neither contained any provisions relating to exploitation of trust land resources nor provided any other management guidance.<sup>136</sup> The 1997 amendments to the Colorado Constitution, which eliminated the previous economic maximization requirement, also required the land board to manage its land holdings "in order to produce reasonable and consistent income over time," as well as adding a requirement that land stewardship principles should guide management of trust lands.<sup>137</sup> State school districts

<sup>133</sup> See *supra* notes 89–99 and accompanying text.

<sup>134</sup> *Branson*, 161 F.3d 619, 625 (10th Cir. 1998).

<sup>135</sup> COLO. CONST. art. IX, § 10.

<sup>136</sup> See *id.*

<sup>137</sup> COLO. CONST. art. IX, § 10(1) (amended 1997). The amendments also included a section discussing the management principles applicable to school trust lands, as described by the *Branson* court:

This section also provides a series of management principles to guide the land board in its activities. Some of these changes include: a requirement that the land board establish a permanent 300,000 acre "Stewardship Trust" of land determined "to be valuable primarily to preserve long-term benefits and returns to the state," and that such land be held and managed for stewardship, public use or future disposition by permitting only uses that will "enhance the beauty, natural values, open space, and wildlife habitat" of that acreage . . . ; a requirement that the board manage its agricultural and natural

and public school students sought to enjoin enforcement and implementation of the amendment, arguing that the amendment was facially in conflict with Colorado's fiduciary duties under its Colorado Enabling Act to manage the school lands "exclusively for the benefit of the 'common schools.'" <sup>138</sup> The federal district court dismissed the suit, <sup>139</sup> and the plaintiffs appealed to the Tenth Circuit. The circuit court first determined that there was sufficient enumeration of duties in the Colorado Enabling Act to create a federal trust. <sup>140</sup> Once it determined that a federal trust existed, the court looked to whether the amendments violated the duties established by the enabling act, and concluded that they did not interfere with the three overriding principles set forth in the enabling act: 1) that the "common schools" shall be the "sole and exclusive beneficiary" of the trust lands, 2) that the only method for disposing of school lands shall be at a "public sale" with a minimum price, and 3) that the interest from the fund created by these land sales is "exclusively and 'permanently' dedicated to 'the support of common schools.'" <sup>141</sup> Rejecting the challengers' argument that the amendments changed the exclusive purpose of the school lands trust of generating maximum financial return, the court characterized the shift away from maximizing income and the added focus on 'sound stewardship' principles as "merely announc[ing] a new management approach . . . for achieving [the state's] continuing obligation to manage the school lands for the support of the common schools." <sup>142</sup> The Tenth Circuit upheld the 1997 amendments, recognizing that it was within the trustee's discretion to determine that conserving the land's natural resources for their long-term value, instead of exploiting the land's resources over the short-term, was in the best interest of the common schools. <sup>143</sup>

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resource holdings to promote long-term productivity and value . . . ; and a requirement to allow school districts to lease, purchase or use the school trust's lands for new school sites at prices that may not be more than "appraised fair market value."

*Branson*, 161 F.3d at 627 (quoting COLO. CONST. art. IX, § 10(1)(b), (e)).

<sup>138</sup> *Branson*, 161 F.3d at 638.

<sup>139</sup> *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1506 (D. Colo. 1997).

<sup>140</sup> *Branson*, 161 F.3d at 634. Congress required the following of Colorado:

That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

Act of March 3, 1875, ch. 139, § 14, 18 Stat. 474, 476 (1875). The *Branson* court notes Congress's prescription of a number of enumerated restrictions on Colorado's specific duties:

(1) how the school lands are to be disposed, (2) at what minimum price, (3) how the income from these sales is to be held, (4) what may be done with the interest on that capital holding, and (5) Congress has provided for the permanence of the benefit of these assets for the common schools.

*Branson*, 161 F.3d at 634.

<sup>141</sup> See *Branson*, 161 F.3d at 637 (quoting §§ 7, 14, 18 Stat. at 475-76).

<sup>142</sup> *Branson*, 161 F.3d at 638.

<sup>143</sup> See *id.* at 639.

The *Branson* decision is significant because it illustrates one way states may alter management priorities for trust lands. As long as amendments to the state constitutional provisions regulating trust land management do not conflict with those requirements imposed by the state's enabling act, a state may change its management priorities. *Branson* is also noteworthy because the Tenth Circuit held that managing trust lands for preservation and conservation uses does not violate the trust duties as long as managers are not managing for preservation at the cost of the trust beneficiaries.<sup>144</sup> The *Branson* decision thus illustrates one way states may combat static management of trust lands.

### *B. Obtaining Fair Market Value for Grazing Leases*

In *Idaho Watersheds Project v. State Board of Land Commissioners* (*Idaho Watersheds*),<sup>145</sup> an environmental group, Idaho Watersheds Project (IWP), submitted grazing lease applications to the Idaho Department of Lands for twenty-four expiring trust land leases.<sup>146</sup> The Department then made a recommendation to the Idaho Land Board (Board), which determined that the IWP was a 'qualified applicant' under state statutory criteria for only three of the leases for which it applied.<sup>147</sup> IWP was the high bidder on two of these parcels, but the Board chose not to lease the lands to IWP.<sup>148</sup> IWP filed suit, claiming that the state statute on which the Board relied in rejecting IWP's bids violated the Idaho Constitution.<sup>149</sup>

Article IX of the Idaho Constitution stipulates that the objective of sales and leases of state trust lands is to "secure the maximum long term financial return to the institution to which granted."<sup>150</sup> The statute that IWP alleged violated the Idaho Constitution directed the Board not only to focus on the financial benefit to schools, but also to consider the stability of the livestock

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<sup>144</sup> See *id.* at 638–39.

<sup>145</sup> 982 P.2d 367 (Idaho 1999).

<sup>146</sup> *Id.* at 368.

<sup>147</sup> *Id.* at 368–69. The statute at issue was § 58–310B of the Idaho Code, which stated in part:

(6) Criteria that may be considered by the state board of land commissioners, in deciding to whom the lease should be awarded, include, but are not limited to, the following:

....

(c) . . . the ability of the [grazing] lessee to remain economically viable without the lease;

(d) The future revenues reasonably anticipated to be generated for the beneficiaries of the endowment and the state . . . ;

(e) The indirect benefits to the beneficiaries of the endowment from tax revenues from all sources generated by the lessee's proposed activities . . . ;

(f) The impact on endowment land or the return to the endowment if the leasehold is not managed in conjunction with adjacent grazing lands.

IDAHO CODE ANN. § 58–310B(6) (2002) (last amended in 1996).

<sup>148</sup> *Idaho Watersheds*, 982 P.2d at 369.

<sup>149</sup> *Id.*

<sup>150</sup> IDAHO CONST. art. IX, § 8 (requiring that the sale of trust lands provide the greatest financial return to the trust beneficiary first, not necessarily directly to the state).

industry, the effect on the state economy of ranchers going out of business, the effect on jobs, and the additional tax funds generated by the livestock industry.<sup>151</sup> These factors disadvantaged potential bidders like environmentalists, who might provide the maximum long-term financial return to the schools, but not to the State's general economy or the livestock industry.<sup>152</sup> The lower courts upheld the statute's constitutionality and dismissed the claim, but the Idaho Supreme Court reversed, ruling that the state statute violated the Idaho Constitution by attempting to promote not only funding for the schools, but also funding for the State generally through the leasing of the school trust lands.<sup>153</sup>

According to the state supreme court, the plain language of the Idaho Constitution required leasing school trust lands to promote only funding for the schools.<sup>154</sup> By focusing on the general state economy and the Idaho livestock industry as well as schools in assessing the lease applications, the statute impermissibly diluted the constitutional requirement that the sale of trust lands provide the greatest long-term financial return to the common schools as the sole beneficiary of the trust.<sup>155</sup> The court, therefore, remanded the case to the Board, with orders to hold new auctions for the leases on which IWP had not been allowed to bid, and in 2000, the Board awarded IWP its first leases for state trust lands.<sup>156</sup>

The Idaho Supreme Court's holding in *Idaho Watersheds* is noteworthy because the court narrowly interpreted the State's duty as trustee and did not allow Idaho to consider other interests in its leasing decisions, reinforcing the concept that trust requirements are interpreted strictly. The State's fiduciary duty under the trust is to only act in the best interest of the trust beneficiaries and it cannot consider the benefit to outside interests to justify awarding bids at below market value. The *Idaho Watersheds* decision is also significant because it ultimately led to IWP being awarded a former grazing lease to use for nongrazing purposes where it was the high bidder.

### C. Considering High Bids from Environmental Interests

In *Forest Guardians v. Wells*,<sup>157</sup> an environmental group that was the highest bidder on three grazing leases on school trust lands filed suit after the Arizona State Land Commissioner (Commissioner) rejected their applications.<sup>158</sup> The Commissioner did so because under the state land classification scheme, nongrazing users—such as the environmentalists—had to bid on leases as commercial leases, not grazing leases, which cost far

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<sup>151</sup> See IDAHO CODE ANN. § 58-310B(1)–(2) (2002) (last amended in 1996).

<sup>152</sup> *Idaho Watersheds*, 982 P.2d at 371.

<sup>153</sup> *Id.* at 369–71.

<sup>154</sup> *Id.* at 370.

<sup>155</sup> See *id.* at 370–71.

<sup>156</sup> *Id.* at 371; Western Watersheds Project, *Victory!*, <http://www.westernwatersheds.org/news-media/online-messenger/victory> (last visited Nov. 12, 2011) (celebrating IWP's award of two 10-year grazing leases, one for 777 acres and the other for 450 acres).

<sup>157</sup> 34 P.3d 364 (Ariz. 2001) (en banc).

<sup>158</sup> *Id.* at 366–67.

less than commercial leases.<sup>159</sup> The plaintiffs planned to retire the land from grazing during the ten-year lease term and, as a result, the Commissioner refused to consider their bids unless the plaintiffs sought reclassification of the property for commercial use, which would require the plaintiffs to pay much higher fees.<sup>160</sup> The Commissioner premised this denial on a conclusion that the state land classification system did not permit the issuance of grazing leases for the purpose of restoring the land.<sup>161</sup>

Both the superior court and the court of appeals affirmed the Commissioner's denial of the bids. The courts ruled that the Commissioner did not violate his fiduciary duty by rejecting Forest Guardians's applications because Forest Guardians's intended restorative use of the land did not meet the land department's criteria for a grazing lease and concluding that grazing leases could not be issued for the purposes of restoration.<sup>162</sup> But the Arizona Supreme Court reversed, holding that the Commissioner violated his fiduciary duties as trustee by rejecting Forest Guardians's high bids and summarily refusing to even consider whether Forest Guardians's offer was in the best interest of the trust.<sup>163</sup> Although recognizing that the land classification system "may be an aid to proper administration of the trust," the court ruled that such a system "must conform to the core fiduciary trust duties imposed."<sup>164</sup> Because Forest Guardians offered to pay more than the former grazing lessee, and its bid also had the potential to increase the value of the land for future grazing by letting it recover from previous grazing activities, the classification system could not provide a legitimate basis to reject Forest Guardians's bid.<sup>165</sup> The court ruled that the Commissioner's fiduciary duty required him at least to consider the environmentalists' bids and to exercise a fact-based discretion to determine whether the bids advanced the interest of the trust and its beneficiaries.<sup>166</sup>

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<sup>159</sup> *Id.* at 367, 370.

<sup>160</sup> *Id.* at 366–67.

<sup>161</sup> *See id.* at 367. The State Land Department notified Forest Guardians that they would have to file an application to have the lands reclassified for commercial rather than grazing use if they wished to lease the trust land for preservation or restoration with no intention of grazing livestock on the land. *Id.* It is not clear from the language in the State Land Department's denial of Forest Guardians's bid whether leases for only light grazing would have satisfied the land classification statute.

<sup>162</sup> *See Montanans For Responsible Use*, 989 P.2d at 367.

<sup>163</sup> *Id.* at 371.

<sup>164</sup> *Id.*

<sup>165</sup> *See id.* The Arizona Constitution requires the Commissioner to consider the highest and best bidder, and the court held that restoration and preservation were legitimate uses for grazing land. ARIZ. CONST. art. X, § 3; *see Forest Guardians*, 34 P.3d at 371.

<sup>166</sup> *Forest Guardians*, 34 P.3d at 371. Similar to the Idaho Supreme Court's holding in *Idaho Watersheds*, the Arizona Supreme Court held that land managers can only consider whether a bid provides the maximum long-term economic return to the named beneficiary of the trust, and cannot consider the benefits to other interests. *Compare id.* at 371, with *Idaho Watersheds*, 982 P.2d 367, 370–71 (Idaho 1999) (holding that the state law violated the state constitution by excluding a conservation group's bids for state land, thereby precluding bidders with potential to provide the "maximum long term financial return" to the schools).

Following the Arizona Supreme Court's decision vacating the Commissioner's decision, the Arizona State Land Department (State Land Department) ruled that environmental groups can hold grazing leases and that "the Trust must consider a restorative use of the land when proposed by a high bidder."<sup>167</sup> The State Land Department handed down an administrative decision that allowed Forest Guardians to compete fairly for a 162-acre grazing lease against the current lessee.<sup>168</sup> In 2003, after nearly six years of legal and administrative battles, the State Land Department awarded Forest Guardians—now WildEarth Guardians—the lease to the parcel with Forest Guardians paying \$84.40 per animal unit month, nearly twice the amount offered by the rancher who formerly held the lease.<sup>169</sup>

The decision in *Forest Guardians* has important implications for the future of trust land management because it refused to allow land managers to use classification systems to deny grazing leases to nongrazing interests and it expressly recognized that restoration and preservation are legitimate uses of grazing land. However, the Arizona Supreme Court stopped short of imposing an affirmative duty on the Commissioner to accept Forest Guardians's high bid, holding only that the Commissioner had to show at least consideration of whether the bid would be in the best interest of the trust.<sup>170</sup> In light of the Commissioner's ensuing decision to lease the land to Forest Guardians, it appears land managers may be more willing to lease trust land to nongrazing interests when the leasing process is subjected to additional judicial scrutiny.

#### *D. Strictly Enforcing the Duty to Obtain Full Market Value*

In *Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Commissioners (Montanans for Responsible Use)*<sup>171</sup> an advocacy group, Montanans for Responsible Use of the School Trust (Montrust), alleged that fourteen state statutes regulating leasing and activities on trust lands violated the Montana constitutional requirement of obtaining full market value for school trust lands.<sup>172</sup> The state district court permanently enjoined eleven of the fourteen total challenged statutes, ruling that those eleven statutes violated the trust requirements in the Montana Constitution, and the parties appealed to the Montana Supreme Court.<sup>173</sup>

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<sup>167</sup> Press Release, WildEarth Guardians, Arizona State Land Department Says Environmental Group Can 'Unranch' Grazing Lease; Requests Sealed Bids for Lease (Apr. 14, 2003), <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=6057> (last visited Nov. 12, 2011).

<sup>168</sup> *Id.*

<sup>169</sup> Press Release, WildEarth Guardians, WildEarth Guardians Awarded State Land Grazing Lease: Group Vows to 'Unranch' Lands, Restore Degraded Babocamari River (May 20, 2003), <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=5238> (last visited Nov. 12, 2011).

<sup>170</sup> See *Forest Guardians*, 34 P.3d at 371.

<sup>171</sup> 989 P.2d 800 (Mont. 1999).

<sup>172</sup> *Id.* at 802, 805.

<sup>173</sup> *Id.* at 802.

First, the supreme court agreed with Montrust that the State's school trust lands were subject to the full market value requirement because of language in the Montana Enabling Act,<sup>174</sup> which is incorporated in Montana's Constitution.<sup>175</sup> Montana's constitutional provisions on trust land management limit the power of the legislature to dispose of state lands. One such limit is the constitutional trust requirement that land managers obtain full market value for trust lands.<sup>176</sup>

The first statute considered by the Montana Supreme Court concerned historic right-of-ways.<sup>177</sup> The statute specified the amounts the Department of Natural Resources (Department) should charge from an applicant to satisfy fair market value, but these values were based on the median values for the classifications of land in 1972, and had never been updated as of the commencement of this suit.<sup>178</sup> The district court had held that this statute violated the trust requirement that the State collect fair market value for trust lands.<sup>179</sup> The state supreme court affirmed the lower court, ruling that the statutory language, which gave no discretion to the department and required it to use 1972 values,<sup>180</sup> violated the constitutional trust requirement to obtain fair market value.<sup>181</sup>

The next statute the Montana Supreme Court considered involved authorization of firewood permits for timber on trust lands.<sup>182</sup> The district court held that the statute violated the trust because it did not discriminate between commercially valuable timber and noncommercially valuable timber, allowing the State to give away commercially valuable timber.<sup>183</sup> The Supreme Court of Montana affirmed, holding that the statute violated both

<sup>174</sup> Act of February 22, 1889 (Montana Enabling Act), ch. 180, §11, 25 Stat. 676, *amended by* Act of May 7, 1932, ch. 172, 47 Stat. 150.

<sup>175</sup> *Montanans for Responsible Use*, 989 P.2d at 804–05; *see also* MONT. CONST. art. X, § 11(2) (providing that property interests must be for full market value).

<sup>176</sup> *Montanans for Responsible Use*, 989 P.2d at 803 (citing §11, 25 Stat. at 679–80).

<sup>177</sup> *Id.* at 804 (citing MONT. CODE ANN. § 77-1-130 (1997) (authorizing individuals and counties to apply to the Department of Natural Resources for historic right-of-way deeds to provide access to private property or continuation of county roads)).

<sup>178</sup> *Id.* at 805 (citing MONT. CODE ANN. § 77-1-130(4)(a) (1997)).

<sup>179</sup> *Id.* at 802–03.

<sup>180</sup> *Id.* at 804–05. The pertinent part of the statute read:

At the time of issuing the historic right-of-way deed, the department shall collect from the applicant the full market value of the acreage of the historic right-of-way based on the following classifications of land:

- (i) \$37.50 per acre for state land classified as grazing land;
- (ii) \$275 per acre for state land classified as timber land;
- (iii) \$100 per acre for state land classified as crop land; and
- (iv) \$100 per acre for other land.

MONT. CODE ANN. § 77-1-130(4)(a) (1997).

<sup>181</sup> *Montanans for Responsible Use*, 989 P.2d at 805.

<sup>182</sup> *Id.* at 807–08; *see also* MONT. CODE ANN. § 77-5-211 (1997) (repealed 2001) (“Permits may be issued free of charge for dead, down, or inferior timber in such quantities and under such restrictions and regulations as the board may approve for fuel and domestic purposes to residents and settlers of the state.”).

<sup>183</sup> *Montanans for Responsible Use*, 989 P.2d at 807–08.

the trust's mandate that full market value be received for school trust lands and the trust duty of undivided loyalty.<sup>184</sup>

The third statute the state supreme court evaluated allowed former leaseholders up to sixty days to remove moveable improvements from state trust lands without incurring a charge for storing their improvements on the land after the lease expired.<sup>185</sup> The district court upheld this statute because "it was reasonably necessary for the Department to allow the former lessee some extra time to remove improvements."<sup>186</sup> But the Montana Supreme Court reversed, concluding that this statute violated the trust because it denied the beneficiaries the full benefit of the trust lands by allowing former leaseholders to continue to use the land for storage without paying for the privilege.<sup>187</sup>

The *Montanans for Responsible Use* decision is important as an example of a court giving an exacting interpretation to the state's trust requirement to obtain full market value for the trust. The case illustrates the extent to which courts can impose limitations on state management regulations to ensure that beneficiaries receive the full benefit of the trust. In light of this decision, any action by the state that allows for use of state trust land or state trust land resources without full market value compensation invites a challenge based on the state's trust obligations.

#### *E. Managing Trust Lands for Long-Term Values*

In *Koepnick v. Arizona State Land Department*,<sup>188</sup> a rancher-lessee of trust lands challenged a decision by the State Land Commissioner to reclassify the lessee's state trust land lease from agricultural to commercial in order to lease the land for nongrazing purposes.<sup>189</sup> One of the Arizona state statutes governing the administration of the trust lands required the Commissioner to classify and appraise state trust lands for the purpose of sale, of lease, or to grant right-of-ways.<sup>190</sup> The Commissioner based his decision to reclassify the parcel on its location in an area experiencing significant commercial and residential development.<sup>191</sup> In his opinion, reclassification of the land best served the interests of the trust by generating more money, since commercial lessees pay a much higher fee.<sup>192</sup>

The trial court upheld an order of the Arizona Land Board of Appeals that affirmed the decision by the Commissioner to reclassify the lease.<sup>193</sup> The Arizona Court of Appeals affirmed, ruling that the Commissioner had the

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<sup>184</sup> *Id.* at 808.

<sup>185</sup> *Id.* at 808; *see also* MONT. CODE ANN. § 77-6-304 (1997) (repealed 2001).

<sup>186</sup> *Montanans for Responsible Use*, 989 P.2d at 808.

<sup>187</sup> *See id.* at 809.

<sup>188</sup> 212 P.3d 62 (Ariz. Ct. App. 2009).

<sup>189</sup> *Id.* at 65.

<sup>190</sup> *Id.* at 66.

<sup>191</sup> *Id.* at 65.

<sup>192</sup> *See id.* at 66.

<sup>193</sup> *Id.* at 65-66.

discretion to consider alternate future uses of the state land.<sup>194</sup> The court of appeals also held that it would not be an abuse of discretion if the Commissioner decided to forego immediate revenue from the current lessee in order to obtain the long-term benefits flowing from employing state school trust land in uses of higher value, including preservation uses.<sup>195</sup> The court stated that as trustee of the trust land, the Arizona State Land Department had to maximize school trust land revenue.<sup>196</sup> But immediate revenue was not the sole consideration; it was only one of the factors that the Commissioner may consider when making management decisions.<sup>197</sup>

The *Koepnick* decision is significant because it reflects a changed approach in trust land management. In the past, land managers believed that the economic maximization requirement the trust imposed on management activities obligated managers to lease land to those activities generating the greatest amount of immediate revenue.<sup>198</sup> *Koepnick* makes clear that immediate revenue is just part of the consideration, allowing land managers to take into account long-term benefits from preserving the land for future uses.

#### V. THE FULL MARKET VALUE REQUIREMENT AND GRAZING LEASES

Courts have uniformly recognized one primary requirement imposed on state trust lands: land managers must demand fair market value for trust lands.<sup>199</sup> Courts have enforced this requirement through enabling acts or state constitutions, in a variety of contexts, including the issuance of right-of-ways and the issuance of firewood permits.<sup>200</sup> Despite widespread recognition of this trust requirement, land managers continue to issue grazing leases on state trust lands at below fair market value.<sup>201</sup> Issuing grazing leases at below market value now seems to be a violation of the trust duties, but neither state managers nor the courts have enforced the

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<sup>194</sup> *Id.* at 69.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (explaining that the Commissioner has broad discretion over the disposition of trust lands, and that as part of that discretion, “the Commissioner may ‘legitimately consider alternate future uses of state land’” (quoting *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 807 P.2d 1119, 1127 (Ariz. Ct. App. 1991))).

<sup>198</sup> See *Bruce & Rice*, *supra* note 5, at 28; *SOUDER & FAIRFAX*, *supra* note 1, at 78–79.

<sup>199</sup> See, e.g., *Lassen*, 385 U.S. 458, 468 (1967) (requiring state land managers “derive the full benefit” of trust lands for the beneficiaries (quoting H.R. REP. NO. 152, at 3 (1910))); *Montanans for the Responsible Use*, 989 P.2d 800, 808–09 (Mont. 1999) (holding that land managers had to obtain full market value for commercially valuable timber on trust lands as well as charge former lessees for using trust lands to store moveable improvements once the lease had run out and a former lessee was no longer paying rent).

<sup>200</sup> *Montanans for Responsible Use*, 989 P.2d at 807–08.

<sup>201</sup> See *Bruce & Rice*, *supra* note 5, at 9; see, e.g., *Montanans for Responsible Use*, 989 P.2d at 803 (recognizing that the Montana Enabling Act requires state trust lands to be obtained for full market value).

requirement uniformly due to a historic practice of using trust lands for ranching.<sup>202</sup>

The historic significance of ranching in the formation of western land management policy is widely recognized.<sup>203</sup> By the 1920s, policymakers recognized that the arid lands composing the majority of the western lands were suited for only one purpose: grazing livestock.<sup>204</sup> Grazing still dominates a large portion of state-owned land in the western states, even though revenue from grazing leases does not contribute significantly to state grant funds, since the lessees are paying below fair market value.<sup>205</sup> In many cases the grazing is impairing the long-term sustainability of the trust lands, thereby reducing the future earning potential of the trust lands as well.<sup>206</sup>

In light of cases like *Lassen* and *Montanans for Responsible Use*,<sup>207</sup> in which courts have interpreted the fair market value requirement strictly and enforced the requirement where the beneficiary was not receiving the full benefit of the trust, grazing leases issued below fair market value violate the trust. In the past, state managers defended below-market grazing leases by arguing that, given the nature of the land, grazing leases were the only way to provide a stable long-term source of income.<sup>208</sup> However, since several courts have now held that immediate revenues are not the sole consideration of trust decisions, land managers may no longer be able to successfully use this defense.<sup>209</sup> Growing acceptance of other nontraditional uses of trust lands, including recreation and preservation, provide other options that may produce stable long-term income from trust lands without degrading the land in the same manner as grazing.<sup>210</sup>

<sup>202</sup> See Bruce & Rice, *supra* note 5, at 21–22; see also *Jeffries v. Hassell*, 3 P.3d 1071, 1074 (Ariz. Ct. App. 1999) (recognizing in dispute over grazing leases that state land managers can, in accordance with Arizona law, take into account other factors besides “maximizing revenue” when leasing trust lands).

<sup>203</sup> See Bruce & Rice, *supra* note 5, at 20; see also SOUDER & FAIRFAX, *supra* note 1, at 102–06; see generally Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155 (1967) (describing the influence of early grazing practices on the development of land regulation and management in the West).

<sup>204</sup> Bruce & Rice, *supra* note 5, at 21; see also 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* 33-5 (2d ed. 2011) (discussing the exponential growth of grazing on public lands in the West during the early twentieth century).

<sup>205</sup> See Bruce & Rice, *supra* note 5, at 21, 31 (noting that the revenues from most state lands have never added a significant amount to the common school fund, with the highest revenue contribution at 13% of the total public school system costs).

<sup>206</sup> See *Id.* at 21; see also Thomas L. Fleischer, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629, 630–31 (1994) (explaining the various ways grazing can damage public lands, including destroying riparian areas, polluting streams, creating soil erosion, displacing wildlife, and spoiling recreation areas).

<sup>207</sup> See *supra* notes 72–78, 171–87 and accompanying text.

<sup>208</sup> See Bruce & Rice, *supra* note 5, at 21–23 (describing a state of “sameness” perpetuated by ranching and farming political power stemming from historical bias that the land could serve only a grazing purpose).

<sup>209</sup> See, e.g., *Branson*, 161 F.3d 619, 638–39 (10th Cir. 1998); see also *Koepnick*, 212 P.3d 62, 69 (Ariz. Ct. App. 2009).

<sup>210</sup> See Bruce & Rice, *supra* note 5, at 47–53 (noting that some states are now using traditional grazing lands for recreational uses, including hunting and fishing, as well as commercial ventures like vacation rentals).

Land managers may be unwilling to impose fair market value on grazing leases of their own volition because the practice of issuing grazing leases below market price is so engrained that land managers may not view it as a violation of the trust. Public choice political theory predicts that the grazing industry, as a well-organized and narrowly focused political interest group, has an advantage in the bidding context; the industry can lobby elected legislators—who require economic resources to maintain their positions—and the land managing agencies that enjoy considerable regulatory power, but depend on the legislature for political and budgetary resources.<sup>211</sup> All these parties have rational incentives to continue the practice of issuing grazing leases on state trust lands at below-market value, even if the general public desires a different result. Strong political presence from the grazing community, which will surely protest any move to raise grazing lease fees, could serve as a deterrent to any proactive role by state managers to start charging fair market value for grazing leases.<sup>212</sup> However, the courts can and should enforce the fair market value requirement as applied to grazing leases,<sup>213</sup> ending the longstanding historic practice allowed by land managers in violation of the trust duty.

As illustrated in *Idaho Watersheds* and *Forest Guardians*, courts have not yet been willing to order land managers to accept the high bids from environmental interests on grazing leases.<sup>214</sup> However, in those two cases, the courts prohibited land managers from using the benefits to the overall state economy from issuing grazing leases or a land classification system to justify denying bids to conservation groups that placed the highest bids.<sup>215</sup> Although the courts did not place an affirmative duty on land managers to accept the high bids in these cases, the courts did rule that the land managers had to show at least some consideration of whether the leases would be in the best interest of the trust, without considering outside interests, such as the general economy of the state and the grazing industry. Ultimately, the land managers issued grazing leases to environmental groups, which suggests that land managers may be more amenable to issuing grazing leases to such groups after the bid selection process fails increased judicial scrutiny.<sup>216</sup> As environmental groups continue to bid on grazing leases

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<sup>211</sup> See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 9 (2008).

<sup>212</sup> The “Sagebrush Rebellion” of the late 1970s is one prominent example of the strong political presence of grazing interests in the United States. See COGGINS ET AL., *supra* note 9, at 76–77. Although the movement never won a final resolution in the courts regarding ownership of public lands, the rebellion “gained considerable publicity” and received strong political backing, especially from Sen. Orrin Hatch (R-Utah). *Id.*

<sup>213</sup> See *Idaho Watersheds*, 982 P.2d 367, 370–71 (Idaho 1999) (holding that the State could not factor in benefits to outside interests, including the grazing community, when turning down a high bid from an environmental group); *Forest Guardians*, 34 P.3d 364, 370–71 (Ariz. 2001) (holding that the State could not use a land classification scheme to justify rejecting the high bid from a conservation group to award the lease to rancher who bid below fair market value).

<sup>214</sup> See *supra* notes 151–53, 163–70 and accompanying text.

<sup>215</sup> See *supra* notes 151–53, 163–70 and accompanying text.

<sup>216</sup> Idaho Watersheds Project, which is now known as Western Watersheds Project, currently holds leases for more than 4000 acres of school trust lands, which it is managing for wildlife

and are able to outbid grazing interests, there may be a shift away from the practice of issuing grazing leases on trust lands at below market value.

#### VI. ECONOMIC MAXIMIZATION AND MANAGING FOR LONG-TERM VALUES

In light of changing social values, one emerging concern is whether management of state trust lands for activities such as preservation, recreation, and wildlife violates the trust duty to maximize economic returns. Recent case law suggests that management for long-term values, such as sustainability, does not violate the trust as long as it will ultimately maximize economic production.<sup>217</sup> As discussed in Part IV, multiple courts have held that land managers may take into account the long-term benefits of management activities, and that short-term economic profit is not the sole consideration in management decisions.<sup>218</sup> Where managers can reasonably conclude that management activities that promote sustainability will generate more profit in the long term than will short-term uses like grazing and agriculture, there is no violation of the trust duty.

It is also apparent that the courts grant land managers broad discretion in determining the potential long-term value of management decisions. For example, in *Forest Guardians*, although the Arizona Supreme Court held that the Commissioner violated his trust duty by failing to even consider a bid by a group that wanted to manage the land for nongrazing purposes,<sup>219</sup> the court stopped short of imposing an affirmative duty on the Commissioner to accept the nongrazing high bid.<sup>220</sup> Managing trust lands for uses like recreation and preservation does not violate the trust duty as long as the manager ensures that the permitted use both provides adequate revenue for the present beneficiaries and generates the maximum revenue in the long term.<sup>221</sup> Ultimately, the land manager has broad discretion to decide whether to allow these types of management activities. However, as the outcomes of *Idaho Watersheds* and *Forest Guardians* illustrate, challenges to land managers' decisions may impose certain limits on that discretion through judicial scrutiny of the bid selection process.<sup>222</sup>

States managing their trust lands for long-term values may attempt to limit the discretion the courts afford land managers by following the Colorado approach.<sup>223</sup> Colorado voters approved an amendment to the state

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habitat and conservation purposes. Western Watersheds Project, *About Western Watersheds Project*, <http://www.westernwatersheds.org/about> (last visited Nov. 12, 2011).

<sup>217</sup> See, e.g., *Branson*, 161 F.3d 619, 638, 640 (10th Cir. 1998) (upholding a state constitutional amendment that shifted the management focus from economic maximization to long-term, sustainable economic production); see also *Koepnick*, 212 P.3d 62, 69 (Ariz. Ct. App. 2009) (holding that immediate economic production was not the sole consideration in management decisions, but only one factor that managers may consider when making trust land decisions).

<sup>218</sup> See *supra* notes 137–39, 188–92 and accompanying text.

<sup>219</sup> *Forest Guardians*, 34 P.3d 364, 371 (Ariz. 2001).

<sup>220</sup> *Id.*

<sup>221</sup> See, e.g., *Branson*, 161 F.3d at 640; *Koepnick*, 212 P.3d at 69.

<sup>222</sup> See *supra* notes 151–53, 163–70 and accompanying text.

<sup>223</sup> See *Branson*, 161 F.3d at 638, 640.

constitution—the amendment subsequently upheld in *Branson*<sup>224</sup>—that changed the language of the trust land provisions to require management to observe stewardship principles.<sup>225</sup> States also have the option of reexamining the source of the trust and concluding, like Utah and Wyoming did, that the trust under which they hold their lands is less restrictive than the trust imposed by the Arizona–New Mexico Enabling Act.<sup>226</sup>

## VII. CONCLUSION

The largest percentage of federally granted state trust lands exists in the West.<sup>227</sup> Despite the abundance of these lands, they are often overlooked.<sup>228</sup> Understanding the state lands trust is difficult due to the fact that each state acquired its statehood lands under different enabling acts,<sup>229</sup> which included different levels of restrictions on the management of state lands, and some states have added their own restrictions in the state constitutions.<sup>230</sup> But courts have simplified understanding the nature of the trust by reading the Arizona–New Mexico Enabling Act—by far the most limiting enabling act—into many other enabling acts,<sup>231</sup> and treating state trust lands as subject to similar trust restrictions.<sup>232</sup> Even though several courts have determined that state enabling acts did not establish a federal trust,<sup>233</sup> these courts still ruled that the lands were held under trust requirements imposed either by the state constitution or by statute.<sup>234</sup>

Although states hold trust lands under generally recognized trust requirements, confusion persists regarding which management activities satisfied the trust requirements, and many state management decisions have been judicially challenged. In recent years, two requirements arose frequently due to this litigation: 1) the land managers must demand fair market value for use of the trust lands, so that the beneficiaries receive the full benefit of the trust lands;<sup>235</sup> and 2) managers must manage the lands for

<sup>224</sup> *Id.* at 643.

<sup>225</sup> *Id.* at 626–27.

<sup>226</sup> See *supra* notes 110–30 and accompanying text.

<sup>227</sup> See CULP ET AL., *supra* note 2, at 54 (“[N]ine of the eleven Western states[—]Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming[—]hold nearly 85 percent, or almost 40 million acres, of the remaining trust lands in the lower forty-eight states.”).

<sup>228</sup> *Id.* at 2; see also SOUDER & FAIRFAX, *supra* note 1, at 1 (explaining that state trust lands, despite their abundance, have generally taken a backseat to federally managed lands in public land discussions).

<sup>229</sup> See SOUDER & FAIRFAX, *supra* note 1, at 32–34; Budge, *supra* note 8, at 223–27.

<sup>230</sup> See, e.g., Budge, *supra* note 8, at 224, 227.

<sup>231</sup> See *supra* note 84–86 and accompanying text.

<sup>232</sup> See *supra* notes 86, 94–104 and accompanying text.

<sup>233</sup> See *supra* notes 101–23 and accompanying text.

<sup>234</sup> See *supra* notes 105–20 and accompanying text.

<sup>235</sup> See *Idaho Watersheds*, 982 P.2d 367, 370 (Idaho 1999); *Forest Guardians*, 34 P.3d 364, 371 (Ariz. 2001); *Montanans for the Responsible Use*, 989 P.2d 800, 803–04 (Mont. 1999).

economic production.<sup>236</sup> The case law indicates that courts have interpreted the fair market value requirement strictly, requiring that land managers obtain the full value of the benefit for the trust, even where third parties may be removing commercial timber from trust land or storing moveable improvements on the land without paying for the privilege.<sup>237</sup> The case law also indicates that although the Arizona–New Mexico Enabling Act requires trust lands to be managed for maximum economic production, this requirement does not necessarily mean state trustees must pursue immediate economic production.<sup>238</sup>

In light of the case law, the current practice of issuing grazing leases on state trust lands at below fair market value is a violation of the trust requirement that trustees demand fair market value for the use of the trust lands, and the courts are likely to continue to enjoin leases issued at below fair market value. Moreover, managing the trust lands for long-term values, including recreation and conservation, is not necessarily a violation of the trust if these activities produce adequate revenue for the present beneficiaries and greater income in the long-term than the traditional activity of grazing.<sup>239</sup> Thus far, state courts have granted land managers fairly broad discretion over management activities and economic production; however, the *Idaho Watersheds* and *Forest Guardians* decisions illustrate situations where courts have concluded that land managers relied on impermissible factors when making land management decisions.<sup>240</sup> Although the courts recognized the land managers' discretion to hold the lease auctions, in both instances the land managers ultimately leased the lands to the high bidding conservation groups.<sup>241</sup> As environmental groups continue to bid on grazing leases, and are able to challenge land managers' decisions in court, the additional scrutiny that litigation places on trust land management decisions may lead to a departure from the historic practice of issuing grazing leases at below market value and an increase in managing for long-term values, including conservation and preservation.

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<sup>236</sup> See *Branson*, 161 F.3d 619, 639 (10th Cir. 1998); *Koepnick*, 212 P.3d 62, 69 (Ariz. Ct. App. 2009).

<sup>237</sup> See *supra* notes 171–87 and accompanying text.

<sup>238</sup> See *supra* notes 195–97 and accompanying text.

<sup>239</sup> See *supra* notes 194–98 and accompanying text.

<sup>240</sup> See *supra* notes 151–56, 163–70 and accompanying text.

<sup>241</sup> See *supra* notes 151–56, 163–70 and accompanying text.