

# SCHOOL TRUST LANDS: THE LAND MANAGER'S DILEMMA BETWEEN EDUCATIONAL FUNDING AND ENVIRONMENTAL CONSERVATION, A HOBSON'S CHOICE?

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## INTRODUCTION

In eastern Oregon, the battle lines are drawn between Jed Pryor, a cattle rancher, and the Oregon Natural Desert Association (ONDA), an environmental advocacy organization, over the rights to state school trust lands.<sup>1</sup> Mr. Pryor has recently filed with the state to renew his twenty-year grazing lease on state school trust land. ONDA is working to prevent the renewal because over 100 years of grazing has left the land overgrazed and in poor environmental health. While the Oregon Land Board (Land Board) is sympathetic to ONDA's concerns, under state and federal law, the Land Board must manage these public lands in trust for the financial benefit of the schools.<sup>2</sup> Therefore, de-

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<sup>1</sup> This fictional hypothetical is representative of the types of conflicts that arise on school trust lands. While ONDA is a real organization, the hypothetical is based upon a simplified version of the facts found in *Mendieta v. State of Oregon*, 941 P.2d 582 (Oregon Ct. App. 1997) and *Idaho Watersheds Project v. State Board of Land Comm'rs*, 918 P.2d 1206 (Idaho 1996).

During the westward expansion of the United States, Congress was concerned about the creation and support of a public school system. To provide a revenue base and land for schools, Congress established a practice of reserving certain sections in every township within the territories for the support of public schools. These lands have come to be known as "school trust lands" because of the fiduciary obligations each state has in the management of these lands. See *infra* Part II (discussing the history of the federal school land grant program).

<sup>2</sup> Section 4 of the Oregon Admission Act, admitting Oregon to the Union, included a grant of sections 16 and 36 in each township to the state "for the use of schools." Oregon Admission Act, ch. 33, § 4, 11 Stat. 383, 383-84 (1859). The Oregon Constitution provides that "[t]he [state land] board shall manage

spite the environmental problems continued grazing will bring, the Land Board is bound by the trust to maximize revenues from these lands to fund public schools.<sup>3</sup> The Land Board finds itself in what it believes to be a classic Hobson's choice;<sup>4</sup> despite its recognition of the need to rehabilitate the range resource, it must collect revenues from the land for its beneficiaries. In the end, the Land Board, with full knowledge of the environmental consequences, resigns itself to its Hobson's choice and issues the lease.

Oregon is not unique in its dilemma. Almost every western state that was granted federal land at statehood for school purposes has encountered this conflict.<sup>5</sup> When the grants were made, the federal government placed conditions in the states' enabling acts<sup>6</sup> to manage these lands for the benefit of schools. Accordingly, many of these conditions were mirrored or expanded

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lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state." OR. CONST. art. VIII, § 5.

<sup>3</sup> The most recent Oregon State Attorney General Opinion on the issue concluded that the language found in the Admission Act and Oregon Constitution requires the State Land Board to manage state school lands in a way that maximizes revenue for schools. 46 Op. Or. Att'y Gen. 468 (1992).

<sup>4</sup> A Hobson's choice is not really a choice at all. The phrase is used to describe those situations where one must either take that which is offered or nothing. A Hobson's choice presents itself in the management of trust lands because the land manager has no choice but to manage these lands for the benefit of the trust beneficiaries. Historically, this trust obligation has resulted in school trust land managers placing a priority on revenue maximization at the expense of other considerations such as resource protection. The phrase derives from the practice of Thomas Hobson, (1544-1631) of Cambridge, England, who rented horses and gave his customers only one choice, that of the horse nearest the stable door. See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 909 (1996).

<sup>5</sup> The Hobson's choice between environmental preservation and resource maximization on school lands is uniquely western. For states lying east of the 100th meridian, where the land was fairly uniform and valuable for agricultural purposes and populations were growing steadily, the states successfully funded public education programs by selling the lands to farmers and depositing the proceeds into permanent school funds. However, for states west of the 100th meridian, where the land was more arid and diverse in topography, there was less of a market for the land. The value of the land for mineral, grazing and logging activities was not recognized until the late 1800s. Consequently, several western states retain control over much of their original grants. See Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?* 12 NAT. RESOURCES & ENV'T 39, 40 (1997).

<sup>6</sup> An enabling act is a generic term referring to the legislation passed by Congress conferring upon a territorial government the authority to create a state. See *infra* notes 80-85 and accompanying text (discussing the road to statehood).

upon in state constitutions.<sup>7</sup> Modern judicial and administrative interpretations of the enabling acts and constitutions of grant land states have concluded that state land managers are under a trust obligation that requires them to maximize revenues from the use of those lands.<sup>8</sup> When taken together, these holdings comprise a body of case law referred to, in this Article, as the modern school land trust doctrine.<sup>9</sup>

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<sup>7</sup> The enactment of a state constitution is the concluding event in the creation of a state. The state constitution sets forth not only the system of government for that state, but also incorporates those conditions set forth in the enabling act by Congress. The documents, in essence, serve as an offer and acceptance for the creation of a state. Consequently, when examining state constitutional issues, the state's enabling act must also be consulted. *See, e.g.,* Branson Sch. Dist. v. Romer, 161 F.3d 619 (10th Cir. 1998) (consulting the Colorado Enabling Act while considering proposed a proposed amendment to the Colorado Constitution).

<sup>8</sup> Twelve different state and federal courts have reached the conclusion that state school trust lands are subject to a trust obligation that requires state land managers to seek market value from the sale/lease of state school land resources. *See* State v. University of Alaska, 624 P.2d 807, 813 (Alaska 1981); Gladden Farms, Inc. v. State, 633 P.2d 325, 329-30 (Ariz. 1981); Idaho Watershed Project v. State Bd. of Land Comm'rs, 918 P.2d 1206, 1211 (Idaho 1996); Department of State Lands v. Pettibone, 702 P.2d 948, 953-54 (Mont. 1985); State Bd. of Educ. Lands & Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985); Oklahoma Educ. Ass'n v. Nigh, 642 P.2d 230, 235-36 (Okla. 1982); Kanaly v. State, 368 N.W.2d. 819, 822-24 (S.D. 1985); National Parks and Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 920-21 (Utah 1993); County of Skamania v. State, 685 P.2d 576, 583 (Wash. 1984) Riedel v. Anderson, 972 P.2d 586, 587 (Wyo. 1999); *see also infra* note 30 and accompanying text. While the courts in North Dakota and Oregon have yet to address this issue, the attorneys general in each state have reached consistent conclusions. *See* 1990 Op. N.D. Att'y Gen. 94 (1990); 46 Op. Or. Att'y Gen. 468 (1992). *See infra* note 31 and accompanying text. Of those states west of the 100th meridian, only California and Colorado have rejected the notion of such a strict trust obligation. *See* Branson Sch. Dist. v. Romer, 161 F.3d 619, 636-43 (10th Cir. 1998); 41 Op. Cal. Att'y Gen. 202 (1963). *See infra* notes 170, 264 and accompanying text. Kansas and Nevada have yet to address the issue in any form.

<sup>9</sup> The doctrine is relatively new to public land law. Consequently, when compared with other public land law doctrines, there is little case law directly addressing the state's obligation to maximize revenues. Sally Fairfax, Jon Souder, and Gretta Goldenman were instrumental in summarizing the conventional wisdom surrounding school trust lands into a recognizable legal doctrine. *See* Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797 (1992). Professors Fairfax and Souder have dedicated a large part of their professional careers researching, writing and consulting on the subject of school trust lands. *See, e.g.,* JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE* (1996). Fairfax and Souder's prior works were invaluable to obtaining an understanding of school land trust law and in preparing this article.

This Article examines the history and evolution of the modern school land trust doctrine and suggests four means by which states, despite the obligation to maximize revenues, can, and in some instances are required to, incorporate conservation and preservation goals into the management of school lands. Some commentators have argued that the adoption of the strict trust obligation by many western courts is inappropriate<sup>10</sup> and any attempt to incorporate environmental values is at odds with a strict trust obligation.<sup>11</sup> According to these commentators, without the flexibility that repealing or loosening the doctrine would bring, states will be unable to make their school land management programs more responsive to environmental concerns.<sup>12</sup> While these arguments are appealing and perhaps persuasive, this Article takes the position that such a repeal of the trust is politically unlikely.<sup>13</sup>

Rather than attacking the school land trust doctrine, this Article suggests that states concerned about the preservation of school lands must find other ways to incorporate conservation principles into their systems of school land management. This Article explores four possible options that allow states to incorporate environmental values into the management of the school lands while maintaining their duty to the beneficiaries to maximize revenues from these lands. Three of the options discussed are legislative solutions to the dilemma. The fourth option allows states to resolve the dilemma through litigation. All four options achieve the same end. They provide a means by which

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<sup>10</sup> See Fairfax et al., *supra* note 9, at 847 (criticizing the Washington State Supreme Court for invisibly incorporating Arizona's statehood bargain into Washington's by its reliance on the United States Supreme Court interpretation of the Arizona-New Mexico enabling act in *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458 (1967)). See also John B. Arum, *Old-growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151, 160 (1990); Daniel J. Chasan, *In Forests We Trust: State's Obligation to Public Trust Beneficiaries as Strong as Obligation to Public Schools*, SEATTLE POST-INTELLIGENCER, Jan. 16, 2000, at C1.

<sup>11</sup> See *id.* at 892; see also Kedric A. Bassett, *Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act*, 9 J. ENERGY L. & POL'Y 195 (1989); Tacy Bowlin, *Rethinking the ABCs of Utah's School Trust Lands*, 1994 UTAH L. REV. 923 (1994).

<sup>12</sup> See Bassett, *supra* note 11; Bowlin, *supra* note 11.

<sup>13</sup> Aside from the fact that calling for the removal of a century old doctrine which guarantees funds for education is politically difficult, repeal of the doctrine would involve legal barriers as well. Once a state has adopted the notion of a trust, the state is unable to repeal or modify the trust arrangement unilaterally. See *infra* note 219 and accompanying text.

states can preserve the environmental values of these lands while still meeting their fiduciary obligations, thus eliminating their Hobson's choice.

## I BACKGROUND

Following the Revolutionary War, Congress began its preparations for the development of a unified nation of states. It believed that free public education was an essential component of a successful democracy<sup>14</sup> and recognized that new states lacked a tax base from which to fund schools.<sup>15</sup> In the interest of placing states on somewhat equal footing,<sup>16</sup> Congress began to look for a way to compensate for this inequity.

It does so by granting the territorial states fee title to portions of the federal estate.<sup>17</sup> Portions of each township were reserved for the purpose of supporting the public schools of the territorial states.<sup>18</sup> To ensure that these lands would remain a viable resource for supporting public education, Congress specifically mandated that these lands "shall be reserved . . . for the maintenance of public schools."<sup>19</sup> Management of these lands

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<sup>14</sup> The link between education and democracy was one of two primary forces behind the implementation of the school land grants. *See infra* Parts II.A-B.

<sup>15</sup> Unlike the western territories, when the thirteen original colonies became states, they retained sovereign control over the lands within their borders. The federal government oversaw the land outside of the states' borders as federal territories. As Congress created new states of the territories (territorial states), Congress retained ownership of most of the land within the new states' borders. While both types of states were able to collect taxes from privately held lands to fund governmental programs, including public education, states could not tax land owned by the federal government. Consequently, when compared with the colonial states, territorial states had a smaller tax base from which to fund public education. *See National Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 917 (Utah 1993).

<sup>16</sup> The realization that all states would need to be equal was the other primary motivation for the implementation of the school land grants. *See infra* Part II.B.

<sup>17</sup> *See* 46 Op. Or. Att'y Gen. 468 (1992); *see also* SOUDER & FAIRFAX, *supra* note 9, at 17-33.

<sup>18</sup> *See* 46 Op. Or. Att'y Gen. 468 (1992).

<sup>19</sup> The General Land Ordinance of 1785, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 375 (Jon Fitzpatrick, Ed. 1933). Similar language can be found in the enabling act or constitution, or both, of every western state.

has been repeatedly interpreted as a trust by both state and federal courts.<sup>20</sup>

The notion of what is required by these trusts has changed dramatically over time. In the nineteenth-century, land grants were a primary source of support for public schools, albeit subject to relatively unfettered disposal by the states, in the form of uncompensated rights-of-way, for example.<sup>21</sup> However, mid-twentieth century judicial interpretations have imposed a more strict trust obligation to manage the school lands with the goal of maximizing revenues for schools.<sup>22</sup> This judicially created obligation to maximize income has made the states focus their attention more on resource leasing and extraction than on conservation.<sup>23</sup>

Surprisingly, the obligation to maximize revenues is a recent development in public land law. For over 100 years, Congress granted school land to the states with only a loose obligation to manage the lands for the benefit of schools.<sup>24</sup> The notion that the state school lands were subject to special limitation was first recognized by the United States Supreme Court in 1919 when it was called upon to interpret the New Mexico–Arizona Enabling Act<sup>25</sup> in *Ervien v. United States*.<sup>26</sup> In *Ervien*, the Court held that the act and state constitutions required these states to hold

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<sup>20</sup> See SOUDER & FAIRFAX, *supra* note 9, at 33-36 (discussing the emergence and evolution of the conventional wisdom that the management of the school land grants is subject to a trust).

<sup>21</sup> See *id.*; see also *infra* Part II.C.4.

<sup>22</sup> See, e.g., *Lassen v. Arizona ex rel Ariz. Highway Dep't*, 385 U.S. 458 (1967). *Lassen* involved a challenge to the state highway department's proposed placement of a state highway over school lands. The highway department believed it did not have to compensate the trust for the use of the lands because highways would bring in more residents, which in turn would benefit the schools. The Supreme Court rejected this argument, and held that the state was responsible for obtaining the full market value for the use of these lands, regardless of who the user was, or the spin off effects of that use. From this case arose the notion that the states must manage these lands for the maximum benefit of the trustees.

<sup>23</sup> See Fairfax et al., *supra* note 9, at 799 (noting that most state trust land managers and virtually all contemporary commentators believe that “the principle goal — the overriding purpose — of the trust administrative agencies is to secure the highest monetary return.”).

<sup>24</sup> Early in the development of school lands jurisprudence, the Supreme Court interpreted the sparse wording of land grants for Michigan and Alabama as creating nothing more than honorary obligations to use the lands for school purposes. See *Alabama v. Schmidt*, 232 U.S. 168, 173-74 (1914).

<sup>25</sup> New Mexico–Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910).

<sup>26</sup> 251 U.S. 41 (1919).

school lands in a trust.<sup>27</sup> However, the Supreme Court did not define the parameters of this trust until 1967, when it decided *Lassen v. Arizona*.<sup>28</sup> In *Lassen*, the Court explained that the trust recognized in *Ervien* required states to manage school lands for one purpose: to obtain full market value from the resources on these lands to fund schools.<sup>29</sup>

While the *Ervien* and *Lassen* decisions involved only Arizona and New Mexico's enabling act, other state and federal courts have adopted these holdings as controlling, rather than independently construing each state's constitution and enabling acts.<sup>30</sup> Likewise, many state attorney generals have relied upon *Ervien* and *Lassen* when advising their respective state legislatures and land boards of the states' duties and obligations in managing the school grant lands.<sup>31</sup> Collectively *Ervien*, *Lassen*, and their progeny have resulted in a dominant-use system of land management for state school trust lands. Today, with the exception of California<sup>32</sup> and Colorado,<sup>33</sup> most western states believe they have an obligation to maximize revenues from school trust lands.<sup>34</sup>

Since adopting the modern school land trust doctrine into their jurisprudence, western states have struggled with how this obligation fits within their overall school land management schemes.<sup>35</sup> As the nation has entered the twenty-first century

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<sup>27</sup> See *Ervien*, 251 U.S. at 45-47.

<sup>28</sup> 385 U.S. 458 (1967).

<sup>29</sup> See *Lassen*, 385 U.S. at 466-70.

<sup>30</sup> See, e.g., *State v. University of Alaska*, 624 P.2d 807, 811 (Alaska 1981); *Gladden Farms, Inc. v. State*, 633 P.2d 325, 329-30 (Ariz. 1981); *Department of State Lands v. Pettibone*, 702 P.2d 948, 953 (Mont. 1985); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 235 nn. 6-7 (Okla.1982); *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993); *County of Skamania v. State*, 685 P.2d 576, 580-83 (Wash. 1984).

<sup>31</sup> See, e.g., 1990 Op. N.D. Att'y Gen. 94 (1990) (stating that the state is bound to utilize all revenues from these lands for school purposes).

<sup>32</sup> California has never recognized that a trust obligation exists. See *infra* note 171 and accompanying text.

<sup>33</sup> Unlike California, Colorado recognizes that there is a trust obligation. However, citizens of Colorado recently passed an amendment to their state constitution requiring that these lands be managed with stewardship principles, not revenue maximization, in mind. See *Branson School District v. Romer*, 161 F.3d 619, 626-27 (10th Cir. 1998); see also *infra* Part IV.A.1 for a discussion of the *Branson* decision.

<sup>34</sup> California is the only western state to expressly deny the existence of a trust on its school lands. See *infra* note 170 and accompanying text.

<sup>35</sup> See *Fairfax et al.*, *supra* note 9, at 892-908.

with an increasing awareness of the value of environmental health, states are realizing the burdens this doctrine places on efforts to protect natural resources.<sup>36</sup> As a consequence, these states are questioning whether the trust obligation impedes them from managing these lands for long-term conservation purposes.<sup>37</sup> This Article argues that the trust imposes no such impediment.

While it is unrealistic to believe that, so long as the courts recognize an obligation to maximize revenues, conservation and preservation interests can replace the current management scheme, there are at least four ways conservation interests can have an impact on how states manage trust lands. Through their legislatures, those concerned with the management of state lands can seek three forms of reform. First, because the obligation to maximize revenues is based upon notions of common law trust principles, the legislature can take advantage of the flexibility in these principles to infuse environmental interests into school trust land management. Second, the legislatures can use their powers to enact statutes of general application that impose environmental protection requirements on school land managers that would run concurrently with the trust obligation. Third, legislatures can remove environmentally sensitive lands from the trust by authorizing the purchase of school lands by agencies that are more "resource friendly."

For states with legislatures that are unwilling to implement one of these legislative approaches, those concerned with the management of school lands can take action on their own to conserve these lands by purchasing leases and using them for conservation purposes. This Article refers to this practice as conservation leasing. To the extent that the state would deny the purchaser the ability to put the land to a conservation use, the state would be violating the trust. Under the modern school land trust doctrine, states must concern themselves only with maximizing long term revenues from these lands for the benefit of the schools.<sup>38</sup> Accordingly, where a purchaser will engage in an activity that does not harm the potential for future revenues and has the ability to pay, the state has no choice but to award the

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<sup>36</sup> See Hager, *supra* note 5, at 39.

<sup>37</sup> See *id.*

<sup>38</sup> See *Lassen v. Arizona ex rel Ariz. Highway Dep't*, 385 U.S. 458, 466-67 (1967).



lease to the highest bidder. A state's failure to award a conservation lease in this situation would be a violation of its trust obligations.

In *Idaho Watersheds Project v. State Board of Land Commissioners*,<sup>39</sup> the Idaho Supreme Court affirmed that the role of the school trust manager is to secure the maximum long-term financial return for the schools through competitive leases. This is true regardless of whether the successful bidder will use the lease for resource extraction<sup>40</sup> or leave the resource in its natural state.<sup>41</sup> Because the trust is derived in part from state constitutions, environmental groups have a constitutional right to participate in competitive leasing programs.<sup>42</sup> Therefore, any denial of that right by the state would be unconstitutional and in violation of its fiduciary duties.

Part II of this Article traces the history of the federal school land grant program and explores the sequence of enabling statutes that led to the concept of a school land trust. Part III discusses recent judicial decisions that emphasize income maximization as the primary obligation of school land managers and explains how several western courts were misguided in their adoption of this principle. Part IV examines how state legislatures can infuse environmental interests into the management of school trust lands through: 1) the use of trust law to redefine and clarify how the trust is to be administered; 2) the enforcement of environmental requirements on school land managers through statutes of general application; and 3) removal of the lands from the trust through inter-agency land exchanges and transfers. Part V discusses a fourth option for incorporating environmental interests into the management of school trust lands – the purchase of leases by environmental interests through competitive bids. This part argues that the school trust doctrine demands that states remove barriers that prevent environmental interests from participating in competitive bidding for school trust land leases. This Article concludes by suggesting that, even if states remain

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<sup>39</sup> 918 P.2d 1206 (Idaho 1996).

<sup>40</sup> As used in this Article, the term "resource extraction" encompasses all resource based activities on state school lands such as grazing and agricultural leasing. This term's application is not limited to those activities whereby a raw product is removed from the lands for market such as timber harvesting or mining.

<sup>41</sup> See *Idaho Watersheds Project*, 918 P.2d at 1211.

<sup>42</sup> See *infra* Part III.A-B.

bound by the strict trust obligation to maximize revenue, it does not necessarily follow that they must sacrifice conservation and preservation goals.

## II

### HISTORY OF THE SCHOOL LAND GRANTS: THE FOUNDATIONS OF THE TRUST

Attempts to incorporate environmental concerns into the administration of the school land trust doctrine are unlikely to succeed without an understanding of the historical roots of the doctrine. Consequently, this Article begins with an exploration of the historical context from which the school land trust doctrine developed.

#### A. *The Land Ordinance of 1785 and Section 16*

The practice of granting lands for the support of common schools is not uniquely American. Scholars have traced the first recorded transfer of land for common schools to the reign of King Henry V in England.<sup>43</sup> In colonial America, it was a well-established tradition for individuals to grant land in support of local schools,<sup>44</sup> a tradition most common in Massachusetts, New York, Connecticut, and New Hampshire.<sup>45</sup> From this origin, the practice steadily developed away from private grants to governmental grants of land for public schools.<sup>46</sup>

The first nationwide effort in the United States to grant lands for schools began with the passage of the General Land Ordinance in 1785 (Ordinance).<sup>47</sup> The Continental Congress enacted the Ordinance to remedy concerns over how the new country was going to apportion and develop its territorial properties.<sup>48</sup> It intended to use cheap land and free education to entice settlers to the West.<sup>49</sup> However, before converting the wild frontier into

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<sup>43</sup> See Fairfax et al., *supra* note 9, at 803 (citing HOWARD C. TAYLOR, THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND ORDINANCES 12-22 (1922)).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 803-04.

<sup>46</sup> See *id.*

<sup>47</sup> See The General Land Ordinance of 1785, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 19, at 375.

<sup>48</sup> See HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 GI BILL 19-25 (1986).

<sup>49</sup> See HYMAN, *supra* note 48, at 19-21.

a civilized domain, Congress recognized that it needed to first take an inventory of its holdings and set out an orderly plan for settlement.

Congress enacted the General Land Ordinance in 1785 to begin this process. The Ordinance authorized the initiation of the township and range rectangular survey, under which all federal territorial lands were to be surveyed and divided into townships six miles square.<sup>50</sup> Each township was then subdivided into thirty-six numbered sections of one square mile (640 acres).<sup>51</sup> Each one-mile section was further divided into fourths, and then again into fourths until the land was divided into forty-acre sections.<sup>52</sup>

Consistent with Congress' goal of providing a foundation for the orderly settlement of western lands, upon completion of the survey, the Ordinance specified uses for particular sections of each township. This early form of land-use planning led to the rectangular pattern of development commonly referred to as checker-boarding, which left a profound imprint on the western landscape that one can still see today.<sup>53</sup>

It was at this stage in the survey process that the Ordinance set forth the foundation for the school land grants. During this time in United States history, the federal government was land rich and cash poor.<sup>54</sup> Congress realized it did not have the treasury necessary to support public programs essential for the development of the West, such as public education, so it turned to its most valuable resource – land. Consequently, the Ordinance arbitrarily reserved all township sections numbered sixteen “for the maintenance of public schools within the said township.”<sup>55</sup> Early on, the states, primarily those of the Midwest and South, used

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<sup>50</sup> See The General Land Ordinance of 1785, reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 19, at 375.

<sup>51</sup> See *id.* at 376.

<sup>52</sup> See Fairfax et al., *supra* note 9, at 805 n. 20.

<sup>53</sup> See Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 LAND & WATER L. REV. 1, 17 (1994).

<sup>54</sup> See PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE xix, 2, 4 (1987) (noting that Congress saw future sales of western lands as an “amazing resource” for paying off the nation’s Revolutionary War debts).

<sup>55</sup> The General Land Ordinance of 1785, reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 19, at 378.

these lands to support public schools by selling large portions to farmers.<sup>56</sup>

Congress had intended that, along with the other provisions in the General Land Ordinance, the school land grants would help provide the stability that was needed to encourage further westward expansion of the United States.<sup>57</sup> However, Congress would later discover that free education was not enough to encourage settlement. Those heading west wanted more than just the promise of free education; they wanted assurance that as territorial citizens they would have the same rights they enjoyed as citizens of the original thirteen colonies.<sup>58</sup> As a result, settlement of the West did not truly begin until Congress put the school land grants to their full potential in the passage of the Northwest Ordinance of 1787.<sup>59</sup>

#### B. *The Northwest Ordinance of 1787 and Equal Footing*

Some commentators claim that, excepting the Constitution, the Northwest Ordinance did more to save the Union than any other document.<sup>60</sup> With the expectation that the promise of statehood would drive westward expansion,<sup>61</sup> Congress passed the Northwest Ordinance to provide a means by which the residents of the settled lands could establish territorial governments

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<sup>56</sup> See Hager, *supra* note 5, at 40.

<sup>57</sup> See HYMAN, *supra* note 48, at 23-24; ONUF, *supra* note 54, at 38-39.

<sup>58</sup> See ONUF, *supra* note 54, at 52.

<sup>59</sup> See Northwest Ordinance, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1934). The Northwest Ordinance was passed on July 13, 1787, just two years before the Constitution of the United States was adopted. The Supreme Court has held that the Northwest Ordinance was superseded by the adoption of the Constitution. See *Chapin v. Fye*, 179 U.S. 127, 130 (1900). However, the Northwest Ordinance remains an important policy document for courts because it provides a key to interpreting the Constitution. See generally Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

<sup>60</sup> See, e.g., HYMAN, *supra* note 48, at 20 (citing RAY ALLEN BILLINGTON, *WESTWARD EXPANSION* 217 (1949)).

<sup>61</sup> The drafters of the ordinance believed that the western territories had an endless supply of resources that would meet the needs of the young nation. They believed it was the manifest destiny of humankind to possess and conquer these resources. Modern scholars have surmised that the combination of these views resulted in what many refer to as the "frontier ethic". See generally Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 95-97 (1995).

and make the transition into statehood.<sup>62</sup> As with the 1785 Land Ordinance, Congress retained its vision of public education as an enticement for settlement.<sup>63</sup> At the same time, however, Congress understood that the newly created states would need to be placed on equal footing with the original thirteen states in order for the West to be attractive for settlement.<sup>64</sup> From these seemingly different incentives sprang the system of school land grants that would endure for the next 150 years.

Congress had already stressed the importance of a free system of education in the General Land Ordinance. In the Northwest Ordinance, however, Congress interwove its commitment to public education with the settlement of future states.<sup>65</sup> Congress believed that publicly supported education would create literate, free citizens who would staff the governments envisioned in the Northwest Ordinance.<sup>66</sup> In support of this vision, article III of that act declared that “[r]eligion, [m]orality, and knowledge being necessary to good government and the happiness of mankind, [s]chools and the means of education shall forever be encouraged.”<sup>67</sup> The theory that education lead to better government remained a central rationale for the federal government when granting lands to the states as a source of school funding.

While creating an association between the virtues of free education and statehood advanced the development of free public education, the inclusion of the equal footing doctrine in the Northwest Ordinance was equally instrumental in guiding the development of the school land grants.<sup>68</sup> At the time the United

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<sup>62</sup> The Northwest Territory, as contemplated by the Northwest Ordinance would be a land in which slavery was prohibited, religious pluralism tolerated, and education promoted. See Northwest Ordinance, 32 JOURNALS OF THE CONTINENTAL CONGRESS at 340, 343.

<sup>63</sup> Congress’ notion that education was a basic tenant of a civilized society is evidenced in the Land Ordinance of 1785, Northwest Ordinance, and the 1789 Constitution. For a discussion of the similarities of these three documents and the connection between education and statehood, see HYMAN, *supra* note 48, at 20-25.

<sup>64</sup> See ONUF, *supra* note 54, at 1, 51-52, 67.

<sup>65</sup> See HYMAN, *supra* note 48, at 24.

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

<sup>67</sup> Northwest Ordinance, 32 JOURNALS OF THE CONTINENTAL CONGRESS at 340.

<sup>68</sup> The equal footing doctrine has become so ingrained in our system of federalism that many people mistakenly look for it in the Constitution. While Article IV, Section 3 of the Constitution grants Congress the power to admit new states, it is silent on the relationship between existing and newly admitted states. See Fairfax et al., *supra* note 9, at 806 n. 23; see also Coyle v. Smith, 221

States declared independence, the original colonies owned all of their lands and could support public education through the collection of taxes from privately held lands.<sup>69</sup> However, the new states that joined the Union were created out of lands that belonged to the United States as territories, which were exempt from state taxation.<sup>70</sup> The drafters realized the reduction in tax base would limit the resources available for public education funding, which they saw as a foundation for successful settlement.<sup>71</sup> To secure funding for public education and to ensure equality among the states, Congress' announcement in article III of the Northwest Ordinance that "[s]chools and the means of education shall forever be encouraged"<sup>72</sup> carried forward its earlier promise in the General Land Ordinance of 1785 to grant lands for the support of the schools.<sup>73</sup> As a consequence, the retention of Congress' plan to grant states federal lands for the support of schools was fueled by both a desire to place all states on an equal footing and a vision that those states would be settled by an enlightened people.

Article V of the Northwest Ordinance provided that Congress would admit each new state on an equal footing with existing states.<sup>74</sup> Congress hoped this provision of equality and independence to unsettled territories would prevent a potential rebellion or a possible swing in allegiance by occupants of the territories.<sup>75</sup> Congress realized that without a provision whereby territories could become states on an equal footing with the ruling states, the new nation would fragment.<sup>76</sup> In short, the equal footing provision of the Northwest Ordinance was included to help prevent western territories from ceding from the United

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U.S. 559, 566-67 (1911) (noting that equal footing language was subsequently included in several state enabling acts).

<sup>69</sup> See *Andrus v. Utah*, 446 U.S. 500, 522 (1979) (Powell, J., dissenting).

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*; HYMAN, *supra* note 48, at 24.

<sup>72</sup> The Northwest Ordinance, 32 JOURNALS OF THE CONTINENTAL CONGRESS at 340.

<sup>73</sup> See The General Land Ordinance of 1785, reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 19, at 378.

<sup>74</sup> See The Northwest Ordinance, 32 JOURNALS OF THE CONTINENTAL CONGRESS at 342.

<sup>75</sup> See Jack E. Eblen, *Origins of the United States Colonial System: The Ordinance of 1787*, 51 WIS. MAG. HIST. 294, 302, 311 (1968).

<sup>76</sup> See ONUF, *supra* note 54, at 1, 51, 67-68.

States due to internal insurrection or external influence.<sup>77</sup> Congress understood that any imbalance in power or standing between old states and new states would discourage settlement because pioneers would be less willing to surrender the political privileges of a state that would have more power than a territory yet to be granted statehood.<sup>78</sup> While the equal footing doctrine has been relied upon to resolve issues that might have otherwise fractured the new nation,<sup>79</sup> it was also instrumental in driving the creation of the school land grants. In a comprehensive fashion, the Northwest Ordinance also tied the administration of these grants to the statehood process.

The road to statehood under the Northwest Ordinance was a cooperative process between the soon-to-be-state and Congress. Once the government had finished its survey under the General Land Ordinance of 1785, the Northwest Ordinance authorized Congress to organize the land as a territory and appoint a territorial governor.<sup>80</sup> When the territory reached a population of 5,000 free white men, it could elect a local legislature and begin some self-governance.<sup>81</sup> At a population of 60,000, the territory could petition Congress to become a state.<sup>82</sup> Once Congress approved the petition, it passed an enabling act.<sup>83</sup> The enabling act set forth the provisions of statehood and allowed the state to convene a constitutional convention to draft a constitution.<sup>84</sup> Once created, the territorial legislature submitted the state constitution to Congress for acceptance, after which Congress would admit the state to the Union.<sup>85</sup> It was through the interplay of petitions, enabling acts, and constitutions that states bargained for their identity.

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<sup>77</sup> See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 34 (1997).

<sup>78</sup> See HYMAN, *supra* note 48, at 20 (citing RAY ALLEN BILLINGTON, *WESTWARD EXPANSION* 217 (1949)).

<sup>79</sup> See Rashband, *supra* note 77, at 30-34.

<sup>80</sup> See SOUDER & FAIRFAX, *supra* note 9, at 18.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* Not all states had an enabling act. A total of 15 states entered the Union without an enabling act. See *id.* at 25. Oregon, for instance, was not admitted into the Union through an enabling act. See Oregon Admission Act, ch. 33, 11 Stat. 383 (1859).

<sup>84</sup> See SOUDER & FAIRFAX, *supra* note 9, at 25.

<sup>85</sup> See *id.*

By virtue of its provisions for land ownership and public education, the Northwest Ordinance “institutionalized the pursuit of happiness.”<sup>86</sup> As Professor Ray Allen Billington wrote, “[m]en could now leave the older states assured that they were not surrendering their legal protections and ultimate political privileges.”<sup>87</sup> By passing the Northwest Ordinance, within just two years of signing the Constitution, Congress had laid the foundation for a unified nation of educated citizens, and the settlement of the West began.

C. *The Evolution of the School Grants and Self-imposition of a Trust*

While the Land Ordinance of 1785 and the Northwest Ordinance of 1787 established the foundation for the granting of land, the terms and conditions of the grants did not evolve into a trust-like obligation until the admission of new states to the Union.<sup>88</sup> Therefore, the body of modern school trust law obtains its substance more from the admission agreements than from the original statutes. While adding a certain level of complexity to the doctrine, this creates the opportunity for confusion and misunderstandings regarding what the doctrine truly requires of both land managers and the courts.

One of the primary misconceptions of school land trust law is based upon the rationale that trusts are created to protect property from misuse. Several courts, including at one time, the United States Supreme Court,<sup>89</sup> have incorrectly assumed that the existence of the school land trusts today are an indication that Congress did not trust the states in the management of the school lands.<sup>90</sup> This assumption has perpetuated a view among modern courts and state legislatures that the trust is a strict obligation and states are not to be given any flexibility in managing

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<sup>86</sup> HYMAN, *supra* note 48, at 20.

<sup>87</sup> *Id.* (quoting RAY ALLEN BILLINGTON, WESTWARD EXPANSION 217 (1949)).

<sup>88</sup> One historian has suggested that until the admission of Ohio, it was unclear whether Congress would ultimately make good on its promises made in the Northwest Ordinance, including the public education provisions. See ONUF, *supra* note 54, at 82.

<sup>89</sup> See *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 463-64 (1967).

<sup>90</sup> See, e.g., *Princess Plaza Partners v. State*, 928 P.2d 638, 643 (Ariz. 1995); *Fain Land & Cattle Co. v. M.J. Hassell*, 790 P.2d 242, 244 (Ariz. 1990); *Murphy v. State*, 181 P.2d 336, 344-46 (Ariz. 1947).



school lands.<sup>91</sup> This myth is further perpetuated by observations that chronologically the series of school land grants consisted of increasingly stringent requirements by Congress in an attempt to guard against state misuse.<sup>92</sup>

The evolution of the school land grants however, is more accurately characterized as a series of grants that increased state autonomy over school lands. As noted above, the grants were meant to compensate for discrepancies in school funding among the states.<sup>93</sup> When viewing the evolution of the school grants as a whole, it is apparent that Congress did trust the states to use the lands to address this inequity. The increase in size of the grants over time and a shift in control of school lands from local to state government supports this position.<sup>94</sup> Further, a close examination of the school grants history demonstrates that the states initiated management programs geared toward land retention, and on their own initiative, began developing permanent school funds and trust programs.<sup>95</sup>

### 1. *Amount of Land Granted*

As Congress admitted more states to the Union, the amount of land it granted increased. Following the first grant to Ohio in 1802, states received one section per township.<sup>96</sup> With the admission of Oregon in 1859, states received two sections per township.<sup>97</sup> From the admission of Utah in 1896 until the accession period ended in 1910 with the admission of Arizona and New

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<sup>91</sup> The 10th Circuit was the first federal court to challenge these myths. See *Branson Sch. Dist. v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998).

<sup>92</sup> Unfortunately, these misconceptions are often cited as support for imposing the modern trust doctrine on states even where there is not clear indication in either the state's enabling act or constitution that it was Congress' intent to create a trust. Apparently, proponents of this view believe that Congress never fully trusted the states and that any grants made by Congress implicitly carried strict terms and conditions on how to use, manage, and dispose of these lands. See *Fairfax, et al.*, *supra* note 9, at 829-30.

<sup>93</sup> See *supra* Part II.B.

<sup>94</sup> See *infra* Parts II.C.1-2.

<sup>95</sup> See *infra* Parts II.C.3-4.

<sup>96</sup> The original school land grant to Ohio is found in the General Land Ordinance of 1785, reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 19, at 378 (granting section 16 of every township encompassed by the ordinance, including Ohio, for the use of schools). This grant was reaffirmed in Ohio's enabling act. See *Ohio Enabling Act*, ch. 40, § 7, 2 Stat. 173, 175 (1802).

<sup>97</sup> See *Oregon Admission Act*, ch. 33, § 4, 11 Stat. 383, 383 (1859) (granting sections 16 and 36 to Oregon for the use of schools).

Mexico, Congress granted the states two to four sections per township.<sup>98</sup>

The reasons for the increase in total acreage are unclear. One suggestion is that because the land became more arid and less valuable as settlement moved west, the states needed more land to support schools.<sup>99</sup> Another possible explanation is that the increase was a result of the growing political power of the new western states.<sup>100</sup> Regardless of Congress' motive, it is clear that as more territories became states, Congress felt more comfortable in turning over larger amounts of federal lands. Arguably, Congress would not have been comfortable turning federal land over to the states if it felt that they were misusing these lands.

## 2. *State Sovereignty Over the Grant*

Congress' practice of giving management responsibility to the states, rather than local governments may be another indication that Congress believed states could properly manage school lands. The issue of who would take direct management control over the school trust lands first arose with the admission of Ohio. When Ohio petitioned for statehood, it proposed that control over the school land grants be placed with the local township government.<sup>101</sup> Congress rejected this idea, and after a series of compromises, Ohio and Congress agreed to vest the authority in the state legislature.<sup>102</sup>

Subsequent to Ohio's statehood, Congress permitted other states' townships to have the authority to manage the lands for the benefit of the townships.<sup>103</sup> Later, Congress provided that the grants were to be managed by the county for the benefit of schools in the township.<sup>104</sup> Eventually, the states agreed that Congress could centralize control of the lands in the state governments, but specified that the township would remain the ben-

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<sup>98</sup> See, e.g., Utah Enabling Act, ch. 138, § 6, 28 Stat. 107, 109 (1894) (granting to Utah sections 2, 16, 32, and 36); New Mexico-Arizona Enabling Act, ch. 310, § 6, 36 Stat. 557, 561-62 (1910) (granting sections 2, 16, 32 and 36 to New Mexico and Arizona).

<sup>99</sup> See SOUDER & FAIRFAX, *supra* note 9, at 27.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 29-30.

<sup>102</sup> See *id.* at 29.

<sup>103</sup> See *id.* at 30.

<sup>104</sup> See *id.*

eficiary of the revenues from the school land in their borders.<sup>105</sup> As settlement moved westward and the diversity of land types increased, it became clear that some townships would contain more valuable land than others. To offset this discrepancy, Congress granted the lands for the benefit of schools in the state, to be administered by the state.<sup>106</sup> Congress, however, did not become so particular as to designate who, at the state level, would manage the lands. As a result, most states provided for a state land commission or board to manage the school lands.<sup>107</sup> Other states placed this duty on the state legislature.<sup>108</sup> Either way, by the end of the accession period, it was clear that Congress preferred that the lands be managed on a statewide basis rather than on a local one.

### 3. *The Evolving Management Policies Toward Retention*

Aside from the indications above that Congress did indeed trust the states to manage these lands appropriately, the trend toward the latter half of the nineteenth century was for states to retain, rather than dispose of, the granted lands.<sup>109</sup> This trend prompted the placement of these lands in a trust, rather than the trusts forcing the states to retain the land, as some have suggested.

The evolution of state land management policies from sale to retention closely tracks the shift from sale to retention in land management philosophies at the federal level. While some courts have mistakenly believed that the shift in state school land management favoring retention was prompted by federal concerns over mismanagement, the shift was actually accomplished on the states' own initiative.<sup>110</sup> As the grant program evolved, Congress offered little guidance on how to manage the lands, thus leaving the issue of whether to sell or lease the lands to the

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See* Fairfax et al., *supra* note 9, at 826-27.

<sup>108</sup> *See id.* at 827.

<sup>109</sup> *See* Wade R. Budge, *Changing the Focus: Managing State Trust Lands in the Twenty-first Century*, 19 J. LAND RESOURCES & ENVTL. L. 223 (1999) (discussing how states manage their school lands today in comparison to the first state enabling acts); Fairfax et al., *supra* note 9, at 822-23.

<sup>110</sup> *See* *Lassen v. Arizona ex rel Ariz. Highway Dep't*, 385 U.S. 458, 463-64 (1967); *Deer Valley Unified Sch. Dist. v. Superior Ct.*, 760 P.2d 537 (Ariz. 1988); *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984).

discretion of the states.<sup>111</sup> The result of this discretion was the creation of twenty-two different school land grant management programs.<sup>112</sup>

Initially, the states wanted to sell the lands to eager settlers.<sup>113</sup> However, it was unclear whether the federal enabling acts would allow the states to transfer the lands to private ownership. In 1827, Ohio petitioned Congress to allow for the sale of school lands to private parties. Congress accepted this change and in 1828 passed legislation that allowed sales of granted land.<sup>114</sup> For the next fifty years, Congress allowed the states autonomy over the granted lands. The first restriction placed on the states concerning the granted lands emerged in 1875 in the Colorado Enabling Act, which required a state that wanted to sell its school lands to do so “at public sale and at a price not less than two dollars and fifty cents per acre.”<sup>115</sup> However, about the time Colorado became a state, the states’ policies began to shift from sale of school lands to retention and lease of the lands.<sup>116</sup> Consequently, Congress was seldom put in a position to enforce provisions like the one in the Colorado Enabling Act.<sup>117</sup>

The shift in policy from disposing of school lands by sale to retaining them took place toward the end of the nineteenth century. The states recognized that complete liquidation of the grants would make sustaining a continuing source of funding more difficult.<sup>118</sup> As Professors Fairfax and Souder note, “the shift toward reservation was accomplished gradually at the state level, in much the same way as it was accomplished at the federal level.”<sup>119</sup> According to Fairfax and Souder, the assumption that public lands would be disposed of eroded under diverse pressures including “the rise of science and scientific bureaucracies in government, to the beginning of the Progressive era, to the clos-

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<sup>111</sup> See Fairfax et al., *supra* note 9, at 820.

<sup>112</sup> See *id.* at 798.

<sup>113</sup> Over a period of a century, Congress granted a total of 322 million acres to the states for schools and related purposes. See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 804 (1968). Today, the states have retained only 135 million acres of surface land and 152 million acres of mineral rights from the original school land grants. See *id.*

<sup>114</sup> See SOUDER & FAIRFAX, *supra* note 9, at 30-31.

<sup>115</sup> Colorado Enabling Act, ch. 139, §14, 18 Stat. 474, 476 (1875).

<sup>116</sup> See Budge, *supra* note 109, at 228; Fairfax et al., *supra* note 9, at 822-23.

<sup>117</sup> See SOUDER & FAIRFAX, *supra* note 9, at 31.

<sup>118</sup> See *id.*

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

ing of the frontier, to the death of the last passenger pigeon.”<sup>120</sup> The question that arose, however, was how to protect the pool of money that was being generated.

#### 4. *Permanent School Funds and Trusts*

Concurrent with the shift towards retention in land management policies in the late 1800s, the states became concerned with the long-term sustainability of the funds produced from the granted lands. To address these concerns, states created permanent school funds and trusts to protect those funds.<sup>121</sup>

Michigan was the first state to initiate a permanent school fund. The state’s 1835 constitution provided that

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, for the support of schools, which shall hereafter be sold or disposed of, shall be and remain a perpetual fund, the interests of which, together with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the State.<sup>122</sup>

Other states later adopted this idea into their constitutions.<sup>123</sup> The invention and incorporation of a permanent fund did not go unnoticed by Congress.<sup>124</sup>

As with most innovations in school land management, Congress followed the states’ lead and incorporated the provisions that the states were imposing upon themselves into subsequent enabling acts. In 1875, Colorado became the first state to have an enabling act that called for the creation of a permanent fund.<sup>125</sup> Colorado’s constitution, adopted in 1876, contained requirements for how the state would administer the fund and who would perform the administration of the fund.<sup>126</sup>

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<sup>120</sup> *Id.* at 31, 309 n.65.

<sup>121</sup> The term “permanent school fund” is not used by all states. Other phrases commonly used include “perpetual fund for schools,” “common school fund,” “public school fund,” and “state school fund.” The term used hinges upon the language used in the state’s constitution. See HENRY A. DIXON, *THE ADMINISTRATION OF STATE PERMANENT SCHOOL FUNDS: AS ILLUSTRATED BY A STUDY OF THE MANAGEMENT OF THE UTAH ENDOWMENT* 3 (1936).

<sup>122</sup> MICH. CONST. art X, § 2 (1835).

<sup>123</sup> See SOUDER & FAIRFAX, *supra* note 9, at 32.

<sup>124</sup> See *id.*

<sup>125</sup> See Colorado Enabling Act, ch. 139, §14, 18 Stat. 474, 476 (1875).

<sup>126</sup> See COLO. CONST. art. IX.

Likewise, the emergence of the trust concept was originally initiated by the states.<sup>127</sup> Outside of the New Mexico–Arizona Enabling Act,<sup>128</sup> no other state enabling act mentions the word “trust.” Indeed, “[p]rior to 1910, the trust obligations that existed arose entirely from state commitments made in state constitutions.”<sup>129</sup> For example, while the Washington state enabling act lacks any mention of a trust, the Washington constitution states that the school lands granted to the state “are held in *trust* for all the people.”<sup>130</sup> Likewise, the constitutions of Montana and Utah provide that the school lands granted shall be held in trust and are to be disposed of only for the purposes for which they were granted.<sup>131</sup>

Again, this practice did not go unnoticed by Congress. In what would later prove to be the most influential event in the development of trust land jurisprudence, Congress incorporated trust language into the last enabling act that created the states of New Mexico and Arizona.<sup>132</sup>

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<sup>127</sup> See Fairfax et al., *supra* note 9, at 809.

<sup>128</sup> See New Mexico–Arizona Enabling Act, ch. 310, §10, 36 Stat. 557, 563 (1910).

<sup>129</sup> *Id.*

<sup>130</sup> WASH. CONST. art. XVI, § 1 (emphasis added).

<sup>131</sup> The language in the Montana Constitution of 1972 regarding state trust lands is explicit:

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

MONT. CONST. art. X, § 11. Utah’s constitution is similarly explicit:

All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and declared to be the public lands of the State; and *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, donated, devised or otherwise acquired.

UTAH CONST. art XX, § 1.

<sup>132</sup> See The New Mexico–Arizona Enabling Act, 36 Stat. 557, § 10 (1910). Had Congress not included trust language into the New Mexico–Arizona Enabling Act, the scope of the school trust doctrine would have been left to the individual states to determine. However, the congressionally mandated creation of a trust in the Enabling Act would later be the focus of the Supreme Court’s holdings in *Ervien* and *Lassen*. Courts would later adopt these holdings wholeheartedly without independently construing the terms and conditions of

D. *Federal Adoption of the Trust Concept: The Last State Grants*

New Mexico and Arizona became states in 1912, thus completing the assession of the contiguous lower forty-eight states. The New Mexico–Arizona Enabling Act<sup>133</sup> is very different from other enabling acts because Congress was extremely detailed in specifying the terms and conditions of the school land grants.

For nearly 100 years prior to the New Mexico–Arizona Enabling Act, Congress added to each subsequent enabling act provisions that existing states had already imposed upon themselves. By the time Congress passed the New Mexico–Arizona Enabling Act in 1910, Congress accumulated enough provisions to fill a number of detailed sections in the New Mexico–Arizona Enabling Act.<sup>134</sup> The Enabling Act was so thorough, for example, that the New Mexico constitution is nearly silent on how the state is to manage the trust lands.<sup>135</sup> The specificity of the language in the New Mexico–Arizona Enabling Act is unique. In contrast, most of the other states' enabling acts allowed the state constitutions to define many of the particulars of how the state would manage school lands. The most notable aspect unique to the

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the state's enabling act and constitution. As Professors Fairfax and Souder note, “[o]nce the Supreme Court decided *Lassen*, state courts all over the West, irrespective of the language of their particular enabling act or state constitution, fell into line. Thus, the least typical of the accession bargains has become central in defining all of them.” FAIRFAX AND SOUDER, *supra* note 9, at 34.

<sup>133</sup> While it may seem peculiar in comparison to the other state enabling acts discussed thus far, that New Mexico and Arizona shared the same enabling act, towards the end of the accession period in the 1800s, it was not uncommon for several states to be formed under the same enabling statute. Some scholars suggest this practice indicates just how routine the adoption of states became by the latter half of the 1800s. See IVISON BLAKEMAN, *THE NEW STATES: A SKETCH OF THE HISTORY AND DEVELOPMENT OF THE STATES OF NORTH DAKOTA, SOUTH DAKOTA, MONTANA AND WASHINGTON* (1889) *cited in* SOUDER & FAIRFAX, *supra* note 9, at 23.

<sup>134</sup> New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557. Section 6 grants sections 2, 16, 32, and 36. § 6, 36 Stat. at 561. Section 9 calls for the establishment of a permanent fund for school land revenues. § 9, 36 Stat. at 563. Section 10 assigns the Attorney General of the United States the authority and duty to prosecute to enforce the school land grant provisions. § 10, 36 Stat. at 563-65. Section 11 provides for surveys of the granted lands. § 11, 36 Stat. at 565. Section 12 confirms all grants of lands previously made by Congress. § 12, 36 Stat. at 565.

<sup>135</sup> See Fairfax et al., *supra* note 9, at 829-30.

New Mexico–Arizona Enabling Act was the express reference to a trust.<sup>136</sup>

Section 10 of the New Mexico–Arizona Enabling Act stated that the granted lands would be 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.”<sup>137</sup> While similar language could be found in many western state constitutions,<sup>138</sup> this was the first time Congress indicated any intent that the state must hold these lands in trust.

In addition to borrowing the idea of a trust from states, the New Mexico–Arizona Enabling Act also contained restrictions on the disposition and leasing of the school trust lands that states had previously imposed upon themselves. For example, any sale or lease of school lands was to go only to the highest bidder at public auction.<sup>139</sup> Congress also required, as was common by the late 1800s, the establishment of a separate fund for all revenues generated by the trust land sales and leases.<sup>140</sup> The Enabling Act also provided that any disposition of the school lands not conforming to the Act would be void and authorized the Attorney General of the United States to enforce the terms of the grant.<sup>141</sup>

It was these latter provisions, along with the emergence of trust language for the first time in an enabling act, that led Professor Fairfax, Professor Souder and Ms. Goldenman to note:

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<sup>136</sup> New Mexico-Arizona Enabling Act, ch. 310, § 10, 36 Stat. at 563.

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., WASH. CONST. art XVI, § 1 (1889); see also Budge, *supra* note 109, at 228.

<sup>139</sup> See New Mexico-Arizona Enabling Act, ch. 310, § 10, 36 Stat. at 563. Section 10 states sales must be “to the highest and best bidder at a public auction.” Notice of the auction must include the nature, time, and place of the sale. See *supra* Part II.C.3 (discussing state created restrictions on school land sales).

<sup>140</sup> See New Mexico-Arizona Enabling Act, ch. 310, § 10, 36 Stat. at 563 (1910); see also *supra* Part II.C.4 for a discussion of state creation of permanent funds.

<sup>141</sup> See New Mexico-Arizona Enabling Act, ch. 310, § 10, 36 Stat. at 564-65. Enforcement by the United States Attorney General is unique to the Arizona and New Mexico enabling act. Section 10 partially explains why key United States Supreme Court decisions usually involve cases about the two states. The idea of an enforcement official to the trust is an uncommon feature under general trust principles. Congress’ motivation for including this provision is unclear.



The pattern observed in the proliferation of both sales restrictions and the spread of permanent school fund and fund management requirements does not support the conventional picture of a concerned Congress acting ever more stringently to bring profligate states to heel. The restrictive provisions were literally initiated in state constitutions, and were initially elaborated at that level. Only at the very end of the process, specifically in the 1910 Arizona and New Mexico accessions, is something which might be called congressional vigilance apparent.<sup>142</sup>

According to Professors Souder and Fairfax, the early enabling acts generally granted the land and left the state legislature to sort out what to do with the land.<sup>143</sup> These scholars note that, “[t]he pattern for the spread of permanent school fund and fund management requirements is familiar: the states initiate such provisions, which become very elaborate; the federal government picks up variations on the state language as grant conditions; and subsequent states elaborate and specify the conditions further.”<sup>144</sup> Consequently, the evolution of the school land grant program is best described as a series of successive enactments, driven by the newly created states who attempted to secure the benefits of the granted lands for themselves.

Given the state roots of the school land trust, one would think that there would be as many variations in school land trust law as there are enabling acts and that each state today would enforce its terms and conditions as it did when it took its place in the historical sequence of enabling acts. However, the opposite is true. Virtually every state with school lands subscribes to the same trust doctrine requiring land managers to place revenue maximization above other state interests such as preservation or conservation.<sup>145</sup> To understand how the modern trust doctrine developed its revenue maximization focus, and why virtually every state has adopted it, it is essential to explore the twentieth century judicial decisions interpreting the legislative enactments of the eighteenth and nineteenth centuries.

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<sup>142</sup> Fairfax, et al., *supra* note 9, at 831.

<sup>143</sup> See SOUDER & FAIRFAX, *supra* note 9, at 32.

<sup>144</sup> *Id.*

<sup>145</sup> See *supra* note 8 (citing cases in which state and federal courts have recognized a trust limiting the management of state lands for the purpose of revenue maximization).

### III JUDICIAL EXPANSION OF THE TRUST: MAXIMIZATION OF REVENUE

The modern school land trust doctrine is a judicially created doctrine. As noted in Part II.D, the idea of a trust was not apparent in the early federal documents granting states the ownership of school lands. The notion of a trust to protect the school lands did not emerge in federal legislation until the adoption of Arizona and New Mexico into the Union. However, the full reach of the trust language in the New Mexico–Arizona Enabling Act was not fully developed until the Supreme Court, in two critical opinions, construed it to require the states to manage these lands for maximizing revenues for schools to the exclusion of all other interests.

#### A. *A Judicially Created Trust Obligation*

The first opportunity for the Supreme Court to interpret the New Mexico–Arizona Enabling Act arose in *Ervien v. United States*,<sup>146</sup> a case in which New Mexico attempted to divert funds from school lands for the advertisement of the state's amenities to prospective residents. The federal government claimed that such a diversion of school land revenues was a breach of the trust imposed by section 10 of the New Mexico–Arizona Enabling Act.<sup>147</sup> The Supreme Court, treating the case as one of statutory interpretation, held that because advertising was not one of the purposes enumerated in the Enabling Act, it would be a breach of the express trust to use the funds in that manner.<sup>148</sup>

At trial, the state had argued that use of these funds to advertise the state's amenities to prospective residents would assist schools because the influx of new people would increase the demand for the purchase and leasing of school lands.<sup>149</sup> The district

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<sup>146</sup> 251 U.S. 41 (1919). This case stemmed from an enforcement action brought by the United States Attorney General in federal court. Under Section 10 of the New Mexico–Arizona Enabling Act, Congress vested in the Attorney General the authority to enforce the terms of the grant. *See* New Mexico–Arizona Enabling Act, ch. 310, §10, 36 Stat. 563. Under normal trust doctrine only the beneficiaries of the trust, here the school boards, would have standing to claim a breach of the state's fiduciary obligations. *See infra* Part III.C.4.

<sup>147</sup> *See Ervien*, 251 U.S. at 46.

<sup>148</sup> *See id.* at 47.

<sup>149</sup> *See id.*

court agreed and ordered the case dismissed because it found that advertising was a wise administration of the property under general trust principles.<sup>150</sup> The Court of Appeals for the Eighth Circuit reversed.<sup>151</sup> It found that the Enabling Act created a stricter trust obligation requiring the state to obtain direct compensation for the use of these lands.<sup>152</sup> Because the contemplated use of funds would be a breach of the trust,<sup>153</sup> the Supreme Court concluded in affirming the Eighth Circuit that the New Mexico–Arizona Enabling Act did not create an ordinary trust in which general trust principles applied.<sup>154</sup> Rather, the Court interpreted the term “trust” to mean “no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact performance of the conditions.”<sup>155</sup> This decision initiated the idea that Congress instituted a trust by which states were to manage the school lands for narrow purposes. It would be almost fifty years until the Court would return to this issue and explain those narrow purposes.

In 1967, the Supreme Court decided *Lassen v. Arizona ex rel Ariz. Highway Dep't*,<sup>156</sup> a decision that marked the end of school land management policies that did not always maximize revenues. In *Lassen*, the Court insisted that states must rigidly adhere to management decisions that would produce the maximum revenues possible from school lands.<sup>157</sup> At issue in *Lassen* was whether Arizona could obtain an easement over school trust land to build a highway without adhering to the Enabling Act’s re-

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<sup>150</sup> See *id.* at 48. Under general trust principles the trustee normally has broad authority to manage the trust. See *infra* Part III.C for a discussion of the trustee’s fiduciary duties.

<sup>151</sup> At the time of this appeal, the Eighth Circuit encompassed New Mexico.

<sup>152</sup> See *United States v. Ervien*, 246 F. 277, 279 (8th Cir. 1917). In regards to the ancillary benefit the lands would receive, the court responded:

While, of course, all of the trust purposes have relation to the general public good and would profit thereby, yet severally regarded, as was manifestly the intention, each is of a more definite and limited character. Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people, or that the proceeds should constitute a fund like moneys raised by taxation for “general purposes.”

*Id.* at 280.

<sup>153</sup> See *id.*

<sup>154</sup> See *Ervien*, 251 U.S. at 47.

<sup>155</sup> *Id.* at 48.

<sup>156</sup> 385 U.S. 458 (1967).

<sup>157</sup> See *id.* at 469.

quirements that sale or lease go only to the highest bidder at public auction.<sup>158</sup> For years, Arizona granted its Highway Department rights-of-way over school trust lands free of charge.<sup>159</sup> In 1964, the Arizona Land Commissioner adopted a rule requiring the Highway Department to compensate the permanent school fund for the appraised value of the rights of way.<sup>160</sup> The Highway Department challenged this rule.<sup>161</sup> The Arizona Supreme Court found for the Highway Department.<sup>162</sup> The court determined that “highways constructed across trust lands always enhance the value of the remaining trust lands in amounts at least equal to the value of the areas taken.”<sup>163</sup> The court then ordered the Commissioner to provide the Highway Department rights-of-way over school trust lands without compensation.<sup>164</sup>

In granting certiorari, the Supreme Court noted it had done so “because of the importance of the issues presented both to the United States and to the States which have received such lands.”<sup>165</sup> Consequently, from the beginning the Court intended its decision to extend to all western states with school trust lands.<sup>166</sup> However, it is unclear whether the Court intended the holding, or just the method of how to construe a state’s enabling act, to extend to every state.

The Court reversed the Arizona Supreme Court and upheld the Arizona Land Commissioner’s rule that the Highway Department must compensate the school fund at the full appraised value.<sup>167</sup> In reaching its decision, the Court relied upon its previous holding in *Ervien*, that the states were to manage the school

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<sup>158</sup> *See id.* at 465.

<sup>159</sup> *See State v. Lassen*, 407 P.2d 747, 747 (Ariz. 1965) (noting that “[f]or over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government.”).

<sup>160</sup> *See Lassen*, 385 U.S. at 459-60.

<sup>161</sup> *See id.* at 459.

<sup>162</sup> *See id.* at 460.

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

<sup>164</sup> *See id.*

<sup>165</sup> *Id.* at 461.

<sup>166</sup> *Id.*

<sup>167</sup> *See id.* at 469. In so holding, the Court also determined that the state was exempt from the public auction requirements mandated by the New Mexico–Arizona Enabling Act. The Court noted that that the legislative intent behind these provisions was to ensure the lands provided a return at or above their appraised value. Because the Court ruled that the state would need to compensate the trust at full value, the Court decided that the rationale behind the public auction requirement did not apply. *See id.* at 463.

lands under a narrow trust obligation.<sup>168</sup> The Court defined this obligation by looking to the language and structure of the Enabling Act and held that “[a]ll these restrictions in combination indicate Congress’ concern both that the grants provide the *most substantial support possible* to the beneficiaries and that *only those beneficiaries profit from the trust*.”<sup>169</sup> With this statement, the Court interjected into the law of school land trusts the mandate that school lands be managed to the maximum value possible for the exclusive benefit of the public schools.

#### B. *Incorporation of the Doctrine in Other Western States*

Following the Supreme Court’s holding in *Lassen*, many western state courts began applying the Court’s constraints on the management of school lands in their states.<sup>170</sup> Notwithstanding the differences between the states’ enabling acts and the New Mexico–Arizona Enabling Act, these state court decisions universally precluded state land managers from managing for public purposes or for promotion of public policies other than those supporting public education.<sup>171</sup> Thus, the New Mexico and Arizona statehood bargain, the least typical of all the accession bargains, has become central in defining what the grants mean to virtually every state with school trust lands.

The Washington Supreme Court’s decision in *County of Skamania v. State*<sup>172</sup> provides a good example of a state relying on *Lassen* to invalidate the disposition of school lands resources

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<sup>168</sup> See *id.* at 467.

<sup>169</sup> *Id.* (emphasis added).

<sup>170</sup> California is the only western state that has not constrained itself through rigid trust rules. The California Attorney General has concluded that school land grants do not create a binding trust relationship but rather an honorary obligation. See 41 Op. Cal. Att’y Gen. 202 (1963). In 1980, the California legislature abandoned dominant use philosophies by mandating multiple use for public school lands management, and expressly including conservation and rehabilitation of the lands as recognizable uses. See CAL. PUB. RES. CODE §6201.5 (West 1999). Colorado does not currently recognize the rigid obligation to maximize revenues from trust lands. See *Branson Sch. Dist. v. Romer*, 161 F.3d 619, 638-39 (10th Cir. 1998). However, prior to the amendment to the Colorado State Constitution at issue in *Branson*, it was believed that an obligation to maximize revenues did exist. See *Colorado Bd. of Land Comm’rs v. Colorado Mined Land Reclamation Bd.*, 809 P.2d 974 (Colo. 1991). For a discussion of the *Branson* case, see *infra* Part IV.A.

<sup>171</sup> See *supra* note 8 (citing cases in which state and federal courts have recognized a trust limiting the management of state lands for the purpose of revenue maximization).

<sup>172</sup> 685 P.2d 576 (Wash. 1984).

at less than full value. In response to the downturn in timber prices, the state passed an act allowing timber purchasers to default on their timber contracts with the state.<sup>173</sup> Various beneficiaries of school trust lands brought suit, claiming that the legislation violated the school land trust.<sup>174</sup> While the Washington Supreme Court acknowledged that Washington's Enabling Act did not contain the restrictive language or reference to a trust found in the New Mexico–Arizona Enabling Act, the court concluded that the trust principles announced in *Lassen* applied.<sup>175</sup> The court asserted:

Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees. . . .<sup>176</sup>

There have been intimations that school land trusts are merely honorary, that there is a "sacred obligation imposed on (the state's) public faith," but no legal obligation. These intimations have been dispelled by *Lassen v. Arizona* . . . This trust is real, not illusory.<sup>177</sup>

In finding that the trust obligation to maximize revenues applied, the court embraced *Lassen* fully, noting that "[a]lthough *Lassen* involved a different enabling act, the principle of *Lassen* applies to Washington's Enabling Act."<sup>178</sup> Washington is not unusual in this regard. The Supreme Courts of Montana and South Dakota, states created out of the same enabling statute as Washington,<sup>179</sup> have also concluded that a trust exists to which the state owes fiduciary duties to ensure the maximization of income from school trust lands.<sup>180</sup>

The application of the principles in *Lassen* is not limited to state court decisions. A federal district court concluded that the

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<sup>173</sup> See *id.* at 578.

<sup>174</sup> See *id.* at 579.

<sup>175</sup> See *id.* at 580.

<sup>176</sup> *Id.* (citing *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458 (1967); *State v. University of Ala.*, 624 P.2d 807 (Ala. 1981); *Oklahoma Education Association v. Nigh*, 642 P.2d 230 (Okla. 1982); *State ex rel. Hellar v. Young*, 58 P. 220 (Wash. 1899)).

<sup>177</sup> *County of Skamania*, 685 P.2d at 580 (quoting *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968), *aff'd* 435 F.2d 561 (9th Cir. 1970)).

<sup>178</sup> *Id.*

<sup>179</sup> See Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, 25 Stat. 676 (1889).

<sup>180</sup> See *Department of State Lands v. Pettibone*, 702 P.2d 948, 953 (Mont. 1985); *Kanally v. State*, 368 N.W.2d 819, 823-24 (S.D. 1985).

school lands trust existed despite the lack of an express reference to a trust in Nebraska's 1866 enabling legislation.<sup>181</sup> The court observed that Nebraska's enabling act states that the lands are granted to Nebraska simply "for the support of common schools" and that it does not contain the express restrictions that Congress incorporated into later acts.<sup>182</sup> Nevertheless, the court concluded that the enabling act contained binding implied restrictions and that Congress made the grant in trust for a specific purpose.<sup>183</sup>

Several scholars have attacked the legitimacy of these court decisions.<sup>184</sup> The premise of these arguments is that, aside from New Mexico and Arizona, school land trust law is a state law doctrine derived from state constitutions. Therefore, the courts should look exclusively to the language in the state constitutions and cases interpreting those constitutions, rather than United States Supreme Court decisions interpreting the unique provisions of the New Mexico–Arizona Enabling Act in deciding conflicts in school land management. As Professor Fairfax has noted, the "gradual process of accreting judicial decisions has rounded the angles and left us with the operating assumption that the grants are trusts and they are basically the same,"<sup>185</sup> when in fact there are twenty-two unique arrangements.<sup>186</sup> By treating all states the same under one doctrine, the courts have limited the possibilities for states to individually explore and experiment with cost effective, efficient, and environmentally sensitive management strategies.<sup>187</sup>

Despite these criticisms, there is no sign that those states that adopted the *Lassen* land trust doctrine will abandon it anytime soon.<sup>188</sup> The notion of a trust has become so thoroughly

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<sup>181</sup> See *United States v. 78.61 Acres of Land in Dawes & Sioux Cos.*, Neb., 265 F. Supp. 564 (D.Neb. 1967).

<sup>182</sup> *Id.* at 567 (quoting the Nebraska Enabling Act, ch. 59, §7, 13 Stat. 47, 49 (1864)).

<sup>183</sup> See *78.61 Acres*, 265 F. Supp. at 567.

<sup>184</sup> See *supra* notes 10-11 and accompanying text.

<sup>185</sup> Fairfax, et al., *supra* note 9, at 847.

<sup>186</sup> See *id.* at 798.

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

<sup>188</sup> This is most evident when viewing recent attorney general opinions. In response to arguments that *Lassen* was wrongly decided, the Washington Attorney General stated, "[t]he unanimous decision of our Supreme Court in *Skamania*, however, represents the law of this State." 11 Op. Wash. Att'y Gen. 10 (1996). In Oregon, a 1992 attorney general opinion rejected the notion that school lands could be used for any other purpose than maximizing long-term benefits for schools. See 46 Op. Or. Att'y Gen. 468 (1992). "To even suggest

embedded in state constitutions, case law, and management philosophy that major shifts in direction are unlikely. Consequently, the appropriate goal for those concerned with the preservation and conservation of these lands ought to be understanding how the trust doctrine operates and finding ways that conservation and preservation interests can become a part of the administration of the trust.

### C. *The Scope of the Modern School Lands Trust*

Although it is generally accepted by most western states that they are under an obligation to manage the lands in a manner to maximize revenue for the support of public schools and that this obligation is referred to as a trust, there is no prevailing view on how the trust relationship is structured, or how the states are to achieve the revenue maximization goal.

In *Andrus v. Utah*,<sup>189</sup> the United States Supreme Court analogized the trust obligation to contract law. The *Andrus* Court referred to the school land grant as a “solemn agreement,” analogous to a contract between private parties.<sup>190</sup> Under this agreement, the Court stated, “[t]he United States agreed to cede some of its lands to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.”<sup>191</sup> One commentator has suggested that the school lands grants constituted a charitable trust “because Congress granted the lands for the charitable purpose of education and because the beneficiaries of the trust constitute a sufficiently large and indefinite class to foster community interest in enforcing the trust.”<sup>192</sup> Another critic has asserted that the states should be subject to the public trust doctrine in their manage-

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that these grant lands might be managed for other purposes and values than the immediate production of income led one [Wyoming] state attorney to respond that it would be ‘thumbing our noses at constitutional law’ to do so.” Bruce & Rice, *supra* note 53, at 30.

<sup>189</sup> 446 U.S. 500 (1980).

<sup>190</sup> *See id.* at 507.

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

<sup>192</sup> Bowlin, *supra* note 11, at 945-46. When the trust is classified as charitable, land managers have the benefit of the *cy pres* doctrine. The doctrine allows a trustee to modify a charitable trust when it is impracticable, impossible, or not expeditious to fulfill the original purposes of the trust. Consequently, in applying this doctrine to state school lands, managers could avoid the revenue constraints by claiming impracticability in meeting that directive in light of environmental concerns. However, no court has adopted this view. *See* Fairfax, et al., *supra* note 9, at 875.



ment of these lands.<sup>193</sup> However, no matter how the trust is classified, there are only six general characteristics that comprise the body of law that makes up the modern school lands trust doctrine.<sup>194</sup>

### 1. *General Trust Principles*

A trust is a fiduciary relationship by which one party is subject to equitable duties to keep or use property for the benefit of another.<sup>195</sup> The party holding the property in trust is the trustee.<sup>196</sup> The party for whom the trustee is holding the property is the beneficiary.<sup>197</sup> The drafters of the Restatement (Third) of Trusts state that, “[i]n administering the trust the trustee is under a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust.”<sup>198</sup> Therefore, it is crucial for proper execution of the trust that the purposes of the trust be made clear.

In order for a trust to be enforceable, it must meet three elements. First, there must be an external expression of intent by the settlor, the creator of the trust, to establish a trust.<sup>199</sup> Second, there must be an identifiable party who is the beneficiary.<sup>200</sup> Third, there must be a trustee who is managing a property interest for the benefit of the beneficiary.<sup>201</sup> After a brief discussion of the role of the school lands trustee, this section explores each element individually in the context of lands trust doctrine.

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<sup>193</sup> See Arum, *supra* note 10, at 163-66 (arguing that imposing the public trust doctrine on school lands will shift the focus of management of these lands away from revenue maximization and become more aligned with the concerns of the public, including resource conservation). See also Chasan, *supra* note 10, at C1.

<sup>194</sup> The tendency of courts to generalize their school lands trust obligations by adopting the *Lassen* court decision is what led Professors Fairfax and Souder to refer to the prevailing trends in school land trust law, including the revenue maximization obligation, simply as the “conventional wisdom.” See Fairfax, et al., *supra* note 9.

<sup>195</sup> See RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

<sup>196</sup> See RESTATEMENT (SECOND) OF TRUSTS § 3 (1959).

<sup>197</sup> See *id.*

<sup>198</sup> RESTATEMENT (THIRD) OF TRUSTS § 170 cmt. q (1992).

<sup>199</sup> See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. g (1959).

<sup>200</sup> See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959).

<sup>201</sup> See *id.*

## 2. *The Land Commission(er) as the Trustee*

Those states that recognize a trust place the trustee responsibility upon either a land commission<sup>202</sup> or a commissioner, as designated by the state legislature.<sup>203</sup> Unlike a traditional trustee, the commissioner is both a trustee and a government administrator. This presents a complicated situation for courts reviewing the commissioner's decisions. Under most state administrative laws, an agency administrator's decisions are entitled to deference unless they are arbitrary, capricious, and otherwise not in accordance with law.<sup>204</sup> However, the courts are to apply the prudent investor rule, a less deferential standard, when reviewing trustee decisions.<sup>205</sup> Because the commission is both an agency and a trustee, the courts must intertwine two levels of judicial review.<sup>206</sup>

While there are some exceptions, two general patterns emerge from the case law when one looks at courts that have applied each standard. First, when a beneficiary challenges a commissioner's decision, the courts will generally apply the prudent investor level of review.<sup>207</sup> Likewise, when disposing of lands through sale, the courts are more likely to scrutinize the commissioner's actions under more strict application of the prudent investor standard.<sup>208</sup> Conversely, when a lessee challenges the land board's action, the courts will treat the board's decision as an administrative action, subject to the more deferential stan-

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<sup>202</sup> Oregon was the first to establish a land commission to oversee management of the trust in 1857. In Oregon the land commission consists of the governor, secretary of state and the state treasurer. *See* OR. CONST. art. VIII, § 5. Other states that adopted a board or commission in their constitutions are Colorado, Idaho, Montana and Wyoming. *See* COL. CONST. art. IX, § 9; IDAHO CONST. art. IX, § 7; MONT. CONST. art. X, § 4; WYO. CONST. art. XVIII, § 3.

<sup>203</sup> Examples of state constitutions that specify the legislature as the responsible entity for the school lands are the constitutions of Nebraska, Nevada, North Dakota, Utah and Washington. *See* NEB. CONST. art. VII, § 6; NEV. CONST. art. XI, § 1; N.D. CONST. art. IX, § 8; UTAH CONST. art. X, § 5; WASH. CONST. art. XVI, § 2.

<sup>204</sup> *See* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971).

<sup>205</sup> *See* Kenneth B. Davis, *Judicial Review of Fiduciary Decisionmaking – Some Theoretical Perspectives*, 80 Nw. U. L. REV. 1, 168 (1985). For a definition of the prudent investor standard, see RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

<sup>206</sup> *See* Davis, *supra* note 205, at 169.

<sup>207</sup> *See id.*

<sup>208</sup> *See* Fairfax, et al., *supra* note 9, at 849.

dard of review.<sup>209</sup> Because most beneficiaries would rather not have the land managed for conservation purposes, and unlike lessees, consistently have standing to bring suit claiming the state breached its trust obligation,<sup>210</sup> any change towards incorporating conservation purposes is more likely to be challenged by a trust beneficiary. Consequently, the state's action will be subject to the stricter trust standard.

Under the trust standard, the trustee has a fiduciary duty of loyalty, which prohibits self-dealing and requires administration that furthers the purposes of the trust.<sup>211</sup> The trustee must also use reasonable skill and care to preserve the trust property and to make the trust property productive.<sup>212</sup> Where the duty to make the trust productive conflicts with the duty to preserve and care for the trust property, the rule is that the trustee must act as a prudent investor.<sup>213</sup>

The prudent investor standard, as recently revised in the Third Restatement of Trusts, states that "[t]he trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust."<sup>214</sup> While not as deferential as the standard of review applied to agency decisions,<sup>215</sup> the prudent investor standard does allow for considerable discretion on the part of the trustee. Therefore, even under the prudent investor standard of review, it is plausible, where it can be shown that environmental interests will produce a long-term benefit to the beneficiary, that the

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<sup>209</sup> See Davis, *supra* note 205, at 169.

<sup>210</sup> See *infra* Part III.C.4 for a discussion of standing to file suit for violation of school land trust duties.

<sup>211</sup> See RESTATEMENT (SECOND) OF TRUSTS § 379 cmt. a (1959).

<sup>212</sup> See *id.*

<sup>213</sup> See RESTATEMENT (SECOND) OF TRUSTS §§ 170-183 (1959). The Oklahoma Supreme Court alluded to this conflict in *Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982). In *Nigh*, the court invalidated legislation providing for low interest mortgage loans of trust funds on the grounds that it violated the duty of the state to maximize revenues. See *id.* at 235. However, in so holding, the court noted that the duty to maximize return to the trust estate from the trust properties is subject to taking necessary precautions of the preservation of the trust estate. See *id.*

<sup>214</sup> RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

<sup>215</sup> See Administrative Procedure Act, 5 U.S.C. § 706 (1994) (providing an arbitrary and capricious standard).

courts will allow the state to adopt environmental interests into the management of school trusts lands.<sup>216</sup>

### 3. *Expression of Intent to Maximize Revenue*

A settlor cannot create a trust unless the settlor “manifests an intention to impose duties which are enforceable in the courts.”<sup>217</sup> Once the settlor defines those duties, as when Congress passes an enabling act admitting a new state into the Union, the trust cannot be modified without the consent of the settlor.<sup>218</sup> Beginning with the Supreme Court’s decision in *Ervien*, many state courts have interpreted the enabling acts and state constitutions as expressing an intent by Congress to create a trust by which the state has an obligation to manage the granted lands for public schools.<sup>219</sup> That trust imposes upon the states a duty to “derive the full benefit” from the use of those lands.<sup>220</sup>

While the school lands trust doctrine is effective in focusing the management of state school lands on the singular objective of producing revenues,<sup>221</sup> the states also have a fiduciary duty to preserve the body of the trust to produce long-term sustainable returns. While trust law alleviates the tension created by these conflicting demands to preserve and maximize through the application of the deferential prudent investor standard, it does not allow states to completely abandon the obligation to maximize revenues. Critics of the school trust doctrine argue that the use of this standard has allowed states to focus too heavily on the revenue maximization side of this tension and have called for the abolition of the trust.<sup>222</sup> However, as discussed later in this Article, the flexibility in this standard also requires states, in the case

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<sup>216</sup> See *infra* Part IV.A.2 for further discussion of this argument.

<sup>217</sup> RESTATEMENT (SECOND) OF TRUSTS § 25 cmt. a (1959).

<sup>218</sup> See *Boice v. Campbell*, 248 P. 34, 35 (Ariz. 1926).

<sup>219</sup> See *supra* Part III.A-B.

<sup>220</sup> *Lassen v. Arizona ex rel. Ariz. Highway Dep’t*, 385 U.S. 458, at 468 (1967).

<sup>221</sup> The doctrine has been so effective in focusing state management policies that some have suggested that the federal government should divest more federal lands to the states in the form of trusts. See Sally K. Fairfax, *Thinking the Unthinkable: States as Public Land Managers*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 249 (1995) (discussing how the state trust land management model can offer a structure for shifting management of federal public lands to the states while protecting national interests).

<sup>222</sup> See *supra* notes 10-11 (citing articles criticizing the obligation to maximize revenues).

of conservation leasing, to incorporate preservation interests to maintain a healthy trust corpus.<sup>223</sup>

#### 4. *The Beneficiary and the Enforceability of the Trustee's Duties*

If a court cannot ascertain a beneficiary, the court will not recognize a trust.<sup>224</sup> A beneficiary must exist to enforce the terms of the trust.<sup>225</sup> The courts have recognized beneficiaries to the school lands trust to include: individual counties,<sup>226</sup> school districts,<sup>227</sup> state educational organizations,<sup>228</sup> environmental groups,<sup>229</sup> individual parents and teachers,<sup>230</sup> school children,<sup>231</sup> and even the general public.<sup>232</sup>

Lessees in school trust land cases also have standing to sue over decisions made by the land managers regarding leases and lease applications.<sup>233</sup> However, challenges by lessees, often brought under administrative procedure statutes, require a showing that the lessees were harmed by the agency action.<sup>234</sup> Beneficiaries, on the other hand, will always have standing to sue where they feel the state is not acting in their best interests.<sup>235</sup> Beneficiaries, unlike lessees, need not point to a specific agency action approving or denying a lease. Moreover, an agency's action will be given less deference by the courts where the plaintiff is a beneficiary.<sup>236</sup> Therefore, when a state's school land management

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<sup>223</sup> See *infra* Part IV.A.

<sup>224</sup> See RESTATEMENT (SECOND) OF TRUSTS § 112 (1959).

<sup>225</sup> See SOUDER & FAIRFAX, *supra* note 9, at 296.

<sup>226</sup> See *County of Skamania v. State*, 685 P.2d 576, 579 (Wash. 1984).

<sup>227</sup> See *Branson Sch. Dist. RE-A2 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998).

<sup>228</sup> See *Oklahoma Education Association v. Nigh*, 642 P.2d 230 (Okla. 1982).

<sup>229</sup> See *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 913 (Utah 1993). *But see Selkirk-Priest Basin Association, Inc. v. State*, 899 P.2d 949 (Idaho 1994) (denying environmental groups standing to make a facial challenge to the administration of the trust because they were not beneficiaries of the trust).

<sup>230</sup> See *Bartells v. Lutjeharms*, 464 N.W.2d 321, 322 (Neb. 1991).

<sup>231</sup> See *Branson Sch. Dist.*, 161 F.3d at 631.

<sup>232</sup> See *Secretary of State v. Wiesenberg*, 633 So.2d 983 (Miss. 1994) (allowing a local automobile dealer to make a constitutional challenge to the Mississippi Public Trust Tidelands legislation of 1989).

<sup>233</sup> See SOUDER & FAIRFAX, *supra* note 9, at 296.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See *supra* Part III.C.2.

decision or policy is challenged, the level of judicial scrutiny will turn on who is challenging the state's action.<sup>237</sup>

##### 5. *The Trust Property and Fund Distribution*

The property that creates the trust is called the corpus. There is little controversy that the school land trust corpus includes permanent school funds in which states place the moneys generated by the school lands.<sup>238</sup> However, there is some uncertainty about whether the land base is included in the definition of trust corpus. If the land base is outside of the intended corpus, the management of those lands would not be subject to the revenue maximization standard. While it may be difficult to completely deny the existence of some obligation for the states to manage these lands under sound stewardship principles, if they were excluded from the corpus, they would also be excluded from the trust.

This view is supported by the historical development of the modern school land trust doctrine. During the accession period, states widely presumed that public land ownership was tempo-

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<sup>237</sup> The distinction between challenges brought by lessees and beneficiaries is important for those advocating conservation of school trust lands. As noted above, challenges to lease applications are decided under an arbitrary and capricious level of review. *See supra* Part III.C.2. The arbitrary and capricious standard requires administrators to base their decisions on a review of all alternatives. *See id.* The standard, however, does not require the agency to choose one alternative over another. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971). Therefore, so long as the state considered the pros and cons of the conservation lease, it would be difficult to have a court overturn a state's denial of a conservation lease under an arbitrary and capricious level of review. Similarly, where a state has approved a conservation lease after reviewing the alternatives, challenges brought by competing lessees would be subject to the same standard and would, therefore, encounter the same difficulties. However, if the beneficiaries of the trust challenged the awarding of a conservation lease, a court would most likely evaluate the case under the prudent investor standard. *See supra* Part III.C.2. Because the prudent investor standard includes an analysis of whether the state's decision is consistent with its trust obligation, defenders of conservation leasing will be able to argue why conservation leasing is in the beneficiaries' best interest. *See infra* Part V (discussing the arguments why conservation leasing is in the beneficiaries' best interest). Therefore, where the state has awarded a conservation lease, those advocating conservation of school trust lands should argue for an arbitrary and capricious level of review. However, where the state has denied a conservation lease, those advocating for conservation should join beneficiaries to their suit, thus evoking the prudent investor standard, thereby putting the merits of the agency's substantive decision at issue.

<sup>238</sup> *See Fairfax et al.*, *supra* note 9, at 878.

rary and that states would sell the lands to private parties to generate school funds.<sup>239</sup> Because of this assumption, the state constitutions that create a trust often speak only to the permanent fund and not the lands themselves.<sup>240</sup> The question of whether the land base is included in the trust corpus has yet to be firmly settled.<sup>241</sup>

The revenues generated from these properties derive from three basic sources: “(1) royalties from the sale of nonrenewable resources . . . ; (2) revenues from the sale of trust lands; and (3) revenues from the lease or sale of renewable resources.”<sup>242</sup> Monies received from the first two noted sources go into a permanent fund, the principal of which remains “inviolable.”<sup>243</sup> Only the interest on the principal is distributed to the beneficiaries.<sup>244</sup> Conversely, the states generally channel the receipts of renewable resources directly to the beneficiaries.<sup>245</sup> Consequently, there is an incentive for the schools to prefer renewable resource exploitation to the collection of royalties and land sales.

#### 6. *Administrative Flexibility*

Although most states have adopted the general principles discussed above, underlying these principles is a level of administrative detail designed to meet the trust obligation to maximize revenues. Each state has flexibility to adopt its own form of managing and administering these lands to meet that obligation.<sup>246</sup> For example, states are free to decide the duration of the leases, the type of lease to issue for each parcel of land, the reclamation or reforestation requirements to prescribe, whether or not to irrigate the lands, and whether to sell or retain these lands.<sup>247</sup> Despite the administrative flexibility, these decisions remain largely driven by the ultimate goal of increasing revenues.

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<sup>239</sup> See *id.* at 877-78.

<sup>240</sup> See *id.* at 877.

<sup>241</sup> Utah is the only state to squarely address this issue. In *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 920 (Utah 1993), the Utah Supreme Court held that the school trust lands are part of the corpus. However, as discussed below, there are arguments to the contrary. See *infra* Part IV.A.

<sup>242</sup> Fairfax et al., *supra* note 9, at 879.

<sup>243</sup> *Id.*

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *id.*

<sup>247</sup> See SOUDER & FAIRFAX, *supra* note 9, at 67-68, 113-24.

Given the reliance states, lessees, and beneficiaries place upon the obligation to maximize revenues, in addition to the Supreme Court and state court precedents declaring a trust obligation to maximize revenues, it is unlikely that advocates of school land conservation interests will be able to convince state land managers, state legislatures, or state courts to completely replace the current school lands trust doctrine with conservation-based principles. In order to have a voice in how these lands are used, advocates of school land conservation must instead look for footholds in the administration of this doctrine to accomplish their goals. Once footholds are found, those concerned about the environmental health of these lands must then use them to establish conservation and preservation as legitimate uses in a management system dominated by the revenue maximization goal. While the ascent to that point admittedly presents some challenge, it is not impossible. The remainder of this Article points out some of those footholds and demonstrates how they can be used to ensure that environmental values become a part of school trust land management decisions.

#### IV

##### PLAYING THE MAXIMIZATION GAME: LEGISLATING CONSERVATION INTO THE CURRENT FRAMEWORK

The mandate that land managers must secure the maximum financial benefit possible from the exploitation of the resources on school lands is a primary target for critics of modern school lands management.<sup>248</sup> These critics claim that when maximizing the financial benefit to public schools conflicts with other state policies, the rigid trust doctrine requires that these other state policies be sacrificed.<sup>249</sup> The critics' concern is that preservation of scenic lands, wilderness areas, recreational areas, and scarce open spaces must give way to resource development.<sup>250</sup> Conversely, when the states include preservation interests in trust land management decisions, the beneficiaries of the trust may

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<sup>248</sup> See *supra* notes 10-11 (citing articles criticizing the obligation to maximize revenues).

<sup>249</sup> See *supra* notes 10-11 (citing articles criticizing the obligation to maximize revenues).

<sup>250</sup> See *supra* notes 10-11 (citing articles criticizing the obligation to maximize revenues).



claim they are being forced to subsidize preservation interests through the loss of revenues.<sup>251</sup>

These conflicting interests create a dilemma for state land managers and have led many of them to conclude that preservation of school lands and compliance with the trust doctrine are nearly mutually exclusive options.<sup>252</sup> However, this dilemma is not irreconcilable. Those concerned about preservation of school land resources have two options. They can pursue legislation requiring the inclusion of environmental interests in school land management decisions, or they can affirmatively assert conservation as a legitimate use of school trust lands by purchasing leases through the competitive bidding process.<sup>253</sup> This Part explores the costs, advantages, and disadvantages of three distinct legislative strategies. The ability of conservation groups to purchase leases through competitive bidding lease programs and the use of the courts to enforce their right to participate in leasing programs is discussed below in Part V.

There are three possible ways state legislatures can affect the administration of the school lands trust doctrine without violating the obligation to maximize revenues. First, state legislatures can use traditional trust principles to support reform legislation that addresses the way trustees manage the trust lands. Second, Congress, and in most situations the state legislatures, can pass laws of general applicability that superimpose environmental planning requirements over the administration of the trust. Third, state legislatures can delegate the authority to school land managers to initiate inter-agency transfers of trust lands.

#### A. *Supporting School Land Reform Legislation with Common Law Trust Principles*

The obligation to maximize revenues from school lands has become firmly rooted in western public land law jurisprudence

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<sup>251</sup> See *Colorado State Bd. of Land Commissioners v. Colorado Mined Land Reclamation Bd.*, 809 P.2d 974 (Colo. 1991).

<sup>252</sup> See Hager, *supra* note 5, at 39.

<sup>253</sup> Aside from these two options, those concerned with the preservation of resources on state school lands can also purchase the land from the state. However, since the early 1800s, states have been reluctant to sell school lands because they provide a secure source of perpetual monies. Consequently, sales of school lands are uncommon. Therefore, this Article does not discuss the purchase option because the opportunity to purchase environmentally sensitive school trust land is limited.

through judicial interpretations, legislative enactments, and administrative rulemaking.<sup>254</sup> However, the application of the modern school land trust doctrine is also subject to traditional trust law principles.<sup>255</sup> Therefore, to survive legal challenges, legislatures should support efforts to reform the school lands trust doctrine to incorporate environmental concerns with trust law principles. Leaseholders and the recipients of school trust land revenues are sure to be opposed to such attempts by state legislatures to reform the administration of the school trust lands to incorporate environmental concerns because environmental interests are often incompatible with resource extraction – the practice that funds school budgets.

State legislatures that are so inclined can use trust principles in three ways to support reform legislation that would incorporate environmental interests into the current administration of school lands. As suggested here, each reform measure is more intrusive than the next. First, the state legislature can independently examine its own enabling act and constitution to determine whether a trust obligation actually exists and, if it does, for what purpose and on what terms. Second, state legislatures can take advantage of the ambiguity in their state constitutions and enabling acts to clarify what constitutes trust property. Third, they can require land managers to consider environmental concerns because trustees have a duty to manage the trust lands for the long-term returns, and conservation practices protect trusts for future generations.<sup>256</sup>

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<sup>254</sup> See *supra* Part III.B.

<sup>255</sup> See *supra* Part III.C.

<sup>256</sup> These arguments are not limited to supporting legislative action. They can also be used to support legal challenges to the state's administration of the school land resource. They are presented here in the legislative context because standing may present an obstacle to environmental plaintiffs challenging the way the states are managing the trust's resources. See *Selkirk-Priest Basin Ass'n, Inc. v. State*, 899 P.2d 949 (Idaho 1994) (denying environmental groups standing to challenge the administration of the trust because they were not beneficiaries of the trust). *But see National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993) (noting that environmental groups have standing because they can show direct injury from state administration of trust properties). However, plaintiffs who can successfully obtain standing should consider using these arguments in their attempts to have the courts redefine the contours of the school trust land jurisprudence.

### 1. *Redefining the Purpose of the Trust*

One way of incorporating environmental concerns into the management of school lands is to pass legislation that clarifies whether the state's constitution and enabling act requires the state to manage the trust lands under a restrictive obligation to maximize revenues.<sup>257</sup> The instrument creating the trust defines the trust's purpose.<sup>258</sup> Under the school lands grants, the enabling acts and state constitutions are the defining instruments. Because the enabling acts and state constitutions prior to the New Mexico–Arizona Enabling Act are silent on the trust, or at least do not limit its purpose solely to revenue maximization, a state legislature can clarify whether its constitution and enabling act allow for the consideration of environmental concerns in the management of state school lands.

This approach closely resembles the arguments advanced by Professors Fairfax, Souder, and others for abandoning the judicially created trust doctrine on the grounds that state court adoption of the Supreme Court's interpretation of the New Mexico–Arizona Enabling Act is illegitimate because each state should only be bound by the terms of its own enabling act and constitution.<sup>259</sup> However, this argument does not have to be directed solely at the courts. A willing legislature may base school land management reform legislation on this line of reasoning as well. For those states whose courts have adopted the *Lassen* holding without independently construing their own state's enabling acts and constitutions, the state legislatures can pass legislation in which the nature of the trust is individually described in terms of the language of their own constitutions and enabling acts grants.<sup>260</sup> In essence, the legislatures would take it upon themselves to define the nature of the trust, thus overruling any prior decisions made by the courts.

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<sup>257</sup> The proposition that a court, or legislature, should begin with its own constitution and enabling act when deciding the terms and conditions of the trust is not novel. In 1986, the Supreme Court noted that the question of whether a statehood statute creates a federal trust requires a case-specific analysis of the particular state's enabling statute, because the history of each state's admission to the Union is unique and Congress seems to have experienced an evolution in its legislative approach to school land grants. See *Papasan v. Allain*, 478 U.S. 265, 289-90 n. 18 (1986).

<sup>258</sup> See generally RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

<sup>259</sup> See Fairfax et al., *supra* note 9, at 853.

<sup>260</sup> See *supra* notes 10-11 (citing articles criticizing the obligation to maximize revenues).

Arguably, legislatures willing to take this approach may need to seek approval from Congress or the beneficiaries. Under traditional trust principles, the fiduciary cannot modify the terms of the trust without the consent of the settlor.<sup>261</sup> As noted by the Arizona State Supreme Court, “any limitation upon the disposition of public land provided in the Enabling Act is absolutely binding on the state of Arizona, unless the Congress of the United States may consent to a change, and any statute or amendment to the state Constitution in conflict therewith is null and void.”<sup>262</sup> Therefore, a legislature wanting to modify the terms of the school land trust would need the consent of Congress.

In addition, this course of action raises separation of powers concerns for those states with courts that have adopted the obligation to maximize revenues. It is unclear whether the courts would treat legislation that overrules judicial adoption of *Lassen* the same as legislative enactments directed at correcting past judicial interpretations of statutes that the legislature did not feel were consistent with legislative intent. For those states where there have only been intimations of an obligation to maximize revenues,<sup>263</sup> the separation of power concerns do not arise. However, where *Lassen* has been adopted, the courts may not recognize the legislatures’ ability to effectively overrule their later decisions, thus precluding this reform measure.

One court has already recognized the states’ ability to define the trustee’s duties under the school lands grant. In 1998, the Tenth Circuit Court of Appeals decided *Branson School District v. Romer*<sup>264</sup> and recognized Colorado’s ability to define the terms and conditions of the trust imposed by the Colorado En-

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<sup>261</sup> See *Boice v. Campbell*, 248 P. 34 (Ariz. 1926) (holding that a state cannot modify the terms of the school land trust without the consent of Congress); 76 AM. JUR. 2D *Trusts* § 91 (1992) (noting that the amount of discretion to modify the terms of the trust often depends upon the instrument creating the trust and that sometimes the consent of the beneficiary is also needed to modify the terms of the trust). For a discussion of what constitutes the trust instrument in school land grants, see Fairfax et al., *supra* note 9, at 853-55.

<sup>262</sup> *Boice*, 248 P. at 35.

<sup>263</sup> Oregon and North Dakota have not had a case directly adopting *Lassen*. Rather, their state attorney generals have issued formal opinions stating that if the issue of maximizing revenue were litigated, *Lassen* would apply. These opinions have effectively prohibited the legislature from passing environmental legislation that would modify the terms of the trust as construed by the *Lassen* Court. See *supra* note 31 and accompanying text.

<sup>264</sup> 161 F.3d 619 (10th Cir. 1998).

abling Act.<sup>265</sup> *Branson* involved a challenge by three rural school districts and two school children to an amendment to the Colorado Constitution.<sup>266</sup> The amendment, passed through a ballot initiative, clarified the terms of the trust obligation on school lands by requiring the state land board to manage the school trust lands under “sound stewardship” principles.<sup>267</sup> The relevant portion of the amendment declared:

[T]he economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations. In recognition of these principles, the board shall be governed by the standards set forth in this section 10 in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.<sup>268</sup>

In district court, the plaintiffs argued that this provision violated the exclusive federal mandate to maximize revenues from school lands recognized in *Lassen*, and therefore violated the Supremacy Clause.<sup>269</sup> On cross motions for summary judgment, the court disagreed with the plaintiffs’ argument.<sup>270</sup> On appeal,

<sup>265</sup> See Colorado Enabling Act, ch. 139, §§ 7, 14, 18 Stat. 475, 476 (1875).

<sup>266</sup> See Amendment 16, 1997 Colo. Sess. Laws 2399. The ballot initiative presented three revisions to Article IX of the Colorado Constitution, the article that pertains to school trust lands.

The first set of revisions set some general parameters for the use of public school funds. . . . [COLO. CONST., Art. IX, § 3]. The second set of revisions involves a wholesale scrapping of the old structure of the three-member paid State Board of Land Commissioners that had managed the school lands for generations. Instead, under Amendment 16, the board would be composed of five term-limited members who would serve without a salary, would have a constitutional protection from personal liability for any negligence in office, and would be selected on the basis of certain interest-group constituencies. See *id.* § 9. The third section of Amendment 16 contains most of the substantive core of the ballot measure, and it is this section which has prompted the crux of the plaintiffs’ challenges. The section wipes out the previous requirement that the land board manage its land holdings “in such a manner as will secure the maximum possible amount” for the public school fund. See *id.* § 10(1). Instead, the third section requires the new land board to manage its land holdings “in order to produce reasonable and consistent income over time.” See *id.*

*Branson Sch. Dist. RE-82*, 161 F.3d at 626-27.

<sup>267</sup> See *Branson Sch. Dist.*, 161 F.3d at 638.

<sup>268</sup> *Id.* at 638; see *infra* Part IV.B (discussing how laws generally applicable to the trustee can modify the state’s trust obligation).

<sup>269</sup> See *Branson School District RE-82 v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997).

<sup>270</sup> See *id.* at 1517.

the Tenth Circuit affirmed both the lower court's decision and its reasoning.<sup>271</sup> After an independent review of the Colorado Enabling Act,<sup>272</sup> the court found no evidence that Congress intended the state to manage these lands for the maximization of revenues.<sup>273</sup> The court did note that a trust existed, but concluded that the amendment was not in direct conflict with the normal duties of a trustee.<sup>274</sup> Consequently, the court upheld the constitutionality of the amendment.<sup>275</sup>

The court agreed that the school lands were held in trust by the state for the plaintiffs' benefit; however, the court noted that "for each provision [in the amendment] there is a 'fairly possible' construction that reads the ballot measure in conformity with Colorado's trust obligations."<sup>276</sup> Moreover, the court found that the Colorado Enabling Act did not impose upon the state a specific duty to maximize revenues.<sup>277</sup> Therefore, it recognized the state's ability to adopt "a new approach to achieving the state's continuing obligation to ensure that the school lands support the common schools" so long as it did not conflict with its fiduciary duty to manage these lands in the interests of the schools.<sup>278</sup>

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<sup>271</sup> See *Branson Sch. Dist.*, 161 F.3d at 639.

<sup>272</sup> See *id.* The court's analysis is encouraging. Unlike other courts that have addressed these issues, the *Branson* court, for the first time since *Lassen*, began its analysis with the state's own constitution and enabling act rather than with a United States Supreme Court decision based on other states' constitutions and enabling acts. Perhaps, the *Branson* decision signals a new trend in judicial treatment of these issues.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> *Id.* at 638. Because the court acknowledged that a trust duty existed but that the stewardship principle was not in conflict with this duty, Colorado was able to pass the amendment without seeking permission from Congress.

<sup>277</sup> See *id.* at 639. Colorado is fortunate in this regard. Unlike most western states, Colorado's courts had not adopted the holdings in *Lassen* and its progeny that the state has a fiduciary duty to maximize revenues. There had been intimations that an obligation to maximize revenues existed, however no court had definitively stated the trust required such a rigid rule. See *Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd.*, 809 P.2d 974 (Colo. 1991). As a consequence, the court did not need to address whether the passage of the amendment presented the separation of powers issues noted above. Oregon and North Dakota are the only other states that have not had a case adopting the obligation to maximize revenues. See *supra* note 28 and accompanying text.

<sup>278</sup> *Branson Sch. Dist.*, 161 F.3d at 639. The court did not see a conflict between the obligation to manage these lands for the benefit of schools and stewardship principles because "[a] trustee is expected to use his or her skill and expertise in managing a trust, and it is certainly fairly possible for a trustee to

Although Colorado was able to avoid the separation of powers and consent issues, the *Branson* case nonetheless lends support to the theory that a rulemaking body, whether the voters of a state or the state legislature, can define the trust obligation around environmental as well as economic concepts.

## 2. *Clarifying the Corpus of the Trust*

Due to the reliance that courts and legislatures historically have placed on the obligation to maximize revenues from these lands, many states may view defining the purpose of the school lands trust to exclude revenue maximization as a radical measure. For legislatures unwilling to redefine the purpose of the trust, a less intrusive reform measure would be for the legislature to pass laws that clarify whether the state lands are a part of the corpus of the trust.<sup>279</sup>

When Congress originally granted the school lands to the states, the states' prevailing management philosophy was to sell the school lands and place the funds from those sales into a permanent school fund.<sup>280</sup> Consequently, the language in the state constitutions that creates the trust obligation to protect and maximize revenue often focuses on the state's permanent fund, not the school lands.<sup>281</sup> Because most state constitutions fail to expressly, or implicitly, mention the school land as part of the trust, legislatures can take advantage of this ambiguity to distinguish the management of the school lands from the permanent school funds. State legislatures can independently construe their own state enabling acts and constitutions to exclude the land base from the corpus of their trust. This would limit the application of the duty to maximize revenues as adopted by the *Lassen* court and its progeny to just the permanent fund.

The Utah Supreme Court, the only court to discuss whether such a distinction can be made, rejected the proposition. In 1993,

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conclude that protecting and enhancing the aesthetic value of a property will increase its long-term economic potential and productivity. The trust obligation, after all, is unlimited in time and a long-range vision of how best to preserve the value and productivity of the trust assets may very well include attention to preserving the beauty and natural values of the property." *Id.* at 638. The concept that preservation of these lands is fundamental to fiduciary obligations is explored *supra* Part IV.A.3.

<sup>279</sup> See *supra* Part III.C.5.

<sup>280</sup> See *supra* Part II.C.3.

<sup>281</sup> See *supra* Part II.C.4.

in *National Parks and Conservation Association v. Board of State Lands*, the court noted that a “distinction between trust duties owed during possession of the land and trust duties owed on disposition of the land is essentially an argument that a trustee can use the trust corpus for its own purposes during possession and that the trust obligations attach *only* on disposition of trust assets or realization of proceeds therefrom.”<sup>282</sup> The court rejected the possibility that the land is free from the trust obligation to maximize revenues because the enabling act did not explicitly distinguish the land base from the revenues derived from the land base.<sup>283</sup> Therefore, the management of the school trust land fell under the same trust obligation as the management of the proceeds derived from these lands.<sup>284</sup>

However, this analysis is surely not to be the final word on this issue.<sup>285</sup> In addition to having no binding effect on other states, the decision of the Utah Supreme Court did not address whether the state could manage the land under a separate trust obligation, with different principles than that of the permanent school fund.<sup>286</sup> Further, the court could not point to any language in the state enabling act or constitution that said the land was subject to a trust. Therefore, the issue of whether the school lands are a part of the same trust that applies to the permanent fund remains an open question that a state legislature could answer.

### 3. *Clarifying the Land Manager's Duty*

For state legislatures unwilling to resolve the ambiguity as to what constitutes the trust corpus, the least intrusive means to incorporate environmental concerns into the administration of the trust is to require land managers to consider conservation measures in the management of school lands. The school lands trust

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<sup>282</sup> *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 920 n. 7 (Utah 1993) (emphasis added).

<sup>283</sup> *See id.*

<sup>284</sup> *See id.*

<sup>285</sup> For a critical discussion of the Utah Supreme Court's decision, see Bowlin, *supra* note 11, at 945-46.

<sup>286</sup> When filling in the details of a separate trust obligation, states could look to the recent amendment to the Colorado Constitution at issue in the *Branson* case. *See supra* note 264 and accompanying text.



doctrine grants the legislature the authority to pass such legislation.<sup>287</sup>

Under traditional trust principles, the state land manager, as a trustee, has a duty to manage the lands with undivided loyalty.<sup>288</sup> In addition, the state land manager has a duty to manage the trust corpus in a manner that ensures sustainable long-term returns.<sup>289</sup> Thus far, outside of the *Branson* decision, courts have done little to clarify the relationship between how the trustee's duties comport with the need to preserve the school land resource.<sup>290</sup> Hence, state legislatures have an opportunity, through reform legislation, to emphasize the preservation side of the state land manager's fiduciary duty.

In deciding permissible uses of the school lands, the state land managers have traditionally favored present consumption and immediate distribution of funds at the expense of long-term preservation.<sup>291</sup> State legislatures have the ability to change this. The Supreme Court has held that short-term gains are an inappropriate measure for land management decisions under the school lands trust, even when the use indirectly benefits the ben-

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<sup>287</sup> Authority in this sense means legal support to modify characteristics of the school land trust. The general authority of the legislature to pass laws directing the management of the school lands derives from the state constitutions.

<sup>288</sup> See *supra* Part III.C.2.

<sup>289</sup> See *supra* Part III.C.3.

<sup>290</sup> See *supra* Part IV.A.1. *Branson* is the only post-*Lassen* decision that has addressed the question of whether a state's citizens could clarify the terms of the school lands trust. See *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). Most of the post-*Lassen* decisions follow a similar pattern. First, the court inquires whether a trust exists. Courts generally spend little time on this question by pointing to *Lassen* as the answer. See, e.g., *County of Skamania v. State*, 685 P.2d 576, 580 (Wash. 1984). Second, after quickly concluding a trust does exist, the court spends the rest of its time analyzing whether a certain state action was in compliance with its trust obligation. See *Fairfax et al.*, *supra* note 9, at 848 (noting that the bulk of the modern cases concern the decisions of the state land commissioner).

<sup>291</sup> Using Utah as an example, Professors Fairfax and Souder show how perpetual trust fund management that enables long-term preservation of trust resources can provide greater overall financial returns for beneficiaries than would immediate distribution of trust revenues which require concurrent liquidation of trust assets. See *SOUDER & FAIRFAX*, *supra* note 9, at 95-98. They note, however, that the administrative fees, which in Utah is based on both royalties and interest payments, can reduce the benefits of preservation just enough to justify immediate distribution of funds and liquidation of trust assets. See *id.* at 97. Thus, "while consuming the value of the trust corpus is explicitly prohibited in most states, the implicit structure for trust management in many states nevertheless leads to this result." *Id.* at 69.

eficiary.<sup>292</sup> Consequently, state legislatures can require that, where preservation of resources for future use makes better economic sense, the land managers must forego short-term gains from resource extraction in lieu of long-term benefits from conservation.

Arguably, there is an inherent tension between the duty to manage these lands for long-term benefits and the trust obligation to seek the highest remunerative value from the school land resource. Due to the uncertainty in commodity prices and discount rates, land managers currently justify short-term sales of school land resources by suggesting that liquidation and reinvestment of the monies in the school permanent fund will ultimately result in a greater return than preserving the resource for future sale.<sup>293</sup> However, such an analysis hardly produces exact results upon which to base resource allocations. By using trust law principles, the legislature can emphasize that these judgments should favor long-term preservation, even where there is a risk that the short-term gains would, in hindsight, have been the more prudent investment. As the Tenth Circuit explained in the *Branson* case, “a trustee is expected to use his or her skill and expertise in managing a trust, and it is certainly fairly possible for a trustee [or a legislature] to conclude that protecting and enhancing the aesthetic value of a property will increase its long-term economic potential and productivity.”<sup>294</sup>

Therefore, state legislatures concerned with the lack of environmental considerations in current school land management could easily rectify this deficiency by passing legislation that explicitly directs school land managers to consider conservation as a viable use of trust lands.

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<sup>292</sup> See *Ervien v. United States*, 251 U.S. 41, 44 (1919).

<sup>293</sup> See *SOUDER & FAIRFAX*, *supra* note 9, at 214-20 (discussing the relationship between how future value of mineral resources is determined and the decision to sell or retain). It is ironic that this “one in the hand is better than two in the bush” philosophy that permeates the conventional wisdom of school land management is what led several states in the first instance to abolish the transfer of school land grants into private holdings and to impose a protective trust to ensure sustainable funds for schools.

<sup>294</sup> *Branson Sch. Dist.*, 161 F.3d at 638.

#### 4. *The Advantages and Disadvantages of Relying Upon Common Law Trust Principles for Reform*

Trust principles can be an effective means of overcoming the land manager's dilemma because legislatures can easily incorporate environmental values into the existing structure. The advantage in basing reform legislation on trust principles is that such legislation can conform to the system of land management that has been in place for the last thirty years without disturbing its basic structure. In addition, because the legislation is based on common law principles, court decisions enforcing the legislative mandates become more predictable.

The use of trust principles as a solution to the land manager's dilemma has its disadvantages as well. First, these strategies do little to alleviate the trust beneficiaries' concerns that they will bear the costs of preservation through lost revenues because these strategies do not shift the costs of preservation away from the trust beneficiaries. Second, inherent in this strategy is the fact that such changes must be acceptable to those who are parties to the trust – both schools and land managers. It is unlikely that outside pressures from environmental groups will force the legislatures to change their states' management philosophies. For trust principles to incorporate environmental interests, pressure will need to come from those to whom the trustees are most accountable – the schools. However, the schools' probable concern that they will be forced to bear the opportunity cost of preservation reduces the likelihood that such pressure will be effective.

#### B. *Environmental Statutes of National Importance*

Another legislative approach to incorporating environmental values into the management of school trust lands is to impose environmental requirements on the administration of the school lands through environmental statutes of nationwide importance. The United States Supreme Court has held that statutes promulgated by Congress that address issues of nationwide importance will trump the specific trust mandate to maximize revenues.<sup>295</sup>

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<sup>295</sup> See *Case v. Bowles*, 327 U.S. 92, 100 (1946); *Board of Natural Resources v. Brown*, 992 F.2d 937, 944 (9th Cir. 1993).

### 1. *Federal Laws of National Importance*

Both Congress and the affected state must consent to modify the terms of the trust as set forth in the state's enabling act.<sup>296</sup> However, this is not the only means by which Congress can alter the obligation to maximize revenues. It can also unilaterally modify the trust through the enactment of laws of national importance.

In *Case v. Bowles*,<sup>297</sup> the United States Supreme Court made clear that valid legislation enacted by Congress will control where that legislation conflicts with the state's trust obligation to secure the maximum financial benefit for public schools. In *Case*, the administrator of the Office of Price Administration, which controlled commodity prices during World War II, sought to prevent the Washington State Commissioner of Public Lands from selling timber on state school lands above a fixed price set by the federal government.<sup>298</sup> The Court declared that Washington's timber sales were subject to the federal price controls, despite the fact that the state would have to sell the timber for less than its maximum revenue generating potential.<sup>299</sup> Commenting on the nature of the school lands grants, the Supreme Court noted that "[n]o part of all the history concerning these grants, however, indicates a purpose on the part of Congress to enter into a permanent agreement with the States under which States would be free to use the lands in a matter which would conflict with valid legislation enacted by Congress in the national interest."<sup>300</sup>

The *Case* decision created an important opening in the seemingly impenetrable trust obligation to maximize revenue.<sup>301</sup>

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<sup>296</sup> See *Boice v. Campbell*, 248 P. 34, 35 (Ariz. 1926).

<sup>297</sup> 327 U.S. 92, 100 (1946).

<sup>298</sup> See *Case*, 327 U.S. at 95-96.

<sup>299</sup> See *id.* at 102.

<sup>300</sup> *Id.* at 100.

<sup>301</sup> Not all courts, however, agree that broad general statutes such as environmental legislation always take precedence over the specific trust mandate. In *Utah v. Kleppe*, 586 F.2d 756 (10th Cir. 1978), the Tenth Circuit was called upon to decide a conflict between the Taylor Grazing Act and Utah's obligation under the school trust doctrine. In holding that school trust doctrine prevailed, the court noted:

Where there are two statutes upon the same subject, the earlier being special [like a state enabling act pertaining to the school trust] and the latter being general [like the Taylor Grazing Act] it is settled law that the special act remains in effect as an exception to the general act unless abso-

*Board of Natural Resources v. Brown*<sup>302</sup> offers a recent example of how Congress can use *Case* as support to enforce federal environmental standards on state school lands. In 1990, Congress enacted the Forest Resources Conservation and Shortage Relief Act,<sup>303</sup> which restricted the foreign export of all domestic timber, in an attempt to control the amount of timber harvesting on state and federal lands.<sup>304</sup> Washington was the state most affected by the statute because many of the state's timber sales from school lands were to Japanese companies at prices above the domestic rate.

Washington challenged the enforcement of the Act, claiming that it interfered with its trust mandate to obtain the greatest economic benefit from the school lands.<sup>305</sup> The Ninth Circuit rejected the state's argument that Congress had a continuing obligation to act in the best interests of the federal grant land trust, an obligation that included selling timber harvested from trust land at full market value.<sup>306</sup> Instead, the court ruled that "*Case* stands for the proposition that 'valid legislation enacted by Congress' trumps the Boards' ability to use the trust lands in whatever way they wish."<sup>307</sup>

The decisions in *Case* and *Brown* demonstrate a hierarchy of federal mandates. The power of the state to maximize its return from its school lands is subordinate to more important federal objectives. Accordingly, environmental standards established under the Clean Air Act (CAA),<sup>308</sup> Clean Water Act (FWPCA),<sup>309</sup> and other pollution control statutes are applicable

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lute incompatibility exists between the two, and all matters coming within the scope of the special statute are governed by its provisions.

*Id.* at 768. This decision was reversed by the United States Supreme Court on other grounds. *See Andrus v. Utah*, 446 U.S. 500 (1980). However, because the Supreme Court failed to comment on the Tenth Circuit's analysis in regard to the special/general applicability distinction, one could argue that the Court left open the question of whether state enabling acts are special legislation that can override general legislative enactments.

<sup>302</sup> 992 F.2d 937 (9th Cir. 1993).

<sup>303</sup> Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. § 620 (1994).

<sup>304</sup> *See Brown*, 992 F.2d at 944.

<sup>305</sup> *See id.*

<sup>306</sup> *See id.*

<sup>307</sup> *Id.*

<sup>308</sup> Air Pollution Control Act, 42 U.S.C. § 7401 et seq. (1994).

<sup>309</sup> Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 et seq. (1994).

to state school lands. The Endangered Species Act (ESA)<sup>310</sup> provides the best example of how federal environmental statutes can infuse environmental interests into school land management decisions.

## 2. *The Endangered Species Act*

Section 9 of the ESA requires a permit from the United States Fish and Wildlife Service (USFWS) if an action has the potential to “take” a listed threatened or endangered species.<sup>311</sup> The United States Supreme Court recently upheld an agency definition of the term “take” to include habitat destruction as well as physical harm.<sup>312</sup> Consequently, the range of actions possibly covered under the ESA is quite broad. The Act defines covered entities to include state agencies, which include any state department, board, commission, or other governmental entity responsible for the management of fish, plant, or wildlife resources within a state.<sup>313</sup> Therefore, permit approval must be obtained from the USFWS for any proposed action on state school lands that will potentially result in a taking of endangered or threatened animals.

To obtain a permit, the state must prepare a habitat conservation plan. This plan outlines probable impacts and mitigation measures for the proposed taking and justifies selection of the proposed action over less destructive alternatives.<sup>314</sup> After the conservation plan is submitted, the USFWS cannot issue the permit unless it finds, after an opportunity for public review is provided, that: 1) the proposed taking of an endangered species will be incidental to an otherwise lawful activity; 2) the permit applicant will minimize and mitigate the impacts of the taking to the maximum extent practicable; 3) the applicant will assure adequate funding for its conservation plan; and 4) the taking will not appreciably reduce the likelihood of the survival of the species.<sup>315</sup>

While the ESA has not prevented a lease or sale of school lands, it makes school lands managers more accountable to scien-

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<sup>310</sup> Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 et seq. (1994).

<sup>311</sup> 16 U.S.C. § 1539 (1994).

<sup>312</sup> See *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995).

<sup>313</sup> See 16 U.S.C. §§ 1532(13), (18).

<sup>314</sup> See 16 U.S.C. § 1539(a)(2)(A).

<sup>315</sup> See 16 U.S.C. § 1539(a)(2)(B).

tific principles<sup>316</sup> and requires them to disclose the effect of their actions to the public through the habitat conservation planning process.<sup>317</sup> The conservation plan requirement of the ESA<sup>318</sup> has the potential to improve trust land management decisions because it requires a land manager to recognize environmental impacts and mitigate those which she might have otherwise ignored under modern school trust law doctrine. This positive impact on school lands is not unique to the ESA. As noted above,<sup>319</sup> other command and control regulatory statutes such as the Clean Water Act<sup>320</sup> or Clean Air Act<sup>321</sup> can also infuse environmental values into the management of school trust lands. Consequently, through environmental statutes of national importance, Congress can impose environmental requirements on school trust lands.

### 3. *State Laws of Statewide Importance*

While it is clear that federal laws of general applicability apply to the management of state school lands, the question of whether state legislatures can impose environmental requirements through laws of statewide importance is less settled. The prevailing trend appears to be to recognize that state environmental laws of general application can impose requirements to consider the environmental effects of school land management decisions.

The Colorado State Supreme Court confronted this issue in *Colorado State Board of Land Commissioners v. Colorado Mined Land Reclamation Board*.<sup>322</sup> In what most commentators refer to as the *Conda* case, the court concluded that school trust lands

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<sup>316</sup> See 16 U.S.C. § 1533(b)(1)(A) (requiring the designation of a species to be based upon scientific data).

<sup>317</sup> See 16 U.S.C. § 1539(a)(2)(B) (requiring the habitat conservation plan be open for public review). There has yet to be a court ruling reconciling the ESA with the school lands trust obligation. However, several state attorney general opinions have accepted the notion that while the ESA may hinder efforts to maximize revenues, it does not substantially burden the state from achieving its obligation under the school lands trust doctrine. See, e.g., 1996 Op. Wash. Att'y Gen. 11 (1996).

<sup>318</sup> See 16 U.S.C. § 1539(a)(2)(A).

<sup>319</sup> See *supra* Part IV.B.1-2.

<sup>320</sup> Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 et seq. (1994).

<sup>321</sup> Air Pollution Control Act, 42 U.S.C. § 7401 et seq. (1994).

<sup>322</sup> 809 P.2d 974 (Colo. 1991).

are not exempt from reasonable state legislation.<sup>323</sup> The issue arose when the state Land Board granted Wesley D. Conda, Inc. (“Conda”) a limited impact mining permit to mine a parcel of school lands in Boulder County.<sup>324</sup> Before the permit was issued, the Colorado legislature passed the Colorado Mined Land Reclamation Act, which conditioned mining permits upon compliance with local zoning and subdivision regulations.<sup>325</sup> When Conda’s limited permit was issued, the company agreed to be bound by all the provisions of the Reclamation Act.<sup>326</sup> When Conda applied to the Reclamation Board, as required by the legislation, to convert the limited use permit to a regular permit, thus increasing the acreage of the proposed mining operations, the Reclamation Board denied the permit on the grounds that Conda’s operations would violate county zoning regulations.<sup>327</sup>

The State Land Board challenged the Reclamation Board’s denial of Conda’s permit on the ground that the Reclamation Act interfered with the Land Board’s trust duty to manage the school lands to obtain maximum revenue.<sup>328</sup> Upholding the Reclamation Board’s decision to deny Conda’s permit, the court ruled that the Land Board, like all other state agencies, is subject to reasonable legislative regulation.<sup>329</sup> Moreover, the Colorado Supreme Court noted:

The constitutional grant of authority to the School Land Board to dispose of school lands in such manner as will secure the “maximum possible amount therefor,” was not intended as a license to disregard reasonable legislative regulations simply because compliance with such regulations might reduce the amount of revenues otherwise available from the leasing of school lands.<sup>330</sup>

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<sup>323</sup> See *Colorado State Bd. of Land Comm’rs v. Colorado Mined Land Reclamation Board*, 809 P.2d at 987. This case was decided prior to *Branson*, which upheld the passage of a Colorado constitutional amendment setting forth a stewardship principle in lieu of the obligation to maximize revenues. See *Branson Sch. Dist.*, 161 F.3d at 638.

<sup>324</sup> See *Mined Land Reclamation Board*, at 977.

<sup>325</sup> See *id.* (citing Colorado Mined Land Reclamation Act, COLO. REV. STAT. §§ 34-32-109(6), 34-32-115 (1984)).

<sup>326</sup> See *id.* at 977-78.

<sup>327</sup> See *id.* at 978.

<sup>328</sup> See *id.* at 985.

<sup>329</sup> See *id.* at 987.

<sup>330</sup> *Id.* (citations omitted).



Thus, the court acknowledged that the obligation to maximize revenues was not unconditional. The court decided that state statutes of general importance, like federal laws of national importance, displace the state's strict obligation to maximize revenues.

Colorado is not the only state to adopt the rule that state environmental laws are applicable to the management of its school lands. In *Noel v. Coel*,<sup>331</sup> the Washington State Supreme Court held that the State Environmental Policy Act applied to decisions to sell timber from state school trust lands.<sup>332</sup> The court ruled that the state Department of Natural Resources must prepare an environmental impact statement for any timber sale from school trust lands that would significantly affect the environment, regardless of the impact on the economics of the sale.<sup>333</sup>

The Utah Supreme Court, in *National Parks & Conservation Association v. Board of State Lands (National Parks)*, acknowledged that trustees clearly have a duty to act according to general state laws despite the trust obligation to maximize economic return from school lands.<sup>334</sup> In *National Parks*, an environmental group challenged the state's decision to exchange school lands located in Capitol Reef National Park to complete paving of the Burr Trail.<sup>335</sup> While the court refused to require the state to take into account the scenic, aesthetic, and recreation values in all school trust land decisions, it did recognize that in some instances "it would be unconscionable not to preserve and protect those

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<sup>331</sup> 655 P.2d 245 (Wash. 1982).

<sup>332</sup> It could be argued that the Washington Supreme Court's decision in *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984) overrules this decision, because in *Skamania* the court invalidated a law passed by the legislature on the grounds it conflicted with the trust. However, this argument fails to make a key distinction between the type of statutes involved. Unlike the State Environmental policy Act in the *Noel* case, the law invalidated in *Skamania* allowed timber harvesters to breach their sale agreements with the state without having to pay a penalty. Because these sales were on school trust lands, the beneficiaries claimed that failing to hold the timber harvesters to their contracts, or at the minimum to a penalty should they breach those contracts, was a violation of the state's trust obligation. Accordingly, the statute at issue focused exclusively on the state's trust lands and was not a law of general applicability.

<sup>333</sup> See *Noel*, 655 P.2d at 249.

<sup>334</sup> *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 921 n.9 (Utah 1993).

<sup>335</sup> See *id.* at 911.

values.”<sup>336</sup> The court noted that while the land manager’s primary objective must be “to maximize the monetary return of school trust lands,”<sup>337</sup> general laws enacted pursuant to the state’s police power are not likely to be in conflict with the terms of the trust.<sup>338</sup>

#### 4. *The Advantages and Disadvantages of Broad Based Environmental Legislation*

Using state and federal environmental laws as a solution to the school land manager’s dilemma has several advantages. First, unlike the trust principles mentioned above,<sup>339</sup> this strategy can be an effective tool for those outside of the trust relationship to affect trust land decisions. Moreover, many environmental regulations involve a public disclosure or participation element in the decision making process. Second, environmental statutes often provide standards by which the courts can measure compliance. Third, enforcement mechanisms are already in place to ensure compliance by state land managers. For example, many of the command and control environmental statutes contain citizen suit provisions that allow private citizen groups to enforce the requirements of the particular act.<sup>340</sup>

Using broad-based environmental statutes to infuse environmental values into the management of school lands has several limitations as well. First, difficulties exist with passing environmental legislation that is specific enough to address the issues of school land management while maintaining its status as a statute of statewide or national importance. To qualify as a statute of nationwide or statewide importance, the environmental legislation must address a broad nationwide or statewide problem.<sup>341</sup> If legislatures tailor the legislation too narrowly to correct specific environmental deficiencies in school land management,<sup>342</sup> the

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<sup>336</sup> *Id.* at 921.

<sup>337</sup> *Id.* at 920.

<sup>338</sup> *See id.* at 921 n.9.

<sup>339</sup> *See supra* Part IV.A.

<sup>340</sup> *See, e.g.,* Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365(a) (1994) (provision of the Clean Water Act allowing citizens to file private civil actions in United States district court to enforce effluent limitations in national pollution elimination system (NPDES) permits).

<sup>341</sup> *See supra* Part IV.B.1 & 3.

<sup>342</sup> For example, legislation prescribing the amount of cattle and location of grazing on state school trust lands would not be a statute of statewide interest because it is specific to school trust lands. However, a statute that required

legislation may lose its status as a statute of nationwide or state-wide importance, thus losing its ability to trump the obligation to maximize revenues. Second, even where the legislature is successful in passing environmental statutes, it is seldom that such statutes will prohibit resource extraction.<sup>343</sup> Consequently, while mitigation of environmental impacts can be a victory in itself for environmental groups, preservation is often a difficult goal to achieve through these statutes.<sup>344</sup> Third, despite the superseding nature of broad based environmental legislation, the specific law requiring economic maximization will remain the dominant force in school land management decisions. As illustrated above by the *Conda* case, environmental statutes only temper the state's obligation to maximize revenues – they do not replace it.<sup>345</sup> Therefore, while environmental statutes certainly help mitigate adverse effects, they are not likely to result in preservation of the school land resource.

### C. *Inter-agency Sales of School Land*

The use of statutes of general application and common law trust principles to support legislative reform can provide means to mitigate the environmental damage done by harvesting and even provide for the conservation of certain resources. However,

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ranchers who leased any public land to file a comprehensive grazing plan with the state or a statute that protected water quality by prohibiting grazing within a specified distance of a lake, river, or stream would arguably be a statute of statewide significance.

<sup>343</sup> Instead, most environmental statutes of national importance only regulate the offending activity to mitigate impacts, not avoid them. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1539(a)(2)(A) (1994) (permitting incidental takes of endangered species after the preparation of habitat conservation plans), National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. (allowing the degradation of the environment so long as the degradation has been identified, alternatives discussed, and the findings disclosed to the public).

<sup>344</sup> *See* Craig N. Oren, *How a Mandate Came from Hell: The Making of the Federal Employee Triprediction Program*, 28 ENVTL. L. 267 (1998).

This [compromise] characteristic of environmental legislation has mixed implications. . . . On the one hand, it increases the potential loss from failing to secure passage of a provision. Any provision that was not included in the 1977 Clean Air Act Amendments, for instance, would have to wait for over a decade for the next set of comprehensive amendments to be adopted. In this way the sporadic nature of environmental legislation encourages compromise to secure adoption.

*Id.* at 272; *see also* Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181 (1999) (discussing three models of legislative decision making and their effects on environmental legislation).

<sup>345</sup> *See supra* notes 322-30 and accompanying text.

because management of school lands under either of these strategies will remain largely driven by the obligation to maximize the economic benefit from those lands, they can do little to aid those interested in preservation of the school lands for indefinite periods of time.

Where unique, environmentally sensitive areas are involved, indefinite and secure preservation may be the only prudent means of protecting the lands. To assure total preservation of these lands would mean removing them completely from the auspices of school land trust doctrine. One means by which state legislatures can achieve this, without violating their duty to maximize revenues from these lands while they are still under control of the trust doctrine, is to authorize the transfer of the school land to a state agency that focuses on resource preservation. The most successful example of this type of program is the Washington Trust Land Transfer Program.<sup>346</sup>

Since statehood, the leading source of revenues for Washington's schools has been timber sales from school trust lands.<sup>347</sup> In the 1980s, Washington had difficulty meeting its school construction needs because less timber could be harvested as a result of increasingly protective environmental regulations.<sup>348</sup> To solve this problem, the state legislature passed a statute that allows for annual transfers of trust land.<sup>349</sup> Under this program, the legislature annually appropriates funds to purchase sensitive trust lands from the school lands board.<sup>350</sup> The state deposits about ninety percent of the purchase price into the school construction account to compensate for the by-passed revenues from resource leases. The state uses the remaining ten percent, which represents the value of the land, to purchase replacement lands more suited to income production.<sup>351</sup>

While this program successfully removes sensitive school lands from the trust obligation to maximize revenues, it is not without its drawbacks. As two commentators noted, "this story

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<sup>346</sup> See WASH. REV. CODE § 43.51.270(1), which provides: "The department of natural resources and the state parks and recreation commission shall have authority to negotiate a sale to the state parks and recreation commission, for park and outdoor recreation purposes, of trust lands at fair market value."

<sup>347</sup> See SOUDER & FAIRFAX, *supra* note 9, at 261.

<sup>348</sup> See *id.*

<sup>349</sup> See *id.*

<sup>350</sup> See *id.*

<sup>351</sup> See *id.*

underscores the obvious: if you have the money, you can buy your way out of many environmental conflicts.”<sup>352</sup> For states that cannot appropriate funds, enacting such a program is not a realistic option. Further, even where the state can identify funds, application of them to such a program could necessitate cuts in other state programs.

For states that can appropriate funds, however, the transfer strategy is an attractive solution to the conflicts between increasing public interest in conservation and the beneficiaries’ interest in maximizing financial returns from the school trust lands. This approach allows the beneficiaries to see that they are not subsidizing conservation on school lands and places the burden of that subsidy on the same taxpaying public that is calling for the conservation of those same lands.

This legislative solution, unlike the others discussed above,<sup>353</sup> appeals to the schools because it shifts the burden of paying for conservation from them to the state. The legislature appropriates public funds to make the trust whole for accommodating a public purpose; the trust, in return, provides a diverse body of land from which the Parks Department can choose. In sum, this approach is the most responsive to political pressures because it places accountability on the legislature. Because school funds are not used to subsidize conservation and preservation uses, this procedure allows public land managers and state legislatures to achieve conservation goals while speaking clearly about who is paying whom, for what, and at what price.

#### D. *The Disadvantages of Legislating Conservation*

The legislative strategies discussed above can provide results for those who are interested in reforming the way states administer school trust lands. However, because it takes consensus among a majority of the parties to an issue to build legislation, the nature of the lawmaking process is compromise. Those who turn to the legislative processes to protect school land resources inevitably compete against those who seek to maximize revenues from these lands. Compromise can be slow to come about, and there is always the potential that by the time the legislature creates a consensus piece of legislation, efforts to preserve school land resources are diluted, if not entirely lost. Therefore, those

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<sup>352</sup> *Id.*

<sup>353</sup> *See supra* Part IV.A-B.

benefiting from the status quo, beneficiaries and lessees, are often the parties well-served by the slow process.

Fortunately, the state legislature is not the only avenue available to those who seek to conserve the school land resources. For those concerned with the environmental health of school trust lands and willing to play an active role in the administration of school trust lands, there is another alternative: conservation leasing.

## V

### BEATING REVENUE MAXIMIZATION AT ITS OWN GAME: CONSERVATION LEASING

Where a legislature is not inclined to actively preserve school lands, or at a minimum implement reform measures, conservation leasing provides an option. Conservation leasing is the practice of purchasing leases and putting them to a “conservation use.”<sup>354</sup> Because it does not require legislative approval, conservation leasing has a significant advantage over the other strategies discussed in this Article:<sup>355</sup> it is something a state is already bound to allow.<sup>356</sup>

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<sup>354</sup> The term “conservation lease” can be misleading. There is no actual “conservation lease” that parties purchase. As used in this Article, the term “conservation lease” is a short-hand way of referring to the purchase of a lease to extract resources, such as a mining lease or grazing lease, in which the lessee simply refrains from using the lease in the manner originally intended. Stated another way, a conservation lease is a lease in which a lessee is putting its rights under the lease to a conservation use.

<sup>355</sup> This Article does not suggest that a state legislature is prevented from recognizing private individuals’ rights to bid on leases and put them to conservation uses. Rather, it suggests that such an acknowledgment is not necessary. The right of private individuals to bid on leases and put them to conservation uses derives from the combination of the state’s trust obligation to maximize revenues and its fiduciary obligations to conserve the trust. *See supra* Parts III.C (discussing the trust as a solemn agreement between the state and Congress) and III.B (discussing the evolution of the obligation to maximize revenues).

<sup>356</sup> This strategy, however, is contingent upon there being a trust obligation to maximize revenues. Consequently, the arguments discussed here can only be applied to state lands. In 1999, the Secretary of the Interior promulgated regulations that would have added “conservation use” as a permissible use of grazing leases issued under the Taylor Grazing Act on federal lands. The Tenth Circuit invalidated this rule on the grounds that the intent behind the Taylor Grazing Act was to issue “grazing permits” that were to be used “*for the purpose of grazing domestic livestock.*” *See Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999) (alteration in original) (quoting the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1702(p), 1902(c)).

### A. *The Nature of the Game*

When Congress first started to grant land to the states, it was not uncommon for the state to sell these lands to eager homesteaders. Due to judicial pressure, some western states adopted a competitive bidding process for the awarding and renewal of leases and timber contracts.<sup>357</sup> States favor leasing because it provides an effective means of managing risks while allowing them to meet their obligation to obtain returns from these lands.<sup>358</sup> However, leasing is not risk free. While leases provide an effective means of deriving revenues from the lands the states also have a fiduciary duty to maintain sustainable long-term returns from these resources.<sup>359</sup> The states must also manage the risk that the lessee may default or even worse, destroy the productivity of the trust lands.

To minimize risks while still obtaining the maximum revenues from state lands, states have set minimum qualifications on bidders to ensure their ability to pay full market price and have set conditions on the lessees to prevent overuse.<sup>360</sup> Historically, these administrative regulations were based on the assumption that the school trust lands would be leased for resource extraction. Consequently, many regulations require that the bidder prove they are capable of operating the lease or that they have grazing experience.<sup>361</sup> However, the variety of uses for public

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(1994)). The court, however, did note that the Secretary had other administrative tools available to impose temporary reductions in grazing levels. *See Babbitt*, 167 F.3d at 1308.

<sup>357</sup> *See SOUDER & FAIRFAX, supra* note 9, at 117 (noting the variation among states in how the states incorporate competition into the leasing procedures). Historically, most states leased school trust lands according to a preference-right leasing system. *See id.* Under the preference-right system, the current lease holder was given the right to renew over other interested parties. However, in 1982 the Oklahoma Supreme Court held that the preference-right system violated trust principles. *See Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982). Today, only three states retain absolute preference rights (Arizona, Louisiana, and Wyoming). *See SOUDER & FAIRFAX, supra* note 9, at 329 n.51. Others simply allow the existing lessee to match the highest bidder. *See id.* at 329 n.52.

<sup>358</sup> *See SOUDER & FAIRFAX, supra* note 9, at 71-77 (discussing a lease as a "mechanism for spreading and sharing some of the [financial] risks" associated with land ownership and management).

<sup>359</sup> *See supra* Part III.C.2 (discussing the duties of the trustee).

<sup>360</sup> *See SOUDER & FAIRFAX, supra* note 9, at 113-19.

<sup>361</sup> *See id.* at 116. A common example is the requirement in grazing leases that the lessee own base property. *See id.* The apparent intent behind the bidding requirements is to ensure that the lessee will be competent to satisfy the

lands has grown. Today, conservationists and preservationists seek their share of the public estate. Accordingly, where conservationists are willing to pay the highest amount for use of school lands, the regulations must be changed to meet these environmental interests. A state's failure to do so would be a violation of the trust.

B. *The Case for Conservation Leasing on School Trust Lands*

The school lands trust doctrine requires the states to seek the highest value from trust lands,<sup>362</sup> but does not prescribe what uses are necessary to achieve this. There is, though, one exception to this rule: use of the land cannot damage the ability of the state to earn moneys from that parcel in the future.<sup>363</sup> Therefore, where a party is the highest bidder for a lease, the lease will not interfere with the ability of the land to produce revenues in the future, and the state can minimize the risk of default, the school lands trust doctrine requires states to award the lease to that party. Accordingly, under these rules, states must allow conservation leasing.

As noted above, conservation leasing is the practice of purchasing a lease which gives the holder the exclusive right to use the land in a certain way, such as grazing, and then opting not to put the lease to its listed use.<sup>364</sup> In this way, conservation leasing does not pose a threat to future revenue production. In fact, conservation leasing helps improve resource quality by allowing the resource to remain in its natural state, thereby increasing the resource's value and potential for future revenues. Where the state feels there is a risk of default, it can require letters of credit or other forms of security to minimize this risk.<sup>365</sup> Therefore,

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lease. However, their effect is to limit the potential pool of bidders to just those who intend to extract the resource. *See id.* For example, Washington state requires grazing lease applicants "have two years of experience in the grazing or handling of livestock or education in range or livestock management and financial resources to carry out the proposed grazing operation." WASH. ADMIN. CODE § 332-20-050 (1999). As Professors Fairfax and Souder note, "these qualifications have significantly hindered efforts by . . . conservation groups to purchase . . . leases." SOUDER & FAIRFAX, *supra* note 9, at 116.

<sup>362</sup> *See* *Lassen v. Arizona ex rel Ariz. Highway Dep't*, 385 U.S. 458, 466 (1967); *see also supra* Part III.C.3.

<sup>363</sup> *See generally supra* Part III.C.2.

<sup>364</sup> *See supra* note 353 and accompanying text.

<sup>365</sup> Letters of credit are not novel. Where some bids are concerned, states already require such assurances from extraction based leases. *See* SOUDER & FAIRFAX, *supra* note 9, at 74.



under the school lands trust doctrine, conservation leasing is a legitimate use for school trust lands that states must consider. Moreover, to the extent that administrative rules intended to minimize risk preclude conservation leasing, they are illegal.

Only one court has evaluated the right of environmentalists to purchase conservation leases on school trust lands. It concluded that environmentalists do possess this right. In *Idaho Watersheds Project v. State Board of Land Commissioners*, the Idaho Watersheds Project (IWP) outbid a previous leaseholder for a 640 acre parcel of rangeland located on school trust lands.<sup>366</sup> IWP intended to fence off the riparian portion of the range in order to protect salmon habitat.<sup>367</sup> However, although IWP's bid was the highest,<sup>368</sup> the State Board of Land Commissioners denied the lease application on the grounds that the Board had a long-standing lease relationship with the prior lessee and that the 640 acres were part of a larger grazing allotment covered by a multi-agency grazing management plan.<sup>369</sup>

IWP challenged the Board's decision, but the district court upheld the award to the previous lessee.<sup>370</sup> The Supreme Court of Idaho reversed, concluding that the State Board of Land Commissioners acted outside its constitutional and statutory duty to manage the school lands for the highest economic return.<sup>371</sup> The Court noted that "[t]he rationale behind the requirement of conducting an 'auction' is to solicit competing bids, with the lease being granted to the bid that would, in the discretion of the Board, 'secure the maximum long-term financial return' to Idaho's schools."<sup>372</sup> IWP offered the most money for the right to use the range. Consequently, the state was bound to award the lease to IWP regardless of whether IWP actually intended to use the lease for its listed purpose. Not only does the school land trust doctrine encourage states to allow conservation leases, it demands they be allowed. When an environmental group is the highest bidder and the conservation use of that lease does not

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<sup>366</sup> See *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 918 P.2d 1206, 1208 (Idaho 1996).

<sup>367</sup> See *id.* at 1207.

<sup>368</sup> Actually, the environmental group was the only bidder because the prior lessee failed to meet the deadline for placing his bid. Thus, the environmental group was the higher bidder by default. See *id.* at 1208.

<sup>369</sup> See *id.*

<sup>370</sup> See *id.*

<sup>371</sup> See *id.* at 1212.

<sup>372</sup> *Id.* at 1211.

interfere with long-term financial returns, a state's refusal to allow an environmental group to bid on a lease is a breach of the trust.<sup>373</sup>

The *Idaho Watersheds Project* decision should put other western states on notice that the use of trust lands should no longer be viewed in traditional resource extraction contexts. Today, despite the obligation to generate revenues from these lands, states should recognize that conservation is not only possible, but is required. Where environmental interests are willing and able to pay for conservation, the trust obligation requires states to eliminate barriers and give conservation leasing the opportunity it is due.

### C. *Defending the Right to Put Trust Lands to a Conservation Use*

As the *IWP* case illustrates, environmentalists have the ability and willingness in many cases to pay for their use of the land. However, since the case was decided, states have remained reluctant to allow environmental groups to participate in school land competitive bidding.<sup>374</sup> This reluctance means that environmen-

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<sup>373</sup> In response to *Idaho Watersheds Project*, the Idaho state legislature drafted an amendment to the state constitution to allow the state land board to set specific qualifications on the types of parties who could be bidders. One of the qualifications was that the successful bidder would agree to use the lease for resource extraction. In 1998, the amendment passed. *IWP* filed suit, claiming the amendment was a violation of the state's trust obligation. *See Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 982 P.2d 367 (Idaho 1999). However, the court did not reach this issue, because in a companion case, the Idaho Supreme Court overturned the amendment on the grounds that the state legislature did not abide by the single subject rule. Because the Court did not reach the issue as to whether this amendment is in violation of the school land trust doctrine, it is likely that the Idaho legislature will attempt the amendment process again. *See id.*

<sup>374</sup> Aside from Idaho, which was required via the *IWP* case to allow conservation leasing, only two western states have amended their administrative codes to provide for some form of conservation leasing, and a third, without adopting conservation leasing, has created a mechanism for nominating sensitive school trust lands for conservation. In May 1999, Oklahoma amended its administrative code to provide for conservation leasing on school trust lands. *See OKLA. ADMIN. CODE* § 385: 25-1-8 (1999). The Oklahoma regulation, however, limits conservation leasing to "certain tracts that are in need of extensive conservation work." *Id.* In September 1999, Wyoming amended its administrative code to provide for "special use" leases. *See WYOMING BOARD OF LAND COMMISSIONERS RULES AND REGS.* Ch. 5 § 3(a) (1999). While the rules are not explicit, a special use lease could include conservation leasing. Wyoming's rules and regulations define special use leases as "*any use* of state land other than for grazing,

tal groups that desire to pursue conservation leases should be prepared to defend their right to do so in court. A recent controversy regarding the Oregon trust land leasing regulations provides a good illustration of this resistance.

In 1994, the Oregon State Land Commission, comprised of the governor, secretary of state, and the state treasurer, voted to affirmatively recognize in their regulations the right of environmental groups to purchase school land leases and the right of leaseholds to put their leases to conservation uses.<sup>375</sup> Unfortunately, this regulation did not last long. In early 1995, newly elected Governor Kitzhaber, backed by agricultural interests, fulfilled a campaign pledge to eliminate the rule.<sup>376</sup> The governor voted in conjunction with the state treasurer to suspend the provision until the public had an opportunity to comment on the regulation.<sup>377</sup> Despite the secretary of state's fear that failure to pass the rule would be a violation of the state's trust obligations, the board dropped the rule from consideration six months later.<sup>378</sup>

Despite the failure of the Land Commission to pass the rule, a party seeking to purchase a conservation lease in Oregon may still do so. Because the obligation to maximize revenues is rooted in constitutional law<sup>379</sup> and the trust requires the state lease to the highest bidder,<sup>380</sup> environmentalists have a constitutional right to participate in the bidding program. In essence, it is the trust that defines the regulations, not the regulations that de-

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agriculture, the extraction of minerals or uses authorized under easements granted pursuant to Chapter 3 of the Rules and Regulations of the Board, or hunting, fishing and general recreational uses pursuant to Chapter 13 of the Rules and Regulations of the Board." *Id.* at § 2(d) (emphasis added). While Arizona has not adopted conservation leasing, in March 1998, the state did pass a regulation allowing concerned individuals to file a petition nominating certain tracts of school trust land to be set aside for conservation purposes. *See* ARIZ. ADMIN. CODE R12-5-2501 (1999).

<sup>375</sup> *See* Rob Eure, *Oregon Moved Toward Ending Bidding for Public Rangelands*, OREGONIAN, Feb. 5, 1995, at B1.

<sup>376</sup> *See id.*

<sup>377</sup> *See id.*

<sup>378</sup> *See id.*

<sup>379</sup> *See supra* Part III.C (discussing the trust as a solemn agreement between the state and Congress).

<sup>380</sup> *See supra* Part III.A-B (discussing the evolution of the obligation to maximize revenues).

fine the trust.<sup>381</sup> Therefore, to the extent that state regulations prevent a use that is required by the trust, they are illegal.

In states that dispute the obligation to allow high bidders to enter into conservation leases, the issue will most likely need to be resolved through litigation. As the Oregon land board story illustrates, supporters of traditional trust land uses are likely to oppose any attempt to remove administrative barriers to conservation leasing. Consequently, environmental groups that assert their right to conservation leases will likely be defending their right to lease school trust lands in court.

### 1. *The Arguments Against Conservation Leasing and Why They Fail*

Those who oppose conservation leasing argue that states are breaching their duty under the trust when they allow environmental groups to lease school lands for conservation purposes. One argument in support of this claim is that conservation leases are not a reliable source of trust fund revenue.<sup>382</sup> Unlike commodity leases, which generate revenues from the lease from which rents are paid, conservation leases do not earn a profit from the land and therefore, opponents assert, carry a greater risk of default. Because the state must manage these lands to generate income,<sup>383</sup> opponents could argue, the state would be breaching its fiduciary duty to lease school lands for uses that do not generate income from the leasehold.

The lack of lease-generated income is not the only argument opponents level against conservation leasing. It is also claimed

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<sup>381</sup> See generally *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 982 P.2d 367 (Idaho 1999) (noting that school trust land regulations that prevent the state from obtaining full market value from trust lands violate the trust obligation).

<sup>382</sup> While this argument has yet to be made in a conservation leasing context, it is not uncommon for opponents of other leases to challenge a state's awarding of a lease to a high bidder on the grounds that the lease will not generate enough income for the bidder to make the lease payments at the amount bid. See, e.g., *State v. Babcock*, 409 P.2d 808 (Mont. 1966) (court approved land board's rejection of highest bid after land board heard testimony that high bidder would not be able to make enough money from growing crops to meet the proposed bid's lease payment); see also *Geierman v. Washington State Department of Natural Resources*, 1999 WL 1143312 (Wash. App. 1993) (court approved department's rejection of highest bid because the bidder failed to show in its application an ability to produce income from grazing and agricultural leases). (Unpublished opinion, filed for public record).

<sup>383</sup> See *infra* Part III.C (discussing the trustees duties).

that such leases are inconsistent with the states' trust obligation because they ultimately reduce the ability of the state to obtain long-term returns from school lands.<sup>384</sup> One state representative has argued that environmental groups would probably pay premium prices to get land out of commodity production, but would then let the leases expire.<sup>385</sup> By that time, prior commodity lessees will have found other lands to lease, or the capital costs to restart commodity production would be prohibitive. The result, opponents continue, is that the state would then be left without a market for public lands.<sup>386</sup>

These arguments are misguided for several reasons. First, while conservation leaseholders will not derive a profit from their lease, there is no indication that environmental groups will default on these leases.<sup>387</sup> Even if states are concerned about environmental groups defaulting on their leases, states can require the lease be paid up front,<sup>388</sup> letters of credit, or other security before entering into the lease agreement.<sup>389</sup>

Second, these arguments presume that conservation groups are only interested in obtaining leases for one term. However, in the case of environmentally sensitive lands, it is likely that to prevent resource extraction, conservation groups will want to retain their leases longer than one term. The lack of certainty that the lease will be renewed would dissuade environmental groups not looking for a long-term commitment from obtaining a lease. Therefore, when environmental groups commit to purchasing conservation leases with the highest bid, the group's commitment is likely to last for several leasing cycles.<sup>390</sup>

Third, critics ignore the fact that conservation can, and often does, result in a higher quality resource. By not putting the re-

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<sup>384</sup> See Eure, *supra* note 375, (State Representative Denny Jones (R-Ontario), a rancher, stating that conservation leases will lead to lost revenues for the state).

<sup>385</sup> See *id.*

<sup>386</sup> See *id.*

<sup>387</sup> This is because there is no way to know if environmentalists will default on leases unless they are first given a chance to obtain conservation leases, and Idaho, thus far, is the only trust land state to permit conservation leasing.

<sup>388</sup> If states indeed eventually choose this option, environmental groups will want to ensure that the lump sum is discounted for future inflation.

<sup>389</sup> See *supra* note 364 and accompanying text.

<sup>390</sup> Leases are renewed on a cyclical basis. Timber leases are often for only three to five year terms. Agricultural and grazing leases are often 10 to 20 year terms. Likewise, mineral leases can extend for many years at a time. See SOUDER & FAIRFAX, *supra* note 9, at 119-20, 171, 208-09.

source into commodity production, the conservation lease allows the resource to regenerate,<sup>391</sup> or at least, grow in volume.<sup>392</sup> Once the conservation lease expires, those who are interested in the land should be attracted to the revitalized resource. If commodity interests do not seek a lease after land has been put to conservation use, the more likely cause is that extracting the resource is unprofitable due to market conditions,<sup>393</sup> not because of the conservation lease itself. Therefore, to the extent that arguments against conservation leasing are based on the assumption that a revitalized resource is less desirable than one that has been overused, they are without merit.

Above all, the arguments against conservation leases presume that any risk associated with conservation leasing cannot be addressed through regulation. At the very least, any trust manager's job is to maximize revenues while minimizing risks.<sup>394</sup> The risks of default and lack of interest in a lease at a later date associated with conservation leasing are manageable. State land managers can find creative ways to address these risks. The arguments put forth by opponents of conservation leasing presume that administrative laws cannot be changed to manage the risks involved. This is simply not the case. Existing bidder qualifications are simply regulations tailored to meet the risks associated with commodity leasing. They are a means to implement a state's obligation under the trust, not define it. Accordingly, where the high bidder seeks to put the lands to a conservation use, these regulations can and must be changed to address the risks associated with that use.<sup>395</sup>

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<sup>391</sup> This is particularly true in the case of overgrazed rangelands.

<sup>392</sup> Timber is a good example of a resource that increases in volumes and value during the time it is not harvested.

<sup>393</sup> Predicting future market conditions is difficult. Whether a resource market will remain strong enough to make harvesting profitable is a risk that land managers cannot address with certainty. *See, e.g.,* SOUDER & FAIRFAX, *supra* note 9, at 72 (discussing uncertainty and risk in lease returns). States currently rely upon resource leasing to shift the risk of changing markets to lessees. *See id.* at 71-77. However, conservation leasing offers states another way to reduce these risks by allowing state managers the opportunity to collect rents from conservation leases during periods when harvesting would otherwise not be profitable.

<sup>394</sup> *See supra* Part III.C.3 (discussing the states' fiduciary duties to maximize income for the beneficiaries).

<sup>395</sup> *See supra* Part V.B (discussing legal arguments in support of conservation leasing).

Conservation leasing is not a breach of the states' fiduciary duties as some would suggest. It, in fact, offers a unique way for the states to meet their obligations under the school land trust, while preserving the resources on state lands. Not only is conservation leasing compatible with the school land trust doctrine, where a conservation lease produces the highest bidder, the trust obligation to maximize revenues requires the state to allow the conservation lease.

## 2. *Conservation Leasing as Sound Public Policy*

Conservation leasing is a sound investment for the state, the environmentalists, and the trust beneficiaries. Conservation leases allow the state to obtain the maximum economic benefit without any need for environmental regulation. This approach, like the land transfer program, allows for the preservation of its resources without the state having to play a regulatory role. However, unlike the land transfer program, the state retains a reversionary interest at the end of the lease period. The result is that the resources can still be sold at a later date. In essence, under a conservation lease the state gets something for nothing. Moreover, conservation leases are likely to be accepted by trust beneficiaries because leases shift the costs of preservation from the state treasury or as opportunity costs to the permanent school fund to those who desire to have the land preserved.

For this strategy to work, environmental groups must be willing to pay for preservation. While some organizations may take issue with having to pay for a use that they feel should be a basic consideration in the management of all public lands, school trust lands are not ordinary public lands. The obligations the courts have placed upon these lands require land managers to generate revenues for schools. Stated most simply, the states need to generate money from these lands for education, and the money needs to come from somewhere. Under this system, where the environmental health of these lands is poor, it is certainly better for everyone if concerned citizens, rather than the sale of the natural resources, are the source of school funds.

## CONCLUSION

Returning to the dispute in Eastern Oregon, where ONDA seeks to prevent the state from reissuing Mr. Pryor's lease, it should be apparent that despite the conventional wisdom of trust

land management, the state is not stuck in a Hobson's choice at all. Assuming Oregon subscribes to the modern school trust doctrine,<sup>396</sup> there are four options that solve the land manager's dilemma. First, the state can pass reform legislation based on trust principles that require the land managers to take into account and to implement conservation measures that address the increased sedimentation as a condition of Mr. Pryor's permit renewal. Second, the state, or Congress, can use its authority to pass statutes of general application binding both the Land Board and Mr. Pryor to consider and mitigate the environmental effects of the grazing lease. Third, the state legislature can appropriate monies to purchase the tract of land Mr. Pryor is leasing from the state Land Board. Finally, despite regulations that would otherwise exclude ONDA from the competitive bidding process, ONDA can rely on the school land trust doctrine to bid for the lease. If ONDA is the successful bidder, it then has the right to put the lease to a conservation use.

People can create and manage trusts for a variety of purposes. When the government creates a trust for the benefit of the public, it is imperative for the public to have a voice in the administration of the trust. A government-administered trust should not only owe a fiduciary duty to the trust beneficiary, but also a duty of undivided loyalty to the public it serves. Ideally, this loyalty would require state land managers to take environmental concerns into account when making any public land management decision. Unfortunately, this is not the case for school trust lands.

Due to the adoption of a Supreme Court opinion involving the Arizona–New Mexico Enabling Act, most western states are under an obligation to manage school trust lands for the benefit of the schools, not the public at large. This trust has been construed by many courts to equate to an obligation to maximize revenues from these lands. However, while the administration of this duty often places development interests over preservation, it

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<sup>396</sup> Oregon is one of the states in which the courts have not specifically addressed the question of whether the trust doctrine applies. *See supra* note 8 and accompanying text. Rather, the adoption of the *Lassen* Court's directive to maximize revenues derives from an attorney general opinion. *See* 46 Op. Or. Att'y Gen. 468 (1992). Consequently, an Oregon could separate itself from the obligation to maximize revenues, as California did, by failing to recognize *Lassen* and its progeny as controlling.



does not mean the states can ignore environmental interests either.

Today, the notion of revenue maximization has become so firmly rooted in state constitutions, case law, and management philosophies that a complete withdrawal from this doctrine is unlikely. Therefore, if environmental groups wish to achieve long-term preservation of natural resources on state school lands, they must develop strategies and participate in programs that can be incorporated into the modern trust doctrine. While each of the strategies discussed above can contribute significantly to protecting environmental values on school lands, the conservation lease is the best alternative.

Unlike the land exchange program, conservation leasing allows the Land Board to retain a reversionary interest in the property at the expiration of the lease. Additionally, recognition of conservation uses in a leasing system allows states to achieve the greatest possible return on the land for the school funds without compromising the ability of the land to produce future revenues. In short, under this system, the state receives something for nothing. Unlike the trust principles and statutes of general applicability, this program shifts the burden of preservation from the beneficiaries of the trust to those who seek to further preservation interests. Moreover, the conservation lease provides a means for those interested in conservation of the school land resource to have an immediate and powerful voice in how the state administers these lands.

While the states have been reluctant thus far to recognize the potential of conservation leasing, they must eventually do so. As the *Idaho Watersheds Project* opinion suggests, to the extent that state rules or regulations prohibit the highest bidder from putting trust land to a conservation use, they are in violation of the trust and are unlikely to survive a legal attack.<sup>397</sup> Consequently, unlike the legislative strategies discussed in this Article, which allow a state, at its discretion, to erect barriers to resource extraction in the interest of conservation, the state is under a legal obligation to remove barriers that prevent conservation under the conservation leasing strategy. Stated simply, unlike legislation protecting state lands, conservation leasing is something the states are already bound to do.

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<sup>397</sup> See generally *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 982 P.2d 367 (Idaho 1999).