

C. Trust Land Management in Colorado

Colorado has nearly three million surface acres of trust lands and an additional three million sub-surface acres of trust lands.¹ Although these lands are most heavily concentrated in the eastern grasslands, they also appear here and there in the sagebrush deserts and aspen groves of the west, and in a few larger parcels and a number of isolated sections throughout the Rocky Mountain range. The majority of Colorado's trust lands occur in a scattered, checkerboard pattern throughout the rural areas of the state, corresponding to the reserved sections of each township. However, Colorado does have a number of significant, consolidated parcels of trust land, including large areas near Denver, Colorado Springs, and Pueblo that encompass several hundred square miles, as well as substantial areas along the North Platte River in northern Colorado, areas near Sterling in northeastern Colorado, and areas near Great Sand Dunes National Monument in south-central Colorado, among others.

1. Colorado's Land Grant

Although the citizens of Colorado repeatedly petitioned Congress for statehood as early as 1858, Colorado's admission to the Union was delayed each time: first in 1859 by the collapse of the 1850's gold boom, which cut into Colorado's once growing population; then in 1864 by the Civil War, which, combined with poorly-producing mines, left the state unable to afford self-government; and then again in 1865 by the assassination of President Lincoln, which put a Democratic president in office who did not want to see another predominantly Republican state admitted to the Union.²

When Colorado was finally admitted to the United States in the Enabling Act of 1875 it was granted sections sixteen and thirty-six in every township "for the support of common schools," with Congress granting equivalent lands if the specified sections were unavailable.³ Colorado was granted additional acreage for several other specific purposes, including erecting public buildings (fifty sections, or thirty-two thousand acres), penitentiaries or prisons (fifty sections, or thirty-two thousand acres), and to support a state university (seventy-two sections, or approximately forty-six thousand acres).⁴ Colorado was also granted lands for the Saline Lands Trust⁵ and the Internal Improvements Trust,⁶ which benefit state parks; the Colorado State University Trust; and the "Hesperus Trust," which is managed for the benefit of Fort Lewis College. Currently, Colorado retains ownership of 64 percent of its original land grant of 4.8 million acres.⁷

2. Enabling Act and Constitutional Requirements

Colorado's Enabling Act does not expressly indicate that the lands granted to the state are to be held in trust. However, the Enabling Act does identify a series of restrictions on disposals of these lands, including provisions prohibiting disposals of the granted lands other than at a public sale and for not less than \$2.50 per acre; provisions that require the establishment of a permanent fund to invest the proceeds from land sales; and a requirement that interest from the permanent fund be used to support the common schools.⁸ These restrictions were the first such sale requirements imposed by Congress on any state; Colorado's Enabling Act was also the first to require the establishment of a Permanent School Fund.⁹

¹ COLORADO STATE BOARD OF LAND COMMISSIONERS FY 2003 ANNUAL REPORT (2004).

² Rebecca Jones, *From a state of flux to statehood: Colorado overcame obstacles of territorial days*, DENVER ROCKY MOUNTAIN NEWS (July 27, 1999).

³ Colorado Enabling Act, 18 Stat. at 475 § 7 (1875).

⁴ *Id.* at §§ 8-10.

⁵ *Id.* at § 11 (benefits the state parks).

⁶ *Id.* at § 12; COLO. REV. STAT. § 33-10-111 (Five percent of the proceeds of the sales of agricultural public lands in Colorado sold by the federal government are credited to the parks and the outdoor recreation fund).

⁷ SOUDER & FAIRFAX, *supra* note 4, at 48.

⁸ Colorado Enabling Act, 18 Stat. at 475, § 14.

⁹ SOUDER & FAIRFAX, *supra* note 4, at 31-32.

3. Colorado's Trust Responsibility

As discussed in section IV(A), the courts have subsequently interpreted the restrictions imposed by Congress in Colorado's Enabling Act to evidence sufficient intent to create a binding federal trust. Based on this trust responsibility, the courts have held that:

- State trust land leases are subject to county zoning regulations, even if those regulations allow the county to deny a use that is otherwise permitted by the lease.¹⁰
- The State Board of Land Commissioners (Board) was charged to issue leases in the best interests of the trust, and thus could issue non-exclusive leases that reserved the right of the Board to later lease mineral rights and other surface rights irrespective of the existence of a current lessee.¹¹
- The state, as trustee, had the discretion to invest school trust funds in farmland loans.¹²

However, the requirements on Colorado's trust managers are significantly different from those in most other states due to the enactment of an amendment to the Colorado Constitution in 1996.

Prior to this amendment, Colorado's Constitution called for the management of trust lands to generate the maximum possible revenues for the trust. Under the amendment this mandate has been significantly changed: trust lands are to be held in a perpetual, inter-generational public trust for the support of public schools that is not to be significantly diminished over time. Sound stewardship is required for the lands to become economically productive and includes protecting and enhancing the beauty, natural values, open space, and wildlife habitat. The Board is required to manage trust lands in such a way as to produce "reasonable and consistent" income over time.¹³

The amendment also requires the Board to protect and enhance the long-term productivity of trust lands by (1) maintaining a long-term stewardship trust of up to three hundred thousand acres of land to preserve long-term returns to the state; (2) including terms in agricultural leases to encourage sound stewardship of the land and community stability; (3) managing natural resources in a manner that will conserve the long-term value of those resources. The amendment also authorizes the Board to sell or lease conservation easements, licenses, or similar interests in the land.¹⁴ The amendment further requires the State Land Board to abide by local land use regulations and plans when considering development of lands. The Board must also consider whether the income generated from the lands will exceed the fiscal impact on local school districts prior to authorizing any lease, sale, or exchange of lands for commercial, residential, or industrial development.¹⁵

As discussed in section IV(B), the 1996 amendment was recently upheld by the Colorado Supreme Court and the Tenth Circuit Court of Appeals; both courts found that "the choice of the trustee to manage the lands to produce reasonable and consistent income over time is reasonable and prudent given the perpetual nature of the trust."¹⁶ However, the Tenth Circuit issued an implicit warning, noting that the provisions were not *facially* invalid because there was at least one interpretation of the provision that indicated the amendment merely announced a new management strategy for the trust.¹⁷ If trust managers apply this provision in the future to simply conserve trust lands for public benefit at the expense of the trust, the Tenth Circuit decision seems to suggest that this could be subject to challenge.

¹⁰ Colorado State Board of Land Commissioners and Wesley D. Conda, Inc., v. Colorado Mined Land Reclamation Board, 809 P.2d 974 (Colo. 1991); see also Wesley D. Conda, Inc. v. Colorado State Board of Land Commissioners, 782 P.2d 851 (Colo. App. 1989).

¹¹ Evans v. Simpson, 547 P.2d 931 (Colo. 1976).

¹² People v. Higgins, 168 P. 740 (Colo. 1917).

¹³ COLO. CONST., Art. IX, § 10(1).

¹⁴ *Id.* at Art. IX § 10(1)(b).

¹⁵ *Id.* at Art. IX, § 10(1)(a).

¹⁶ Branson School District RE-82 v. Romer, 958 F. Supp. 1501, 1520 (D. Colo. 1997).

¹⁷ Branson School District RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998).

4. Governance of Trust Lands in Colorado

The administration of Colorado's trust lands is overseen by the state's Board of Land Commissioners, also known as the Colorado State Land Board (Board), which functions as a subdivision of the Colorado Department of Natural Resources. The agency is administered by the Director of the Board of Land Commissioners (Director), who is appointed by the Board.¹⁸ Although the Board is composed of appointed officials, Colorado has a straightforward representative scheme that ensures direct representation of various stakeholder interests on the Board. The Board composition, which is defined in the state's Constitution and statutes, consists of five geographically diverse citizens,¹⁹ appointed by the Governor with the consent of the Senate,²⁰ that are intended to encompass the major stakeholders for state trust lands. The membership consists of one member with substantial expertise in agriculture, one with expertise in primary or secondary education, one with local government and land use planning expertise, one with natural resource conservation expertise, and one citizen at large.²¹ Each Board member is limited to two, four-year terms, and the terms are staggered so that the entire Board is not simultaneously up for reappointment.²²

The Colorado State Land Board is composed of three major divisions: the Mineral Department, the Agriculture Department, and the Commercial Department. The Mineral Department leases property to both private and public entities, collecting rent for the use of the natural resources on the land. The Agriculture Department manages lands for grazing, crops, recreation, and other surface rights; they also provide drought relief, and manage conservation and stewardship leases. The Commercial Department, also known as the Real Estate Section, handles commercial land leases and sales to public and private entities. It also "controls income-producing properties such as parking lots and property on which businesses are located."

Goods, services, and personnel necessary to perform the duties of the Board are paid for out of the income from the school lands. The state general assembly is required to give deference to the Board's assessment of its budgetary needs, and appropriates this money from the income from the trust lands.²³ These expenses are paid from lease revenue and mineral royalty revenue rather than from the proceeds of permanent trust dispositions.²⁴

5. Trust Land Management in Colorado

The Board identifies its mission as follows:

[to] manage the assets entrusted to our care for our beneficiaries to produce a reasonable and consistent income with long-term protection of economic values, while providing responsible environmental stewardship to ensure the conservation of natural resources.

Colorado's trust management activities can be roughly divided into four types of activities: surface uses, subsurface uses, trust land sales and other uses, and conservation reserve. Colorado currently receives a majority of its total trust income from subsurface lease uses and surface leasing; revenues from trust lands sales are negligible.

¹⁸ COLO. REV. STAT. § 36-1-102.

¹⁹ COLO. CONST., Art. IX, § 9(1).

²⁰ COLO. REV. STAT. § 36-1-101.5(1).

²¹ COLO. CONST., Art. IX, § 9(2).

²² *Id.* at Art. IX, § 9(3).

²³ *Id.* at Art. IX, § 9(4).

²⁴ ANNUAL REPORT, *supra* note 410, at 5.

a. Surface Uses

The vast majority of Colorado's surface lease acreage and revenues are associated with grazing, agricultural, commercial, and right-of-way uses; however, Colorado also administers a recreational leasing program, which includes leases on lands that are simultaneously leased for other purposes.

The Board is permitted to lease trust land for various purposes in a manner consistent with Article IX of the Colorado Constitution.²⁵ When renewing surface leases, the Board is required to consider the care and use of the land as well as any work the lessee has done to conserve and promote the productivity of the land for the benefit of the trust.²⁶ Non-mineral leases may be terminated if the lessee has failed to comply with lease provisions, violated any lease provision, or made any false statement in the application of the lease.²⁷ The Board delegates enforcement matters and lease termination authority to the director of the Board;²⁸ the Director also has direct authority over the administration of all commercial leases.²⁹

Lands with potential for commercial development are deemed to have unique economic value for funding the public schools,³⁰ and the Board is given increased flexibility to manage these lands to comply with the Constitution and Enabling Act, and to prevent undue speculation, as well as protect the public's interest in these lands.³¹ Commercial developments pursuant to state land leases are required meet all federal, state, and local land use regulations and lessees are encouraged to obtain the maximum economic recovery from the development of these lands.³² In addition, taxes on commercial leases must be paid as if the land involved were privately owned.³³ The Board also has authority to subdivide trust lands into lots, blocks, or other tracts that may be sold at public auction or exchanged.³⁴

Leases for grazing and agricultural purposes are generally issued for terms of ten years, unless an alternate term is agreed to,³⁵ for a minimum yearly rental of \$250 to cover transaction and administrative costs.³⁶ Lease fees for grazing uses vary based on range productivity and the grazing division that the lease is assigned.

Agricultural and grazing leases are required to include provisions that will ensure sound stewardship of the land;³⁷ in addition, before renewing grazing or agricultural leases, the Board is required to evaluate the benefit of continuing these uses of the land to the trust by considering the lessee's record of stewardship on the land, the stability of the local community, and the revenue generated for the trust. However, current lessees generally have a preferential right to renew their leases unless the Board and lessee fail to agree on lease terms; the lessee has failed to comply with the terms of a lease; or the Board finds that the lands should be converted to other uses to secure greater benefits for the trust or that continued use for grazing or agriculture is incompatible with other purposes for which the land is to be leased. However, if state trust land is located in the path of development, the Board is granted increased flexibility in the management of these lands to protect the public's interest in these lands and to prevent speculation by third parties.³⁸

²⁵ COLO. REV. STAT. § 36-1-118(1)(a).

²⁶ *Id.* at § 36-1-118(1)(b)(I).

²⁷ *Id.* at § 36-1-118.

²⁸ Board of Land Commissioners Policy No. 01-1, Policy Concerning Termination of Leases (Non-mineral) (2001). (hereinafter "BLC Policy").

²⁹ BLC Policy No. 99-3, Approval of Commercial Lease Renewals and Amendments (1999).

³⁰ COLO. REV. STAT. § 36-1-120.5(1).

³¹ *Id.*

³² *Id.* at § 36-1-120.5(3).

³³ *Id.* at § 36-1-120.5(4).

³⁴ *Id.* at § 36-1-122.

³⁵ *Id.* at § 36-1-118(1)(a).

³⁶ BLC Policy No. 93-3, Minimum Agricultural Annual Lease Rental Policy (1993, rev. 1994).

³⁷ COLO. REV. STAT. § 36-1-118(1.5).

³⁸ *Id.* at § 36-1-120.5.

Private individuals or organizations are also entitled to apply for private recreational leases for a variety of purposes on most state trust lands.³⁹ Recreational leases are normally “stacked” on top of existing agricultural, timber, grazing, or mining leases where they do not interfere with the existing lessees activities.⁴⁰ As with other surface leases, the Board requires a minimum annual rental of \$250 per application; however, recreational leases are generally issued for 1/2 the length of the agricultural lease term on a flat rate of not less than \$0.25 per acre.⁴¹

Leases for agriculture and grazing account for approximately 16 percent of the total revenue generated by Colorado’s trust lands. Rentals for purposes other than agriculture, grazing, or subsurface uses generate another 15 percent; leases for rights-of-way generate only around 2 percent of total revenues.

b. Subsurface Uses

Subsurface uses are administered under the authority of the Director of the Board, although the Director is required to seek Board review of any matter that has the potential to significantly affect the trust beneficiaries.⁴² The Director is authorized to issue leases for oil, gas, and minerals, although leases are required to comply with local government regulations and cannot be issued on lands designated as unsuitable for those uses.⁴³ Colorado currently receives approximately 64 percent of its total trust revenues from the administration of subsurface leases, with the majority of revenues derived from royalties on oil, gas, and coal.

Oil and gas leases are granted for five year terms at public auction, with auctions scheduled by the Board on a quarterly basis.⁴⁴ Minimum bid prices start at \$1.50 per acre per year, and oil and gas royalty rates are set at 12.5 percent of production. Mineral lands are leased on an annual basis with royalty payments calculated when and if a mineral resource is discovered.⁴⁵ There are special provisions for geothermal leases, which are let through a competitive bidding process and contain provisions for royalty payments and environmental protection.⁴⁶

c. Land Sales and Other

The Board has the authority to sell state trust land only at public auction to the highest and best bidder.⁴⁷ Auctions are required to be advertised for four consecutive weeks in the weekly paper of the county in which the land is located.⁴⁸ Colorado’s land sales provisions also contain certain protections for lessees; although the Board may sell leased land at any time during the lease as though the lease had not been executed,⁴⁹ one year’s notice to the lessee is required,⁵⁰ and current lessees of agricultural land or grazing lands are afforded the right to match the highest bid.⁵¹

Although Colorado does not have statewide land use planning, trust lands are subject to Colorado’s “Land Use Planning Act,” which emerged as a consequence of the rapid growth and development of the state and the resulting demands on its land resources. The Act addresses the needs of agriculture, forestry, industry, business, residential communities, and recreation in future

³⁹ BLC Policy No. 92-8, Multiple-use Policy (1992).

⁴⁰ BLC Policy No. 98-3, Private Recreational Leases on State Trust Lands (1998).

⁴¹ *Id.*

⁴² BLC Policy No. 2003-01, Oil & Gas and Solid Mineral Leasing (2003).

⁴³ *Wesley D. Conda, Inc. v. Colorado State Bd. of Land Comm’rs*, 782 P.2d 851, 853 (Colo. App. 1989).

⁴⁴ COLO. REV. STAT. § 36-1-118.

⁴⁵ *Id.* at § 36-1-113.

⁴⁶ *Id.* at § 36-1-147.

⁴⁷ *Id.* at § 36-5-102.

⁴⁸ *Id.* at § 36-1-124.

⁴⁹ *Id.* at § 36-1-118(4)(a).

⁵⁰ BLC Policy No. 00-04, Policy Concerning Auction of Agricultural Leases on Unleased Land (2000).

⁵¹ COLO. REV. STAT. § 36-1-118(4)(b).

growth.⁵² The Board is responsible for developing a total land use planning program for trust lands, incorporating interests from all levels of government.⁵³

Colorado's trust land sales provisions also contain several unique protections for environmentally sensitive lands. If trust lands that are offered for sale are determined to have a unique economic or environmental value to the public, the Board cannot proceed with the sale unless the land is authorized for sale by Board resolution or for two years, whichever occurs first.⁵⁴ The Board is also authorized to transfer interests in state land, other than grazing or agricultural interests, to the Department of Natural Resources (DNR) when that land has "unique economic or environmental value for the public."⁵⁵ If land would be damaged or destroyed if it passed into private ownership, the executive director of the DNR may give notice in writing to the Board that the land must be disposed to DNR through eminent domain or at public sale. The Board is also authorized to sell or lease conservation easements, licenses, or other similar interests in accord with the requirements of the Colorado Constitution.⁵⁶

Unlike a number of other Western states, the Board is permitted to grant rights-of-way across or on state trust land; however, the grant must be on terms the Board determines and the right-of-way reverts to the state when the land ceases to be used for the purpose granted.⁵⁷ The Director of the Board has authority with regard to right-of-way, easement, and road access applications.⁵⁸

Colorado statutes also permit the Board to engage in land exchanges, provided that the lands acquired in the exchange and any resulting income are credited to the appropriate beneficiary.⁵⁹ Appraisals or established market values for the lands to be exchanged must be reviewed and accepted by the Board, and the minimum value of the lands acquired in the exchange must not be less than 100 percent of the appraised or market value of the lands being exchanged.⁶⁰ The Board is also authorized to engage in "non-simultaneous" exchanges of state trust land to reinvest in higher yield properties or to consolidate ownership. Funds resulting from a non-simultaneous exchange are placed in a temporary fund⁶¹ and are not deposited in the permanent fund until the exchange transactions are completed; however, these exchanges are only permitted where they do not result in any loss of principal or where any loss can be offset by a gain within three fiscal years.⁶²

Land sales currently comprise only a tiny fraction of Colorado's trust revenues, generating only \$272,156 in 2002-03, or around 1 percent of total revenue.⁶³

d. Conservation Reserve

The 1996 amendment to Colorado's Constitution established a long-term "Stewardship Trust" of between 295,000 and 300,000 acres of land "that are valuable primarily to preserve long-term returns to the state."⁶⁴ Under Colorado's implementing statutes, the lands in the Stewardship Trust are to be designated by the Board (after a public nomination process) in order to preserve the beauty, natural values, open space, and wildlife habitat of Colorado lands. Once lands have been approved for inclusion in the Stewardship Trust, only uses that will protect and enhance the beauty, natural values, open space, and wildlife habitat are permitted on the lands. This nomination and approval process began in 1998 with a first round of public nominations that encompassed approximately 620,000

⁵² *Id.* at § 24-65-102.

⁵³ *Land Use Planning in Colorado: Smart Growth Colorado's Future*, COLORADO DEPARTMENT OF LOCAL AFFAIRS 1 (October 9, 2004).

⁵⁴ COLO. REV. STAT. § 36-1-124(3).

⁵⁵ *Id.* at § 24-33-107.

⁵⁶ *Id.* at § 36-1-150, see also COLO. CONST. Art. IX §§ 9,10.

⁵⁷ COLO. REV. STAT. § 36-1-136.

⁵⁸ BLC Policy No. 98-4, Policy on Approval of Right-of-way, Easement, and Road Access Applications and Assignments (1998).

⁵⁹ COLO. REV. STAT. § 36-1-141.

⁶⁰ BLC Policy No. 99-01, Policy Concerning State Trust Land Exchanges (1999).

⁶¹ ANNUAL REPORT, *supra* note 410, at 5.

⁶² COLO. REV. STAT. § 36-1-124.5; see also *East Lake Creek Ranch, LLP v. Brotman*, 998 P.2d 46 (Colo. App. 1999), *rev'd on other grounds*, 31 P.3d 886 (Colo. 2001).

⁶³ ANNUAL REPORT, *supra* note 410, at 7.

⁶⁴ See COLO. REV. STAT. § 36-1-107.5.

acres; the Board ultimately designated 217,943 acres from the nominated lands. A second nomination process in 2000 nominated another 200,000 acres of land, of which the Board approved additional inclusions that brought the total land area in the Trust to 295,930 acres.⁶⁵

The Director of the Board is required to conduct a baseline assessment of each parcel of Stewardship Trust land that identifies the natural values supporting the property's designation as Stewardship Trust land.⁶⁶ Before any permit or lease is granted on Stewardship Trust lands, the Director is required to review the baseline inventory and other relevant information to identify the natural values associated with the parcel. Applicants for a permit or lease are required to demonstrate that the proposed use will not significantly affect these natural values before any lease can be granted, and the terms of the lease must include language that is protective of the identified natural values. The Director is required to conduct monitoring on each parcel at least once every three years.

Similar requirements apply to the management of mineral or other subsurface uses on Stewardship Trust lands; before any lease or permit can be granted, the Board must determine whether or not the development or exploitation of subsurface resources can be conducted while protecting and enhancing the identified natural values on the property. If significant adverse impacts on the natural values of the property result, or if reclamation standards are not consistent with the identified end-use of the land, a permit or lease to develop or exploit subsurface resources may not be granted.⁶⁷

Lands that are included in the Stewardship Trust also cannot be sold or exchanged unless the lands are first removed from the Stewardship Trust.⁶⁸ Lands can be removed from the Stewardship Trust on the affirmative vote of four of the five members of the Board; however, when lands are removed from the Stewardship Trust, the Board must designate an equal or greater amount of land to be added to the Trust.

⁶⁵ Colorado State Land Board Online, available at: <http://www.trustlands.state.co.us/Documents/Stewardship/Nomination.pdf>.

⁶⁶ BLC Policy No. 2001-02, Management of Surface Estate of Stewardship Trust Properties and Removal of Land from the Designation of Land into the Stewardship Trust (2001).

⁶⁷ BLC Policy No. 2002-03, Management of Mineral Activities on Stewardship Trust Properties (2000).

⁶⁸ COLO. REV. STAT. § 36-1-124(4).

Table V(C): FY 2003 Revenues – Colorado State Land Board

Source	% of Revenue	Receipts
Surface Uses		
Agriculture	5.0%	\$1,360,779
Grazing	11.0%	\$2,993,714
Other surface	1.0%	\$272,156
Total Surface	17.0%	\$4,626,648
Subsurface Uses		
Oil and Gas	40.0%	\$10,886,232
Coal	22.0%	\$5,987,427
Other	2.0%	\$544,312
Total Subsurface	64.0%	\$17,417,971
Sales and Other		
Land Sales	1.0%	\$272,156
Other rentals	15.0%	\$4,082,337
Rights of Way	2.0%	\$87,090
Misc fees	1.0%	\$272,156
Total Sales and Other	19.0%	\$4,354,493
Grand Total	100%	\$27,215,579
Agency Budget*		\$3,375,513

* Figure reflects State Land Board's appropriation within the Department of Natural Resources budget

Source: Colorado State Board of Land Commissioners Annual Report, FY 2003; Office of State Planning and Budget, Colorado Department of Natural Resources Fact Sheet, July 2004. Colorado had not published its FY 2004 Annual Report by the time of publication.

6. Trust Revenue Distribution in Colorado

There are eight separate beneficiaries who receive revenues from trust management activities in Colorado. These beneficiaries include: (1) the School Trust (Colorado common schools); (2) the Public Building Trust; (3) the Penitentiary Trust; (4) the University of Colorado Trust; (5) the Saline Trust (benefits the State Parks, original acreage consisted of "salt springs not exceeding twelve in number with six sections of land adjoining and contiguous to each."); (6) the Internal Improvements Trust (benefits State Parks); (7) the Colorado State University Trust; and (8) the Hesperus Trust (managed for the benefit of Fort Lewis College). Of these, the School Trust is by far the largest, accounting for 91 percent of the total trust land acreage in the state. In addition, lands vested in the state as a result of foreclosure are designated "public school fund lands" and are considered an investment of the public school fund.⁶⁹

Each parcel of state trust land is assigned to a specific trust beneficiary and a corresponding trust account associated with the state permanent fund. Revenues from the sale of trust lands and from royalties for natural resource extraction (other than timber sales) are deposited into the state permanent fund and are credited to the appropriate beneficiary.⁷⁰ By contrast, proceeds from timber sales and rental payments for surface or subsurface use are distributed directly to beneficiaries. Expendable revenues from the school trust lands are deposited into the public school fund and are distributed for use by schools as described below.⁷¹ However, for revenues generated from the lease or rental of surface rights on trust lands located in state forests 75 percent are distributed to the public school income fund and 25 percent to the county public school fund of the county in which the lands are located.⁷² Monies collected by the Board for fees and services are deposited in a Land and Water Management Fund and used for the management and improvement of state trust lands and their associated waters.⁷³

The state's permanent fund is invested by the state treasurer, who is statutorily authorized to invest in a variety of types of deposits and investments, including time deposits, savings and loans, common and preferred stock, and other low risk funds.⁷⁴ The permanent funds are required to be maintained inviolate, with only the interest available for distribution to beneficiaries.⁷⁵ However, at the discretion of the Treasurer, the permanent fund may also be used to make loans directly to the school district to facilitate the provision of buildings, land, and equipment necessary for the operation of public schools, or to guarantee bonds issued by the school district where the guarantee is not in excess of three times the market value of the public school fund.⁷⁶ Colorado was one of the few states to see an increase in its permanent funds during fiscal year 2002-2003.⁷⁷ The balance of the state's permanent fund balance was \$369.9 million as of June 2003 (the last date for which data was available).⁷⁸

Interest derived from the investment of the permanent fund is generally distributed to the beneficiaries; however, starting in 2003-2004, interest from the public school fund that exceeds \$19 million is automatically reinvested into the principal of the fund (which effectively caps distributions to schools from the permanent fund for the foreseeable future).⁷⁹ Interest from the School Trust portion of the permanent fund that is not reinvested is periodically transferred into the state public school fund.⁸⁰

⁶⁹ *Id.* at § 22-41-103.

⁷⁰ *Id.* at §§ 36-1-134; 36-1-116(1)(b).

⁷¹ *Id.* at § 36-1-116(1)(a).

⁷² *Id.* at § 36-7-202.

⁷³ *Id.* at § 36-1-145.

⁷⁴ *Id.* at § 22-41-104 (lawful education investments); see also Colorado State Treasurer, http://www.treasurer.state.co.us/about/investments/public_school/index.htm.

⁷⁵ COLO. REV. STAT. § 22-41-102.

⁷⁶ *Id.*

⁷⁷ ANNUAL REPORT, *supra* note 410, at 3.

⁷⁸ Colorado State Treasurer Quarterly Report, Colorado Public School Permanent Fund, available at: http://www.treasurer.state.co.us/about/investments/public_school/PubSchoolJune03.pdf.

⁷⁹ COLO. REV. STAT. § 22-41-102(3).

⁸⁰ *Id.* at § 22-41-106.

Under Colorado's "School Finance Act," school districts are to be provided a per pupil base amount that is set by the legislature each year, adjusted for costs of living, enrollment sizes, and at-risk student populations.⁸¹ The proceeds from the state public school fund are distributed to counties on top of this per-pupil base, taking into account their per-pupil enrollment.⁸² The legislature is constitutionally prohibited from substituting public school fund proceeds for monies that are appropriated by the general assembly.⁸³ These funds also cannot be used erecting, repairing, or furnishing school buildings, nor can they be used to purchase school lots, and are thus they are generally used for teachers' salaries.⁸⁴ Proceeds from the state public school fund are supplemented by distributions of trust proceeds that were deposited in the local county public school fund; these revenues are also dispersed on a per-pupil basis.⁸⁵

Overall, revenues from Colorado's trust lands contribute a relatively minor amount to the overall state school budget. Trust contributions totaled approximately \$50 million in 2003, including both revenues from activities and interest from the permanent fund – making up less than 1 percent of the state's \$6.6 billion in K-12 expenditures.⁸⁶

7. Recent Developments and Emerging Issues in Colorado

a. Lowry Range

The Lowry Range, also known as the Lowry Bombing and Gunnery Range, was used as a bombing training facility during World War II through to the Vietnam War.⁸⁷ The Board acquired the land through land exchanges with the Department of Defense in 1964, 1966, and 1991. The area is currently undeveloped short-grass prairie, contaminated with unexploded military ordinance, and is leased primarily for grazing and a few oil wells.

The trust currently owns 25,854 acres out of the 600,000 acre range. This trust parcel is one of the largest pieces of undeveloped metropolitan property under single ownership in the U.S.⁸⁸ There is an estimated two hundred-year water supply for one hundred thousand single-family homes at the Range.⁸⁹ The Lowry Range parcel is slated for development when ongoing clean-up efforts are completed. The state Governor has stated his hope that development on this land will become a "jewel for generations to come," and that over the next twenty or twenty-five years the area will develop into a high-quality community with "plenty of open space."⁹⁰ The Board has estimated that the completed value of the development to the trust would be in the "billions and billions of dollars."⁹¹

b. Multiple Use Management Policy

The Multiple-Use Management Policy was created by the Board of Land Commissioners in 1992 after more than two years of research and public input. The primary mission of the Policy is to maximize benefits to the trust while recognizing state interests and citizen concerns. The Policy requires trust assets to be managed in a manner that preserves and enhances the long-term productivity and value of *all* trust land assets, and to promote increased annual rentals by creating

⁸¹ *Id.* at § 22-54-101 et seq.

⁸² *Id.* at § 22-54-115.

⁸³ COLO. CONST. Art. IX § 3.

⁸⁴ FLETCHER SWIFT, A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1798-1905, 227 (1911).

⁸⁵ COLO. REV. STAT. §22-54-113(2).

⁸⁶ *Annual Survey of Local Government Finances 2002-2003, Summary of Public School System Finances for Elementary-Secondary Education by State*, U.S. CENSUS BUREAU (2005), available at <http://www.census.gov/govs/www/school.html>.

⁸⁷ Press Release, *Former Lowry Bombing and Gunnery Range*, U.S. Army Corps of Engineers, available at <http://www.nwo.usace.army.mil/html/pm-h/lowrywebpg.htm>.

⁸⁸ John Rebchook, *Homes, Homes on the Range: Under Governor's Plan, Former Lowry Bomb-training Site Would Become Gigantic New Development Project*, ROCKY MOUNTAIN NEWS (Denver, CO) 1C (March 6, 2004).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

opportunities for lessees other than traditional agricultural lessees to lease state trust lands.⁹² By responding to the increased demands for outdoor public recreation from growing populations and the state's \$6 billion tourism industry,⁹³ the Board anticipates obtaining an additional \$1 million per year of rental income for the trust.

The Policy is designed to be phased in over ten years, and will provide for multiple uses such as hunting, wildlife related uses, hiking, camping, and biking in a manner compatible with existing agricultural and grazing leases under Multiple-Use Management Plans (MMPs). MMPs will prescribe overall management goals, recommendations for habitat improvements, tools to achieve desired results, considerations related to the contribution of the plan to quality of life, and monitoring and evaluation mechanisms.⁹⁴ The Policy also adopts guidelines for motorized vehicle use, buildings or other capital structures, littering, camping and fires, pets, and hours of use.⁹⁵ Lessees will have the opportunity to participate as a full partner with the Board and the Division of Wildlife in building consensus on wildlife management strategies, and can serve as on-site managers for wildlife uses.

The largest single recreational lessee of trust lands in Colorado under this program is the Colorado Division of Wildlife, which leases in now excess of four hundred thousand acres of trust land for hunting, fishing, and other wildlife recreation on a non-exclusive basis under a memorandum of understanding. The cost of the lease is paid for via surcharges on hunting and fishing licenses.

c. Fiscal Impact Study Requirements

Under the terms of Amendment Sixteen, the Colorado Board of Land Commissioners is now required to consider whether or not the income derived from the use of trust land for development will exceed the costs associated with increased student enrollment associated with that development in order to avoid detrimental impacts on local schools and state funding of education.⁹⁶ If the Board is directly involved in the development of trust property, or if the Board is indirectly involved via a development agreement, a fiscal impact study must be conducted whenever a parcel that is leased, sold, or exchanged is zoned for residential, commercial, or industrial purposes.⁹⁷

If the benefits to the trust do not outweigh the burdens on local schools from increased enrollments, the proposed development may not proceed. For example, every child in Colorado attending public school costs the state \$4,666.29 in base funding, plus a cost of living factor, an "at risk" student factor, a personnel costs factor, and the size of the school factor (larger schools have greater buying power).⁹⁸ The budget for fiscal year 2004-2005 guarantees a minimum of \$5,627 per pupil. As such, a large residential development will place a significant financial burden on the state – that is, if the costs of this development are not offset by increases in property taxes and specific ownership taxes that are used to fund education in Colorado,⁹⁹ the financial demands on the school may well outweigh the increased revenues generated for the school trust.¹⁰⁰

⁹² BLC Policy No. 92-8, Multiple-use Policy (1992).

⁹³ *Id.*

⁹⁴ *Id.*, at Appendix II.

⁹⁵ *Id.*

⁹⁶ COLO. REV. STAT. § 36-1-112.5.

⁹⁷ *Id.* at § 36-1-112.5. See also Board of Land Commissioners Policy No. 99-02, Policy Concerning Fiscal Impact (1999).

⁹⁸ *Understanding Colorado School Finance and Categorical Program Funding*, COLORADO DEPARTMENT OF EDUCATION, PUBLIC SCHOOL FINANCE UNIT (July 2004).

⁹⁹ COLO. REV. STAT. § 22-54-103.

¹⁰⁰ COLO. CONST. Art. IX § 3.