

IV. The State Trust Doctrine

The vast majority of Western states whose courts have considered the issue have found that trust relationships were created by their individual enabling act grants, or at least by the state constitutional provisions that control the management of the granted lands.¹ Today, only two Western states – California and Wyoming – have found that neither their Enabling Acts nor their Constitutions impose any trust responsibilities on the state,² and Wyoming nevertheless holds its lands in trust pursuant to the direction of the state legislature.³

However, the concept of a trust responsibility as applied to state trust lands is a relatively recent concept. As noted elsewhere, the term “trust” did not expressly enter into state constitutional requirements until a handful of states – such as Washington, Idaho, South Dakota, and Montana – recognized a trust responsibility associated with their land grants in their Constitutions. The New Mexico-Arizona Enabling Act was the first in which Congress imposed detailed restrictions and specified that the states were to hold the granted lands “in trust” for the benefit of various public purposes and institutions.⁴ Additionally, the major decisions of the U.S. Supreme Court that interpreted the New Mexico-Arizona Act and firmly established the doctrine of the state trust responsibility in modern jurisprudence were not decided until 1919 and 1968, respectively.

As a result, it was ultimately interpretations of federal enabling acts and state constitutional requirements for the various state and federal courts that formally introduced the “trust” concept into the management of trust lands in the West. Following the Supreme Court’s logic, many state courts found that their constitutions required lands to be held in trust, and although Congress had not expressly stated in any of the grants prior to Arizona and New Mexico’s grant that school lands were to be held “in trust,” many courts subsequently found that the terms of previous enabling grants contained sufficient evidence that Congress had intended to obligate the states to manage the lands in a fiduciary capacity.⁵

The precise contours of the trust responsibilities that govern the administration of state trust lands vary substantially depending on the specific enabling act, constitutional, and statutory requirements that apply to each state. This doctrine is also continuing to evolve in common law as courts consider challenges to the decisions of trust managers through litigation by lessees, trust beneficiaries, and other stakeholders (most notably conservation groups), and as states adopt new statutory and constitutional requirements in response to changing conditions. The overall result is that several common themes apply to most of the states that hold trust lands west of the Mississippi River: first, these lands are held in trust by the state; second, the state, as the trustee, has a fiduciary duty to manage the lands for the benefit of the “beneficiaries” of the trust grant; third, this fiduciary duty operates as a constraint on the discretion of the state and requires that lands be managed in a manner consistent with the best interests of the trust. However, although the nature of the fiduciary duties imposed on the state as a trustee are quite similar to those imposed on the trustees of other common law trusts, there are nevertheless a number of differences between state trusts and the common law trusts discussed in section III that should not be overlooked.

¹ 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). Attorneys general in two states where courts have not addressed the issue have reached the same conclusions. See 1990 Op. N.D. Att’y Gen. 94 (1990); 46 Op. Or. Att’y Gen. 468 (1992).

² See 41 Op. Cal. Att’y Gen. 202 (1963).

³ *Riedel v. Anderson*, 70 P.3d 223 (Wyo. 2003).

⁴ See discussion in Section II, *supra*.

⁵ See discussion in Section III(A), *infra*.

A. Evolution of the State Trust Doctrine

In decisions that have considered the status of lands granted to the states in the early days of the state accession process, the courts have consistently taken the position that although these grants were clearly intended by Congress to support public education, the grants did not create any binding obligations on the states. For example, in *Cooper v. Roberts*,⁶ the U.S. Supreme Court considered a challenge to the sale of Michigan's sixteenth section lands. Although the sale of the land was not permitted by the terms of the state's Enabling Act, the Court characterized the grant of the sixteenth section lands as being "to the State directly, without limitation of its power."⁷ Although the Court concluded that the grant "for the use of schools" constituted a "sacred obligation imposed on its public faith," the limitation was not enforceable against the state.⁸ Similarly, in *State of Alabama v. Schmidt*,⁹ the U.S. Supreme Court considered the validity of a state statute that allowed private parties to adversely possess¹⁰ school lands. The Court ultimately concluded that the statute was valid. Although the land grant had required that the lands be used for school purposes, the grant to the state was absolute and thus gave the state essentially unrestricted authority over the administration of the lands. The court once again indicated that the terms of the grant imposed a "sacred obligation on the public faith," but concluded that this obligation was ultimately "honorary" in nature.¹¹ Similar results were reached in other cases interpreting the early grants of lands to the states.¹²

As noted above, the New Mexico-Arizona Enabling Act of 1910 was the first enabling act to clearly specify that the lands granted to the states were to be held "in trust" (although several states had previously adopted similar provisions in their constitutions). However, the implications of this provision remained unclear until the U.S. Supreme Court interpreted its meaning in two cases: *Ervien v. United States*¹³ and *Lassen v. Arizona*.¹⁴ These two rulings by the U.S. Supreme Court have exerted a powerful influence on the state land trust doctrine.¹⁵

1. The *Ervien* and *Lassen* Decisions

Ervien v. United States considered the validity of a program under which the New Mexico Land Commissioner proposed to utilize funds derived from school lands to advertise the state to prospective residents. The stated rationale for this proposal was that this advertising would ultimately benefit the schools by increasing demand for trust lands, thus increasing revenues from the sale and lease of trust land.

The federal government brought suit to enjoin the advertising program as a violation of the state's Enabling Act. Although a federal district court initially concluded that the advertising program was a legitimate use of trust assets under general trust principles, the Eighth Circuit Court of Appeals disagreed. The appeals court noted that the Enabling Act required the state to hold the lands "in trust," had specified that funds derived from those lands were to support specific public institutions,

⁶ 59 U.S. 173 (1855).

⁷ 59 U.S. at 182.

⁸ *Id.*

⁹ 232 U.S. 168 (1914).

¹⁰ Adverse possession is a doctrine which allows one party, by occupying lands in an open and "hostile" manner without the permission of the owner for an established period of time (typically five years) to obtain the legal title to those lands.

¹¹ 232 U.S. at 173.

¹² Even before these cases were considered by the U.S. Supreme Court, state courts had reached similar conclusions. The Supreme Court of Illinois, considering a challenge to the management of sixteenth section lands, rejected the notion that the lands were held in trust, finding that the lands were best understood as the consideration for the state's agreement to forfeit part of its inherent sovereignty as a part of joining the Union (forgoing the taxation of other federal lands as well as nonresidents of the state). See *Bradley v. Case*, 4 Ill. 585 (1842). A number of other courts interpreting early trust grants have reached similar conclusions; *c.f. Lipscomb v. Columbus Mun. Separate School Dist.*, 269 F.3d 494 (C.A.5 Miss. 2001) (federal trust applicable to Mississippi section 16 lands "merely honorary"); *Louisiana v. William T. Joyce Co.*, 261 F. 128, 130, 133 (5th Cir.1919) (Louisiana's lands subject to "merely honorary trust"); *Special School Dist. No. 5 of Mississippi County v. State*, 213 S.W. 961, 963 (Ark. 1919) (Arkansas' school lands granted unreservedly, and legislature has full discretion to manage or dispose the lands as they see fit).

¹³ 251 U.S. 41 (1919).

¹⁴ 385 U.S. 458 (1967).

¹⁵ O'Laughlin, *supra* note 3, at 11.

and that any use of the lands or the revenues derived from them in a manner other than those specified in the Act would constitute a “breach of trust.”¹⁶ The court found that the advertising program would take funds intended for these specific purposes to benefit the state as a whole, while providing only incidental benefits to the trusts, each of which held only a small fraction of the land in the state. The court found that this was inconsistent with the direction of the Act, which had dedicated the land and its proceeds “to a particular object to the exclusion of all others.”¹⁷ As such, the Eighth Circuit concluded that the advertising program did not comport with the requirements of the Enabling Act and constituted a “breach of trust” that could be enjoined by the U.S. Attorney General.¹⁸

In *Ervien*, the Supreme Court upheld this interpretation, finding that the Act contained “a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of other purposes.”¹⁹ However, in discussing the significance of the term “breach of trust” in its opinion, the Court noted, somewhat cryptically, that it meant “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.”²⁰ Although the decision established that the conditions and purposes specified in the New Mexico Enabling Act were binding on the state, it did not explain the characteristics of the “trust” to which the state was bound.

The Court’s next opportunity to consider this issue was nearly fifty years later, when it decided *Lassen v. Arizona ex rel. Ariz. Highway Dep’t*.²¹ *Lassen* was concerned with the validity of Arizona’s long-standing practice of granting rights-of-way to the State Highway Department free of charge (despite a requirement in the state Enabling Act providing that lands could only be sold or leased at public auction to the highest and best bidder).²² After the Arizona Land Commissioner adopted a rule in 1964 that required the Highway Department to compensate the trust for these rights-of-way, the Highway Department successfully challenged the rule. The Arizona Supreme Court held that the highways built on trust lands would always enhance the value of the trust lands across which they were built in an amount at least equal to the value of the right-of-way, such that compensation to the trust was not required.²³

Noting that it had decided to hear the case due to the “importance of the issues presented both to the United States and to the State which have received [trust] lands,”²⁴ in *Lassen* the U.S. Supreme Court reversed the decision of the Arizona Supreme Court, finding that the Land Commissioner was required to obtain compensation for the grant of all right-of-ways.²⁵ The Court noted that under its previous holding in *Ervien*, the state was required to manage the school lands in a manner consistent with the purposes and requirements specified in the Enabling Act. The practice of granting rights-of-way to the Highway Department violated these requirements by disposing of these lands for compensation less than their true value (the Act specifically requires that lands cannot be sold for less than their true value).²⁶

Interestingly, the Court found that despite the public auction requirement, the state was not required to dispose of state highway rights-of-ways at public auction.²⁷ Based on the legislative history of the Act, the Court found that this provision had been included by Congress with the intent of preventing fraudulent dispositions to private parties (a problem in New Mexico prior to statehood). Since dispositions to the state for fair market value did not seem to fall within the category of dispositions that the provision was intended to protect against, and since the State Highway Department could condemn land purchased at auction by any potential alternative bidder (which

¹⁶ U.S. v. *Ervien*, 246 F. 277, 278-279 (8th Cir. 1917).

¹⁷ *Id.* at 279.

¹⁸ *Id.* at 280.

¹⁹ 251 U.S. at 47.

²⁰ *Id.* at 48.

²¹ 385 U.S. 458 (1967).

²² *Id.* at 465.

²³ *Id.* at 459-460.

²⁴ *Id.* at 461.

²⁵ *Id.* at 470.

²⁶ *Id.* at 469-470.

²⁷ *Id.* at 465.

would effectively chill the auction), the Court concluded that the auction requirement was unnecessary for dispositions of this type as long as the trust obtained the fair market value.²⁸

However, the Court expressly rejected the rationale offered by the Arizona Supreme Court to justify dispositions free of charge, or even – as advocated by the United States in the case – to allow the Land Commissioner to discount the costs of the right-of-way by the anticipated enhancement of value to the trust parcel. The Court found that the Act required that the beneficiaries receive the “full benefit” from the disposal of trust land, finding that the laundry list of restrictions contained in the Enabling Act “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.”²⁹ Because a discount for “enhanced value” would require the state to make an inherently uncertain estimate of the value of the enhancement, the Court found that this would risk diverting a portion of the benefits derived from the trust lands to the Highway Department and away from trust beneficiaries.³⁰

Lassen was not the first decision to find a trust responsibility associated with the lands that were granted to the states at statehood. As noted elsewhere, a number of states had included provisions in their state constitutions indicating that the lands were to be held “in trust.”³¹ As a result, a number of previous decisions in state courts had found the existence of a legally binding trust that restricted the states’ discretion in managing and disposing of trust lands and the revenues derived from them.³² However, as the first Supreme Court decision to address the nature of the land grants to the Western states, the *Lassen* decision proved to be extremely influential, prompting a flood of trust-related litigation over the decades that followed, and resulting in a series of similar decisions by other state and federal courts.

2. State Adoption and Adherence to the Trust Doctrine

The U.S. Supreme Court did not specify the intended scope of the principles that it announced in *Lassen*. Although the decision clearly found that Congressional grants could create a continuing trust obligation that was binding on the states, and that a trust was created by the express provisions of the New Mexico-Arizona Enabling Act, the implications of this decision for enabling acts of other states with less restrictive language was not discussed by the Court. However, the Court subsequently made clear that the determination of whether a trust existed in a given state required a case-by-case analysis of the terms of each state’s enabling act and constitution.

For example, in a 1986 case, *Papasan v. Allain*,³³ the Court considered a challenge by local school officials and schoolchildren to improper dispositions of Mississippi’s school trust lands on the grounds that the dispositions were a breach of trust. Although the Court decided the case on other grounds and declined to rule on whether or not the State of Mississippi was subject to a trust responsibility, its decision noted that the character of the trust grants differed significantly from state to state. The court also noted that while the New Mexico-Arizona grants imposed a trust responsibility, other earlier land grants had been found to impose only “honorary” restrictions; as such, the existence of a trust in Mississippi was not a foregone conclusion.³⁴ In reviewing the history of its earlier decisions as to whether specific enabling acts had created binding trusts, the Court noted that its interpretations of the New Mexico-Arizona Enabling Act in *Ervien* and *Lassen* had found the existence of an express trust, but the Court seemed to harbor some questions as to whether these decisions were truly consistent with one another. In discussing a petitioner’s argument that none of the enabling act grants had been intended to create enforceable trusts, the court made the following “observation” in a footnote:

²⁸ *Id.* at 463-465.

²⁹ *Id.* at 467.

³⁰ *Id.* at 469.

³¹ See note 82, *supra*.

³² *C.f.* State ex rel. Hellar v. Young, 58 P. 220 (Wash. 1899); State ex rel. Ebke v. Board of Educ. Lands & Funds, 47 N.W.2d 520 (Neb. 1951).

³³ 478 U.S. 265 (1986).

³⁴ *Id.* at 279-280.

it could be that the earlier grants did give the grantee States absolute fee interests, while the later grants created actual enforceable trusts. On the other hand, it may be that the petitioners are correct in asserting that the substance of all of these grants is the same.³⁵

The Court cited to congressional records discussing the New Mexico-Arizona Enabling Act that had referred to the express trust provisions in the Act as “nothing new in principle,” and noting that “[f]or many years it has been the custom to specify the purposes for which grants of lands are made to incoming states and to place express restrictions upon the mode of disposing of them.”³⁶ Without reaching any conclusion, the Court also observed that yet another view of the relationship could be as a contract between the states and the federal government, noting that “perhaps, then, the conditions of the grants are still enforceable by the United States, although possibly not by third parties.”³⁷

Regardless, since the U.S. Supreme Court decisions in *Ervien* and *Lassen*, virtually all of the Western states whose courts have considered the issue have found that trust relationships were created by their individual enabling act grants.³⁸ Attorneys general in states whose courts have not directly addressed the issue have reached the same conclusions.³⁹ Today, only two Western states – California and Wyoming – have found that neither their Enabling Acts nor their Constitutions impose any trust responsibilities on the state, and only California has found that their state land managers are not subject to any form of trust responsibility whatsoever.⁴⁰

A number of commentators have argued that in many cases, state and federal court decisions that have found the existence of a trust in various states were essentially adopted in a sort of “rote” adherence to the *Lassen* and *Ervien* decisions.⁴¹ These commentators have typically pointed to decisions in states such as Alaska, Montana, Oklahoma, Utah, and Washington,⁴² as well as state attorney general opinions that have relied on *Lassen* to conclude that trust responsibilities exist.⁴³ Many of these decisions seem to ignore the fact that the decisions in both *Lassen* and *Ervien* were based on an interpretation of the strict New Mexico-Arizona Enabling Act, and simply adopted the *Lassen* trust logic without independently construing the requirements of that state’s constitution and enabling act. These commentators generally argue that, because the New Mexico-Arizona Enabling Act of 1910 is the only act that specified that granted state lands were to be held “in trust,” the negative implication is that Congress had not intended to create a trust in the previous grants.⁴⁴

³⁵ *Id.* at 292 n.18.

³⁶ *Id.*, citing to S. Rep. No. 454, 61st Cong., 2d Sess., 18-20 (1910).

³⁷ *Id.* at 292 n.18.

³⁸ 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).

³⁹ See 1990 Op. N.D. Att'y Gen. 94 (1990); 46 Op. Or. Att'y Gen. 468 (1992).

⁴⁰ See 41 Op. Cal. Att'y Gen. 202 (1963); see also *Riedel v. Anderson*, 70 P.3d 223 (Wyo. 2003).

⁴¹ 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); 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); Wade R. Budge, *Changing the Focus: Managing State Trust Lands in the Twenty-First Century*, 19 J. LAND RESOURCES & ENVTL. L. 223 (1999).

⁴² For list of cases discussing the application of common law trust principles to the school trust, see note 38.

⁴³ O'Day, *supra* note 5, at 169. Some commentators have also suggested that states have been too quick to conclude that the lands are included in the trust, i.e., the trust responsibility might only apply to the revenues generated by those lands. The Utah Supreme Court, which was the first court to consider the issue, rejected this notion. See *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993) (discussed further below). However, the Wyoming Supreme Court later found that while its permanent fund was held in trust pursuant to the state Constitution, the lands were held in trust only pursuant to the will of the Wyoming legislature, which lends at least some credence to this notion. See *Riedel v. Anderson*, 70 P.3d 223 (2003) (discussed further below).

⁴⁴ See Arum, *supra* note 223; see also Bassett, *supra* note 223; Bowlin, *supra* note 223; Budge, *supra* note 223.

However, a review of the caselaw suggests that in many states, the development of the trust doctrine has been more nuanced than a simple acceptance and application of *Ervien* and *Lassen* without regard to individual state history and grant requirements. For example, although both Washington and Utah have been criticized for finding that their Enabling Acts created a binding trust relationship between the state and Congress, the full history of their trust caselaw suggests that this conclusion was based on an independent analysis of their respective Enabling Acts and Constitutions.

When Washington entered the Union in 1889, Congress granted the state sections sixteen and thirty-six for “the support of common schools,” as well as other lands for the support of an agricultural college, a scientific school, normal schools, public buildings at the State capital, and various charitable, educational, penal, and reformatory institutions.⁴⁵ In the Act, Congress laid down clear rules for the disposal of state lands and the handling of sale proceeds derived from those lands. These included requirements that school lands could only be disposed at public auction (except for leases of five years or less), that lands must be sold for a minimum price of \$10 per acre, and that all land sale proceeds be credited to a Permanent School Fund, with the interest from the fund used for the support of common schools.⁴⁶ The Washington Constitution affirmed these restrictions and indicated that the lands were to be “held in trust for all the people.” The Constitution also added requirements that the land must be sold for at least its appraised value, and set disposition restrictions that limited the state to selling no more than one-quarter of the school lands by 1895, and not more than one-half by 1905. These restrictions were perhaps not surprising in light of the state’s poor experience with fraudulent land transactions under the territorial government.

The Washington state courts concluded as early as 1899 that the state’s permanent fund constituted a trust.⁴⁷ It should be noted that this decision was reached a full two decades prior to the U.S. Supreme Court’s ruling in *Ervien*, although the Washington courts did not immediately rule on whether the lands themselves were held in trust or what specific requirements were associated with those trust responsibilities. However, in 1968, a Washington federal district court ruling finally addressed this issue in *U.S. v. 112 Acres of Land*,⁴⁸ a case in which the U.S. Bureau of Reclamation took a parcel of trust lands under eminent domain and claimed that, pursuant to a Washington statute that allowed donations of easements for federal irrigation projects, it was not required to pay compensation to the state trust.

Although this statute was inconsistent with the requirements of the state’s Enabling Act (which requires the state to obtain full market value for any disposal of trust lands), the Bureau argued that Congress had not intended this provision to apply when disposals were made to the federal government, citing precedents involving other types of conditional federal land grants.⁴⁹ However, the court noted that the Enabling Act contained several provisions that were inconsistent with allowing a taking without compensation. First, the court noted that the Act announced a principle of indemnity that ensured the state would receive the full benefit of the trust land grant. Under this provision, Congress allowed the state to select *in lieu* lands in the event that any of the granted section sixteen and thirty-six lands were reserved or disposed by the federal government between the date of the state’s admission and the time that these sections were identified by survey.⁵⁰ Secondly, the court noted that the express terms of the Enabling Act did not provide for any federal exception to the full market value requirement.⁵¹ Finally, the court noted that the Washington Constitution, in accepting the terms of the grant, required that in no event should trust lands “be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.”⁵² After reviewing the history of this provision, the court read the latter part of the phrase as

⁴⁵ Omnibus Enabling Act, 25 Stat. 676 (1889).

⁴⁶ *Id.*

⁴⁷ *C.f.* State ex rel. Hellar v. Young, 58 P.2d 220 (Wash. 1899) (based on the express language of the Washington Constitution, the fund was “in the nature of a trust fund” and that, pursuant to private trust principles, the state was obligated to repay any monies that were improperly invested).

⁴⁸ 293 F. Supp 1042 (D.C. Wash. 1968).

⁴⁹ *Id.* at 1045.

⁵⁰ *Id.* at 1045-1046.

⁵¹ *Id.* at 1046.

⁵² *Id.*

conjunctive with the former, i.e., the consent of the United States was not in itself sufficient to free the land from the constitutional requirement of full compensation, and moreover, that the consent required was that of Congress, not of a federal agency.⁵³

Taken together, the court found that the provisions of the Enabling Act and the Constitution constituted a “declaration of trust,” which had interposed the equitable interest of the public school system between the federal government, as the grantee of the lands, and the state as the recipient.⁵⁴ Although the court noted that *Schmidt* had suggested that all requirements in federal land grants to the states had been merely “honorary,” *Lassen* had “dispelled these intimations,” and the court thus concluded that “this trust is real.”⁵⁵ The Washington Supreme Court subsequently approved this determination in *County of Skamania v. State*,⁵⁶ striking down a statute that attempted to extend a subsidy to companies that held timber contracts on state lands (suffering due to a price downturn in the timber market) to extend or terminate those contracts without penalty. Finding that the lands were held in trust under the logic of *U.S. v. 112 Acres of Land*, the court noted, “a trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests.... [and] may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be.”⁵⁷

It thus seems clear that the Washington courts did not simply “follow” *Lassen*. Rather, they found sufficient evidence of intent to create a trust in the bargain struck between Congress and the State in the Enabling Act and the State Constitution. This evidence included requirements that the trustee could not dispose of the lands except by receiving the full market value, with the proceeds credited to an identified beneficiary; that after the grant was made, the grantor would replace any property that was inadvertently disposed to ensure that the beneficiary remained whole and received the full benefit of the grant; and that the terms of the grant could only be modified upon the consent of both the granting and receiving party. All of these terms are entirely consistent with the creation of a trust under common law principles.⁵⁸

In analyzing the provisions of the Utah Enabling Act and State Constitution, the Supreme Court of Utah considered a similar series of factors in reaching its conclusion that the state’s granted lands were held in trust. In *Duchesne County v. State Tax Commission*,⁵⁹ the Utah Supreme Court considered whether lands that were acquired through foreclosure of a mortgage that secured funds loaned from the state’s permanent fund were held in trust, and thus exempt from taxation. In reviewing the requirements of the state’s Enabling Act, the court noted that all of the elements of an express trust were present: first, the legal title to the fund was vested in the state; second, the terms of the Enabling Act established that the fund was perpetual, with the interest to be used for a specified purpose (the support of schools); third, that the fund was to be guaranteed by the state against any loss or diversion.⁶⁰ The court noted that

⁵³ *Id.* at 1047.

⁵⁴ *Id.* at 1049.

⁵⁵ *Id.*

⁵⁶ 685 P.2d 576, 578-579 (Wash. 1984).

⁵⁷ *Id.* at 581-82. In 1982, in response to collapse in timber prices precipitated by falling housing starts, the Washington Legislature passed the Forest Products Industry Recovery Act, which enabled timber companies to either extend timber contracts on state lands at no cost or to terminate contracts, essentially without penalty. The Act contained language indicating that by helping the timber companies, it would ultimately benefit the trust beneficiaries, noting that if the companies went bankrupt, there would be no buyers for state timber in the future. *Id.* at 578-579. Skamania County ultimately sued the state, arguing that the grant of lands to the state constituted a trust, and the Forest Products Industry Recovery Act violated the state’s fiduciary duties as a trustee of state lands (the County was joined in the suit by the State Board of Education and the Board of Regents for the University of Washington). The court ultimately agreed, holding that the grant of lands to the state in fact constituted a trust. Because the Act provided “direct, tangible benefits to the contract purchasers [and the state economy], at the expense of the trust beneficiaries,” the state’s actions violated its undivided duty of loyalty as a trustee. *Id.* at 581-82. One critic has noted that the state (and Congress) have been inconsistent in defending this principle, however, noting that a few years later (in 1990), Congress passed a law that prohibited the export of timber from public lands (including state trust lands) in the Pacific Northwest; this decision ultimately cost beneficiaries approximately \$90 million a year in lost revenues for the benefit of small sawmills that had been impacted by injunctions against the cutting of old growth trees of federal lands. Chasan, *supra* note 55, at 19.

⁵⁸ See discussion of common law trusts in section III, *supra*.

⁵⁹ 140 P.2d 335 (Utah 1943).

⁶⁰ *Id.* at 337-338.

this embraces all the elements of an express trust, with the state the trustee, holding title only for the purpose of executing the trust; and is made the guarantor of the trust estate against loss... It implies two interests, one legal, and the other equitable; the trustee holding the legal title or interest; and the cestui que trust or beneficiary holding the equitable title or interest. This being a charitable trust, or a public trust, it is not necessary that the cestui que trust be a definite or ascertainable being... The trust estate is definite, the trustee is certain, and the purpose of the trust and use of the fund is definite, certain and particularly characterized. This is sufficient...⁶¹

The court concluded that the only logical result was that the state held the permanent funds as the trustee of an express trust, with the funds limited in the amounts and purposes for which it could be expended.⁶²

Although *Duchesne County* concluded that the permanent fund (including lands acquired via investment of the permanent fund) was held in trust, the court arguably left open to question whether trust lands that were originally granted to the state were also held in trust. The Utah Supreme Court revisited this question approximately fifty years later in *National Parks and Conservation Association v. Board of State Lands*,⁶³ during a challenge to a land exchange involving county-owned land and state trust lands within the boundaries of Capitol Reef National Park. In challenging the land exchange, the National Parks and Conservation Association (NPCA) argued that, (1) while the permanent fund was held in trust for the support of schools, the granted lands were not necessarily held in the same trust; (2) that the school trust lands should be subject to the public trust doctrine; and (3) that the state should have prioritized considerations related to the scenic, aesthetic, and environmental values of the trust lands over economic and financial considerations in considering the exchange.⁶⁴

The Utah Supreme Court rejected these arguments, finding that state trust lands were held in trust for the benefit of public schools. The court found that the trust which applied to the state's permanent fund must by necessity apply to the lands as well, since 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."⁶⁵ Since the Enabling Act did not explicitly distinguish between the trust land and the revenues derived from that land, the management of the school trust land was therefore subject to the same trust obligations as the proceeds derived from the lands.⁶⁶ Similarly, the court found that NPCA's argument that the school lands were subject to public trust doctrine

confuses the public trust that applies to sovereign lands with school trust land. The "public trust" doctrine, discussed in *Colman v. Utah State Land Board*, 795 P.2d 622, 635-36 (Utah 1990), protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large. The public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts.⁶⁷

The court found that the Enabling Act clearly specified a narrower set of intended public beneficiaries (i.e., schools) than the public at large, and thus the purposes of the school trust and the requirements of the public trust were necessarily different. Noting that the express purpose of the school trust was to produce revenues for the support of public schools, the court rejected the idea that the state had

⁶¹ *Id.* at 338.

⁶² *Id.*

⁶³ 869 P.2d 909 (Utah 1993).

⁶⁴ *Id.*

⁶⁵ *Id.* at 920 n7.

⁶⁶ *Id.*

⁶⁷ *Id.* at 919.

breached its trust responsibilities by failing to prioritize public scenic, aesthetic, and environmental values over financial considerations in making the exchange.⁶⁸

3. Revisiting the Trust Doctrine

Criticisms that the courts have been too quick to assume the existence of a trust have not fallen entirely on deaf ears. In recent years, several courts – including courts in Colorado, Utah, and Wyoming – have revisited the issue of whether or not their Enabling Acts were explicit enough in their restrictions to create a trust, with varying results. In *Branson Sch. Dist. RE-82 v. Romer*,⁶⁹ the Tenth Circuit Court of Appeals addressed the issue of whether Colorado's state trust lands were held in trust. In reviewing the history of Colorado's Enabling Act, the court noted that the Act fell, both chronologically and substantively, somewhere in between the Michigan and Alabama Acts with their "honorary" restrictions and the New Mexico-Arizona Act with its express trust obligations. As such, the court reasoned that the existence or non-existence of a trust depended on whether Congress had sufficiently manifested the intent to create a fiduciary relationship via a sufficient "enumeration of duties" that "would justify a conclusion that Congress intended to create a trust relationship."⁷⁰

The court noted that the granting language contained in the Act, which provided that the school lands "are hereby granted to the said State for the support of the common schools,"⁷¹ was insufficient to create a trust in isolation, since it was no more specific than the language of the Michigan and Alabama grants that had been interpreted to create only "honorary" obligations on the part of the states.⁷² However, the court noted that this language was supplemented by a series of specific restrictions on how the school lands could be managed and disposed, and that the Colorado Enabling Act was the first to contain such restrictions.⁷³ These included requirements that the lands could be disposed only at public sale, that they must be sold at a price of not less than \$2.50 per acre, and that the proceeds of the sales must be placed in a permanent fund to benefit the common schools.⁷⁴ The court held that these additional restrictions were sufficient evidence of intent to create a trust, since they identified specific duties that were clearly imposed to ensure that the lands would be used to further Congress' goal of providing perpetual, financially sound support for Colorado's common schools.⁷⁵

Following the decision in *Branson*, the Tenth Circuit also had occasion to revisit the boundaries of Utah's trust doctrine in *District 22 United Mine Workers of America v. Utah*.⁷⁶ Building on its analysis in *Branson*, the court examined the Utah Enabling Act's grant of fifty thousand acres for the state miners' hospital under a similar set of principles. Like the Colorado Enabling Act, the court noted that the Utah Enabling Act simply provided that the fifty thousand acres was granted "for the purpose[] indicated, namely: ... [F]or a miner's hospital for disabled miners...";⁷⁷ taken alone, the court once again held that this language was insufficient to create a trust based on the previous interpretations of the Michigan and Alabama grants.⁷⁸

The court also found that, unlike the Colorado Enabling Act, the Utah Enabling Act did not place any explicit restrictions on the manner in which the granted lands were to be managed or disposed; instead, the Utah Enabling Act merely provided that "the lands... shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature may provide." As such, the court found that the Utah Enabling Act had explicitly given the legislature full discretion as to how these lands were to be managed or disposed, and under general trust principles,

⁶⁸ *Id.* at 920-921.

⁶⁹ 161 F.3d 619 (10th Cir.1998).

⁷⁰ *Id.* at 634.

⁷¹ Colorado Enabling Act, 18 Stat. at 475 § 7.

⁷² 161 F.3d at 634.

⁷³ *Id.*

⁷⁴ Colorado Enabling Act, 18 Stat. at 476 § 14.

⁷⁵ 161 F.3d at 634.

⁷⁶ 229 F.3d 982 (10th Cir. 2000).

⁷⁷ *Id.* at 989.

⁷⁸ *Id.* at 990.

this discretion “militates against the creation of a trust.”⁷⁹ However, in reviewing the requirements of the Utah Constitution and the interpretations of those requirements by the Utah Supreme Court in several previous cases, including *National Parks & Conservation Ass’n v. Board of State Lands*,⁸⁰ and *Duchesne County v. State Tax Comm’n*,⁸¹ the court held that the explicit trust language contained in the Utah Constitution was sufficient to conclude that the lands were “held in trust pursuant to the Utah Constitution.”⁸² Although Utah is the only Western state in which this conclusion has been reached, the concept of a constitutional trust is not unique; Mississippi courts have also found that Mississippi’s trust lands are held in trust pursuant to its State Constitution; by contrast, the requirements of its federal Enabling Act are merely honorary.⁸³

The Wyoming Supreme Court recently made a similar finding with regard to the requirements of the 1890 Wyoming Admission Act in *Riedel v. Anderson*,⁸⁴ which considered a challenge to a state statute that granted the holder of an agricultural lease on state trust lands a preferential right to renew the lease by matching any competing bid. Reviewing the evolution of the Wyoming Admission Act in light of the Tenth Circuit’s decisions in *Branson* and *Dist. 22 United Mine Workers*, the court noted that Wyoming’s Enabling Act, while similar to Colorado’s, was different in two important respects: first, it did not specify any minimum sales price for state trust lands, and secondly, it expressly authorized the leasing of trust lands in “any manner the state legislature provides.”⁸⁵ On balance, the Wyoming Supreme Court found that, as was the case in Utah, the broad latitude extended to the Wyoming legislature by this provision “militates against the creation of an express trust.”⁸⁶

The court reached the same conclusion after reviewing the requirements associated with the Wyoming Constitution. After comparing Wyoming’s Constitution to other state constitutions that had been found to create a trust, either alone (such as in Utah) or in combination with the requirements of state enabling acts (such as in Colorado, South Dakota, and Oklahoma), the court concluded that the Wyoming Constitution did not contain sufficient evidence of intent to create a trust. The court noted that the Wyoming Constitution indicated that the lands were accepted for educational purposes, provided that lands could only be sold at public auction for at least $\frac{3}{4}$ of their appraised value, and that the lands could be leased in any manner that the legislature should provide, and that the proceeds from the sale and lease “shall constitute a permanent trust fund, with only the income used for educational purposes.” Unlike many other state constitutions, the court also noted that although Wyoming’s Constitution stated that the permanent funds were to be held in trust,⁸⁷ the Constitution contained no express declaration that the state trust lands themselves were held in trust.⁸⁸ The court noted that the more specific trust language that had been used in other state constitutions, such as Colorado, Oklahoma, Idaho, and Washington, had been available to the drafters of the Wyoming Constitution, and that Wyoming’s draft constitution was also available to Congress prior to Wyoming’s Admission Act. As such, the court assumed that this distinction was deliberate.⁸⁹ Given the “express latitude given the legislature, [and the] limitation of the express trust language to the proceeds from the lands,” the court concluded that there was also no constitutionally-mandated trust responsibility.⁹⁰

However, the court did find that Wyoming’s state trust lands were held in trust pursuant to Wyoming statutes. Combined with the fact that the legislature had repeatedly referred to these lands as “trust lands,” the court also noted that recent legislation amending the state’s leasing provisions

⁷⁹ *Id.*

⁸⁰ 869 P.2d 909, 917-20, and n. 7.

⁸¹ 140 P.2d 335, 338 (Utah 1943).

⁸² 229 F.3d at 990.

⁸³ *Lipscomb v. Columbus Mun. Separate School Dist.*, 269 F.3d 494 (C.A. 5 Miss. 2001).

⁸⁴ 70 P.3d 223 (2003).

⁸⁵ See Wyo. Act of Admission § 5, 26 Stat. at 22-23.

⁸⁶ 70 P.3d at 231.

⁸⁷ Wyo. CONST. Art. 7, §§ 2, 6.

⁸⁸ 70 P.3d at 232.

⁸⁹ The Wyoming Supreme Court’s finding that this language was deliberately chosen was its only answer the state’s argument, derived from *National Parks & Cons. Ass’n v. Bd. of State Lands*, 869 P.2d 909 (Utah 1993), that it was “irrational” to distinguish between the lands and the proceeds of those lands in identifying the corpus of a constitutionally declared trust.

⁹⁰ 70 P.3d at 232.

had provided that trust lands should be managed under a total asset management policy, that the trust was intergenerational and the corpus should be protected for the long term, that trust assets should not be sold to maximize revenues in the short term, that all leases of trust land should be made for full market value, and that the permanent fund should be invested in a manner that would protect it from inflation. The court also noted that the same legislation had directed that trust lands be leased "in such manner and to such parties as shall inure to the greatest benefit to the state land trust beneficiaries."⁹¹ The court held that the use of "such explicit trust language" indicated the legislature's intention that the lands were to be held in trust.

The distinction between a federal, constitutional, or statutory trust is of great significance, since in the latter case, the legislature can unilaterally alter the terms of the trust. The *Riedel* court, reaching the issue of the validity of the preference statute, found that "the statutes [regarding trust lands] incorporate all of the trustee's duties," and as such it was neither necessary nor appropriate for the court to look to trust principles to define the state legislature's obligations towards the management of the trust lands; rather, the legislature was free to define the boundaries of the trust within the minimal limitations defined in the Constitution (requiring lands to be sold at public auction, etc.). Noting that the Constitution permitted the lease of lands in any manner prescribed by the legislature, the court found that the principles that applied to "the leasing of the trust lands ... are governed by the statutes and not by common law trust principles... The legislature will not be presumed to have created the trust and violated it at the same time."⁹² Thus, in Wyoming, the "trust responsibility" binds only the agency that administers the trust lands.

Despite these recent decisions in Utah and Wyoming, it seems doubtful that other Western states will be likely to revisit their adoption of the trust doctrine with regard to the administration of their state trust lands. As one commentator notes, the notion of the trust is now "thoroughly embedded in state constitutions, case law, and management philosophy,"⁹³ and as noted above, virtually all of the Western states have found that trust relationships were created by their individual enabling act grants, with only California finding that its lands are not subject to any trust whatsoever. The Wyoming and Utah Enabling Acts and Constitutions, which aside from California present the weakest case for the existence of a trust – are relatively unique among the Western states; indeed, of the states that entered the Union after Colorado, only Utah was not subject to any specific limits on its authority to dispose of trust lands.⁹⁴ In any event, both Wyoming and Utah ultimately concluded that the lands were nevertheless subject to a trust. As such, the vast majority of state trust lands in the West are likely to remain subject to the trust responsibility for the foreseeable future. However, the trust doctrine is not necessarily as restrictive – or as monolithic – as many trust managers, beneficiaries, and critics are often heard to suggest.

⁹¹ *Id.* at 232-233.

⁹² *Id.* at 233.

⁹³ O'Day, *supra* note 5, at 194.

⁹⁴ See Fairfax, et al., *supra* note 17, at 821.

B. Distinguishing State Trusts from Common Law Trusts

1. State Trusts as a Form of Charitable Trust?

A number of courts that have considered the nature of the state trusts in light of the history of state trust grants have analogized the trusts to a bilateral “contract” between the federal government and the states, formed as a part of the bargaining process between an incoming state and the federal government. For example, in *Andrus v. Utah*,⁹⁵ the United States Supreme Court noted that under this “solemn agreement,” the federal government “agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.”⁹⁶ This view was once again suggested by the Court in *Papasain v. Allain*, noting that the state grants “perhaps... are all properly viewed as being in the nature of a 'solemn agreement' which in some ways may be analogized to a contract between private parties.”⁹⁷

The *Andrus* Court noted that this view of the trust provides a convincing rationale for the “indemnity lands” selection process, in which the “the State's right to select indemnity lands may be viewed as the remedy stipulated by the parties for the federal government's failure to perform entirely its promise to grant the specific numbered sections... Thus, as is typical of private contract remedies, the purpose of the right to make indemnity selections was to give the State the benefit of the bargain.”⁹⁸ This “contract” logic has been followed by a number of state courts as well.⁹⁹

As the federal district court noted in *Branson School District RE-82 v. Romer*,¹⁰⁰ under this theory of the trust relationship, the terms of the “contract” would be defined by reference to the enabling act and the state constitution. As the court noted, this view would seem to raise some question as to whether the conditions of the land grants could be enforced by third parties.¹⁰¹ However, because the grant and the corresponding constitutional provisions clearly express the intent that the state would “act as trustee of school lands for the benefit of the public schools,” this would nevertheless place the “beneficiaries” of the land grants in the position of “archetypal third-party beneficiaries of the contract”¹⁰² who were entitled to enforce the terms of the contract under the fiduciary requirements imposed by the federal enabling act and state constitution.¹⁰³

Regardless of the source of the states' fiduciary obligations, the overwhelming weight of authority in the Western states is that – by contract or otherwise – these grants created a relationship that can be characterized as a “trust.”¹⁰⁴ In seeking to uncover the character of these trusts, however, a review of the laws and judicial opinions with regard to the administration of state trust lands makes clear that these state trusts are clearly *not* akin to private trusts. If anything, these trusts are probably most similar to common law charitable trusts.¹⁰⁵ Notably, grants for the benefit of “common schools” embrace a purpose that is among the most basic of the charitable purposes recognized under the common law; grants for hospitals, schools for the deaf and blind, and public buildings are also traditional “charitable” purposes.

Similarly, all of the grants benefit either (a) an indefinite class of beneficiaries (such as the “common schools,” or (b) specific public institutions that provide benefits to the broader community and are properly the subject of a charitable trust. As such, they do not benefit a discrete individual or

⁹⁵ 446 U.S. 500 (1980).

⁹⁶ *Id.* at 507.

⁹⁷ *Papasain v. Allain*, 478 U.S. 265, 292 n.18 (1986), quoting *Andrus v. Utah*, *supra*.

⁹⁸ *Id.* at 507-508.

⁹⁹ See *Oklahoma Educ. Ass'n, Inc. v. Nigh*, 642 P.2d 230, 235 (Okla.1982) (referring to the land grants as an “irrevocable compact”; *State v. Platte Valley Pub. Power & Irrigation Dist.*, 23 N.W.2d 300, 306 (Neb. 1946) (referring to the terms of the grant as a “contract” between the accepting state and the United States); *Newton v. State Board of Land Commissioners*, 219 P. 1053 (Idaho 1923) (same).

¹⁰⁰ 958 F.Supp. 1501 (D.Colo. 1997).

¹⁰¹ *Id.* at 1516.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See cases listed in note 220, *supra*.

¹⁰⁵ See *Bowlin*, *supra* note 223, at 945-946.

group of individuals that are effectively separated from the larger public in the manner of a private trust. Finally, the grants establish the trusts in perpetuity, as they do not specify a limitation on the existence of the trust and embrace purposes that will continue from generation to generation without a foreseeable end.

This interpretation appears to be consistent with the few court decisions that have squarely addressed this issue.¹⁰⁶ These include two of the early decisions of the U.S. Supreme Court that addressed Indiana's trust lands, *Trustees of Vincennes University v. State of Indiana*¹⁰⁷ (a challenge to a sale of lands that had been reserved for a seminary under Indiana's Enabling Act), and *Springfield Township v. Quick*¹⁰⁸ (a challenge to a state practice of counting revenues from sixteenth section lands towards the state contribution to public education costs in each township). In those cases, the United States Supreme Court held that Indiana's Enabling Act had created a trust similar to a private charitable trust, and that this trust should be strictly construed under fiduciary principles.

A similar finding has been reached by the few state courts that have directly considered this issue. For example, in *Forest Guardians v. Powell*,¹⁰⁹ a New Mexico court noted that "the primary differences between a charitable trust and other private trusts are that a charitable trust may be perpetual, the denominated recipients of the trust income may be indefinite, and the intended beneficiary is the community itself."¹¹⁰ The court then noted that

the trusts created by the Enabling Act are perpetual...[and] the recipients of the trust income, the "common schools," are indefinite... Finally, when the grants to support the common schools are read in the context of grants made to other Enabling Act land recipients, such as government buildings and a miners' hospital, we conclude that the intended beneficiary of the federal land grants is the general citizenry of the State, and that the purpose of the grants was to insure a source of funding to support the construction and maintenance of essential social institutions.¹¹¹

The Supreme Court of Utah followed similar logic in interpreting the nature of its state trust. In *Duchesne County v. State Tax Commission*,¹¹² the Utah Supreme Court found that the trust constituted a "charitable trust" or "public trust," with a definite trust estate, definite trustee, identified purpose for the use of the trust fund, and a beneficiary that was not a "definite or ascertainable being."¹¹³ An identical result was reached by the Montana Supreme Court in *Department of State Lands v. Pettibone*,¹¹⁴ with the court citing the early decisions of the U.S. Supreme Court in *Trustees of Vincennes University* and *Springfield Township* in support of this conclusion.¹¹⁵

¹⁰⁶ A number of court decisions that have found that a state trust exists without identifying the nature of this trust. For example, in *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886 (Colo. 2001), the Colorado Supreme Court followed the 10th Circuit's determination in *Branson School District* that Colorado's Enabling Act had created a trust, and also found that the intended beneficiaries of that trust were narrower than the general public – the "common schools." Because the rules applicable to trusts only allow a beneficiary or one suing on a beneficiary's behalf to enforce the terms of the trust, the court concluded that a ranching company, as a member of the general public that was unrelated to the public school system, lacked the ability to enforce the terms of the trust. 31 P.3d at 894-895. However, the court did not specifically consider whether or not the trust was charitable in nature, despite the fact that *Branson* had allowed standing to school children as "beneficiaries" of the trust for "common schools" – a holding that is more consistent with a finding of charitable trust than a finding that the trust was created for the benefit of specific institutions. See *Branson School District RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998).

¹⁰⁷ 55 U.S. 268 (1852).

¹⁰⁸ 63 U.S. 56 (1859).

¹⁰⁹ 130 N.M. 368 (N.M. App. 2001).

¹¹⁰ *Id.* at 373, citing Restatement (Second) of Trusts § 364-65 (1959).

¹¹¹ *Id.*

¹¹² 140 P.2d 335 (Utah 1943).

¹¹³ *Id.* at 338.

¹¹⁴ 216 Mont. 361 (1985).

¹¹⁵ See also *Cinque Bambini Partnership v. State*, 491 So.2d 508, 511-512 (Miss. 1986) (Supreme Court of Mississippi stated that Congressional grants of tidelands and sixteenth section lands created "two great public trusts" in which state took title to lands to hold for benefit of the public, following previous decisions in which the Court made clear that the beneficiaries of the school lands trust were the inhabitants of the townships in which the lands were granted); *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770, 777 (Miss. 1985); *Jones v. Madison County*, 72 Miss. 777 (Miss. 1895); see also *East Lake Ranch LLP v. Brotman*, 998 P.2d 46 (Colo. App. 1999) (members of the public at large, through the institution of the public schools, are the intended beneficiaries of the state school land trust).

As discussed below, the fiduciary duties imposed on the state as a trustee are essentially similar to those imposed on the trustees of other common law trusts. However, there are nevertheless significant – if subtle – differences between state trusts and common law trusts that should not be overlooked. Many of these differences essentially relate to the status of the parties to this trust relationship as not just settlor and trustee, but also government bodies with a broader set of powers and responsibilities. As noted above, under the common law trust doctrine, the trustee owes a strict duty of loyalty to the beneficiary (whether private or charitable) and must elevate the beneficiary's interests over all other considerations. However, as public bodies, both Congress (as settlor) and the state (as trustee) have public obligations that extend far beyond the normal duties of a private settlor or trustee. As described in the sections that follow, this has several implications for state trusts.

2. Fiduciary Duties of the State Trustee

As noted in section III (C), the trustee of a charitable trust is subject to the same fiduciary duties as a private trustee. Decisions interpreting the requirements of state trusts have applied a variety of common-law fiduciary principles to trust managers.¹¹⁶ A typical case is *State ex rel. Ebke v. Board of Educ. Lands and Funds*,¹¹⁷ which relied on trust principles to overturn a Nebraska statute that eliminated competitive bidding for leases of state trust land in favor of automatic renewal where the lessee complied with the terms of the lease and took appropriate care of the property. This statute caused the state to turn down a number of competing lease applications, even where the prospective lessees had offered to pay more than the existing lessees.

In *Ebke*, the Supreme Court of Nebraska found that the school lands were held in trust, and that as the administrator of those lands, the state stood in the position of a trustee and was subject to a series of common law trust principles, including:

- Trust lands are required to be administered under rules of law applicable to trustees acting in a fiduciary capacity, and laws adopted by the legislature that govern the activities of trust managers must be consistent with the duties and functions of a trustee.
- The state owes a duty of undivided loyalty and good faith to the trust beneficiaries, and lands must be administered in the interest of those beneficiaries; as such, laws affecting trust property violate trust responsibilities where they “substantially benefit[] a special class of persons at the expense of the trust estate.”
- The state has a duty to obtain a maximum return to the trust estate from the trust property under its control, subject to its duty to preserve the trust estate; as such, any law which fixes the value of trust lands without regard to fair market value or disposes of them in a manner that conveys special benefits on third parties at the expense of the trust violates this trust responsibility.
- The state must balance its duty to protect the corpus of the trust in a manner that bears a reasonable relationship to the risk of loss; the state cannot permit an unreasonable loss in income to the trust in the name of protecting the trust corpus where the loss is out of proportion to the risk that is sought to be avoided.¹¹⁸

These or similar requirements are typically understood to apply to most state trust managers. However, it is critical to note that despite these generally common fiduciary obligations, there are nevertheless significant variations in the goals, terms, and restrictions on trust managers as a result of the varied history and substance of the states' diverse trust grants. Just as a particularized, state-by-state analysis is required to understand whether a trust was created by a particular enabling act or

¹¹⁶ C.f. *Oklahoma Ed. Ass'n, Inc. v. Nigh*, 642 P.2d 230, 236 (Okl. 1982) (express designation of the school lands and funds as a “sacred trust” has the effect of irrevocably incorporating into the Enabling Act, Oklahoma Constitution, and conditions of the grant, all of the rules of law and duties governing the administration of trusts).

¹¹⁷ 47 N.W.2d 520 (Neb. 1951).

¹¹⁸ *Id.*

state constitution, the differences between these documents can have significant implications for interpreting trust mandates. Unlike a private trust that is created by a singular “trust instrument,” the trust instrument in the case of a state trust may consist of multi-layered requirements contained in enabling act provisions, state constitutions, state legislation, and administrative rules. Many of these documents may contain provisions that significantly alter – or at least influence – the commonly-understood “mandate” for state trusts.

For example, although Idaho and Washington were admitted to the Union within a year of each other and both states adopted provisions in their Constitutions that have been interpreted to create a binding trust, Idaho’s Constitution contains provisions that require the state to obtain the “maximum long term financial return” from trust assets and the “maximum amount possible” from dispositions of trust lands.¹¹⁹ This requirement does not appear in the Washington Constitution. However, unlike Idaho, Washington’s Constitution contains a provision which states that “[a]ll the public lands granted to the state are held in trust for all the people.”¹²⁰ To date, the courts have not definitively ruled on the meaning of this provision, which some commentators suggest could be interpreted to subject state trust lands to a constitutional public trust that underlies the express federal trust relationship established by the State’s Enabling Act.¹²¹

Even where state constitutional provisions simply mirror the requirements of the state’s enabling act, courts may ultimately adopt different interpretations of the same provisions. For example, in *Deer Valley Unified School District v. Superior Court*,¹²² the Arizona Supreme Court interpreted the Arizona Constitution to prevent the state and its local jurisdictions from condemning state trust lands. Although the U.S. Supreme Court had liberally interpreted identical language in the state’s Enabling Act *not* to restrain condemnations, the Arizona Supreme Court adopted a strict construction of the same language, holding that “[t]he Enabling Act, as interpreted in *Lassen*, merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more.”¹²³ The Arizona Supreme Court subsequently used the same logic to prohibit exchanges of state trust lands in *Fain Land & Cattle Co. v. Hassell*,¹²⁴ concluding that exchanges would constitute a sale without public auction in violation of the Arizona Constitution – despite the fact that the Enabling Act expressly allows exchanges and provides that exchanges are *not* sales for purposes of the Act. As such, the fiduciary obligations of state trustees can differ substantially from state to state.

3. The Trustee’s Additional Obligations as a Public Entity

As noted above, trustees are normally subject to a duty of undivided loyalty to the interests of the trust. However, the status of states as sovereign governments that are responsible for passing and enforcing laws and protecting the public welfare complicates this picture. Although a private trustee would be held liable for virtually any action that derogates the interests of the trust as a violation of this duty of loyalty, the state trustee is not bound by this restriction insofar as the laws it adopts are laws of general applicability – even where those laws modify the management of trust assets in a manner that benefits third parties, or even the general public, in derogation of the interests of the trust.

For example, in *Colorado State Board of Land Commissioners v. Colorado Mined Land Reclamation Board*,¹²⁵ the Colorado Supreme Court held that trust lands were subject to state laws that conditioned mining permits upon compliance with local zoning and subdivision regulations. As such, permits could be denied when they were inconsistent with county zoning regulations even if this caused a direct loss to the trust. Although these state laws (which were passed by the trustee) served to disadvantage the interests of the trust, they were a legitimate exercise of the state’s police powers.

¹¹⁹ IDAHO CONST. Art IX, § 8.

¹²⁰ WASH. CONST. Art. XVI.

¹²¹ Chasan, *supra* note 55, at 42.

¹²² 760 P.2d 537 (Ariz. 1988).

¹²³ *Id.* at 541.

¹²⁴ 790 P.2d 242 (Ariz. 1990).

¹²⁵ 809 P.2d 974 (Colo. 1991).

This freedom similarly extends to the federal government as the settlor of the trust. Under normal principles of charitable trusts, the settlor would be unable to alter the terms under which the trust is managed; however, under principles of federal supremacy, Congress is free to pass laws that regulate the use of trust assets. In *Case v. Bowles*,¹²⁶ the U.S. Supreme Court considered the validity of federal legislation that established price controls as applied to timber sales on Washington's trust lands; the state argued that the imposition would prevent the state from receiving the maximum revenues from those sales in violation of the trust that Congress had established (and committed to) in its Enabling Act. The Supreme Court concluded that Congress was not bound by the trust relationship when enacting laws of general applicability, noting that "[n]o part of all the history concerning these grants... 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."¹²⁷

Courts have long recognized that all trusts – whether private or charitable – are subject to both federal and state laws of general application regardless of whether those laws are in derogation of the trust. As such, this may not seem like a particularly significant deviation from normal trust doctrine. What is significant, however, is the fact that the state, even as a trustee, can pass laws that regulate its own behavior – and these laws may require the state to behave in a manner that would not be required of a private trustee under the same circumstances.

One obvious example of this are state environmental laws, which frequently hold trust managers, as state agencies, to a higher standard than a private trustee under the same circumstances. These include state statutes that require analysis of state actions along the lines of that required of federal agencies by the National Environmental Policy Act, or holding state agencies to a higher standard with regard to actions that would impact threatened or endangered species. For example, in *Noel v. Coel*,¹²⁸ Washington's Supreme Court held that trust managers were obligated to follow the requirements of the state's Environmental Policy Act when making decisions to sell timber, and thus were required to prepare an environmental impact statement even where this limited their ability to sell timber or imposed significant additional costs on the trust. Because the environmental impact statement requirement applied only to state agencies, this placed the state trust at a distinct disadvantage with respect to privately managed timberlands. Similarly, in *Ravalli County Fish and Game Association v. Montana Department of State Lands*,¹²⁹ the Montana Supreme Court held that trust managers were required to follow the requirements of the Montana Environmental Policy Act when approving a modification to a grazing lease. Another excellent example can be found in Colorado's recent requirement on state trust managers to conduct a fiscal impact analysis that considers impacts on local communities before approving the development of state land – a requirement that does not apply to the private sector when contemplating development.¹³⁰

Other examples of such provisions are requirements on state trustees to give public notice of their decisions, to hold public hearings and accept public comment, to maintain all materials related to trust administration as public records subject to inspection by members of the public (or even by economic competitors), to produce annual reports in a standardized format that may disclose (or fail to disclose) information that might or might not be present in a private trust report, and even to conduct trust-related management activities in compliance with executive budgets subject to legislative appropriation (which may or may not reflect an allocation of resources and staff that is conducive to the optimal management of trust resources). In each case, the trustee is permitted to adopt substantive or procedural requirements that unilaterally alter the administration of trust lands in a manner that may work against or even affirmatively harm the interests of trust beneficiaries – regardless of whether these same requirements will apply to private trusts and trustees.¹³¹ Obviously, given that most of these decisions will be made in a public, politically charged context, these requirements may not be adopted with the best interests of the trust in mind, and may direct trust assets and resources to serve public purposes other than those originally specified in the trust grant.

¹²⁶ 327 U.S. 92 (1946).

¹²⁷ *Id.* at 100.

¹²⁸ 655 P.2d 245 (Wash. 1982).

¹²⁹ 903 P.2d 1362 (Mont. 1995).

¹³⁰ See discussion of this requirement in section V(C), *infra*.

¹³¹ SOUDER & FAIRFAX, *supra* note 4, at 163.

The federal government (as settlor) and the state (as trustee) may also have broader authority to modify the terms of the trust than would normally exist in a private context. As noted in section III (C), absent express terms to the contrary, charitable trusts are generally only modified pursuant to the doctrines of equitable deviation and *cy pres*. With regard to the doctrine of equitable deviation, however, most enabling acts and state constitutions contain only minimal restrictions on trust managers (such as requiring the trustee to obtain “fair market value,” sell lands at “public auction,” or “maximize revenues”). Given the general nature of these restrictions, it seems unlikely that a convincing case could be made for a significant deviation from these principles based on unforeseen circumstances.

Similarly, the purposes for which the vast majority of lands were granted – support of common schools or universities, support of penal institutions, or support of public buildings – are continuing, legitimate public purposes that are unlikely to disappear in the foreseeable future of our society and would thus not support the application of *cy pres*. As such, although the occasional case might be made for allowing deviation from the terms of a state’s trust responsibility to promote more efficient management, or for changing the purpose of a minor trust where the intended beneficiary no longer exists, these doctrines would be unlikely to provide any significant flexibility for trust managers to modify either the terms of trust management or the purposes for which the lands were granted. Indeed, these doctrines have been mentioned only once in the history of the trust caselaw, and appear never to have been expressly relied upon in interpreting the permissible limits of state trust management.¹³²

As sovereign governments, Congress and/or the affected state can nevertheless modify the terms of the trust with or without the permission of the courts¹³³ – a kind of flexibility that is denied to private trustees.¹³⁴ In the long history of the trust doctrine, there are numerous examples where Congress and the various states have modified the terms of the original trust grants.¹³⁵

4. Enforcing the Trust Against the Public Trustee

Another significant distinction between state trusts and other forms of private trusts are associated with the enforcement of the legal duties of the trust manager.¹³⁶ As noted in section III (C), even in the broader enforcement context of a common law charitable trust, the enforcement of the trustee’s responsibilities is essentially limited to the state attorney general (who may or may not take the appropriate level of interest) and those individuals or entities that can evince a “special interest” in the charitable trust. As such, the enforcement of trust responsibilities against the trustee is normally reliant on the vigilance of those beneficiaries who are in a position to enforce these legal requirements. (Because the trust relationship in such cases is created by a private transaction involving only the settlor, trustee, and trust beneficiaries, the only persons in a position to enforce the terms of the trust are the participants themselves; no outside party could have standing to challenge the actions or decisions of the trustee.) As a result, where these beneficiaries of a trust are

¹³² See Fairfax, et al., *supra* note 17, at 867-877.

¹³³ *C.f.* Boice v. Campbell, 248 P. 34, 35 (Ariz. 1926).

¹³⁴ Fairfax, et al., *supra* note 17, at 867-877 (“changing the trust appears less complex than one might have predicted. The idea of a compact does not have much meaning in this context. The federal government is bound by little, and the states are free to alter their management of the granted lands so long as they do not violate their enabling acts. Moreover, trust principles restricting changes to the trust have not been applied. The trust notions that have emerged in connection with the land grants seem fairly restricted to economic returns and undivided loyalty. Preserving the trust property, *cy pres*, and equitable deviation are rarely mentioned by the courts.”).

¹³⁵ These changes have embraced everything from sweeping changes to minor amendments to the terms of trust management. For example, as noted in the discussion in Section II, *infra*, in the mid 1800’s Congress acted to retroactively authorize the sale of trust lands in states whose Enabling Acts had initially forbidden their sale – an extremely significant modification to say the least. In Arizona, by contrast, Congress once made a minor amendment to the Enabling Act to allow the state to extend the permissible term of grazing leases from five years to ten years. See *Kadish v. Arizona State Land Dept.* 747 P.2d 1183, 1189 (Ariz., 1987).

¹³⁶ State trusts are unique in this regard, since U.S. Supreme Court decisions addressing the enforcement of conditions on most other types of federal grants have held that “Congress alone has the power to enforce the conditions” of Congressional grants. *Emigrant Co. v. County of Adams*, 100 U.S. 61, 69 (1879).

disinterested or absent – or alternatively, where a beneficiary and a trustee have a mutual interest in avoiding the terms of the trust – there is a significant risk that the terms of a trust will not be honored.

By contrast, where the trustee is a public agency, the number of interested parties that can seek to enforce the trustee's legal responsibilities – and the range of available enforcement tools – can alternatively be significantly expanded or significantly limited in comparison to private trusts. This relates to the fact that the right of a party to sue a public agency is governed by the laws and judicial doctrines that establish the requirements for standing to contest government decisions, as well as principles related to the separation of powers and resulting judicial deference to executive fact-finding, the exercise of discretionary powers, and decisions on matters of policy. Similarly, unlike a normal private or charitable trust, the terms of state trusts are the result of a transaction defined in federal law, constitutional provisions, and state statutes and regulations.¹³⁷

As such, the standards under which interpretations of the trust requirements will be reviewed are governed by judicial doctrines that extend varying degrees of deference to state legislatures and state agencies in their interpretations of federal laws, state constitutional provisions, and state statutes. These laws and doctrines effectively supplement or supplant traditional trust doctrines, such that the trust doctrine's primary role with regard to trust lands is to define a background of fiduciary principles that inform the interpretive framework for the various provisions of federal, state, and constitutional law within which an agency's decisions will be evaluated – if standing is proper and to the extent that the court will not grant deference to the decision.¹³⁸

Principles of judicial standing to contest the decision of a state agency are generally related to whether or not a party has suffered a redressable, legally-cognizable injury (or injury-in-fact). However, special requirements for standing may also apply depending on the type of entit(ies) that are party to the suit. For example, if a school district sues to enforce the trust responsibilities of a state agency in federal court, the district will have to satisfy the special requirements for “political subdivision standing” (a doctrine that regulates the ability of political subdivisions to sue their state creators; although suits based on controlling federal law are allowed, suits under state law or on the basis of individual rights are generally barred).¹³⁹

When state courts are involved, the precise contours of the standing doctrine and the associated requirements to demonstrate standing will vary somewhat from state to state, but they are generally similar to the requirements for a suit brought in federal court (such as a challenge to a state action under a federal trust responsibility) under Article III of the federal Constitution. To show such standing, a plaintiff must allege an “injury-in-fact,” a causal connection between the injury and defendant's actions, and that the injury can be redressed by judicial action.¹⁴⁰ An “injury-in-fact” will exist where the plaintiff shows “an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”¹⁴¹

Where a plaintiff relies on a constitutional or statutory “right” as the basis for this legally cognizable interest, courts will generally employ a “zone of interests” test to determine whether or not the plaintiff has a legally protected interest under the constitutional or statutory provision in question. Under this test, plaintiffs can show standing under a statutory right where they are in the “zone of interests” that were intended to be protected by the statute – in other words, whether they appear to fall in the category of persons that were meant to be protected or regulated by a particular statute or constitutional guaranty.¹⁴²

¹³⁷ C.f. *Bartels v. Lutjeharms*, 464 N.W. 2d 321, 324 (Neb. 1991) (the state's duties as trustee are defined by the state constitution, and a violation of those duties is thus a violation of the constitution itself).

¹³⁸ *Fairfax, et al.*, *supra* note 17, at 888. As noted by *Fairfax, et al.*, “[b]ecause the courts give themselves enormous latitude to take hard looks, or not, at administrative discretion, and use a wide range of demanding criteria to determine the appropriateness of agency action, it is not possible to identify cases where trust principles have clearly tipped the scales in favor of an agency action that would otherwise have been disallowed.” *Id.*

¹³⁹ C.f. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) (upholding the standing of a school district to sue the State of Colorado, as trustee, since the trust in question was based on federal law).

¹⁴⁰ See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-103(1998).

¹⁴¹ *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

¹⁴² 2 AM. JUR. 2D *Administrative Law* §430.

A party that can show a sufficient “special interest” would clearly meet these requirements in most circumstances.¹⁴³ Similarly, as the trustee, the state will always have standing to enforce the terms of the trust.¹⁴⁴ However, a much wider range of interests will also potentially have standing to contest an agency decision, at least to the extent that they could show that they were directly affected by that decision. Because the terms of the trust are a matter of state and federal law, a party with standing is also in a position to challenge a violation of a fiduciary duty on the basis that the decision was illegal – irrespective of whether that party would have had standing in a private context (as a person with a “special interest”) to challenge a violation of the trustee’s fiduciary duty.

For example, in *Forest Guardians v. Wells*,¹⁴⁵ the Arizona Supreme Court considered a challenge by an environmental group to the rejection of a competitive bid for a grazing lease by the Arizona State Land Department. The group clearly would not have qualified as a party with a “special interest” in the trust; rather, the standing for its challenge was based on the direct harm suffered by the group due to the Land Department’s failure to consider its lease application. Nevertheless, the Supreme Court decided the case based on fiduciary principles, finding that because the Department’s interpretation of its responsibilities as a trustee with regard to the leasing program represented an interpretation of law, it was subject to de novo review by the Court – the least deferential standard of review. The Court ultimately concluded that the Department’s failure to consider the lease application represented a breach of its trust responsibilities.¹⁴⁶ At the opposite end of the spectrum of interests, the Alaska Supreme Court also granted standing to a timber company that sought to bid on a timber contract.¹⁴⁷

It should be noted that under the “zone of interests” test, this will not always be the case. For example, in *Director of Office of State Lands & Investments v. Merbanco*,¹⁴⁸ the Wyoming Supreme Court denied standing to a corporation that had proposed to buy state trust lands to challenge a state statute permitting the state to exchange lands without a public auction, since the public auction requirement was intended to protect interests of the permanent fund and the beneficiaries, not those who wished to purchase state lands. The court thus denied standing to the corporation as a plaintiff, although it allowed standing to a state educational association, parents of schoolchildren, and school children since they fell within the “zone of interests” protected by the statute.¹⁴⁹ Similarly, in *Brotman v. East Lake Creek Ranch, L.L.P.*,¹⁵⁰ the Colorado Supreme Court denied standing to an adjacent landowner seeking to contest a sale of land, on the grounds that an adjacent landowner was not within the “zone of interests” sought to be protected under the constitutional and statutory provisions governing land sales.¹⁵¹

As the decision in *Forest Guardians v. Wells* suggests, courts generally extend little or no deference to state agencies in their interpretations of law.¹⁵² As a result, parties who do not qualify as having a “special interest” may nevertheless be able to obtain very strict review of an agency’s interpretation of its responsibilities as a trustee. In other situations, however, the state may be entitled to a higher level of deference in its decision-making than would normally be afforded to a private trustee. For example, when the state acts to guide trust decision-making through its state legislature – even where the legislature is interpreting and applying constitutional provisions that govern the

¹⁴³ C.f. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) (Court found that as beneficiaries of the state trust, plaintiff school districts and school children necessarily have a “legally cognizable interest in the undivided loyalty of the school lands trustees”).

¹⁴⁴ C.f. *Hill v. Thompson*, 564 So.2d 1 (Miss. 1989).

¹⁴⁵ 201 Ariz. 255 (2001).

¹⁴⁶ *Id.* at 262.

¹⁴⁷ C.f. *Aloha Lumber Corp. v. University of Alaska*, 994 P.2d 991, 999 (Alaska 1999) (granting standing to a lumber company, as a citizen-taxpayer, to sue to enforce the terms of the state trust governing university lands and challenge an administrative decision, as the company was (1) one of the parties most likely to actually enforce the trust by virtue of its position, (2) the issues raised in the suit were of substantial statewide importance, (3) the company had a sufficient economic interest in enforcement that it would not be a “sham” plaintiff).

¹⁴⁸ 70 P.3d 241, (Wyo. 2003).

¹⁴⁹ *Id.* at 248-249.

¹⁵⁰ 31 P.3d 886 (Colo. 2001).

¹⁵¹ *Id.* at 890-891.

¹⁵² 2 AM. JUR. 2D *Administrative Law* § 489.

behavior of trust managers – the legislature is entitled to a significant level of deference from the courts. Under the rules governing statutory interpretation, courts generally extend a presumption of constitutionality to state statutes, upholding legislative actions against constitutional challenge if there is “any reasonable interpretation” of the statute that would be consistent with the state constitution,¹⁵³ or requiring that a plaintiff engaged in a facial challenge to a statute prove that it is unconstitutional beyond a reasonable doubt.¹⁵⁴

For example, in *Skyline Sportsmen's Association v. Board of Land Commissioners*,¹⁵⁵ the Montana Supreme Court considered the validity of Montana statutes that acted to prohibit a proposed land exchange that would have resulted in significant benefits to the trust. The Court concluded that the Board of Land Commissioners’ discretion as a trustee was properly constrained by the laws passed by the legislature that regulated the conduct of land exchanges. The Court noted that it was bound by doctrines governing judicial interpretation to “presume that the Montana Legislature understood the effect of its action in passing [the statute] ... which may constrict the Board's discretion in managing state trust land... ‘[t]he legislature is presumed to act, so far as mere questions of policy are concerned, with full knowledge of the facts upon which its legislation is based, and its conclusions on matters of policy are beyond judicial consideration’.”¹⁵⁶ Of course, this does not mean that a challenge to a legislative interpretation of a constitutional trust requirement is doomed to failure; there are numerous examples where courts have found that legislatures have erred in their interpretations of constitutional requirements.¹⁵⁷

Similarly, although state administrative agencies are generally not entitled to deference in their interpretations of law, they are entitled to significant levels of deference when it comes to conclusions of fact.¹⁵⁸ As a state agency, as long as the agency complies with the letter of the law, the agency’s actual decisions are normally entitled to significant deference and can only be overturned if the decisions are “arbitrary” or “capricious,” or are unsupported by substantial evidence in the record.¹⁵⁹ Where a discretionary decision of an agency is implicated (such as a decision with regard to whether or not to grant a lease, whether or not to sell land, and so forth) courts will apply a similar “abuse of discretion” standard.¹⁶⁰ As noted by the Supreme Court of Montana, an abuse of discretion involves:

"not merely an error in judgment, but perversity of will, prejudice, passion, or moral delinquency [citations omitted], but it does not necessarily imply wrong-doing or a breach of trust, or import bad faith [citations omitted]; it conveys, rather, the idea of acting beyond the limit of discretion [citations omitted]; the disregard of the evidence adduced [citation omitted]; the basing a decision upon incompetent or insufficient evidence [citation omitted]; an exercise of discretion to an end or purpose not

¹⁵³ See *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). See also *Branson School District RE-82 v. Romer*, 958 F.Supp. 1501 (D. Colo. 1997).

¹⁵⁴ See *National R.R. Passenger Corp. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985). See also *Villanueva v. Carere*, 873 F.Supp. 434, 447 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996).

¹⁵⁵ 951 P.2d 29 (Mont.1997).

¹⁵⁶ *Id.* at 32-33, quoting *Rider v. Cooney* 23 P.2d 261, 264 (Mont. 1933).

¹⁵⁷ *C.f.* *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242 (Ariz. 1990) (court held that statutory scheme interpreting constitution to allow land exchanges without public auction was invalid; Arizona Constitution intended that exchanges constituted “sales,” and thus must be conducted at public auction); *State v. Cooley*, 56 N.W.2d 129 (Neb. 1952) (legislature’s statutes defining the terms under which school lands are leased are subject to and limited by the obligation to preserve the trust); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 47 N.W.2d 520 (Neb. 1951) (legislative act that fixed the value of school lands without regard to fair market value violated the duties of the state as trustee by conferring benefits on third parties to the detriment of beneficiaries).

¹⁵⁸ *Forest Guardians v. Wells*, 34 P.3d 364, 367-368 (Ariz. 2001) (state land commissioner has considerable discretion with regard to trust administration decisions that involve questions of fact).

¹⁵⁹ 2 Am. Jur. 2d *Administrative Law* § 488. This question is well-settled with regard to federal agency actions, but state courts are also in general agreement on this point. See *id.* at § 489. Where questions of law and fact are mixed, courts will generally interpret the law independently of the agency’s determination, but then apply this to the facts as found by the agency. See *id.* at § 496.

¹⁶⁰ *C.f.* *Foster v. Anable*, 19 P.3d 630, 633 (Ariz. App. Div. 1 2001) (Land Commissioner had broad discretion in dispositions of trust land, and would not be overturned absent abuse of discretion or illegal action). See also *Campana v. Arizona State Lands Dept.*, 860 P.2d 1341 (Ariz. App. Div 1 1993); *Thompson v. Conwell*, 363 P.2d 927 (Wyo. 1961).

justified by, and clearly against, reason and evidence [citations omitted]; a clear error in law in the circumstances [citations omitted]."¹⁶¹

This standard thus provides significant deference to the decisions of state agencies.

On the other hand, courts may apply different standards for review of trust decision-making depending on who is challenging the decision. Thus, although the court might review a specific factual decision not to renew a lease under a relatively deferential standard where this decision was challenged by a lessee, it might apply a much less deferential standard under trust principles (such as the "prudent investor" rule) to the extent the decision is challenged by a beneficiary. As a result the judicial standard for reviewing trust managers' decisions can differ depending on whether the person challenging the decision qualifies as a beneficiary of the trust.¹⁶²

To an important extent, the availability of third-party standing will also be driven by the kind of agency decision that is being challenged. Standing to contest individual decisions – such as the leasing decision challenged in *Forest Guardians v. Wells* – will generally lie in the parties affected by those specific decisions, and these challenges can embrace enforcement of trust principles insofar as the plaintiff can demonstrate that an action taken by the agency was contrary to the agency's trust responsibilities. However, standing to challenge a broader set of agency decisions, a pattern or policy of decision-making, or a strategic framework for trust asset management may only lie in an entity that can demonstrate the requisite level of "special interest" in the trust to show harm from that decision.

For example, a previous case filed in New Mexico came to a very different result when the same environmental group attempted to challenge the state's system of extending preference rights to lessees for the renewal of grazing lessees on trust lands. In *Forest Guardians v. Powell*,¹⁶³ the New Mexico Court of Appeals denied standing to a group of plaintiffs composed of schoolchildren, parents, and environmental groups. Noting that New Mexico's trust was properly viewed as a charitable trust, the court held that only the attorney general or a person with a demonstrable "special interest" could enforce its terms. Because New Mexico's trust revenues are disbursed according to the state's complex budgeting process, no specific public school could be said to receive income directly from the trust; as such, none of the schoolchildren (or their parents) could demonstrate that they had "a special and definite interest in the trust or are entitled to receive a benefit."¹⁶⁴ Similarly, the Court found that the conservation groups were not within the "zone of interests" intended to be protected by the Enabling Act.¹⁶⁵ The Court also found that none of the plaintiffs had alleged injuries sufficient to invoke the "great public importance doctrine."¹⁶⁶ As a result, while the court noted that the environmental groups might have standing to pursue an administrative appeal of a specific leasing decision, it denied any of the plaintiffs standing to challenge the merits of the leasing program as a whole.

In other cases, however, even a position as an ostensible beneficiary has not been enough. In *ASARCO, Inc. v. Kadish*,¹⁶⁷ the United States Supreme Court held that the Arizona Education Association, a non-profit association representing state public school teachers, lacked standing to challenge the validity of a statute regulating mineral leases on school lands. The Court noted that because state trust revenues were bundled with other state support for schools, even if a challenge was successful and resulted in more money being dedicated to education, the state might thereafter reduce its supplement from the general fund such that the money available to schools could be unchanged.¹⁶⁸

¹⁶¹ Jeppeson v. State, Dept. of State Lands, 667 P.2d 428 (Mont. 1983), quoting Taylor v. County Comm'rs 270 P.2d 994, 999 (Mont. 1954), quoting Grant v. Michaels, 23 P.2d 266, 269 (Mont. 1933).

¹⁶² Kenneth B. Davis, *Judicial Review of Fiduciary Decisionmaking - Some Theoretical Perspectives*, 80 N.W.U. L. REV. 1, 168 (1985).

¹⁶³ *Forest Guardians v. Powell*, 24 P.3d 803, 808 (N.M. Ct. App. 2001).

¹⁶⁴ *Id.* at 808.

¹⁶⁵ *Id.* at 810-811.

¹⁶⁶ *Id.* at 814-815.

¹⁶⁷ 490 U.S. 605 (1989).

¹⁶⁸ *Id.* at 614-15.

The judicial doctrines governing standing helps to explain why state and federal courts have been somewhat inconsistent in their recognition of “special interest” standing in state trust “beneficiaries.” In various cases, courts have recognized standing in “beneficiaries” as varied as school districts and schoolchildren;¹⁶⁹ state educational organizations;¹⁷⁰ teachers and parents of school children;¹⁷¹ and county governments;¹⁷² even as other courts have denied standing to these same types of individuals and entities under seemingly similar circumstances.¹⁷³

It is notable that under the logic of the *Forest Guardians v. Powell* decision, “special interest” standing is related to the distribution scheme for trust benefits – and changes in the distribution strategies for trust revenues may create standing in individuals or entities who would not otherwise qualify to enforce the terms of the trust.¹⁷⁴ For example, a recent change in Arizona’s school funding system that has dedicated trust revenues to specific purposes such as teachers’ salaries, classroom size reduction, and so forth¹⁷⁵ may have the result of allowing teachers and students to challenge trust management decisions to the extent that they can now show a direct benefit or harm from changes in trust management activities – a change that might have resulted in a different decision in *ASARCO*.

Regardless of the various doctrines governing judicial enforcement, the waters of state trust enforcement are greatly muddied by the fact that many individuals and entities that perceive themselves either as trust “beneficiaries” (such as school boards, school administrators, teachers’ unions, and other school advocates) or trust “stakeholders” (such as lessees, development interests, and conservationists), are to a greater or lesser extent represented in the legislative and administrative processes that govern trust management decisions. As a result, trust managers may (or may not) be answerable to trust beneficiaries or various user groups in a manner that would be inappropriate or at least unusual in the context of a private trust. In the public context, there will usually not be a clean separation between the roles of the state as a trustee, as a public agency, and as a lawmaking and rulemaking body. As noted above, this has consequences for the manner in which trust lands may be regulated compared to similarly-situated private lands, since the state can adopt standards and procedures for the management of trust lands that do not apply in private contexts and may disadvantage the trust. However, it also has consequence for the manner in which the terms of the trust can be enforced, since much of the actual “enforcement” (or lack thereof) may occur extra-judicially, and political tradeoffs, incentives, and realities may strongly influence the behavior of the public agencies and legislative bodies that are responsible for trust management – regardless of their theoretical duties as “trustees.”

More than one commentator has suggested that, in light of the political and legal realities surrounding trust enforcement, a strong role for beneficiaries in the enforcement of trust doctrine may lead to better trust management practices over the long term. For example, litigation brought by beneficiaries in Nebraska and Oklahoma (in *Ebke* and *Oklahoma Education Association*) led to the implementation of what is generally recognized as best practices of a competitive leasing system for grazing and agricultural lands. Similarly, as one commentator has pointed out, the Skamania litigation in Washington set the stage for Washington’s current sustainable timber management program, which is generally thought to have made better management choices than many public forest programs.¹⁷⁶

¹⁶⁹ *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998).

¹⁷⁰ *Oklahoma Educ. Ass'n, Inc. v. Nigh*, 642 P.2d 230 (Okla.1982).

¹⁷¹ *Bartells v. Lutjeharms*, 464 N.W.2d 321, 322 (Neb. 1991).

¹⁷² *County of Skamania v. State*, 685 P.2d 576, 583 (Wash. 1984).

¹⁷³ See *Essling v. Brubaker*, 55 F.R.D. 360 (D. Minn. 1971) (denying standing to schoolchildren on the basis that only schools, not schoolchildren, were properly beneficiaries of the trust); see also *Selkirk-Priest Basin Association, Inc. v. State*, 899 P.2d 949 (Idaho 1995) (denying standing to school children, parents, and environmental groups because they were not beneficiaries of the trust).

¹⁷⁴ For example, in *Branson School Dist. v. Romer*, 958 F.Supp. 1501 (D. Colo 1997), the district court found that the school district and school children plaintiffs had shown a concrete injury sufficient to provide standing due to the fact that revenues from school lands were not commingled in the general fund.

¹⁷⁵ See discussion in section V(B)(6), *infra*.

¹⁷⁶ See Jon A. Souder & Sally K. Fairfax, *Arbitrary Administrators, Capricious Bureaucrats and Prudent Trustees: Does it Matter in the Review of Timber Salvage Sales*, *Pub. Land and Res. L. Rev.* Vol. 18, 165-212 (1997).

Over the past few years, there have been increasing levels of attention paid by interest groups that are traditionally thought of as trust “beneficiaries” to the management of state trust lands and trust land revenues. One organization, the Children’s Land Alliance Supporting Schools (CLASS),¹⁷⁷ has been extremely active in promoting the interests of trust beneficiaries with regard to trust management. After only a few years, CLASS has made significant headway in establishing relationships with trust managers, going so far as to schedule their annual conference to overlap with the summer conference of the Western States Land Commissioner’s Association (the state trust land managers’ professional association).

5. Beyond Revenue Maximization: the Implications of Perpetual Trusts

The differences in state trust doctrine – both within and among states and between state trusts and common law trusts – may have particularly significant implications for the interpretation of the common requirement that trust lands be managed for the exclusive benefit of the trust beneficiaries. As one commentator has noted, some trust managers seem to have interpreted this obligation as a requirement to pursue the highest monetary returns possible for trust beneficiaries, regardless of other considerations.¹⁷⁸

Modern trust doctrine does not necessarily bear out this interpretation, embracing a much more flexible theory of “portfolio management” that incorporates concepts of balanced risk and return and management for long-term sustainability. This modern doctrine is much more in line with the standards applied for asset management in the private sector; maximum financial return “is barely tolerated as the controlling notion, and is rarely practiced, even on lands privately held by corporations.”¹⁷⁹ As such, some trust managers may be proceeding under a set of assumed management restrictions that are actually far narrower than those that are commonly applied in the private trust sector.

These restrictions may be particularly inappropriate in the context of a perpetual trust, where the obligation of the trustee must run not just to current beneficiaries, but to all future generations as well. As the district court noted in *Branson School District RE-82 v. Romer*,¹⁸⁰ “as this trust was clearly intended to benefit the public schools in perpetuity, Colorado, as trustee, is under no obligation to maximize the benefit of the trust to the current public schools... long-range planning is prudent, and so long as decisions are made with the sole purpose of benefiting the common schools both now and for generations to come, [no trust violation occurs].”¹⁸¹ Although trust managers may well owe an undivided duty of loyalty to manage trust assets for the benefit of public schools, absent an express direction in an enabling act provision or state constitution, this duty will not necessarily be to maximize revenues.

Regardless, even if the requirement to achieve “maximum financial return” were a proper element of the modern trust mandate, the perpetual nature of state trusts also sets them apart from private trusts. Unlike most private trusts, state trusts are intended to endure essentially in perpetuity. By necessity, this requires trust managers to look beyond revenue maximization, and – at least in theory – obligates trust managers to embrace notions of intergenerational equity by investing portfolios in sustainable management strategies or preservation-oriented leasing programs that will maintain a healthy trust corpus for future generations.¹⁸²

In addition, recent court decisions have indicated that although trust managers must manage trust resources to meet the financial objectives of the trust, the perpetual nature of the state trusts and the larger public significance of these lands requires trust managers to consider a variety of non-monetary values that are associated with trust lands. For example, in *National Parks and Conservation Association v. Board of State Lands*,¹⁸³ the Utah Supreme Court found that despite the duty of the

¹⁷⁷ See CLASS’s website at <http://www.childrenslandalliance.com>.

¹⁷⁸ See Fairfax et al., *supra* note 17, at 799.

¹⁷⁹ *Id.*

¹⁸⁰ 958 F.Supp 1501 (D. Colo 1997).

¹⁸¹ *Id.* at 1517.

¹⁸² See discussion in O’Day, *supra* note 5, at 198-199.

¹⁸³ 869 P.2d 909 (Utah 1993).

state to maximize monetary returns, the perpetual nature of the trust requires the state, as trustee, to consider and preserve a much broader range of “values” associated with its trust lands.

Located on some state school lands are unique scenic, archeological, and paleontological sites. Such treasures are legacies of past millennia whose true value could never be expressed in monetary terms. The question is, can such treasures be preserved without violating the terms of the school trust? We think so... Although the primary objective of the school land trust is to maximize the economic value of school trust lands, that does not mean that school lands should be administered to maximize economic return in the short run. The beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run... Certainly it would be as much a violation of the state's fiduciary obligations to immediately sell all state school lands as it would be to use the proceeds from the lands for a nontrust purpose.

The Division should recognize that some school lands have unique scenic, paleontological, and archeological values that would have little economic value on the open market. In some cases, it would be unconscionable not to preserve and protect those values. It may be possible for the Division to protect and preserve those values without diminishing the economic value of the land. For example, with appropriate restrictions it may be possible for livestock grazing and perhaps even mineral extraction to occur on a school section without damaging archaeological and paleontological sites.¹⁸⁴

The court recognized that in some cases, financial exploitation of trust lands might be incompatible with the preservation of non-monetary values. In this case, the court suggested the state may have to consider exchanging trust lands or purchasing these lands from the trust “so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized.”¹⁸⁵ Although to a certain extent the court seems to blur the distinction between financial or monetary values and economic values, the message is clear enough: managers need to consider how they can obtain revenues for trust beneficiaries without diminishing the non-monetary values on those lands.

The flexibility in the trust mandate that can exist as a result of the increased latitude that the states are afforded as trustees, as well as the differences in enabling act requirements from state to state, is perhaps most clearly demonstrated in a recent Tenth Circuit decision, *Branson School District v. Romer*,¹⁸⁶ that considered the validity of a recent amendment to the Colorado Constitution under the Colorado Enabling Act. Amendment Sixteen, which was approved by the voters in 1996, significantly altered the terms of Colorado's trust mandate, declaring that “the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations.” The school district that brought the challenge to the amendment argued that this revised mandate conflicted with the state's fiduciary duty to maximize revenues for the beneficiaries. After reviewing the history and substance of the Colorado Enabling Act, the Tenth Circuit found that although the Act had created a binding trust, the trust responsibility did not require the state to manage lands for the maximization of revenues. As such, the court found that the revised mandate was not in conflict with the state's duties as a trustee:

we believe that the "sound stewardship" principle merely announces a new management approach for the land trust. The additional requirement to consider beauty, nature, open space, and wildlife habitat as part of the whole panoply of land management considerations simply indicates a change in the state's chosen mechanism for achieving its continuing obligation to manage the school lands for the

¹⁸⁴ *Id.* at 920-21.

¹⁸⁵ *Id.*

¹⁸⁶ 161 F.3d 619 (10th Cir. 1998).

support of the common schools. 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 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.¹⁸⁷

As a result, the court upheld the constitutionality of the amendment.

Under similar logic, the court also upheld a provision in the amendment that created a “Stewardship Trust,” in which between two hundred ninety-five thousand and three hundred thousand acres of trust land must be managed to permit only uses that “will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof.”¹⁸⁸ Once placed in the trust, lands can only be removed from protection by a four to one vote of the land commission, and if removed, are required to be replaced by an equal amount of land. The court noted that this amounts to essentially “permanent” protection of these lands for conservation purposes. Although the court considered this provision to be the “most troubling” of all of the provisions in Amendment Sixteen, the court ultimately upheld the provision, reasoning that the Board could still exchange lands out of stewardship status and could continue to receive revenues from the lands in the interim by leasing them for compatible uses; assuming that Colorado continued to hold trust land outside of the land in the Stewardship Trust, the court found that it could avoid a conflict of interest between the stewardship principle and the interests of the beneficiaries. Applying general principles of statutory construction, the court held that the provision did not violate the Enabling Act, noting that “because it is *possible* to construe the provisions of the Stewardship Trust as not imposing a conflict with the state’s fiduciary duties, we must.”¹⁸⁹

C. Towards a More Flexible View of Trust Management

In many parts of the West, trust managers are also under increasing pressure to account for the larger social, economic, and environmental costs and benefits associated with management decisions within the framework of traditional trust doctrines and priorities. The degree to which trust managers recognize this flexibility has important implications for their ability to adapt to changing economic conditions, and political and social priorities that have brought less traditional uses – such as conservation, recreation, and residential and commercial development – into the realm of trust management.

Many interest groups have recently turned to the trust doctrine in an effort to shape trust decision-making so that it better aligns with these emerging priorities. As one commentator has noted, “...trust principles are enjoying a moment in the sun as a reasonable organizational template somewhere between the inefficiencies of government bureaucracy and the rapaciousness of global capitalism.”¹⁹⁰ For example, in at least five states (Arizona, Idaho, New Mexico, Oregon, and Montana) environmental groups have attempted to use trustees’ revenue maximization obligations to force trust managers to eliminate apparent “subsidies” in the form of low-cost, generally uncompetitive leases by bidding competitively for these leases and forcing trust managers to lease lands for conservation purposes instead of grazing. These efforts have led to a great deal of litigation – and legislation to undo the threats caused by litigation – with mixed results for both participants and the integrity of trust principles.¹⁹¹

¹⁸⁷ *Id.* at 638.

¹⁸⁸ COLO. CONST. (Amendment 16), § 10(1)(b)(1).

¹⁸⁹ [emphasis added]. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 639-640 (10th Cir. 1998).

¹⁹⁰ Fairfax & Issod, *supra* note 76, at 341.

¹⁹¹ *Id.* at 345-346. For example, Fairfax & Issod provide a detailed discussion of the grazing lease litigation in *Idaho Watersheds Project v. State Board of Land Commissioners*, 918 P.2d 1206 (Idaho 1996) and its progeny in both lawsuits and legislation. After an environmental group successfully bid for a grazing lease application, the State Board of Land Commissioners (SBLC) awarded the lease to a rancher anyway – despite the fact that he had not bid for the lease at all. After the environmental group successfully appealed the decision, a second auction was held in which the environmental group outbid the rancher by a factor

As a result of these and other conflicts over the management of state trust lands, it is becoming increasingly clear that in some cases, traditional trust management techniques may be placing undue burdens on efforts to protect natural resources that are vital to local and state economies, and that traditional views of trust management obligations may be impeding the adoption of more flexible land management techniques.¹⁹² As the economies of Western states continue to diversify, the flexibility that may be inherent in the trust doctrine may enable trust managers to take advantage of new opportunities – and to meet new responsibilities – within the limits of their fiduciary responsibilities.

In this regard, even the more conservative state constitutions are not as hidebound as conventional wisdom might suggest. Even in states with mandates for revenue maximization and obtaining “full market value,” these notions are porous, allowing flexibility in the methods of revenue generation to accommodate concepts of sustainability and the consideration of ancillary values that may be associated with state lands. In addition, long-term uncertainties with regard to the factors that may affect land productivity (and thus returns to trust assets) may require consideration of various non-market values, including environmental effects, political realities, and social considerations.¹⁹³ In other cases, the management of lands for multiple benefits may produce higher value for trust beneficiaries (such as the improved management of lands leased for grazing to preserve fish, game, and recreational values that can be marketed to other users).

Policy decisions that guide trust land managers have been, and likely will continue to be, a balancing of financial, environmental, and social concerns.¹⁹⁴ Although in some cases there may be unavoidable tensions between obtaining financial returns for the beneficiary and achieving general public benefits – including those that do not produce revenues – as state agencies and trustees, trust managers have a considerable amount of discretion in choosing how and on what terms to maximize revenues, and satisfying general public needs and benefits need not be incompatible with trust responsibilities.¹⁹⁵

of 200. Nevertheless, the SBLC awarded the lease to the rancher. A similar result was reached in a case involving another environmental group, with SBLC going out of its way to lease the land to a rancher, extending deadlines, encouraging the rancher to apply for the lease, and then combining the lease with another parcel shortly thereafter to prevent the environmental group from bidding. After both environmental groups filed suit to contest SBLC's decisions, the legislature then revised the statutes governing grazing lease applications to stack the deck in favor of livestock lessees, and then attempted to amend the state constitution to eliminate the auction requirement for grazing leases. After a series of bloody battles in the courts, the environmental groups emerged victorious, but the issue is far from settled. See Fairfax & Issod at 360-369.

¹⁹² See generally O'Day, note 5.

¹⁹³ *Id.*

¹⁹⁴ Jay O'Laughlin & Philip S. Cook, *Endowment Reform and Idaho's State Lands: Evaluating Financial Performance of Forest and Rangeland Assets*, UNIVERSITY OF IDAHO, 4 (2001).

¹⁹⁵ In Idaho, for example, trust managers have made policy decisions to protect important viewsheds from timber harvests, and have let more than 1.8 million acres of grazing leases at rates below fair market value. *Id.* at 92.