

II. History of the Trust Land Grants

The end of the American Revolutionary War opened the floodgates on a vast and virtually inexorable stream of settlement across the Appalachian Mountains and into the American West. Over the next 140 years, the European, Asian, and African settlers of the American continent witnessed the transformation of the lands that they had claimed from a vast, alien world of aboriginal civilizations and uncharted wilderness into a settled and conquered frontier of newly-organized states and rapidly-growing cities, towns, and settlements, each neatly divided into townships, sections, and quarter-sections by federal survey crews.

At one time or another, the federal government held title to more than 80 percent of the land in the United States. Today less than 30 percent of the land in the United States still remains in federal ownership, with the vast remainder of this land transferred to private entities and state institutions as a part of the settlement of the American frontier.¹ Among the millions of acres that passed out of federal ownership during this period were more than eighty million acres of “state trust lands” – lands that were granted to the newly-organized states in support of public education.² These land grants to the new states – and the purposes that inspired them – were intimately tied to the early history of the relentless westward expansion that became the American era of “Manifest Destiny.”³

A. Education, Cession, and Expansion

Beyond managing and financing the Revolutionary War effort, one of the first tasks facing the new American Continental Congress after issuing the Declaration of Independence was to begin to cope with rampant land speculation in the western territories and the westward expansion of white settlements.⁴ Without a system in place for regularizing the process of land claims and organizing territorial governments, each new settlement increased the possibility that some or all of the relocating populations would eventually break off to form independent states outside the control of the Union. While rapid expansion into the West was viewed as essential to secure the new nation’s claims to its Western frontier, Congress was growing increasingly concerned with how to police the growing settled territories, how to finance the governments that would inevitably be necessary in the territories, and – most importantly – how to ensure that the new territories would hold to the democratic values for which the Revolutionary War was being waged.⁵ These concerns had become acute by the time the Revolutionary War drew to a close in September of 1783, as the Continental Congress faced a massive war debt that significantly limited the new nation’s financial means.⁶

There was a strong sentiment among America’s revolutionary leadership that providing for public education in the territories would be an essential element to ensure a democratic future for the

¹ Jay O’Laughlin, *Idaho’s Endowment Lands: A Matter of Sacred Trust*, UNIVERSITY OF IDAHO (1990).

² JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT AND SUSTAINABLE USE*, 20-21 (1996). These figures exclude lands in Alaska and Hawaii, which were admitted to the Union in the mid-twentieth century.

³ Sean O’Day, *School Trust Lands: The Land Manager’s Dilemma Between Educational Funding and Environmental Conservation, A Hobson’s Choice?* 8 NYU ENVTL. L. J. 176, 174 (1999). See generally Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 95-97 (1995).

⁴ In exchange for military support during the French and Indian War, the British crown signed a series of agreements with powerful tribal land empires in which the British agreed to contain white settlements from spreading west of the Appalachian mountains; this containment policy, formalized in the Proclamation of 1763, was financed with the passage of the Stamp Act, which imposed a direct tax on the colonies to pay for the troops and forts necessary to secure the western frontier. The passage of the Stamp Act met with furious colonial opposition and rioting, and threatened the ruin of many powerful families who were heavily invested in land speculation activities in the western lands. The subsequent repeal of the Stamp Act by the British Parliament in 1766 triggered an uncontrolled land rush in which colonial land speculators rushed to survey and purchase huge tracts of land from tribal governments in the Indian-controlled western lands, with hopes of vesting rights that the crown would later be persuaded (or forced) to ratify. See ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 225, 227-286 (1990). This situation only worsened after the dawn of the American Revolution due to uncertainty regarding the status of the vast land claims held by the original thirteen colonies, many of whom had claims that extended as far west as the Pacific Ocean. With the British authority gone and no single body having clear authority over these areas, land speculators thrived in a legal gray area. *Id.* at 292-305.

⁵ See PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE*, xix, 2, 4 (1987) (noting that Congress saw future sales of western lands as an “amazing resource” for paying off the nation’s Revolutionary War debts).

⁶ O’Day, *supra* note 5, at 173-174. See also SWIFT, *HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES*, 1795-1905, 124 (1911).

expanding nation. At the time of the Revolution, educational opportunities were still largely restricted to the wealthy;⁷ however, the concept of public education had been a theme in the settlement of the American colonies from the beginning. More than a few of the colonies had passed laws requiring the education of all children in a government-run public education system as early as the 1600's, and some of the first state constitutions had provisions that required the public education of all citizens.⁸ This theme was adopted with great fervor by the American revolutionaries, who believed that a well-educated citizenry would be essential to protect liberty and ensure that the citizens of the Republic would be prepared to exercise the basic freedoms of religion, press, assembly, due process of law, and trial by jury.

The early federal programs that would eventually lead to the creation of state trust lands essentially descended from the tension generated by the belief in the need for (or at least the inevitability of) Westward expansion, and the belief that a free people would by necessity have to be an "educated people."⁹ Thomas Jefferson, as one of the period's leading political and popular figures, was a strong proponent of this belief; indeed, his frequently-cited concept of "agrarian democracy" was one of a society that would draw its strength from well-educated farmers, whose commitment to the land would provide the foundation for both equality and freedom.¹⁰ Many revolutionaries – Jefferson among them – believed it equally essential that this educational system be operated by the government to control sectarian influence. However, they saw a limited role for the new federal government, in that they clearly believed that education was best placed under local – not national – control.¹¹

While the Eastern states had an established land and property base that could provide the tax revenues necessary to fund public education, the territorial areas simply lacked these resources. For the growing communities in the territories, it was up to the new state governments or the new federal government to subsidize basic public services until a sufficiently large population and economic base was established. Moreover, until lands were settled or otherwise passed out of the federal public domain, they would be exempt from taxation by the new states.¹² This highlighted another central concern of the post-revolutionary era – the principle that new states should be joined to the Union on an "equal footing" with those that had come before them. Without some assurance of an appropriate degree of equality and independence, early leaders felt that there would be a risk of internal rebellions or changes in allegiance within the territorial settlements that would fragment the nation.¹³

A solution to the problems of debt, speculation, expansion, education, and equal footing finally appeared when the Continental Congress negotiated the cession of the colonies' western land claims to the federal government. In 1784, Congress brokered a compromise under which Virginia ceded its massive land claims (the largest claims of any of the original colonies) to the federal government.¹⁴ With the cession of the western lands, Congress not only put an end to the chaotic land speculation in the West, but also guaranteed that despite the wars, recessions, and other burdens on public finances that would arise over the next century, the federal government would always have one resource in abundance – land. The administration of this land would provide the solution to the organization of settlement and the formation of new states, the provision of public education and other essential services for their citizens, and the repayment of the burgeoning national debt. Over the next three years, Congress proceeded to adopt the General Land Ordinance of 1785 and the Northwest Ordinance of 1787, which established the policies that would govern the disposal of the public domain and the creation of new states. These laws also initiated the system of granting lands for the support of public education and other essential public institutions to the new states.

⁷ See Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?* 12 NAT. RESOURCES & ENV'T 39, 40 (1997); See also ROBERT M. HEALEY, *JEFFERSON ON RELIGION IN PUBLIC EDUCATION*, 178-179 (1970).

⁸ Hager, *supra* note 9, at 40.

⁹ HEALEY, *supra* note 9, at 178-79.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Andrus v. Utah*, 446 U.S. 500, 522 (1979) (Justice Powell, dissenting).

¹³ O'Day, *supra* note 5, at 174-175.

¹⁴ SOUDER & FAIRFAX, *supra* note 4, at 18, 303 n. 3. See also ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936* (1942).

The practice of granting land to support public education was not a new concept; in fact, this practice was already well established in the colonies by 1785. Land grants to educational institutions were a practice inherited from Europe, traceable as far back as the Roman Empire, ancient Greece, and even the kingdoms of Egypt.¹⁵ Scholars have traced land grants for the purposes of supporting public education to at least the reign of King Henry V in England,¹⁶ and during the 1600's and 1700's, the American colonies had established land endowments for a variety of institutions, ranging from colleges to elementary schools.¹⁷ Many of these states also used the sale or lease of public lands as a funding source for public education. Although there were no federal land grants for public education in the original thirteen colonies, the colonial governments, and later the early state governments of Connecticut, Massachusetts, New York, New Hampshire, New Jersey, Pennsylvania, North Carolina, and Georgia all made substantial land grants in support of public education. These early land grants established a variety of permanent school funds that were financed from the sale or lease of public lands, reserved state lands in each township to support schools, or granted land to support specific educational institutions.¹⁸ Given this history, the innovation of the General Land Ordinance and Northwest Ordinance was not the concept of supporting public education with land grants, but rather the systematization of this practice on a massive scale.

B. The General Land Ordinance and Northwest Ordinance

The General Land Ordinance of 1785¹⁹ established the rectangular survey system. This system was the foundation for the process of the survey and sale of land by the federal government; the Ordinance also established a process for recording land patents and the related records necessary to establish a chain of title for public domain lands. The Ordinance additionally provided for the first reservations of lands for new states, providing that section sixteen in every township (one square mile of land, adjoining the center of each thirty-six-square mile township) would be reserved "for the maintenance of public schools within the said township."²⁰

The rectangular survey system, combined with the reservation of a centrally-located section for the support of schools, was a concept that was strongly informed by the governance systems of the original colonies and the revolutionary sentiments related to public education, enlightenment-era rationalism, and the concept of agrarian democracy. This system of organizing land and education envisioned the township as the most basic unit of government, with populations oriented around small, agrarian communities that would provide for the democratic education of their citizens, with these communities rationally distributed across the countryside under the logical, mathematical system of rectangular survey. In the words of the United States Supreme Court, by reserving a centrally-located section within each township, Congress could

consecrate the same central section of every township of every State which might be added to the federal system, to the promotion 'of good government and the happiness of mankind,' by the spread of 'religion, morality, and knowledge,' and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modeled.²¹

¹⁵ Fairfax, Souder, and Goldenman, *The School Trust Lands: A Fresh Look At Conventional Wisdom*, 22 ENVTL. L. 797, 803 (1992).

¹⁶ See O'Day, *supra* note 5, at 172.

¹⁷ Fairfax, et al., *supra* note 17, at 803.

¹⁸ SOUDER & FAIRFAX, *supra* note 4, at 20-21.

¹⁹ The General Land Ordinance of 1785, 1 Laws of the United States 565 (1815).

²⁰ *Id.*

²¹ *Cooper v. Roberts*, 59 U.S. 173, 178 (1855).

The Northwest Ordinance,²² passed two years later, created a system of territorial governments and a process for transitioning territories into new states.²³ The Northwest Ordinance also carried through on the vision of cheap land, state equality, and public education that were considered critical to the success of the western settlements;²⁴ Article III of the Northwest Ordinance announced that "Religion, Morality, and Knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged," and Article V provided that Congress should admit every new state on an "equal footing" with the existing states.²⁵

Under the terms of the Ordinance, after the survey and settlement of new regions, these regions would be organized by an act of Congress into U.S. Territories, with a territorial government that was appointed by the President. Once the population of a territory reached five thousand adult males, the territory could elect a legislature and send a non-voting delegate to Congress, and once the population reached sixty thousand, the territory could petition Congress for admission to the Union. If the petition was granted, Congress would then pass an enabling act authorizing a constitutional convention in the new state, with the constitution subject to a popular referendum in the territory. If successful, the constitution would be sent to Congress for ratification, and the state would be admitted.²⁶ At the time of admission, the state would also receive land grants giving title to its reserved school lands, as well as additional land grants to support other public institutions.

C. Emergence of the School Land Grants

The state admission process established in the Northwest Ordinance was never strictly followed by Congress. This was particularly true in the years leading up to and continuing through the Civil War, when the admission of new states was a process that was politically charged with conflicts over slavery and the desire of both North and South to maintain an approximately equal balance between free and slave states.²⁷ Prior to 1803, sixteen states had entered the union, including the thirteen original colonies, as well as three other states – Vermont, Tennessee, and Kentucky – that were carved out of the colonies' land cessions through varying mechanisms.²⁸ Because there were no "public domain" lands in these states, none of them received federal land grants (although they later received land grants to support colleges under the Morrill Acts).²⁹

Ohio (1803) was the first "public domain" state admitted to the Union, and the first state to receive a land grant in support of schools (the section sixteen reservation provided by the General Land Ordinance).³⁰ After Ohio, virtually every state admitted to the Union received substantial grants of reserved lands at admission. There were only three exceptions: the State of Maine, which was created out of lands ceded by Massachusetts as a part of the Missouri Compromise of 1820 (which traded Maine's admission as a free state in exchange for Missouri's admission as a slave state); the State of Texas, which was annexed as an existing sovereign government in 1848 after its successful war for independence with Mexico (and therefore had its own sovereign state lands);³¹ and West Virginia, which was carved out of the existing State of Virginia and admitted as a free state in the midst of the Civil War.

²² Northwest Ordinance, 1 Stat. 51 (1787).

²³ The Northwest Ordinance also prohibited the introduction of slavery into the Northwest land areas, bounded by the Ohio and Mississippi Rivers. See also Fairfax et al, *supra* note 17, at 806.

²⁴ See HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 GI BILL 19-25 (1986).

²⁵ See Northwest Ordinance, *supra* note 24.

²⁶ SOUDER & FAIRFAX, *supra* note 4, at 25.

²⁷ See generally PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987).

²⁸ Hager, *supra* note 9, at 39.

²⁹ Morrill Act of 1862, 7 U.S.C. §303; Morrill Act of 1890, 7 U.S.C. §322 et. seq. The Morrill Act of 1862 granted the states who had remained loyal to the Union during the Civil War 30,000 acres of land for each member of their Congressional delegation, to fund the establishment of colleges for engineering, agriculture, and military science. The Morrill Act of 1890 later provided the same grants to the sixteen southern states who had been denied lands under the 1862 grant.

³⁰ SOUDER & FAIRFAX, *supra* note 4, at 27-29.

³¹ However, it should be noted that Texas also reserved Section sixteen lands when it was an independent Republic. Mineral royalties (often derived from these original reservations) have provided the vast majority of the permanent fund held by the State of Texas. See generally THOMAS LLOYD MILLER, THE PUBLIC LANDS OF TEXAS, 1519 – 1970 (1972).

1. Consolidation of State Authority Over School Grants

While Congress maintained consistent support for the practice of granting lands to states, the doctrines under which this occurred evolved significantly over time. For example, although we now refer to the lands that were granted to the states as “state trust lands,” under the original concept of the General Land Ordinance and Northwest Ordinance, the section sixteen lands in each township would be reserved to maintain the schools in that township, consistent with the Jeffersonian model of agrarian communities administering locally-controlled schools.³² This concept was rejected by Congress during the admission of Ohio (Congress vested control of Ohio’s grant lands in the Ohio state legislature).³³ However, in the years that followed, Congress returned to its original idea, reserving lands to support schools in that township.

As the accession process continued, the impracticability of this concept – driven in large part by the limitations of the rectangular survey system itself – became increasingly manifest. Although the rectangular system had mathematical appeal for purposes of surveys and administering the chain of title, population centers in the western lands tended to develop around natural, economic, and military features – rivers and waterways, arable lands, mountain passages, roads, trails, railways, army and cavalry forts, and friendly native governments – without regard for the artificial township boundaries. As such, there were not always local governments associated with each township to manage the grant lands, and when these governments did exist, they frequently lacked the resources to administer the granted lands.³⁴

Moreover, while some of the granted lands could be leased for farming or other valuable uses, many of the lands were not located in proximity to existing population centers. As a result, most of these lands could not provide meaningful support for schools in a given township, and in some cases, the lands were simply granted to teachers in lieu of a salary until sufficient tax revenues could be gathered to pay them.³⁵ In response, Congress gradually shifted away from township-centered land administration, by first granting lands to benefit schools in the township and to be managed by the county governments,³⁶ and later by centralizing management of the lands in the state government, and reserving the benefits of the lands to the corresponding townships.³⁷ Finally, in the Michigan grant in 1836, Congress simply granted the lands “to the State for the use of schools.”³⁸ By the middle of the nineteenth century, Congress had abandoned the township reservation concept altogether and, like its grant to the State of Michigan, simply granted the lands to the state, to be administered by the state for the support of schools statewide.³⁹

2. Expanding Trust Grants

The size of the trust grants also increased significantly over time. From 1803 to 1858, Congress admitted fourteen states to the Union, each of which received the regular section sixteen reservation.⁴⁰ However, beginning with the admission of California in 1850 and the admission of Oregon in 1859, Congress began to grant two sections out of each township to the states (sections sixteen and thirty-six).⁴¹ With the admission of Utah, Congress once again increased the grant allocation, this time to four sections (two, sixteen, thirty-two, and thirty-six). Congress continued this policy with the admission of Arizona and New Mexico in 1910, granting both states four sections of land.⁴² Table II-1 shows the chronology, character, and relative sizes of the trust grants.

³² See HOWARD CROMWELL TAYLOR, THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND ORDINANCES, 25-29 (1922).

³³ Fairfax et al., *supra* note 17, at 817.

³⁴ See TAYLOR, *supra* note 34, at 85.

³⁵ *Id.*

³⁶ SOUDER & FAIRFAX, *supra* note 4, at 30.

³⁷ *Id.*

³⁸ See *Papasan v. Allain*, 478 U.S. 265, 270 (1986).

³⁹ *Id.* See also Fairfax, et al., *supra* note 17, at 817-818.

⁴⁰ SOUDER & FAIRFAX, *supra* note 4, at 20-21.

⁴¹ *Id.*

⁴² *Id.*

The reasoning behind the increasingly large grants of land appears to have been a practical one. With the early state admissions – primarily in the American Midwest and the South – states primarily utilized their grant lands by selling or leasing these lands for agriculture.⁴³ However, as state admissions proceeded west of the 100th Meridian, the character of the granted lands changed significantly – moving from the flat, rich farmlands that predominated in the East to the steeper, arid lands of the West. As such, the majority of these lands had little value for agriculture, and the organized ranching, mineral, and timber industries that would eventually be able to utilize at least some portion of these lands had not yet come into flower. It was therefore recognized that the states west of the 100th Meridian would require a larger quantity of land in order to produce the necessary revenues to support schools and other public institutions.⁴⁴ An estimate by the first Washington Land Commissioner, for example, estimated that the average value of a section of trust land was around \$800; assuming the land could be sold, the investment income from the proceeds of the sale would produce only about \$48 per year, or about one month's salary for an average teacher.⁴⁵

The original reservation grants for common schools were also accompanied by increasingly generous “block” grants for the support of other public institutions. For example, the 1841 Preemption Act granted five hundred thousand acres of land to every public land state for a variety of public purposes;⁴⁶ later, the Agricultural College Act of 1862 granted lands to all of the states that were not in active rebellion against the Union to endow agricultural and mechanical colleges (when the war ended, this grant was extended to the southern states as well).⁴⁷ Other grant programs transferred lands to states to finance internal improvements, such as railroads.⁴⁸

These grants grew larger and larger over time. By the time New Mexico and Arizona were admitted in 1910, they received enormous grants on top of their four reserved sections for a laundry list of public purposes: 200,000 acres for university purposes; 100,000 acres for public buildings; 100,000 acres for insane asylums; 100,000 acres for schools and asylums for the deaf, dumb, and blind; 50,000 acres for disabled miners' hospitals; 200,000 acres for normal schools; 100,000 acres for penitentiaries and reform institutions; 150,000 acres for agricultural and mechanical colleges; 150,000 acres for schools of mines; 100,000 acres for military institutes; and one million acres for the payment of county bonds (with any remainder going to the benefit of the common schools).⁴⁹ Many states received other land grants in advance of their statehood to support the functions of territorial governments. Congress also made a number of grants to states post-statehood such as the Morrill Act grants for colleges, which were applied not just to the new western states, but also the existing eastern states.⁵⁰

Beyond these additional grants, Congress also took up the practice of allowing states to select *in lieu* lands from elsewhere in the public domain when their reserved lands in a given township were already occupied by private homesteaders, railroad grantees, or various federal reservations. These *in lieu* selections initially excluded federally reserved lands. For example, the 1889 "Omnibus" Enabling Act for North Dakota, South Dakota, Montana, and Washington and the 1896 Utah Enabling Act did not provide for *in lieu* selections to offset the federal land reservations. For states that were admitted in the later history of the accession process, this policy cost the states a significant amount of acreage due to previous federal commitments of millions of acres

⁴³ O'Day, *supra* note 5, at 173-174.

⁴⁴ See Hager, *supra* note 9, at 40.

⁴⁵ See *generally* THOMAS BIBB, HISTORY OF EARLY COMMON SCHOOL EDUCATION IN WASHINGTON (1929).

⁴⁶ Preemption Act of 1841, ch. 16, 5 Stat. 455.

⁴⁷ Agricultural College Act of 1862, ch. 130, 12 Stat. 503.

⁴⁸ Fairfax et al., *supra* note 17, at 815.

⁴⁹ New Mexico-Arizona Enabling Act, 36 Stat. 572 (1910).

⁵⁰ C.f. PAUL W. GATES, THE WISCONSIN PINE LANDS OF CORNELL UNIVERSITY: A STUDY IN LAND POLICY AND ABSENTEE OWNERSHIP (1943). For a discussion of the Morrill Acts, see note 31, *supra*.

Table II(C): History of State Land Grants in the United States

Year of State-hood	State	Sections Granted	Common Schools (acres)*	All Public Institutions (acres)**	All Land Grants (acres)***
1803	Ohio	16	724,266	1,447,602	2,758,862
1812	Louisiana	16	807,271	1,063,351	11,441,032
1816	Indiana	16	668,578	1,127,698	4,040,518
1817	Mississippi	16	824,213	1,104,586	6,097,064
1818	Illinois	16	996,320	1,645,989	6,234,655
1819	Alabama	16	911,627	1,318,628	5,007,088
1821	Missouri	16	1,221,813	1,646,533	7,417,022
1836	Arkansas	16	933,778	1,186,538	11,936,834
1837	Michigan	16	1,021,867	1,357,227	12,143,846
1845	Florida	16	975,307	1,162,587	24,208,000
1846	Iowa	16	1,000,679	1,336,039	8,061,262
1848	Wisconsin	16	982,329	1,320,889	10,179,804
1850	California	16	5,534,293	5,736,773	8,852,140
1858	Minnesota	16	2,874,951	3,167,983	16,422,051
1859	Oregon	16, 36	3,399,360	3,715,244	7,032,847
1861	Kansas	16, 36	2,907,520	3,106,783	7,794,669
1864	Nevada	16, 36	2,061,967	2,223,647	2,725,666
1867	Nebraska	16, 36	2,730,951	2,958,711	3,458,711
1876	Colorado	16, 36	3,685,618	3,933,378	4,471,604
1889	N. Dakota	16, 36	2,495,396	3,163,476	3,163,552
1889	S. Dakota	16, 36	2,733,084	3,432,604	3,435,373
1889	Montana	16, 36	5,198,258	6,029,458	6,029,458 ⁵¹
1889	Washington	16, 36	2,376,391	3,044,471	3,044,471
1890	Idaho	16, 36	2,963,698	3,663,965	4,254,448
1890	Wyoming	16, 36	3,472,872	4,248,432	4,345,383
1896	Utah	2, 16, 32, 36	5,844,196	7,414,276	7,507,729
1907	Oklahoma	16, 36	2,044,000	3,095,760	3,095,760
1912	New Mexico	2, 16, 32, 36	8,711,324	12,446,026	12,794,718
1912	Arizona	2, 16, 32, 36	8,093,156	10,489,156	10,543,931

* Figures include acreage derived from the reservation of sections in each township for common schools.

** Figures include all grants of lands for schools, universities, penitentiaries, schools for the deaf and blind, public buildings, repayment of county bonds, and similar public institutions and purposes. (Hereafter referred to as "state trust lands" in this report.)

*** Figures include all lands granted to states, including grants for re-granting to railroads, lands for roads, wagon trails, canal and river improvements, and swamplands grants.

Source: Paul W. Gates *History of Public Land Law Development*, Appendix C (1968).

⁵¹ There is a discrepancy in the source between the total land grants to the states and the total of the figures provided in the table for each of the individual grants. The total of the figures provided for the individual grants was used.

to Indian reservations, military reservations, and other federal uses. However, by the end of the grant process, Congress provided for *in lieu* selections even where lands were reserved for federal purposes. Oklahoma received *in lieu* selections for lands previously reserved for the state's numerous Indian reservations, and both Arizona and New Mexico received *in lieu* selections for all federal lands within the states.⁵²

At least initially, these *in lieu* selections were not always the panacea that the states had hoped for. In Washington, for example, territorial officials had apparently anticipated being able to generate large amounts of sales revenue by participating in the frenzied land speculation that dominated the early history of the state.⁵³ However, their hopes were somewhat dimmed by the fact that the state selections occurred last.

Mill companies, land speculators, prospectors, settlers, and the Northern Pacific Railroad had already done their best to lock up the most valuable acreage. In locating an exact route from the Columbia to Puget Sound, [Northern Pacific Railroad] engineers tried to lay track through the most heavily timbered areas, so that valuable timberland would be included in the land grant. Out of all the individuals and companies claiming land, the state institutions picked last. Even other public entities stood closer to the head of the line.⁵⁴

As a result, much of the *in lieu* land that Washington acquired was too far from navigable water or railroad to be feasible for logging or farming in the short term, and the granted lands thus provided very little money for the educational and institutional needs of the state in the early years of the grant. The state quickly sold off most of its marketable land, essentially grinding state land sales to a halt within a few years of statehood and leaving only leasing and timber sales on the accessible portions of the trust property as the major revenue generating activities for Washington's state trust lands.⁵⁵

For the states that continue to hold their trust lands in the present day, these less-than-optimal *in lieu* selections have paid significant dividends, because they allowed the states to acquire large, contiguous parcels of lands instead of the scattered one, two, or four sections per township that the states received where *in lieu* selection opportunities were limited. Additionally, these present day lands are generally no longer as remote or inaccessible as they once were. In Arizona, for example, the state was left with enormous *in lieu* selections due to the predominance of federal land holdings and existing railroad grants in the state. Although these selections were not always as well positioned as the lands they were supposed to replace, the selection process allowed the state to acquire enormous blocks of lands throughout the state that have been far more practical to manage over the long term than scattered tracts. As the state has grown, these once remote lands have become an invaluable resource. The Arizona State Land Department now controls more than 30 percent of the available urban development land in Maricopa County – the fastest growing area of the state – and holds much of it in large, contiguous blocks that are ideal for master-planned community developments as well as urban open space. One off-the-cuff estimate indicates that a single twenty thousand acre tract in north Phoenix may be worth as much as \$40 billion in lease and sale revenues to the trust over the next one hundred years.⁵⁶

Congress' increasingly expansionist approach to state land grants culminated with the grant of the mineral rights in the previously granted lands. Congress specifically exempted mineral lands from the grant process in 1889 with the Omnibus Enabling Act providing for *in lieu* selections to

⁵² Congress was not consistent in applying this policy retroactively, however. For example, the State of Mississippi lost significant quantities of its section sixteen lands in the northern third of the state due to the creation of the Chickasaw Indian Reservation; even when the federal government later revoked the status of this area as a reservation, the state was not compensated for the section sixteen lands in this area.

⁵³ Daniel Chasan, *A Trust for All the People: Rethinking the Management of Washington's State Forests*, 24 SEATTLE UNIVERSITY L. R. 1 (2000).

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 6.

⁵⁶ Personal Communication with Ron Ruiska, Asset Management Division Director, Arizona State Land Department 9/22/2004.

replace these lands.⁵⁷ A later U.S. Supreme Court decision, interpreting the Utah Enabling Act, determined that Congress had reserved mineral rights in all state land grants;⁵⁸ however, the Jones Act of 1927 reversed the Supreme Court decision, and granted states the mineral rights in all granted lands.⁵⁹

3. Changing Rules for the Administration and Disposition of Trust Lands

The rules and restrictions applicable to the grants of trust lands also changed significantly over time. In the initial grants of lands to states, Congress had presumed that school lands would be leased to generate revenues rather than being sold.⁶⁰ However, the experience of the early states with leasing proved to be a failure. In 1827, Ohio requested authority to sell its granted lands; Congress subsequently passed legislation retroactively granting this authority to all states, and included sale authority in all new grants.⁶¹ Following this initial foray into restricting the management of trust lands, Congress' subsequent land grants contained little or no guidance, leaving it to the states to decide how best to manage their lands.⁶²

As one commentator has noted,⁶³ Indiana serves as an excellent example of many of the early trust grants. Indiana's Enabling Act, passed in 1816, contains only one provision related to school trust lands:

That the section numbered sixteen, in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.⁶⁴

Noticeably absent from this provision are any requirements regarding the sale or disposal of the lands, fiduciary obligations, or other principles commonly associated with state trust lands; although Section six of Indiana's Enabling Act makes a series of additional grants for the support of other public institutions, these grants were similarly unrestricted.⁶⁵ Most early trust grants closely mirror this provision.⁶⁶

The majority of early states rushed to sell their granted lands in the frenzy of frontier land disposals to support the early school systems.⁶⁷ As a result, "much of the land and its potential benefit were lost due to incompetence, indirection, and corruption,"⁶⁸ providing few lasting benefits for schools.⁶⁹ Regardless, by the 1830's, states were becoming increasingly concerned with the sustainability of this approach to the management of their trust lands.

⁵⁷ Omnibus Enabling Act, 25 Stat. 676, § 19 (1889).

⁵⁸ *United States v. Sweet*, 245 U.S. 563, 572-74 (1918).

⁵⁹ Jones Act of 1927, ch. 57, 44 Stat. 1026.

⁶⁰ *Fairfax et al.*, *supra* note 17, at 820.

⁶¹ O'Day, *supra* note 5, at 181.

⁶² *Id.* at 181-182.

⁶³ *Fairfax et al.*, *supra* note 17, at 809.

⁶⁴ Indiana Enabling Act § 6, 3 Stat. 290 (1816).

⁶⁵ *Id.*

⁶⁶ *Fairfax et al.*, *supra* note 17, at 809-810.

⁶⁷ O'Day, *supra* note 5, at 182.

⁶⁸ *Fairfax et al.*, *supra* note 17, at 807.

⁶⁹ Many abuses involved fraudulent deals executed under the auspices of territorial or state officials; for example, in the Territory of Washington, lands that had been set aside for the establishment of a territorial university were sold to timber companies in a series of land deals that allowed purchasers to cherry-pick lands from government holdings for a fixed price of \$1.50 an acre. The overly friendly relationships between the public officials involved in the sales and the timber and mill companies indicated to most observers that the arrangement was essentially a conspiracy to defraud the territorial government. However, the political influence of the timber operators was great enough to avoid a federal investigation and any invalidation of the transactions. Other abuses were simply related to the inability of early land managers to police their own lands; for example, shortly after Washington was granted admission to the Union, the new Washington Land Commissioner observed that railroad lines were frequently being sited over state lands without obtaining the rights to do so, that valuable timber was being destroyed or removed without permission, and that appraisals of state lands, which had been delegated to county commissioners, were regularly made too low for the benefit of special interests. Chasan, *supra* note 55, at 30-31.

One of the early innovations to address this problem appeared with the admission of Michigan to the Union in 1837. Although previous land grants indicated that these lands were for the support of public education, Michigan's Constitution adopted specific restrictions on the use of revenues from these lands, requiring the state to place proceeds from the sale of trust lands into a permanent fund.⁷⁰ The accrued sale proceeds in the fund would then be invested; the interest from these investments, combined with rental revenues from trust lands, would then be used to fund school activities.⁷¹ This served both to discourage fire sales of trust lands to achieve short term benefits – since only the interest from these sales, and not the proceeds would be immediately available – and to ensure that when lands were sold, the state would continue to benefit from the investment of those proceeds in perpetuity. After Michigan, nearly all subsequent states adopted constitutional language that mirrored Michigan's permanent fund concept; Louisiana, which was admitted twenty-five years earlier, amended its Constitution to create a permanent fund.⁷² As noted below, Congress eventually followed suit, incorporating the requirement for a permanent fund into the Enabling Act for the State of Colorado and all subsequent grants.⁷³

This innovation was soon complemented with increasingly complex restrictions on the sale and lease of trust lands in state constitutions that developed out of experience with questionable land transactions and the efforts of a growing public school lobby that sought to protect the trust grants.⁷⁴ Many states began to impose provisions requiring minimum land sale prices, fair market value for all sales, and that all dispositions occur at public auctions. However, as some observers have noted, the states' increasingly conservative approach to the management of trust lands also mirrored a larger shift in the nation's attitude towards the public domain.⁷⁵ As the nineteenth century progressed, Congressional policy towards the public domain began to transform from a policy of rapid disposal to encourage and underwrite "manifest destiny," towards a policy of retention and long-term management of the public domain for multiple uses, public benefits, and federal purposes. With this transformation, Congress took steps towards the closure of the frontier by reserving vast tracts of public lands for forests, parks, and other public uses. The restrictions on trust management in state constitutions and statutes took on a similar character, with restrictions to limit or even prohibit the sale of state lands, and an emphasis on leases and licenses for timber, grazing, agriculture, and similar "sustainable" uses.⁷⁶

Regardless, it is important to note that the evolution of these restrictions was largely driven by the states themselves. As one commentator notes, "[a] bouncing ball pattern is apparent in the evolution of sales restrictions provisions: a state adopts a restriction in its constitution; variations show up in subsequent state constitutions and occasionally in enabling acts; a subsequent state adopts variations on those conditions with further elaborations."⁷⁷ After the mid-nineteenth century, state constitutional restrictions on trust lands were typically far more restrictive than the requirements imposed by Congress in state enabling acts.⁷⁸ A common misperception is that Congress developed these restrictions to protect its trust grants from misuse by untrustworthy states; in fact, these restrictions first originated within the states to ensure that they received the full benefits from their land grants – even as Congress generously increased the size and scope of land grants over time.⁷⁹ Indeed, even the concept that the granted lands were to be held in "trust" was originally developed by states. For example, although the Omnibus Enabling Act contained no language with regard to the granted lands being held in trust, Montana, Idaho, South Dakota, and Washington each adopted constitutional language to that effect.⁸⁰

⁷⁰ MICH. CONST. Art. X § 2 (1835).

⁷¹ SOUDER & FAIRFAX, *supra* note 2, at 31-32.

⁷² *Id.* at 32.

⁷³ See *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).

⁷⁴ Sally K. Fairfax & Andrea Issod, *Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases*, 33 ENVTL. LAW 341, 348 (2003).

⁷⁵ O'Day, *supra* note 5, at 181.

⁷⁶ *Id.*

⁷⁷ Fairfax et al., *supra* note 17, at 821-822.

⁷⁸ *Id.*

⁷⁹ O'Day, *supra* note 5, at 178-179.

⁸⁰ IDAHO CONST., Art. IX, § 8; MONT. CONST., Art. X § 11; S.D. CONST., Art. VIII §7; WASH. CONST., Art XVI § 1.

As a result, the first significant restrictions in state enabling acts did not begin to appear until the passage of the Colorado Enabling Act in 1875, which contained provisions requiring the establishment of a state permanent fund, the sale of trust lands at public auction, and a minimum price for all land sales.⁸¹ Virtually all of the states that entered the Union after Colorado were subject to similar requirements.

However, even these restrictions did not prevent many Western states from continuing with rapid land disposal schemes. In Oregon, for example, the state disposed of the vast majority of its trust grant under a liquidation policy based on the theory that once this property was in private hands, the lands would generate more revenue for the state in property taxes than it would in public ownership. This policy was discontinued after the discovery of widespread corruption and fraud in a series of investigations from 1872 to 1913, which ultimately led to the conviction of twenty-one high level state and federal officials.⁸² As one commentator notes, however, the extent of the early mismanagement of trust lands can sometimes be overplayed:

Viewed from the perspective of the current value of the land and resources, it is reasonable to think that it would have been preferable to rent a given section rather than to give it in salary to the school teacher. Nonetheless, many of the policies that might have been more beneficial to current students would have probably deprived the earliest generations of school children of much of the benefit of the grants.⁸³

The development of the land grant process culminated in the grants contained in the New Mexico-Arizona Enabling Act,⁸⁴ admitting the last two states in the continental U.S. to the Union. Unlike the enabling acts that came before it, the New Mexico-Arizona Enabling Act provided detailed provisions for the management and disposition of trust lands and the management of the revenues derived from them; New Mexico's Enabling Act is so detailed that the state found it unnecessary to supplement its provisions with its own constitutional restrictions.⁸⁵ The Enabling Act included provisions requiring that lands be sold or leased at public auction, a series of enumerated auction exceptions for short-term leasing and mineral leasing, requirements for the establishment of a permanent fund, and a number of other limitations derived from previous state constitutions.⁸⁶ Most significantly, the Act provided that the granted lands were to be held

in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.⁸⁷

The Act also provided that any disposition of the lands that violated these requirements would be void, with the terms of the grant enforceable by the U.S. Attorney General.⁸⁸

The admission of Arizona and New Mexico as the forty seventh and forty eighth states in 1910 essentially drew the era of state trust lands to a close. The "state-making" process then went on hiatus until the admission of Hawaii and Alaska in the 1950's. Hawaii, as a previously independent sovereign, had no "public domain" from which the federal government could reserve lands. Instead, Hawaii's statehood act ratified an existing trust established on royal lands to support schools (based on the Great Mahale of 1848). The federal government also returned all of the lands held by the U.S. to Hawaii at the time of statehood.⁸⁹ Alaska, by contrast, was given the largest land grants of any state

⁸¹ 161 F.3d at 633-34.

⁸² *Administrative Overview*, Oregon Department of State Lands, available at: <http://www.oregonstatelands.us/adminoverview.htm>. See also STEPHEN A. DOUGLAS PUTER, *LOOTERS OF THE PUBLIC DOMAIN* (1908).

⁸³ Fairfax et al., *supra* note 17, at 807.

⁸⁴ New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910).

⁸⁵ SOUDER & FAIRFAX, *supra* note 4, at 26.

⁸⁶ New Mexico-Arizona Enabling Act, 36 Stat. 557, § 10 (1910).

⁸⁷ *Id.* at §§ 10, 28.

⁸⁸ Fairfax et al., *supra* note 17, at 829.

⁸⁹ SOUDER & FAIRFAX, *supra* note 4, at 23-24.

– over 110 million acres. However, unlike previous land grants, the vast majority of Alaska’s massive land grants were given to the state without any special restrictions on the revenue uses. As a result, of the 110 million acres granted to the state, only 1.2 million acres were specifically dedicated for school purposes, with an additional one million acres dedicated to support mental health services in the state.⁹⁰

4. Lessons from the History of State Land Grants

Due to the accumulative process that characterized the development of the federal program of granting lands to the states, there are substantial differences among the states with regard to the requirements and approaches to trust management. These differences range from requirements as to whether lands must be sold or leased at public auction to more subtle variations in language, the implications of which may not yet have been tested in the courts. For example, there are many variations in the descriptions that were used to identify the purpose of state land grants that may have subtle implications for how trust lands should be managed or who should benefit from them. Ohio’s Enabling Act granted state lands “for the use of schools.”⁹¹ By contrast, Oklahoma’s Enabling Act indicates that lands are for “the use and benefit of common schools,”⁹² while Colorado’s Enabling Act indicates that the grant is for “the support of common schools,”⁹³ a phrase also shared by the Montana, Washington, North Dakota, and South Dakota grants.⁹⁴

These differences frequently relate more to what Congress did not specify than to what it did, as the lack of guidance provided by the majority of state enabling acts left states free to improvise in developing trust asset management approaches. For example, no state enabling act ever specified a method by which trust lands should be administered, although many states adopted a pattern (first developed in Oregon) in which lands were administered by a “land commission” or similar body composed of high-level state officials; Colorado, South Dakota, Montana, Idaho, Wyoming, and Oklahoma all followed in this vein.⁹⁵ Other states utilized commissions composed of appointed officials (Utah), executive agencies headed by an elected official (New Mexico), or an unelected appointee (Arizona).⁹⁶ These differences developed despite the fact that a number of these states – including Arizona and New Mexico, and South Dakota, North Dakota, Montana, and Washington – entered the Union under the same enabling acts.⁹⁷

These differences in state enabling acts and state constitutions have translated into a remarkable diversity in trust land management programs that makes it difficult, and perhaps irresponsible, to generalize about the management of state trust lands in the West. Nevertheless, as the history of these land grants demonstrates, trust lands share a common origin and thus share many common themes. Perhaps the most important of these common themes is the concept of the trust responsibility itself.

⁹⁰ Alaska Mental Health Enabling Act of 1956, § 101 et seq., 70 Stat.709. For discussion of federally granted lands in Alaska, see *State of Alaska v. University of Alaska*, 624 P.2d 807 (Alaska 1981).

⁹¹ Ohio Enabling Act, 2 Stat. 173, § 7 (1802).

⁹² Oklahoma Enabling Act, 34 Stat 267, § 7 (1906).

⁹³ Colorado Enabling Act, 18 Stat. 474, § 7 (1875).

⁹⁴ Omnibus Enabling Act, 25 Stat. 557, § 10 (1889).

⁹⁵ Fairfax et al., *supra* note 17, at 826.

⁹⁶ See UTAH CODE ANN. § 53C-1-201; N.M. STAT. ANN. § 19-1-5; ARIZ. REV. STAT. § 37-131(B).

⁹⁷ New Mexico-Arizona Enabling Act, 36 Stat 557 (1910), Omnibus Enabling Act, 25 Stat 676 (1889).