

I. Introduction

If you look at a map of public land ownership in almost any Western state, amongst the great blocks of green (usually national forests and national parks), orange (usually Indian reservations), yellow (usually Bureau of Land Management lands), and white (usually private lands), you will find some light blue: the color traditionally reserved by mapmakers for state trust lands. In total, these lands comprise approximately forty-six million acres of land spread across twenty-four states, primarily located to the west of the Mississippi River. Despite their abundance, they are one of the most frequently ignored and least understood categories of land ownership in the American West.

State trust lands date back to the first decades after the American Revolutionary War. In the General Land Ordinance of 1785 and the Northwest Ordinance of 1787, Congress established a policy of granting lands to states to support public education and other important public institutions. This practice was continued – and expanded – throughout the process of state accession. Although many of the states that received these grants sold all or most of their granted lands within a few decades of statehood, many of the Western states – generally admitted to the Union later than their Eastern counterparts – retained a significant percentage of their original trust land grants, mirroring the development of federal approaches to the disposition and retention of public lands.

These lands, which often play vital roles in the natural and cultural heritage of Western communities, encompass a diverse range of landscapes: from the forests and mountain ranges of the Inter-Mountain West and the Pacific Northwest, to the grasslands and rich farmlands of the Midwest, to the arid deserts of the Southwest. Unlike other categories of public lands, the vast majority of state trust lands are held in a perpetual, intergenerational trust to support a variety of beneficiaries, including public schools (the principal beneficiary of most grants), universities, penitentiaries, and hospitals. To fulfill this mandate, these lands are actively managed for a diverse range of uses, including: timber, grazing, mining for oil and gas and other minerals, agriculture, commercial and residential development, conservation, and recreational uses such as hunting and fishing. These land holdings are normally accompanied by large permanent funds – some of which now total in the billions of dollars – that generally hold the proceeds from the permanent disposal of these lands or the extraction of their non-renewable natural resources (e.g. minerals, oil, and gas). These funds, and the interest payments derived from them, are used for many purposes, including guaranteeing school bonds and loans, funding construction, providing land for public institutions, and paying teacher's salaries.

At the time of statehood, and continuing through the early twentieth century, the economies of most Western states focused primarily on feeding the economic engines of the East via natural resource extraction, including hard rock mining, timber harvesting, grazing, agriculture, and, later on, mining for coal, oil, and natural gas. As such, revenue generation from state trust land has focused on the leasing and sale of natural products. Even in the present day, many Western states continue to obtain significant financial benefits from specific natural resource management activities on trust lands – particularly subsurface uses. Oil, gas, coal, and other mineral extraction continues to provide the bulk of the revenues derived from trust lands for states such as Colorado, New Mexico, Texas, Utah, and Wyoming, and will likely continue to do so in the future. Timber management also continues to provide significant revenues in states such as Idaho, Minnesota, Montana, Oregon, and Washington.

At the same time, a growing number of Western communities are rapidly transforming as a result of urbanization and an ongoing shift in the United States towards more diversified, knowledge-based economies. This transformation has diminished the role of natural resource extraction in many regional economies, even as it has elevated cultural, environmental, recreational, and location-based amenities to ever-increasing prominence.¹ As a result of these changes, certain key Western natural

¹ See Ray Rasker, et. al., *Prosperity in the Twenty-First Century West*, SONORAN INSTITUTE (2004). This is not to suggest that this is the only future for Western communities; some research suggests that it is possible to balance natural resource extraction with the protection of environmental amenities. See Chuck Harris, et al., *Forest Resource-Based Economic Development in Idaho: Analysis of Concepts, Resource Management Policies, and Community Effects*, UNIVERSITY OF IDAHO (2003).

resource industries – particularly agriculture, ranching, and timber production – are in decline. In many communities, the engine of the West’s new economy is increasingly driven by location and lifestyle choices, a rapid rise in retirement and investment income, and the attractiveness of living in proximity to protected public lands for an increasingly mobile and professional population.²

As the twenty-first century dawns, Western states are struggling to reconcile changing environmental and economic realities and ongoing population growth with resource extraction and development. Although the extent of this transition varies from state to state and from community to community, in many parts of the West, these developments have led trust managers to diversify trust portfolios, particularly as school funding shortfalls and rapid growth rates continue to place pressure on trust managers to maintain or increase trust revenues. For example, the decline in natural resource industries and the explosive growth in many Western communities have led some trust managers to explore opportunities for lucrative residential and commercial development on trust lands.

On a parallel track, in many communities state trust lands are increasingly viewed as public assets that have value for open space, watershed protection, fish and wildlife, and recreation – values that should be given equal or greater weight than traditional economic uses. This change in viewpoint has brought traditional natural resource production activities – particularly grazing and timber – under increasing scrutiny regarding their impact on conservation values, their real contributions to local economic growth, and their long-term value to trust beneficiaries. It has also required many trust managers to balance their fiduciary responsibilities with public values associated with the preservation of healthy landscapes, urban open space, and better planning for growth.

In 2003, the Lincoln Institute of Land Policy and the Sonoran Institute established their Joint Venture on State Trust Lands to assist diverse audiences in improving state trust land administration in the American West. The goals of the Joint Venture are to ensure that trust land stewardship, collaborative land use planning, and efficient and effective asset management on behalf of state trust land beneficiaries are integral elements of how these lands are managed in the West. The Joint Venture seeks to utilize the core competencies of each organization to broaden the range of information and policy options available to improve state trust land management.

This report was developed to support the work of the Joint Venture. It explores the historical background and legal framework of trust land management in the American West, recent developments in key Western states, and opportunities for focused investments in research and policy analysis to improve trust management in the West. The intent of this report is to provide a starting point for discussion about trust land management within and among Western states.

Part II of this report provides a history of the conceptual origins of state trust lands and the practice of granting federal public domain lands to states. Part III explores the legal concepts that underlie the common law of trusts, and examines the nature of the fiduciary responsibilities that have traditionally been understood to apply to trust managers. Part IV of this report analyzes the nature of the trusts that apply to state trust lands, the legal development of state trust doctrine, and the differences between state trusts and traditional common law trusts, arguing that state trust doctrine may incorporate a greater degree of flexibility than has traditionally been presumed. Part V focuses on a selected group of nine Western states, providing an overview of trust grants, trust requirements, governance and trust management strategies, and highlights some recent developments and innovations in trust land management in those states. Finally, Part VI of this report identifies a series of research questions and policy analysis investment opportunities that may assist trust managers in improving asset management strategies and developing mechanisms to balance a wider array of public values with their fiduciary responsibilities.

² See generally Rasker, *supra* note 1.