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## COMMENTS

### Wyoming School Trust Lands Trapped Inside Grand Teton National Park— Alternative Solutions for the Commissioner of Public Lands

As part of the State of Wyoming's admission to the United States in 1890, the federal government granted to Wyoming certain lands from the public domain for specific purposes associated with statehood.<sup>1</sup> Sections number sixteen and thirty-six of each township in Wyoming<sup>2</sup> were granted expressly to provide support for the common schools.<sup>3</sup> Congress anticipated that the state would sell these scattered sections of land to create a permanent school fund, the interest on which would be used to fund the school.<sup>4</sup> Most of the school lands which are administered by the State Board of Land Commissioners (Board)<sup>5</sup> through the Commissioner of Public Lands (Commissioner),<sup>6</sup> have been retained by the state.<sup>7</sup>

In 1929, Grand Teton National Park was created out of the public domain in northwestern Wyoming.<sup>8</sup> Jackson Hole National Monument was established in 1943 on adjacent lands, which included privately held and state owned lands.<sup>9</sup> Congress expanded the boundaries of Grand Teton National Park to encompass the National Monument in 1950.<sup>10</sup> As a result, the State of Wyoming currently owns approximately 1366 acres of school lands within the park boundaries.<sup>11</sup>

This comment sets forth the conflicts faced by the State of Wyoming in administering school lands that are located within Grand Teton National Park. The first section contains a review of the concept of school trust obligations. The second section includes an examination of land use restrictions in the Park. The final section consists of an analysis of the reasonable alternatives available to the Commissioner to resolve the conflict between the school trust obligation and the Park's restrictions.

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1. Wyoming Act of Admission, ch. 664, 26 Stat. 222 (1890).

2. Wyoming Act of Admission, § 2. Lands within Yellowstone National Park were expressly excepted from the grants.

3. Wyoming Act of Admission, §§ 4, 5.

4. *Lassen v. Arizona*, 385 U.S. 458 (1967).

5. "The governor, secretary of state, state treasurer, state auditor and superintendent of public instructions shall constitute a board of land commissioners, which under direction of the legislature as limited by this constitution, shall have direction, control, leasing, and disposal of lands of the state granted, or which may be hereafter granted for the support and benefit of public schools, subject to the further limitations that the sale of all lands shall be at public auction. . . ." WYO. CONST. art. 18, § 3.

6. WYO. STAT. § 36-3-102(a) (1977).

7. Wyoming currently owns 3,538,385 acres of school trust land. Telephone interview with Ray Carlson, Deputy State Commissioner of Public Lands (October 10, 1984).

8. Grand Teton National Park Enabling Act, ch. 331, 45 Stat. 1314 (1929).

9. Proclamation No. 2578, 8 Fed. Reg. 3277 (1943).

10. 16 U.S.C. § 406d-1 (1982).

11. Draft Land Protection Plan — Grand Teton National Park, 45 (1983). Wyoming also owns school lands in national forests. Disposal of these lands, however, is a secondary priority to the state because the land use restrictions of the national forests are not as severe as those of the national parks.

## SCHOOL TRUST OBLIGATION

*Basis of the Obligation*

Wyoming entered the Union as a state in 1890. One of the provisions in the Act of Admission of Wyoming passed by Congress provided:

That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. . . . [A]nd such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States . . . but shall be reserved for school purposes only.<sup>12</sup>

Wyoming accepted the grant of these lands with the following provision in its constitution:

The State of Wyoming hereby agrees to accept the grants of lands heretofore made, or that may hereafter be made by the United States to the state, for educational purposes . . . with the conditions and limitations that may be imposed by the act or acts or congress, making such grants or donations.<sup>13</sup>

The grant and acceptance of the Wyoming school lands created a trust relationship with the State of Wyoming as trustee, the common schools as beneficiaries, and the school lands as the trust corpus.

The United States granted school lands to many other states upon their admission, and these states accepted the school lands with provisions in their constitutions similar to those in the Wyoming Constitution.<sup>14</sup> In *Oklahoma Education Association v. Nigh*, the Oklahoma Supreme Court stated:

These acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. *The State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from the use and disposition of the trust property.*<sup>15</sup>

Because the trust was created by an act of Congress and the state constitution, states cannot excuse themselves from their trust obligation by statute.

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12. Wyoming Act of Admission, ch. 664, § 5, 26 Stat. 222, 223 (1890).

13. WYO. CONST. art. 18, § 1.

14. See, e.g., New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910). ARIZ. CONST. art. 10, § 1.

15. 642 P.2d 230, 235 (Okla. 1982) (emphasis added).

According to *Nigh*, the two primary obligations of the states as trustees are to manage the trust for the exclusive benefit of the schools and to obtain full (market) value for the trust in any dealings involving school lands.<sup>16</sup> In *Alamo Land & Cattle Company v. Arizona*,<sup>17</sup> the United States Supreme Court held that the school trust must always receive the fair rental value of school lands when they are leased. The Nebraska Supreme Court, in *Ebke v. Board of Educational Lands and Funds*,<sup>18</sup> held that the state, as trustee, has a duty to dispose of trust property on the most advantageous terms possible. The court also noted that the duty to obtain maximum return from the leasing of school lands is subject to necessary precaution for the preservation of the trust estate.<sup>19</sup> In sum, the same principles which govern the duties of a trustee of a private trust are to apply to states in managing school trust lands.<sup>20</sup>

### *Cases Applying the Trust Obligation*

The United States Supreme Court first recognized the school trust obligation of the states in 1919, in *Ervien v. United States*.<sup>21</sup> The State of New Mexico had spent school trust funds for the general promotion of the state. The Court held that the state statute authorizing the advertising of the state using school trust funds was invalid as a breach of the trust conditions imposed by Congress in the New Mexico-Arizona Enabling Act.<sup>22</sup> The Court added that the specific conditions set forth in the Act that created the trust were added to prevent states from engaging in speculative methods to prosper more quickly, just as New Mexico had attempted to do.<sup>23</sup>

The United States Supreme Court also found a breach of the school trust in *Lassen v. Arizona*.<sup>24</sup> In that case, the Arizona highway Department took a right-of-way across state school lands without paying full compensation for the easement to the trust fund. The Court rejected the state's theory that the construction of the highway would increase the value of the remaining school land, and therefore, the trust fund was not injured. The Court ordered the highway department to pay the trust the full value of the property interests taken, undiminished by any increase in value to the remaining school lands.<sup>25</sup>

In *United States v. 111.2 Acres of Land*,<sup>26</sup> the State of Washington donated, by statute, school lands to the federal government for irrigation purposes. The United States District Court for the Eastern District of

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16. *Id.*

17. 424 U.S. 295 (1976).

18. 154 Neb. 244, 47 N.W.2d 520 (1951).

19. *Id.* at 255, 47 N.W.2d at 526.

20. See *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981).

21. 251 U.S. 41 (1919).

22. *Id.*; New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910).

23. *Ervien*, 251 U.S. 41, 47 (1919).

24. 385 U.S. 458 (1967).

25. *Id.* at 469.

26. 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd.*, 435 F.2d 561 (9th Cir. 1970).

Washington held the statute unconstitutional. Failing to receive fair market value for the trust lands constituted a breach of the trust even though the donation was to the source of the trust lands, the United States.

At issue in *State v. University of Alaska*,<sup>27</sup> was whether the State of Alaska could include trust lands as part of a state park. The trust lands were granted to Alaska for the support of the University of Alaska. The Alaska Supreme Court found that including the trust lands was a violation of the trust because school trust lands cannot be used for other public purposes without compensating the trust.<sup>28</sup> The court found that the appropriate remedy was inverse condemnation. The state could either pay damages to the trust equal to the full appraised value of the lands included in the park, or give other state lands of equal value to the trust.

An Oklahoma state statute setting below market ceilings on the rent on state school lands and on the interest on farm loans was challenged in *Oklahoma Education Association v. Nigh*.<sup>29</sup> The Oklahoma Supreme Court declared the statute unconstitutional, reasoning that the statute subsidized the farming and ranching industry at the expense of the school trust beneficiaries.<sup>30</sup> The legislature caused the state to breach its obligation as trustee by requiring below market return on the school trust assets.

In *County of Skamania v. State of Washington*,<sup>31</sup> the latest case applying the school trust obligation, the Washington legislature passed the Forest Products Industry Recovery Act of 1982.<sup>32</sup> The Act released certain rights held by the state in contracts for the sale of timber on school lands.<sup>33</sup> This action was taken to relieve some of the hardship of a depressed timber market. As a result, the legislature reasoned, the whole public would benefit. The Washington Supreme Court struck down the law, noting that the state owed a fiduciary duty of undivided loyalty to the trust beneficiaries.<sup>34</sup> By failing to receive full compensation for the release of the contract rights, the state had breached that duty.

The United States Supreme Court has set forth the principle that the common schools are to be the exclusive beneficiaries of the school trust.<sup>35</sup> The state courts have applied this principle when examining the state management of the school trust. Management of the trust for the benefit of the public generally through the building of roads or irrigation projects, the dedication of parks, or the subsidization of vital industries does not, in itself, constitute a breach of the trust obligation. The breach occurred in each of the above examples because the school trust was harmed by not receiving full compensation for the use or disposition of its assets.

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27. 624 P.2d 807 (Alaska 1981).

28. *Id.* at 810.

29. 642 P.2d 230 (Okla. 1982).

30. *Id.* at 236.

31. \_\_\_\_ Wash. 2d \_\_\_\_, 685 P.2d 576 (1984).

32. WASH. REV. CODE ANN. § 79.01.1331-1339 (Supp. 1984-85).

33. *County of Skamania*, at \_\_\_\_, 685 P.2d at 578.

34. *Id.* at \_\_\_\_, 685 P.2d at 580.

35. See *Ervien*, 251 U.S. 41 (1919); *Lassen*, 385 U.S. 458 (1967).

*School Trust Obligation in Wyoming*

The school trust, which was created by the Act of Admission<sup>36</sup> and the Wyoming Constitution,<sup>37</sup> was first recognized by the Wyoming Supreme Court in 1912.<sup>38</sup> Since then, the Wyoming Supreme Court has been inconsistent in protecting the school trust. The strongest protection came in *Alamo Drainage District v. Board of County Commissioners*.<sup>39</sup> There, the court held that a lien held by the permanent school fund against the drainage district was superior to the state's general tax lien against the drainage district. The court stated that it was its "bounden duty" to ensure the school fund "shall remain forever inviolate and undiminished" so far as possible.<sup>40</sup>

Unfortunately, the Wyoming Supreme Court has not given this protection to the school trust in its other cases. Contrary to the holdings of the United States Supreme Court, Wyoming has taken the view that the trust beneficiaries include the public generally.<sup>41</sup> In *Kerrigan v. Miller*,<sup>42</sup> the Wyoming Supreme Court interpreted a state statute that provided: "The board shall lease all state lands in such manner and to such parties as shall inure to the greatest benefit and secure the greatest revenue to the state." In the court's analysis, the phrase "greatest benefit" must mean something more than "greatest revenue" because the legislature used both phrases in the statute. The "greatest benefit," concluded the court, "probably [referred] to the *general benefit to the state and the people thereof*."<sup>43</sup> If the Wyoming Supreme Court were to consider this statutory language today, in light of the well developed rule that the schools are the exclusive beneficiaries of the school trust lands,<sup>44</sup> the statute would have to be struck down.

The statutory interpretation of *Kerrigan* was followed by the Wyoming Supreme Court in *Mayor v. Board of Land Commissioners*.<sup>45</sup> In that case, a challenge was made to the Board's decision not to lease a tract of school trust land. The court recounted the difference between "greatest benefit" and "greatest revenue" as explained in *Kerrigan* and upheld the broad discretion of the Board in leasing state lands. The court added:

Instances may readily be suggested where it would be a far greater advantage to *both the people of the state and the schools thereof* that the lands be withheld from lease.<sup>46</sup>

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36. Wyoming Act of Admission, ch. 664, 26 Stat. 222 (1890).

37. WYO. CONST. art. 18, § 1.

38. *State v. Board of School Land Commissioners*, 20 Wyo. 162, 122 P. 94 (1912).

39. 60 Wyo. 177, 148 P.2d 229 (1944).

40. *Id.* at 192, 148 P.2d at 234.

41. For an argument that the schools are not the exclusive beneficiary, see generally McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525 (1982).

42. 53 Wyo. 441, 84 P.2d 724 (1938). The phrase "state lands" includes school trust lands.

43. *Id.* at 454, 84 P.2d at 729 (emphasis added).

44. See *supra* notes 21-35 and accompanying text.

45. 64 Wyo. 409, 192 P.2d 403 (1948).

46. *Id.* at 429, 192 P.2d at 411 (emphasis added).

Again, the Wyoming Supreme Court stated its view that the schools are somehow co-beneficiaries of the school trust along with the people of the state generally. The court then stated:

There are many other advantages and benefits to be taken into consideration in such matters other than obtaining a specified amount of revenue.<sup>47</sup>

This language could be interpreted in one of two ways. It could simply recognize the principle of private trust law that the trustee must administer the trust corpus so as to protect it from waste.<sup>48</sup> Another way to view the court's language is that fair market value need not be recovered from state school lands if another general interest of the state is served.

In the following two cases, the Wyoming Supreme Court gave *Mayor* the second interpretation. In *Stauffer v. Johnson*,<sup>49</sup> the discretion of the Board to grant leases to someone other than the highest bidder was upheld. The previous lessee offered a rental for a section of state school land of \$320. Another bidder, a non-resident of Wyoming, offered a rental of \$3500. The Wyoming Supreme Court held that it was not an abuse of discretion for the Board to grant the lease to the previous lessee considering that the loss of the lease would reduce the value of his existing ranching operation.<sup>50</sup> Under the principle of *Oklahoma Education Association v. Nigh*,<sup>51</sup> such an action by the Board would have to be viewed as a breach of the school trust obligation. Farming and ranching interests cannot be subsidized to the detriment of the school trust.<sup>52</sup>

The Wyoming Supreme Court interpreted another state statute relating to the leasing of state lands by the Board in *Frolander v. Ilsley*.<sup>53</sup> The court noted the omission of a clause in the statute which would have required the Board to consider the greatest revenue to the state when leasing state lands. This omission, said the court, meant that the legislature intended the Board to have increased discretion. In summing up the school trust obligation, the Wyoming court said:

School lands are, it is true, held in trust by the state, and the trust must be administered wisely and prudently so that its aim may be reasonably attained. But prudence and wisdom do not, we think, require that it must be so administered as to destroy or diminish the value of the ranching interests of the state which form a large part of the source from which our schools are nourished. We see no reason why the interest of the trust and that of the ranchers in the state may not be harmonized so as to result in the best interest of the state as well as of the schools.<sup>54</sup>

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47. *Id.* The court did not give any examples of the other advantages and benefits.

48. *Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 255, 47 N.W.2d 520, 526 (1951).

49. 71 Wyo. 386, 259 P.2d 753 (1953).

50. *Id.* at 413, 259 P.2d at 758.

51. 642 P.2d 230 (Okla. 1982).

52. *Id.* at 236.

53. 72 Wyo. 342, 264 P.2d 790 (1953).

54. *Id.* at 365, 264 P.2d at 799.

The United States Supreme Court has made clear that the interests of the school trust beneficiaries are exclusive, i.e. not to be compromised or balanced against other public interests.<sup>55</sup> Wyoming appears to have ignored the Supreme Court in the past. These Wyoming cases are all over thirty years old now. If the Wyoming Supreme Court were to address the administration of the school trust today, it could not ignore the precedent of the cases discussed from other jurisdictions, including the decisions of the United States Supreme Court.

### PARK RESTRICTIONS

The purpose of Grand Teton National Park "is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>56</sup> To this end, the National Park Service has written a Land Protection Plan specifically for the Grand Teton National Park.<sup>57</sup> The heart of the Land Protection Plan is the policy of acquiring those inholdings which pose a threat to the resources the Park exists to protect.<sup>58</sup>

According to priorities set forth in the Land Protection Plan,<sup>59</sup> the National Park Service will acquire inholdings in this order: 1) when a landowner begins actions incompatible with the purposes of the Park; 2) when the landowner is offering an unimproved tract for sale at market value; and 3) when improved property is offered for sale at market value. The Park inholdings of the State of Wyoming, which are held in trust for the schools, are currently undeveloped, although they are sometimes leased for grazing.<sup>60</sup> Therefore, they would fall into the second priority of general acquisition should the state offer them for sale.

If the state initiated actions incompatible with the Park's purposes, the state lands would become a first priority for acquisition. For agricultural and undeveloped lands those actions would be: new commercial or residential development, subdivision, timbering, or mineral development.<sup>61</sup> The Land Protection Plan imposes de facto land use restrictions on the inholdings, because any landowner who attempts to develop his land in a manner considered incompatible with the Park's purposes faces acquisition of his land by the National Park Service.<sup>62</sup>

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55. See *Ervien v. United States*, 251 U.S. 41 (1919); *Lassen v. Arizona*, 385 U.S. 458 (1967).

56. National Park Service Enabling Act, ch. 408, 39 Stat. 535 (1916) (Grand Teton Park shares this purpose with all the other national parks).

57. A Draft Land Protection Plan was prepared in 1983 pursuant to 48 Fed. Reg. 21,121 (1982) [hereinafter Land Protection Plan]. As of October 21, 1984 no final version of the Land Protection Plan has appeared in the Federal Register.

58. *Id.* at 37.

59. *Id.* at 38.

60. *Id.* at 45.

61. *Id.* at 18.

62. *Id.*



## CONFLICT BETWEEN THE PARK RESTRICTIONS AND THE SCHOOL TRUST

The State of Wyoming currently receives only \$566 per year in rent from the school lands located inside the Grand Teton National Park.<sup>63</sup> The current market value of the school lands is about eight million dollars.<sup>64</sup> The rate of return to the school trust from these lands equals .00707%. The state receives a return of 7.78% on its current investment of permanent school funds.<sup>65</sup> Every year that the state holds these lands, the school trust fund forgoes approximately \$622,000 in income.<sup>66</sup> Under these circumstances, the school trust is clearly not receiving market value return on its assets in the Park. To realize a higher rate of return on the school lands would require development or land use changes which are prohibited under the Land Protection Plan of the National Park Service. To continue to hold these lands under the current circumstances is a breach of the school trust obligation by the State of Wyoming.

## ALTERNATIVES

Recognizing the state's duty as trustee of the school lands, the State Commissioner of Public Lands<sup>67</sup> has established the Land Exchange Task Force.<sup>68</sup> The Task Force is to consider alternative solutions to the Grand Teton National Park problem, and other problems of state land management which might be resolved by some type of land transfer. This effort by the current Commissioner continues the efforts of the two previous Commissioners,<sup>69</sup> who also tried to end the management problems of having school lands located inside the National Park.

The following is an analysis of the advantages and disadvantages of the reasonable alternatives which the Land Exchange Task Force should consider. Each is a means of freeing the school trust from such burdened lands.

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63. Telephone interview with Ray Carlson, Deputy Commissioner of Public Lands (October 1, 1984). Wyoming owns two 640-acre sections and one 86-acre parcel. One section is under lease to the Wyoming Game and Fish Commission.

64. Interview with Ray Carlson, Deputy Commissioner of Public Lands (August 31, 1984). This estimate is based on a 1977 appraisal of the lands, performed by independent appraisers, which formed the basis of price negotiations between the Park Service and Wyoming. The 1977 figure has been adjusted for inflation.

65. Telephone interview with Earl Kabeiseman, Deputy State Treasurer (October 10, 1984). This rate of return is below market because the permanent school fund invests in low interest loans granted by the state. According to *Oklahoma Education Assoc. v. Nigh*, 642 P.2d 230 (Okla. 1982), this investment practice is unconstitutional.

66.  $\$622,000 = (7.78\% \times \$8,000,000) - \$566$ . The state loses revenues in the amount of the rate of return of the permanent school fund, times the appraised value of the land, less the yearly rental income.

67. The current Commissioner is Howard M. Schrinar. He was appointed to this position by Governor Ed Herschler on May 7, 1984.

68. The Land Exchange Task Force is headed by Deputy Commissioner Ray Carlson, and consists of representatives of the State Planning Office, the State Forester, the State Geologist, the Wyoming Game and Fish Department, and the State Recreation Commission. Their first meeting was held October 9, 1984.

69. A.E. King, Oscar Swan.

*Friendly Condemnation*

The state could "sell" the school lands in fee to the National Park Service at their appraised value.<sup>70</sup> To avoid the requirement that state lands be sold at public auction,<sup>71</sup> this "sale" would take the form of a "friendly condemnation." In other words, the federal government would use its power of eminent domain to condemn the land and the state would not raise any of its available defenses. The state could then invest the proceeds of the sale to receive a better rate of return than it currently receives from leasing the school lands.<sup>72</sup>

The problem with this course is that it requires the cooperation of the National Park Service and Congress in purchasing the land. Although the Park Service's Land Protection Plan provides for acquiring inholdings at fair market value,<sup>73</sup> the Congress simply may not be a willing buyer at this time.

A previous attempt to sell these lands to the United States failed because no money was ever appropriated by Congress.<sup>74</sup> This occurred despite support from the Wyoming delegation<sup>75</sup> and the National Park Service.<sup>76</sup> In sum, the problem with this alternative is that the federal action required is entirely beyond the control of the State of Wyoming. The State Board of Land Commissioners and the National Park Service could negotiate endless agreements for the sale of these lands but the transaction will never come to pass without the funding from Congress.

*Inverse Condemnation*

Wyoming could, in effect, force the United States to purchase the inholdings, by filing an action of inverse condemnation against the National Park Service in the United States Court of Claims.<sup>77</sup> Inverse condemnation is the remedy used when the government has taken property for a public purpose but has failed to condemn and pay compensation for it.<sup>78</sup> Recall that inverse condemnation was the remedy ordered by the Alaska Supreme court in *State v. University of Alaska*,<sup>79</sup> when Alaska took school

70. WYO. STAT. § 36-9-112 (1977) provides that Wyoming must reserve the minerals on any state land sold. This should not be a problem because mineral development within the Park is prohibited, therefore, the mineral estate adds no value to the parcels.

71. WYO. CONST. art. 18, § 1; WYO. STAT. § 36-9-101 (1977).

72. Proceeds of the sale of school lands must be used for the support of the schools also. WYO. CONST. art. 18, § 2.

73. Land Protection Plan, *supra* note 57.

74. Letter from Wyoming Governor Ed Herschler to Secretary of the Interior James Watt (March 11, 1982) [hereinafter Herschler Letter].

75. Letter from U.S. Representative Dick Cheney to Oscar Swan (November 5, 1979); Letter from U.S. Senator Malcolm Wallop to Oscar Swan (May 23, 1979).

76. Letter from Sherman W. Swenson, Chief, Division of Land Acquisitions, National Park Service to A.E. King (May 9, 1978); Letter from Larry E. Meierotto, Assistant Secretary of the Interior to Sidney R. Yates, Chairman, House Subcommittee on the Interior (August 16, 1979).

77. For a general discussion of inverse condemnation action against the United States, see 7 FEDERAL PROCEDURE, LAWYER'S EDITION 14:155 (1982).

78. *Id.*

79. 623 P.2d 807, 816 (Alaska 1981).

lands for park purposes without compensation. The state could argue that under the Park's de facto land use restrictions it cannot realize anything close to the land's value, and hence, a taking has occurred.<sup>80</sup> If successful, the United States Court of Claims would award the state just compensation for the property taken, plus the reasonable costs and attorney fees incurred by the state in the proceeding.<sup>81</sup>

This alternative has most of the same attributes as the friendly condemnation of the lands by the United States. The important difference is that through a successful inverse condemnation action, Wyoming can control the action of the federal government, and is thereby not dependent on the cooperation of Congress.

The disadvantage of this alternative is the uncertain outcome of the litigation. The Tucker Act,<sup>82</sup> which sets a six year statute of limitations on claims against the United States, could cause quick dismissal of the state's suit. Therefore, this option is dependent on the courts.

### *Development of State Lands*

A second method of forcing the federal government to condemn the state lands would be to violate the land use restrictions imposed by the Land Protection Plan. If the National Park Service follows its Land Protection Plan, it would condemn the lands to protect the Park's resources.<sup>83</sup> Condemnation would almost certainly be forthcoming if the state, for example, granted a lease for the construction and operation of a luxury resort hotel within the Park. If the Park Service failed to act in accordance with its stated policy of condemnation, the State of Wyoming would then enjoy the increased revenues to the school trust derived from a higher and better use of the land.<sup>84</sup>

This plan, like an action of inverse condemnation, forces the hand of the federal government, while giving the state the ultimate advantages of friendly condemnation. The flaw in this plan is the risks involved in the expenditure of money by the state, or by any private lessee, towards

80. The State of New Mexico filed an inverse condemnation action against the United States under this same theory. New Mexico school lands were located within the White Sands Missile Range, preventing the state from developing these lands or realizing a market rate return from leasing them. The federal government never condemned the lands, nor did it pay New Mexico for this taking. This is closely analogous to the Grand Teton National Park situation. The Court of Claims held that New Mexico was entitled to just compensation. *Armijo v. United States*, 229 Ct. Cl. 34, 663 F.2d 90 (1981).

81. 7 FEDERAL PROCEDURE, LAWYER'S EDITION 14:156 (1982).

82. 28 U.S.C. § 2501 (1982). A threshold question would be whether the taking of the school lands occurred in 1950, when the lands were included within the park, or more recently. The state might argue that the taking really occurred when negotiations to sell the lands to the Park Service failed or when the final Land Protection Plan becomes effective, in other words, that the taking was within the last six years.

83. The Park Service has taken this action on four parcels previously. Land Protection Plan, *supra* note 57, at 22.

84. The State of New Mexico has created a Business Lease Task Force within its State Land Office. That Office is also pursuing an Urban Development Project near Albuquerque. The idea is to obtain greater revenues for the school trust through higher and better uses of school lands.

construction, which may be interrupted at any time by the Park Service. There is no assurance that development could be completed before condemnation would take place, and the market value of a half-finished hotel would probably not match its construction costs.

### *Public Auction*

A less coercive option would be to offer the lands for sale at public auction.<sup>85</sup> The Park's Land Protection Plan does not list transfer of title as an action incompatible with Park purposes.<sup>86</sup> The plan does, however, warn against the possible consequences of the state lands leaving state ownership.<sup>87</sup> The federal government might determine that it is in its best interest to appropriate the funds necessary to be the high bidder at such a sale. Regardless of the purchaser's identity, though, the State of Wyoming would have satisfied its obligation to the school trust.

### *Land Exchange*

All four of the alternatives discussed above would relieve the state of its burden of managing school trust lands located within Grand Teton National Park. In addition, they all effect a transfer of title to these lands in exchange for money. The land exchange alternative goes beyond simply ridding these problem lands from state ownership; it uses the disposal of the school lands as a means to solve other state problems as well. One of those problems is the management of split-estate lands.

As a result of exchanges under the Taylor Grazing Act of 1934,<sup>88</sup> the federal government ended up owning the surface estate, and Wyoming the mineral estate, on 375,529 acres of land.<sup>89</sup> Federal ownership and control of those lands on which the State of Wyoming reserved minerals has led to conflicts.<sup>90</sup> Mineral lessees of the state have encountered problems in using the surface controlled by the Bureau of Land Management even though the mineral estate is dominant.<sup>91</sup> Through an exchange of school lands within Grand Teton National Park for federal surface interests over state mineral lands, these conflicts could be reduced, while at the same time, satisfying the state's school trust obligation.

The Federal Land Policy Management Act (FLPMA) grants authority for federal land exchanges with states.<sup>92</sup> Wyoming also has express statutory authority to exchange state lands for federal lands.<sup>93</sup> Both

85. WYO. STAT. §§ 35-9-101 to -102 (1977).

86. Land Protection Plan, *supra* note 57, at 17.

87. *Id.* at 45.

88. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified in scattered sections of title 43 of the United States Code).

89. Letter from Oscar Swan to Dick Hartman, Wyoming State Planning Coordinator (March 4, 1983).

90. Herschler Letter, *supra* note 74. An example of a conflict is given by the Governor. The BLM has designated certain federally-owned surface over state-owned minerals as unsuitable for mining.

91. *Id.*

92. 43 U.S.C. § 1716 (1982).

93. WYO. STAT. § 36-1-105 (1977).

FLPMA and the school trust obligation of the state require a value for value exchange.<sup>94</sup> This necessitates a great deal of appraisal work. Direct congressional legislation could alleviate this problem by expressly exempting this exchange from the appraisal requirements of FLPMA. The State of Utah, in its Project BOLD, a massive federal/state land exchange proposal, is pursuing this approach to avoid the burden of section by section appraisals.<sup>95</sup> In Utah's proposal, the total value of federal and state lands was estimated.<sup>96</sup> The danger in estimating land values is that the school trust requires full compensation. Any margin of error should be given in favor of the school trust.

The Land Protection Plan specifically addresses the Wyoming school lands inside of the Park.<sup>97</sup> The plan recognizes the importance of a land exchange, both from the view of the state and the Park.

The Wyoming Board of Land Commissioners is mandated by law to obtain revenue from these lands for the State school fund, but because they are in the park it is restricted to livestock grazing. The State is very receptive to a land exchange. Such an exchange must be for lands that would provide revenues for the State. The goal is to transfer ownership of State lands within the park to Service jurisdiction in exchange for other federal lands from which the State could obtain higher revenues for the school fund. . . .

It is important that these lands retain their largely undeveloped character.

Continued use of these lands for grazing is compatible with park objectives. If the lands were to change ownership and be developed, however, the impacts would be highly detrimental to park values.<sup>98</sup>

Should an exchange fail to be negotiated, the plan calls for a cooperative agreement with the state to keep the lands in their current agricultural and undeveloped land uses.<sup>99</sup>

A second advantage of a land exchange with the federal government would be the increase in the amount of land owned by the state, with a corresponding decrease in the amount of land owned by the federal government within Wyoming. This would occur because of the very high value of the school lands in Grand Teton National Park and the very low value of the surface estates owned by the United States.<sup>100</sup> In a value for value

94. 43 U.S.C. § 1716 (1982). See *supra* notes 21-35 and accompanying text.

95. Telephone interview with George McCormack, Professor of Law, University of Utah (September 26, 1984). For more information about Project BOLD, write Utah Natural Resources and Energy, 1636 West North Temple, Salt Lake City, UT 84116.

96. *Id.*

97. Land Protection Plan, *supra* note 57, at 45.

98. *Id.*

99. *Id.* It would be a breach of the trust obligation for Wyoming to agree to maintain the status quo, where market value returns are impossible.

100. The Wyoming Public Lands Office has been using \$250 per acre as a "ballpark figure" of the value of federal surface rights which would be involved in such an exchange.

exchange, the state would receive the surface rights to approximately 32,000 acres of land.<sup>101</sup> This would advance the state's current policy of maintaining state land inventories.<sup>102</sup> It would also be positively received by those citizens of Wyoming who oppose the federal government owning as much of the state as it currently does.

A proposal for the exchange of state and federal lands has been before the Department of Interior since 1979.<sup>103</sup> In a 1982 letter to the Secretary of the Interior, James Watt, Wyoming Governor Ed Herschler summarized the apparent reason why the proposed exchange had yet to take place:

I am informed that the Park Service would be more than willing to enter into such an exchange agreement. This is understandable. Its purpose is to acquire these lands for park purposes and avoid any jurisdictional confrontations which will result if they remain in state ownership. Since the federal lands which would be exchanged are presently managed by the BLM, the Park Service must rely on it to carry out most of the details involved in making such an exchange.

The BLM appears a little overwhelmed by the prospect of making the numerous appraisals which would be necessary. *It is also apparently reluctant to divest itself of the management of so much acreage.*<sup>104</sup>

The solution to the appraisal problem, direct congressional enactment, might also be the solution to the problem of a federal agency that just does not want to give up so much of its "turf." With the attitude of the Reagan Administration, which seeks to trim the role of the federal government in this country, perhaps now is the time to pursue direct congressional action to effectuate this stalled exchange.

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101.  $32,000 = \$8,000,000 \div \$250$ .

102. "Quite frankly, the State does not wish to reduce its land inventory. We are particularly reluctant to reduce the land inventory by sales to any agency of the Federal government. The Federal government already owns approximately one-half the land in the state and it is exercising its ownership in ways which are becoming increasingly irritating to the State government and to the citizens. Any action which reduces the State's land inventory and at the same time increases the Federal government's land inventory in Wyoming is, it seems to me, detrimental to the State's interest." Letter from Oscar Swan to Chandler P. St. John, Forest Supervisor, Wasatch National Forest (July 11, 1980).

103. Herschler Letter, *supra* note 74. An alternative proposal made by the Bureau of Land Management involved the exchange of federal mineral interests. In valuing these interests, the BLM refused to credit Wyoming for the fifty percent share of mineral royalties that the state receives pursuant to the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 191 (1982). Memorandum from Ed Hunter, Associate Director, BLM to Maxwell T. Lieurance, Wyoming State Director, BLM (October 19, 1981). Wyoming had to reject the proposal because the interests coming to Wyoming in such an exchange would only have a value of fifty percent of that of the school lands being exchanged. This would constitute a breach of the trust duty of the state to obtain full compensation in the disposal of school trust lands.

104. Herschler Letter, *supra* note 74 (emphasis added).

### CONCLUSION

The preferred alternative is an exchange of the state school lands located inside Grand Teton National Park for an equal value of federal surface rights over state owned mineral estates. This plan offers these advantages:

- 1) Reducing the conflicts between lessees on Wyoming mineral estates because the state will have control of the surface estates also.
- 2) Increasing the state's land inventory and reducing federal land ownership within the State of Wyoming.
- 3) Avoiding the need for Congress to appropriate cash payment for the land, during a period of budget slashing.
- 4) Insuring the National Park Service will receive title to the state inholdings in their undeveloped state, resources intact.

If the land exchange option cannot be completed, the second preferred action would be to offer the lands for sale at public auction. This alternative avoids the litigation involved in an action of inverse condemnation and the coercive tactic against the Park Service of threatened development of state inholdings. It also does not depend on the cooperation of the federal government in any form.

The one course of action the State of Wyoming cannot pursue is maintaining the status quo. Under the rule developed by the United States Supreme Court and applied by several state supreme courts, the failure of Wyoming to receive market rate returns on these school lands constitutes a continuing breach of the school trust obligation.

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