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MANAGEMENT OF WYOMING'S STATE TRUST LANDS FROM 1890- 1990: A RUNNING BATTLE BETWEEN GOOD POLITICS AND THE LAW

Clinton D. Beaver*

All three branches of Wyoming state government play important roles in the management of the trust lands granted to the State upon admission to the Union. Since statehood, Wyoming has generally exercised its duties as trustee in a manner favoring the users of state trust lands. Looking forward to its second century, the state of Wyoming should be prepared to manage the trust lands for the exclusive benefit of the trust beneficiaries.

INTRODUCTION

Upon admission to the Union in 1890, the federal government granted to the State of Wyoming a substantial inventory of land from the public domain.¹ These lands were granted in trust for specific governmental purposes, including the support of public schools and various state institutions.² As the law construing these grants has developed, courts have recognized two duties falling on the states receiving

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1. Wyoming has received a total of 4,214,305 acres in trust land grants. WYOMING STATE LAND AND FARM LOAN OFFICE, ANN. REP. 14 (1990).

2. Wyoming Act of Admission, ch. 664, §§ 4, 6, 8, 10 & 11, 26 stat. 222 (1890).

trust land grants. States must manage the trust lands for the exclusive benefit of the beneficiaries, and states must receive full value for the use and disposition of trust lands.³ Essentially, the granted lands must be managed by the state under the same standards as a private trust.⁴ Therefore, any policy which subsidizes third parties at the expense of the trust beneficiaries violates the terms of the grant.

Placement of these trust lands in the hands of state government results in a counter-intuitive legal mandate. When acting as trustees, publicly elected officials are prohibited by law from using trust lands under their control to directly benefit the general public.⁵ It is no wonder that proper management of state trust lands is a confusing issue for both state officials and the public.

This article will dispel some of the mystery of state trust lands by specifically examining the management history of the surface estate of Wyoming's trust lands and suggesting ways in which management could be improved to better comply with the terms of the grants.

THE BENEFICIARIES

The Act of Admission granted lands for twelve specific purposes: support of the common schools, the university, and an agricultural college; establishment, maintenance, and support of the insane asylum, the state penitentiary, the territorial penitentiary, the fish hatchery, the deaf, dumb, and blind asylum, the poor farm, the miner's hospital, public buildings at the capital, and all other state charitable, educational, penal and reformatory institutions.⁶ These institutions are the named beneficiaries of the trusts created by Congress at Wyoming's statehood. Of course, all Wyoming residents benefit indirectly from the support provided to these state services from the federally granted trust corpus.

As institutions within state government, the trust beneficiaries suffer from an identity crisis. They do not have a voice independent from that of the trustee. In Wyoming, the trust beneficiaries have been silent concerning the management of their trust lands.⁷

3. *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 235 (Okla. 1982).

4. "Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees." *County of Skamania v. State*, 102 Wash. 2d 127, 137, 685 P.2d 576, 580 (1984).

5. "The beneficiaries do not include the general public, other governmental institutions, nor the general welfare of this state." *Kanaly v. State*, 368 N.W.2d 819, 824 (S.D. 1985).

6. Wyoming Act of Admission, ch. 664, §§ 4, 6, 8 & 11, 26 Stat. 222 (1890).

7. Perhaps educational entities have been quiet because the school land trust is one of the smaller contributors to total funding for schools. The income to the Wyoming public schools from the common school trust lands was \$7,112,940.62. Unrecorded conversation with Sharon Garland, Assistant Commissioner, Wyoming State Land and Farm Loan Office (January 14, 1991). Interest income from the Common School Permanent Land Fund for fiscal year 1990 was \$59,427,793.52. STATE TREA-

THE TRUSTEES

The State's responsibility to act as trustee for the several land trusts rests in some manner upon all three branches of state government. The roles of the executive and legislative branches are set out in the Wyoming Constitution.

The governor, secretary of state, state treasurer, state auditor and superintendent of public instruction 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, after such delay (not less than the time fixed by congress [sic]) in portions at proper intervals of time, and at such minimum prices (not less than the minimum fixed by congress) as to realize the largest possible proceeds. And said board, subject to the limitations of this constitution and under such regulations as may be provided by law shall have the direction, control, disposition and care of all lands that have been heretofore or may hereafter be granted to the state.⁸

Hence, the Board of Land Commissioners (the Board) is the executive agency with the day-to-day responsibility of managing the trust lands, while the legislature is to provide general statutory direction for the Board.

Recently, the Board openly acknowledged its duties as a trustee in this preamble to the Board's rules:

"State trust lands" are those lands and interests granted by the federal government to the State of Wyoming under various acts of Congress and accepted and governed under Article 18 of the Wyoming Constitution. The primary duty of the State Land Office and Board of Land Commissioners is to manage and protect such state trust lands for the maximum and exclusive benefit of the common schools and other institutional beneficiaries consistent with the sound husbandry and conservation of trust land resources. The Board, as trustee, acts in a fiduciary capacity in the administration of state trust lands and related assets, with the object of obtaining the greatest possible long term benefit to the trust. The State Land Office and the Board of Land Commission-

SURER'S ANN. REP. 1990, p. 16. Total revenue for Wyoming public schools from all sources for school year 1987-88 (most recent year available) was \$489,990,762. Wyoming Data Handbook 1989, p. 136. In contrast to Wyoming, teachers' unions in some other states have taken up the cause of their respective common school trust. See *Kadish v. Arizona State Land Dep't*, 155 Ariz. 484, 747 P.2d 1183 (1987); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982).

8. Wyo. CONST. art. 18, § 3.

ers shall seek to:

(1) Manage state trust lands for their best use and highest value in the sole interest of the trust beneficiaries.

(2) Obtain full value from state trust land uses and maximize the economic return for the trust consistent with sound land and business management principles.

(3) Preserve state trust land productivity and perpetuate state land renewable resources through proper land and resource management and conservation practices.⁹

It is difficult for elected officials to function as trustees. Good politics and the law often conflict. Both the Board and the legislature are composed of elected officials, who are accountable to their constituents. Yet the job of trustee requires fidelity, not to constituents, but to the trust beneficiaries. Whenever members of the public demand that trust lands be managed for their benefit, the stage is set for a conflict between the perceived interests of the public and the interests of the trust beneficiaries. When conflicts arise, elected officials naturally feel more pressure to accommodate the public.

Through judicial review of executive and legislative acts, the judicial branch also functions as a trustee. If adherence to the terms of the land grants is politically unpalatable, the courts provide the only remedy to enforce the law. Administrative or legislative acts that are contrary to the terms of the trusts must be struck down as unconstitutional.¹⁰ The Wyoming Supreme Court has recognized the trust status of the granted lands, but has also limited the significance of that status.¹¹

History of the Board

At statehood, the Wyoming Constitution provided for two different state administrative boards, one to manage the school trust lands, and one to manage all other trust lands.¹² Their composition differed slightly, with the governor, secretary of state, and superintendent of public instruction serving on both boards, while the state treasurer

9. Policy Preamble to Rules and Regulations, adopted by the Board of Land Commissioners on May 5, 1988.

10. *Alamo Drainage Dist. v. Bighorn County*, 60 Wyo. 177, 148 P.2d 229 (1944).

11. *Frolander v. Ilsley*, 72 Wyo. 342, 365, 264 P.2d 790, 799 (1953).

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 maybe 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 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.

Id.

12. Wyo. CONST. art 7, § 13 & art. 18, § 3 (1890).

was a member of only the school land board. In 1891, the legislature prescribed the powers and duties of only the state land board.¹³ The oversight was remedied in 1903 with the statutory creation of both a "State Board of Land Commissioners" and a "State Board of School Land Commissioners."¹⁴ The law governing each board was identical. A logical reorganization of state government came in 1922 when a constitutional amendment combined the two agencies into one board with all the constitutional authority previously vested in the separate boards.¹⁵ The state auditor was added as a member, so that all five state elected officials comprised the new, expanded "Board of Land Commissioners." This structure was recognized in statute in 1929,¹⁶ and remains intact today.¹⁷

The chief administrative officer of the original land board was the superintendent of public instruction, who acted as the board's secretary and "Register."¹⁸ In 1903, legislation added the board-appointed position of "State Land Inspector," with the duty of appraising the state trust lands.¹⁹ The positions of Register and Inspector were both abolished in 1905 and replaced with a "Commissioner of Public Lands."²⁰ The Commissioner is appointed by the Governor with the consent of the senate. He or she functions as the secretary to the Board,²¹ and is the chief administrative officer over the Board's staff, which constitutes the de facto agency commonly known as the "State Land Office."²²

LEASING

A trustee charged with the management of land for the support and benefit of the public schools and other state institutions must choose from three basic alternatives: trust lands could be sold, leased, or used directly by the trust beneficiaries. Wyoming trust beneficiaries can only put to use a fraction of the over four million trust acres themselves,²³ but they will always need financial support for operations. Land sales build the permanent trust funds, but practical considerations prohibit the immediate sale of such a large quantity of

13. Public Lands Act, ch. 79, § 1, 1890-91 Wyo. Sess. Laws 332.

14. Act approved Feb. 21, 1903, ch. 78, §§ 1, 2, 1903 Wyo. Sess. Laws 84, 84-85.

15. S.J. Res. 2, 16th Leg., 1921 Wyo. Sess. Laws 293.

16. Act approved Feb. 23, 1929, ch. 108, § 2, 1929 Wyo. Sess. Laws 185, 185-86.

17. Wyo. STAT. § 36-2-101 (1977).

18. Public Lands Act, ch. 79, § 7, 1890-91 Wyo. Sess. Laws 332, 333.

19. Act approved Feb. 21, 1903, ch. 78, § 10, 1903 Wyo. Sess. Laws 84, 86.

20. Act approved Feb. 15, 1905, ch. 36, § 1, 1905 Wyo. Sess. Laws 28.

21. Wyo. STAT. § 36-3-101, -102 (Supp. 1990).

22. While Wyoming Statutes section 36-2-103 provides for a staff to be employed by the Board, and Wyoming Statutes section 36-3-111 provides for a deputy to the Commissioner, the legislature has never created a "Department of Public Lands" or "State Land Office" as an agency of state government.

23. Beneficiary institutions use 2,240.13 acres. WYOMING STATE LAND AND FARM LOAN OFFICES, ANN. REP. (1990).

land.²⁴ Thus, the best choice is to lease the surface to provide an income stream for the beneficiaries pending future disposition.

Types of Leases

Since statehood, the Board has had express authority to lease trust lands for agriculture and grazing purposes.²⁵ Leases for agricultural or grazing purposes were originally limited to a maximum term of five years by the Act of Admission.²⁶ In 1934, Congress raised the maximum term to ten years,²⁷ and the legislature changed the Board's leasing authority accordingly.²⁸

In 1963, the legislature gave the Board statutory authority to lease state trust lands for commercial, industrial, and recreational purposes.²⁹ The legislature also initiated the concept of multiple use in the management of the surface of state trust lands.³⁰ Under the multiple use concept no lease would necessarily give the lessee exclusive possession of the entire premises. Two or more lessees could share a parcel of state trust land as long as the uses were compatible.³¹ The Board has adopted rules which help determine whether a proposed new use of a parcel is compatible with the existing uses.³²

These non-agricultural and grazing leases are referred to in the rules as "special use leases."³³ Special use leases were originally limited to ten year terms,³⁴ but in 1971, the law was amended to permit terms of up to twenty-five years.³⁵ The ten year limit on lease terms in the Act of Admission does not apply to special use leases.³⁶

Awarding Leases

In leasing state trust lands, the Board must determine two things: who will be awarded the lease and for what consideration. The iden-

24. Beyond the administrative burden, the state might create a market surplus and negatively impact the price it could receive for its lands. Further, the resulting "bust" in land prices might create or aggravate a more general economic depression, thereby harming the income streams of all state agencies, including trust beneficiaries.

25. Public Lands Act, ch. 79, § 16, 1890-91 Wyo. Sess. Laws 332, 334.

26. Wyoming Act of Admission, ch. 664, § 5, 26 stat. 222 (1890).

27. Act approved Feb. 15, 1934, ch. 12, 48 stat. 350, 350-51.

28. Act approved Feb. 17, 1937, ch. 49, § 1, 1937 Wyo. Sess. Laws 68 (codified at Wyo. STAT. § 36-5-102 (1977)).

29. Act approved Feb. 26, 1963, ch. 187, § 1, 1963 Wyo. Sess. Laws 313 (codified as amended at Wyo. STAT. § 36-5-114 (1977)).

30. Wyo. STAT. § 36-5-114(b) (1977).

31. Board of Land Comm'rs, Rules & Regulations, ch. 5, § 4 (Sept. 28, 1988) (Special Use Leasing).

32. *Id.*

33. *Id.* § 2(c).

34. Act approved Feb. 26, 1963, ch. 187, § 1, 1963 Wyo. Sess. Laws 313.

35. Act approved Feb. 27, 1971, ch. 79, § 1, 1971 Wyo. Sess. Laws 244, 245 (codified at Wyo. STAT. § 36-5-114 (1977)).

36. Wyoming Act of Admissions, ch. 664, § 5, 26 stat. 222 (1890).

tity of the lessee is not important to the trust beneficiaries as long as the selection process does not negatively impact the consideration received. Presumably many individuals are capable of fulfilling the responsibilities of a lessee. However, as a matter of public policy a fair and impartial process for awarding leases is desirable when state officials are involved in choosing between competing members of the public.

The Commissioner of Public Lands receives applications to lease state trust lands.³⁷ If conflicting applications³⁸ are received, the Commissioner makes an initial decision as to who should be awarded the lease.³⁹ This decision can be appealed to the Board.⁴⁰ The "appeal" is treated as a "contested case" under the Board's rules.⁴¹ Even if the Commissioner's decision is not appealed, the Board must make the final leasing decision.⁴² An aggrieved party has the right to judicial review of the Board's decision.⁴³ In reviewing final leasing decisions, the Wyoming Supreme Court has always given great deference to the Board's judgment.⁴⁴

The first Wyoming legislature adopted a general policy statement to direct the Board in awarding leases: "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."⁴⁵ This policy statement ignored the trust status of the state trust lands. By using the phrase, "greatest benefit . . . to the state," the legislature expressed a view that the state as a whole should directly benefit from the trust lands, as though Congress had not specified particular beneficiaries.

The Wyoming Supreme Court followed suit in *Kerrigan v. Miller*.⁴⁶ Noting that the legislature had not defined "greatest benefit to the state," the court offered that the "greatest benefit" must be something other than the "greatest revenue" and it probably referred to "the general benefit to the state and the people thereof."⁴⁷ Thus,

37. WYO. STAT. § 36-3-102 (Supp. 1990).

38. Two lease applications are in conflict if each seeks to lease the same estate of the same land for incompatible uses.

39. WYO. STAT. § 36-3-102 (Supp. 1990).

40. *Id.*

41. Board of Land Comm'rs, Rules & Regulations, ch. I, § 8 (March 29, 1988) (Contests Before the Board). In a "contested case", the parties enjoy certain rights, including notice, a hearing, representation, and presentation of evidence. *See generally* Wyoming Administrative Procedure Act, WYO. STAT. §§ 16-3-101 to -115 (1990).

42. WYO. STAT. § 36-3-102 (Supp. 1990). The Commission's "decision" is really a recommendation, which the Board need not accept.

43. *Id.* § 16-3-114 (1990).

44. *Mahoney v. L. L. Sheep Co.*, 79 Wyo. 293, 333 P.2d 712 (1958); *Banzhaf & Banzhaf v. Swan*, 60 Wyo. 201, 148 P.2d 225 (1944); *Marsh v. Board of Land Comm'rs*, 7 Wyo. 478, 53 P. 292 (1898).

45. Public Lands Act, ch. 79, § 22, 1890-91 Wyo. Sess. Laws 332, 335.

46. 53 Wyo. 441, 84 P.2d 724 (1938).

47. *Id.* at 454, 84 P.2d at 729.

the court followed the legislature's lead in not considering the beneficiaries to be limited to those named in the Act of Admission.

In 1943, this general policy statement was revised by removal of the words, "and secure the greatest revenue" from the statute.⁴⁸ This substantive change was not lost on the Wyoming Supreme Court, as illustrated by two cases, one before the deletion and one after.

In *Sullivan Co. v. Meer*, the Board had awarded a lease without giving consideration to a rental offer that exceeded the rent set by the Board.⁴⁹ The Wyoming Supreme Court held that the general policy statement made attainment of the greatest revenue a goal in leasing. Although the rental amount was not the only factor in awarding leases, it was one factor that must be taken into account.⁵⁰

After the statute was amended to remove the greatest revenue factor, the Wyoming Supreme Court decided *Mayor v. Board of Land Commissioners*.⁵¹ *Mayor* concerned the competing lease applications of an individual rancher and the Johnson County Wool Growers Association for a certain parcel of trust land which area sheepherders had been using to water and rest their flocks. The Board decided not to lease the land in question—in effect, granting free use to the area sheepherders.⁵² In upholding the Board's action, the court stated that by removing the "greatest revenue" language, the legislature intended to give the Board greater latitude in leasing decisions. Therefore, the Board was acting within its discretion in finding that leaving the land unleased would be to the greatest benefit to the state.⁵³

In essence, the *Mayor* decision sanctioned a "lease" of trust lands to a local industry for no consideration. Clearly, it was not within the Board's discretion to donate state trust assets to private parties.⁵⁴ The Wyoming Supreme Court apparently failed to see the forest for the trees in this case. By focusing on the statutory change, the court missed the constitutional requirement to maximize the proceeds to the trust beneficiaries.⁵⁵

Rights to Renew Leases

In addition to the general policy statement, the legislature has enacted many laws granting special rights to particular classes of lease applicants. These special rights have restricted, to a greater or lesser

48. Act approved Feb. 19, 1943, ch. 60, § 1, 1943 Wyo. Sess. Laws 65, 65-66 (codified as amended at Wyo. STAT. § 36-5-105 (1977)).

49. 58 Wyo. 90, 125 P.2d 168 (1942).

50. *Id.*

51. 64 Wyo. 409, 192 P.2d 403 (1948).

52. *Id.* at 414-19, 192 P.2d at 404-06.

53. *Mayor v. Board of Land Comm'rs*, 64 Wyo. 409, 192 P.2d 403 (1948).

54. The state is prohibited from making donations to private parties. WYO. CONST. art. 16, § 6.

55. WYO. CONST. art. 18, § 3.

degree, the Board's discretion to make leasing decisions.

The most restrictive of the special rights was a right to renew a lease given to lessees who reclaimed the lease premises by irrigation.⁵⁶ The right extended for three renewal leases of five years each, after the original five year term. Thus, the original lessee could hold a particular leasehold for a total of twenty years. The Board was not allowed to withhold the land from leasing, to sell the land, or to lease to anyone but the original lessee. Even the rental was guaranteed not to change in the renewal leases.⁵⁷ This was an absolute right to renew, leaving no discretion in the Board, as interpreted in *Cooper v. McCormick*.⁵⁸ In that case, the Board awarded a lease to an applicant offering the highest rental, rather than the old lessee. The old lessee claimed an absolute right to renew based on his efforts to irrigate the premises. The Wyoming Supreme Court agreed that the Board had no discretion in the matter. The court also discussed the legislative purpose of the renewal statute: "Its object is the encouragement of the improvement and reclamation of the arid lands belonging to the State through the individual efforts of its lessees by the expenditure of their time and means, the same eventually to accrue to the benefit of the State."⁵⁹

Although initially sacrificing increased rentals, the state eventually benefited from irrigation of trust lands because upon the expiration of the series of leases granted to the original irrigating lessee, the water rights and all irrigation improvements became property of the state.⁶⁰ This first renewal statute provided an incentive to the lessee while enhancing the long term value of the trust lands.

In 1903, the legislature revised the right-to-renew provisions in a manner which clearly benefited the lessee at the expense of trust beneficiaries. The 1903 revision granted a lessee the right to a series of three renewal leases, for an area of up to 2,560 acres.⁶¹ The Board was allowed to reappraise the land at each lease renewal and adjust the rental accordingly. However, the reappraisal was not to take into account any improvements placed on the premises. The rental was based solely on the value of the raw land. There was no requirement that the lessee make any improvements to the land.⁶²

In contrast to the earlier statute, the 1903 law offered no benefit to the trust beneficiaries. If any improvements were made on the trust lands, the trusts did not receive rents based on those improvements, and no provision was made for ownership of the improvements to re-

56. Public Lands Act, ch. 79, § 23, 1890-91 Wyo. Sess. Laws 332, 335-36.

57. *State ex rel. Harrison v. State Bd. of Land Comm'rs*, 10 Wyo. 413, 69 P. 562 (1902).

58. 10 Wyo. 379, 69 P. 301 (1902).

59. *Id.* at 403, 69 P. at 305.

60. Public Lands Act, ch. 79, § 24, 1890-91 Wyo. Sess. Laws 332, 336.

61. Act approved Feb. 21, 1903, ch. 78, § 16, 1903 Wyo. Sess. Laws 84, 88.

62. *Id.*

vert to the State at any future time.

The only effect of the 1903 law was to convert a five year lease into a twenty year lease.⁶³ That effect ran afoul of the Act of Admission when applied to leases of common school trust lands. In *State ex rel. Huckfeldt v. Board*, the Wyoming Supreme Court found that the law violated the Act of Admission's five year limit on leases of school trust lands.⁶⁴ While the Board could, as a matter of choice, lease the same lands to the same applicant for successive five year terms, the court held there could not be a statutory or contractual right in the lessee to demand renewals. This was the first and strongest recognition by the Wyoming Supreme Court that the state trust lands were held subject to the limitations imposed by Congress.⁶⁵ The legislature was not free to pass laws concerning the trust lands which would be contrary to the conditions of the grant.

Preferences in Leasing

Initially, where no applicant held a right to renew a lease, the Board chose between conflicting applicants. Then in 1903, the legislature provided for an auction conducted by the Register of the Board to resolve conflicts.⁶⁶ The lease was awarded to the applicant willing to pay the highest annual rental. The auction was a fair, objective process that also guaranteed a market rental rate to the trust beneficiaries.

In 1921, the earlier rights to renew and the auction process were replaced with a law granting "preference rights" to certain applicants.⁶⁷ The Board was directed to give preference when awarding leases to applicants who:

1. were citizens and taxpayers of the state;
2. held title to lands nearest to the lands applied for;
3. had actual and necessary use for the lands; and,
4. were not applying for speculation or sale.⁶⁸

However, this preference was not to be given over an old lessee⁶⁹ if:

63. *Id.* The original lease and each of the three renewal leases were for five year terms, resulting in a twenty year total term. *Id.*

64. 20 Wyo. 162, 122 P. 94 (1911).

65. *Id.*

[I]t is at least a solemn engagement on the part of the state that such conditions and limitations shall be observed by its laws. And so far as the manner of disposing of or leasing the lands granted is prescribed by the terms of the grant, the state is certainly bound by its contract to dispose of or lease the lands only in that manner, though it may no doubt adopt additional regulations not inconsistent with the grant or the limitations expressed therein; . . .

Id. at 174-75, 122 P. at 95.

66. Act approved Feb. 21, 1903, ch. 78, § 12 1903 Wyo. Sess. Laws 84, 87.

67. Act approved Feb. 17, 1921, ch. 62, § 1, 1921 Wyo. Sess. Laws 56.

68. *Id.*

69. The statute uses the term "old lessee" for the preceding lessee of the same lands.

1. the old lessee had made valuable improvements on the trust lands or any other lands in the vicinity; and,
2. the Board found that giving the lease to anyone else would work an extreme financial hardship on the old lessee, or impair the value of the old lessee's operation.⁷⁰

This statute was clearly intended to protect the interests of established lessees and expanded upon a 1909 statute that required lease applicants to deposit with the Commissioner a sum equal to the value of any improvements located on the lease premises.⁷¹ If the applicant was awarded the lease, the money was paid to the owner of the improvements. In thus protecting established lessees, the simplicity of the auction process was abandoned. Instead the Board undertook the far more complex and subjective task of evaluating the importance of trust lands to the old lessee.

The 1921 preference law was simplified and improved in 1929.⁷² After 1929, preference went to:

1. bona fide Wyoming residents;
2. with actual and necessary use for the land;
3. who held title to lands in the vicinity; and,
4. who offered the highest annual rental.⁷³

If two or more applicants tied for the high offer, preference went to the applicant owning lands closest to the lease premises. However, the supreme preference went to the old lessee, provided he had not violated the terms of his lease and was willing to meet the highest rental offer received.⁷⁴

The 1929 law was an improvement over the 1921 version because the old lessee's preference right was more objective and the concept of competitive bidding was resurrected. Competitive bidding is consistent with the Board's constitutional mandate to realize the maximum possible proceeds. Unfortunately, the 1929 law did not allow pure competitive bidding. The statute directed the Board to set aside any high bid that it judged to be unreasonably excessive as compared to the market rate for similar lands. Yet, a competitor would likely have to enter a premium bid to overcome the old lessee's right to match the highest offer. Thus, the law discouraged competition and kept rents "reasonably" low. Politically, those may have been sound policies, but they ran counter to the interests of the trust beneficiaries.

The 1929 preference statute withstood a narrow constitutional challenge in *Mercer v. Thorley*.⁷⁵ The Wyoming Supreme Court distinguished the leasing preference statute from the right-to-renew stat-

70. Act approved Feb. 17, 1921, ch. 62, § 1, 1921 Wyo. Sess. Laws 56.

71. Act approved Feb. 27, 1909, ch. 132, § 1, 1909 Wyo. Sess. Laws 180.

72. Act approved Feb. 23, 1929, ch. 108, §§ 13 14 1929 Wyo. Sess. Laws 185, 188 (codified as amended at Wyo. STAT. §§ 36-5-105, -108 (1977)).

73. *Id.*

74. *Id.*

75. 48 Wyo. 141, 43 P.2d 692 (1935).

ute which was found to conflict with the Act of Admission in *Huckfeldt*. Unlike the right-to-renew statute, the 1929 preference law did not require the Board to issue a lease to the old lessee. The Board was free to sell the land, or use it itself. The preference right in the old lessee was merely "over all others," should the Board decide to lease the land.⁷⁶

In 1943, the legislature made three major changes in the preference statute. First, the requirement to own lands in the vicinity was modified to persons owning, leasing, or lawfully occupying lands adjoining the lease premises.⁷⁷ The new law, however, did not alter the 1929 provision that gave preference to the applicant owning land closest to the lands applied for in cases of a tie for highest offer. As a result, it was not clear whether an applicant asserting a preference must own, lease, or occupy lands and whether such lands must adjoin the lease or just be in the vicinity. It took the Wyoming Supreme Court three cases and twenty-one years to finally conclude that the 1943 amendments essentially repealed the unamended 1929 language concerning owning lands closest to the lease.⁷⁸

Second, the preference right for the highest offer was eliminated. So long as the rent offered was within a minimum and maximum set by the Board, it was acceptable for purposes of qualifying for a preference. In no longer requiring that applicants make the highest rental offer to earn a preference right, the amended statute equated all applicants who met the tests of residency, need, and lands in the vicinity.

The third change was the elimination of the requirement that the old lessee meet the highest rental offer in order to exercise his preference. Therefore, the old lessee could stand pat on the low bid and still assert a preference right.

A change in the statute's format also occurred with the 1943 amendment. Two separate paragraphs were used to address leasing for grazing purposes and for agricultural purposes. Although both paragraphs contained the general policy statement, only the paragraph on grazing leases included the preference right of the old lessee. In 1945, the identical preference right was added to the agricultural leasing paragraph.⁷⁹

The relationship between the particular preference rights and the

76. *Id.* at 150, 43 P.2d at 695.

77. Act approved Feb. 19, 1943, ch. 60, § 1, 1943 Wyo. Sess. Laws 65, 65-66 (codified at Wyo. STAT. § 36-5-105 (1977)).

78. This statutory conflict was discussed in *Risha v. Willadsen*, 397 P.2d 803 (Wyo. 1964); *Thompson v. Conwell*, 363 P.2d 927 (Wyo. 1961); and *Mahoney v. L.L. Sheep Co.*, 79 Wyo. 293, 333 P.2d 712 (1958).

79. Act approved Feb. 5, 1945, ch. 34, § 1, 1945 Wyo. Sess. Laws 26, 26-27 (codified at Wyo. STAT. § 36-5-105 (1977)).

general policy statement was first explained in *Kerrigan v. Miller*.⁸⁰ The Wyoming Supreme Court there held that all preference rights must be read as subject to the general policy that the Board act for the greatest benefit and to secure the greatest revenue to the state.⁸¹ But in *Bosler v. McKechnie*, the court reversed this interpretation on the basis of the 1945 amendment to the paragraph dealing with leasing agricultural lands.⁸²

In *Bosler*, a competing applicant had been awarded a preference over the old lessee. The Wyoming Supreme Court first construed the legislature's intent in enacting the 1945 revision to the preference statute. The court found it significant that in the 1945 revision, the general policy of "greatest benefit to the state" was modified by language mandating a preference award to an old lessee meeting certain conditions. The court considered that revision to further limit the Board's discretion. According to the court, the legislature meant to convey that refusal to honor the old lessee's preference right was detrimental to the state's interest.⁸³

In the last case to deal with the issue of preference rights enjoyed by old lessees, *Thompson v. Conwell*, the court held that the general statement of policy and all other preferences were subordinate to the preference rights of the old lessee.⁸⁴ While acknowledging that constitutional considerations could conceivably preempt the legislature's award of superior preference to the old lessee, the court declined to say how that might come about, and found no basis for preemption in *Thompson*. Thus, the legislative award of preference to the old lessee controlled.⁸⁵ In effect, the legislature had virtually countermanded its own general policy statement to the Board.

The 1945 statutory preferences remain in effect today.⁸⁶ The interpretation of the old lessee's preference right given in *Thompson* is still controlling case law. Apparently, the Board's only alternatives when a qualified old lessee applies for renewal are to award him the lease or sell the land.⁸⁷ The Wyoming Supreme Court has effectively rewritten the law by interpreting the words, "preferred right to renew" to mean "absolute right to renew, unless sold."

The process for determining who receives leases of state trust

80. 53 Wyo. 441, 84 P.2d 724 (1938).

81. *Id.*

82. 362 P.2d 809 (Wyo. 1961).

83. *Id.* at 813. Ironically, while the court based its statutory analysis on the subsection dealing with agricultural leases, the lease in question was for grazing, not agricultural.

84. 363 P.2d 927 (Wyo. 1961).

85. *Id.* at 929.

86. WYO. STAT. § 36-5-105(a), (e) (1977).

87. The opinion in *Bosler* states that "[l]eaving the [parcel] idle would not be [in] the state's best interest." *Bosler*, 362 P.2d at 812. This statement is at odds with the court's holding in *Mayor. Mayor v. Board of Land Comm'rs*, 64 Wyo. 409, 192 P.2d 403 (1948).

land can have an impact on how much money the trust beneficiaries will earn. In a competitive market, the lease will return full market value. To the extent that the leasing process reduces interest in applying for leases or limits the consideration that can be offered by competing applicants, the trust beneficiaries will suffer reduced income.

Under the current process, the trust beneficiaries cannot expect to receive more than the minimum rental. The old lessee has no incentive to offer anything above the minimum rental set by the Board because his preference right requires no more. New applicants might submit higher offers but the Board faces an uphill battle in awarding the lease to anyone other than the old lessee.⁸⁸ In fact, with the old lessee's preference right, other interested parties have little incentive to even bother filing an application. As a result, virtually all leases are re-issued to the old lessee at the minimum rental.⁸⁹ This non-competitive process clearly benefits the old lessee and disregards the State's duty to manage the trust assets for the exclusive benefit of the trust beneficiaries.

The future holds a ray of hope, however. During the 1990 Legislative Session, a bill was offered for introduction that would require the Board to award grazing and agricultural leases under a competitive bidding process.⁹⁰ No preferences would be allowed. The bill failed to achieve the two-thirds majority required for introduction in the budget session, although a simple majority did support introduction.⁹¹

Lease Rental Rates

While a truly competitive bid process determines both who receives leases and how much the lease will cost, throughout most of the history of state trust lands, these two questions were answered in separate processes. Generally, the Board has determined the value of the land, and has then set rental rates accordingly.

The First Wyoming Legislature set the minimum annual rental for state trust land leases at five percent of the land value as fixed by the Board.⁹² In 1903, the applicant was given authority to challenge the Board's valuation if the applicant was willing to pay for three neutral appraisers.⁹³

88. Because of the Wyoming case law discussed *supra* note 78, an old lessee may well assert an absolute right to renew the lease.

89. Out of 356 leases that expired in 1990, 355 were renewed by the old lessee without competition. Only one case involved a conflicting application; that lease was awarded to the old lessee. Compare this with the Board's experience with vacant parcels, i.e., without an old lessee. Three out of five vacant leases advertised for lease in 1990 drew conflicting applications. Interview with Lee Ann Hopson, clerical employee, Wyo. State Land and Farm Loan Office.

90. H.R. 221, 50th Leg., 1990 Wyo.

91. The vote for introduction in the House was 32 ayes, 31 nays, 1 excused.

92. Public Lands Act, ch. 79, § 16, 1890-91 Wyo. Sess. Laws 332, 334.

93. Act approved Feb. 21, 1903, ch. 78, § 12, 1903 Wyo. Sess. Laws 86, 87.

From 1929 through the present, grazing and agricultural leases have had a minimum and maximum annual rental set by the Board.⁹⁴ The minimum cannot be less than two percent of the appraised value of the land. Five and one-half percent of appraised value is the maximum rental. A statutory maximum rental prevents the trust beneficiaries from receiving full market value for the lease of trust lands.⁹⁵

All state trust lands are to be classified and valued by the Board, and that information is used to determine the minimum and maximum rentals.⁹⁶ The Board's first rules on the subject set rentals for grazing land at five to ten cents per acre, dry farm land at twenty-five cents per acre, and fifty cents per acre for irrigated farm or natural hay land.⁹⁷ A more detailed rental schedule was included in rules adopted in 1946 and 1960, with a breakdown by county.⁹⁸

The schedule was abandoned in 1961, when the Board began to set minimum annual rentals based on carrying capacity as expressed in animal unit months (AUM).⁹⁹ The AUM fee is applicable statewide, while the carrying capacity is estimated for each individual lease. The state-wide AUM fee was not placed in the Board's rules until 1988.¹⁰⁰ The Board reviews this fee annually, based upon updated market information. If the Board changes the minimum AUM fee, a standard lease provision automatically adjusts the rent due each year to the new minimum for those leases issued at a lower rate.¹⁰¹

Excess Rentals From Subleases

An adjunct to rental rates is the issue of subleasing state trust lands. If a lessee can sublease the trust land at a profit, one must question whether the state is doing all it can to maximize revenues to the trust beneficiaries.

Until 1943, the legislature had been silent regarding the subleasing of state trust lands. A requirement was added in 1943 that any sublease or assignment of a state lease must be approved by the Board or risk cancellation.¹⁰² Further, if the lands were subleased for

94. Act approved Feb. 23, 1929, ch. 108, § 8, 1929 Wyo. Sess. Laws 185, 187 (codified as amended at Wyo. STAT. § 36-2-106 (1977)).

95. For this reason, the Arizona Supreme Court has held that a statutory maximum royalty rate for trust land mineral leases is unconstitutional. *Kadish v. Arizona State Land Dep't*, 155 Ariz. 484, 747 P.2d 1183 (1987).

96. Wyo. STAT. § 36-2-105 (1977).

97. Regulations of the Bd. of Land Comm'rs, p. 10, adopted June 4, 1919. This is the earliest version of the rules preserved by the Commissioner of Public Lands.

98. Regulations of the Bd. of Land Comm'rs, p. 10, adopted December 5, 1946; Regulations of the Bd. of Land Comm'rs, p. 12, adopted September 8, 1960.

99. 21 Minutes of the Bd. of Land Comm'rs 52 (March 13, 1964).

100. Board of Land Comm'rs, Rules and Regulations, ch. 4, § 6 (Sept. 14, 1988) (Grazing & Agricultural Leasing).

101. Board of Land Comm'rs, Rules & Regulations, ch. 4, § 3 (Sept. 14, 1988) (Grazing & Agricultural Leasing).

102. Act approved Feb. 19, 1943, ch. 60, § 1, 1943 Wyo. Sess. Laws 65, 66.

more than the rental amount paid to the state, one-half of the excess rental must be paid to the Board. This statute became fertile ground for challenges by applicants against old lessees claiming a preference right to renew leases.

In *Stauffer v. Johnson*, a conflicting applicant accused the old lessee of having violated the terms of his lease by subleasing the state trust land without approval of the Board.¹⁰³ If the allegation was true, the old lessee would lose the preference right under the statutes. The court upheld the Board's decision to award the lease to the old lessee based on the statutory preference. The court held that "pasturing" cattle on the lease premises does not constitute a sublease. Pasture agreements whereby the lessee allows another's cattle to graze on the leasehold for a fee are only licenses to use the land and do not create an interest in the property.¹⁰⁴

A sublease was defined by the Wyoming Supreme Court in *Rayburne v. Queen*, under a similar challenge to the old lessee.¹⁰⁵ The *Rayburne* court placed the burden of showing that the old lessee subleased the state trust lands on the party challenging the old lessee's preference. The court also stated that it was not enough to show the lump-sum for the sublease of both deeded and state lands exceeded the rent paid to the Board, because an allocation between the two would be a mere guess.¹⁰⁶

The court made proof of excess rentals even more difficult in *Bosler v. McKechnie*.¹⁰⁷ In this case, the court suggested that where the state land under lease was unfenced allowing cattle to move freely between state and private land, it would be acceptable for the parties to simply agree that all of the payment under the sublease was for the private land and none was to be attributed to the state land.¹⁰⁸

The legislature brought pasture agreements and all other land use contracts within the requirement to obtain the Board's approval in a 1967 amendment.¹⁰⁹ However, the requirement to collect one-half of the excess rental was not extended to money received under a "con-

103. 71 Wyo. 386, 259 P.2d 753 (1953).

104. *Id.* at 412, 259 P.2d at 765.

105. 78 Wyo. 359, 326 P.2d 1108 (1958). The court defined a sublease as follows: A sublease occurs where a lessee underlets the premises or a part thereof to a third person for a period less than the lessee's term. If the lessee reserves to himself a reversionary interest in the term, it constitutes a sublease, however small the reversion, and regardless of the form of the instrument.

Id. at 366-67, 326 P.2d at 1110.

106. *Id.* at 359, 326 P.2d at 1108.

107. 362 P.2d 809 (Wyo. 1961).

108. *Id.* at 811.

109. Act approved Mar. 3, 1967, ch. 223, § 1, 1967 Wyo. Sess. Laws 661, 662 (codified as amended at WYO. STAT. § 36-5-105 (1977)). See also Board of Land Comm'rs, Rules & Regulations, ch. 4, § 8(a) (1988) (Grazing & Agricultural Leasing). This rule excludes "price support and production adjustment" contracts from the approval requirement.

tract." It is not clear why the statute treats consideration paid under a contract differently than that paid under a sublease. In either case, the lessee may receive money for the use of the trust lands above that which is paid to the trust.

The existence of any excess rentals for subleasing state lands indicates that the trusts are not receiving full market value under the lease.¹¹⁰ Excess rentals are only possible when the Board's lessee is paying less in rent to the Board than the market will bear. If the lessee is paying a market rate, he can still sublease, but he cannot realize a profit.¹¹¹

In capturing only 50% of the excess rental the loss of income to the trusts is masked with the appearance of increased revenues. Rightfully, all of the excess reflected in the marketplace for subleases should be going to the trust beneficiaries. The purpose of the federal land grants was not to provide income to "middlemen" who are wiley enough to secure a bargain lease from the state and then capture the money the state has left in the marketplace. The state should analyze its leasing process to ascertain why it is not receiving market value in leasing trust lands. Very likely, the lessee obtains the full value for the sublease by exposing it to a truly competitive market without the statutory provisions which restrict the Board.

Rental Rates for Special Use Leases

Rental rates for special use leases were left to the Board's discretion until 1979, when the legislature provided that annual rentals must be between two percent and five and one-half percent of the appraised value of the land.¹¹² However, there are two types of special use leases which are not subject to this provision.

The statute allows the Board to set the annual rental for non-profit camps operated by political subdivisions or non-profit corporations at "less than two percent (2%) of appraised value . . . or one hundred dollars (\$100.00), whichever is less, regardless of the amount of acreage involved."¹¹³ Because of the peculiar wording of this statute, any rental under two percent of appraised value is authorized, even zero. Legislative authorization of free leases reflects extreme disregard for the constitutional trust obligations of the state.

110. Excess rental received by the Board in Fiscal Year 1990 was \$86,775.03. WYOMING STATE LAND AND FARM LOAN OFFICE, ANN. REP. 5 (1990). Since this figure represents the Board's statutory share of 50% of excess rentals attributable solely to land, total excess rentals of trust lands attributable solely to land would have been twice this figure. See *infra* note 111.

111. Because subleases may include improvements owned by the lessee, the Board adjusts gross sublease rentals to a net figure that represents excess rental attributable to the land only. Interview with Charles Roll, Appraiser, Wyoming State Land and Farm Loan Office (Jan. 14, 1991).

112. Act approved Feb. 19, 1979, ch. 60, § 1, 1979 Wyo. Sess. Laws 104.

113. *Id.*

A second exception to the normal rental rates for special use leases was created in 1985, by adoption of the following language:

If the land to be leased under this subsection was originally acquired by the state from a city or town, is to be used by a non-profit corporation and is to be used for nonprofit purposes, the annual rental fee assessed by the board shall not exceed one hundred dollars (100.00) per acre.¹¹⁴

On its face, this provision could apply to trust lands. Lands acquired from cities or towns via general fund purchase would not be trust lands. However, lands acquired in an exchange with cities or towns for state trust lands would then have to be considered trust lands. To the extent that the rental value of a lease exceeds \$100 per acre, the 1985 amendment would subsidize particular lessees at the expense of the trust beneficiaries.

The Board has ignored the two statutory provisions regarding non-profit lessees in its rules governing special use leases. The rules set the minimum annual rental at five and one-half percent of appraised value.¹¹⁵ In exceptional cases, the Board can approve a lease rental as low as two percent of appraised value.¹¹⁶

SALES

The sale of state trust lands was authorized by the Act of Admission subject to some limitations.¹¹⁷ Sale must be made at public auction and the minimum price is ten dollars per acre. Sale proceeds go into a permanent fund for each of the various trust beneficiaries.¹¹⁸

The Wyoming Constitution reiterates the congressional requirements and adds that sales are to be "in portions at proper intervals of time, . . . as to realize the largest possible proceeds."¹¹⁹ This mandate is entirely consistent with a trustee's duty. It suggests the need for some analysis of potential sales in order to know whether the timing is right to realize the largest possible proceeds. Neither a moratorium on land sales, nor an immediate liquidation of the trust land inventory would be within the spirit of the constitution.

The Board has adopted rules governing sales of state trust land consistent with the Wyoming Constitution.¹²⁰ The rules call for a case-

114. Act approved Feb. 20, 1985, ch. 118, § 1, 1985 Wyo. Sess. Laws 163 (codified at Wyo. STAT. § 36-5-114 (Supp. 1990)).

115. Board of Land Comm'rs, Rules & Regulations, ch. 5, § 7(b) (Sept. 28, 1988) (Special Use Leasing).

116. *Id.*

117. Wyoming Act of Admission, ch. 667, §§ 5, 11, 26 Stat. 222 (1890).

118. *Id.* §§ 5, 8.

119. WYO. CONST. art. 18, § 3.

120. Board of Land Comm'rs, Rules and Regulations, ch. 2 (Feb. 20, 1990) (Sale of State Lands).

by-case approach to selling parcels. The Board may offer land for sale on its own motion, or may be petitioned to sell a parcel by an interested buyer.¹²¹ Six criteria are examined by the Board in deciding whether a sale is in the best interest of the trust beneficiaries:

- (i) The purchase price offered by the applicant.
- (ii) The current uses and income to the Board generated by the lands.
- (iii) The probable future uses and income to the Board which would be generated by the lands.
- (iv) The estimated current value of the lands.
- (v) The probable appreciation in value of the lands.
- (vi) The location, condition, accessibility, and manageability of the lands.¹²²

These rules appear to give the Board the necessary flexibility to make prudent judgments on land sale proposals, while ensuring that the best interest of the trusts are paramount.

The Wyoming Supreme Court assured that the Board does not have to sell a particular parcel upon demand of an interested purchaser in *Curtis v. Center Realty Company*.¹²³ In that case, the court upheld the Board's decision not to sell a parcel because in the Board's opinion its value was going to increase. The court refused to second guess the Board's judgment on the question of selling state trust lands.¹²⁴

The legislature, in 1980, added a requirement that the Board hold a hearing in the county where the trust land is located before any sale, if requested by the board of county commissioners.¹²⁵ Such hearings could be helpful in gathering information on local land values and the extent of interest that might be expected at an auction. They could also serve as a public forum to pressure the Board to base its decision on the local community interest, rather than the interest of the trusts.

Contracts For Deed

Other legislation concerning land sales has mostly focused on the terms of the installment sales contract or "contract for deed" offered to purchasers of state trust land. In 1891, purchasers were required to put thirty percent down and pay the balance within seven years with

121. *Id.* § 3.

122. *Id.* § 5.

123. 502 P.2d 365 (Wyo. 1972).

124. *Id.*

125. Act approved Mar. 20, 1980, ch. 53, § 2, 1980 Wyo. Sess. Laws 264, 267 (codified at Wyo. STAT. § 36-1-117 (Supp. 1990)).

six percent per annum interest.¹²⁶ Down payments were reduced to ten percent in 1911.¹²⁷ Interest on contracts was capped at four percent and terms were lengthened to eighteen years. A penalty interest on delinquent payments of six percent was added too. In 1925, the interest rate was fixed at four percent and the term stretched to thirty years.¹²⁸

Beginning in 1933, the legislature lowered the interest rate on contracts to one percent.¹²⁹ This rate was effective every year from 1934 through 1941 except 1936, and applied not only to new land sales but also to contracts already in existence.¹³⁰

The Board was given limited flexibility to set the contract interest rate under a 1961 amendment.¹³¹ The range allowed under the law was four to six percent. Down payments were increased to twenty-five percent. Finally, in 1969 the current statute was passed, expanding the range of allowable rates to four to eight percent and raising the penalty interest rate to eight percent.¹³² The Board's current rules establish the contract interest rate at eight percent.¹³³

Public Auction

As in leasing, the sale process employed by the Board must serve two interests: trust beneficiaries should receive full value, while public confidence in the integrity of the process must be preserved.

The time, place, terms of sale, and the appraised value of the lands to be sold must be advertised for four consecutive weeks prior to the auction.¹³⁴ The advertisement must appear in a newspaper in the county where the land is located. Additional advertising may be done in the Board's discretion. In today's global marketplace, interested buyers come from around the world to buy land in Wyoming. The more widely advertised an auction is, the more likely the trust beneficiaries will receive full market value for the land.

Before trust land is offered at auction, the Board determines its appraised value.¹³⁵ The Wyoming Constitution only requires the Board to receive three-fourths of the appraised value.¹³⁶ The legislature has increased the minimum acceptable price to full appraised

126. Public Lands Act, ch. 79, § 34, 1890-91 Wyo. Sess. Laws 332, 328.

127. Act approved Feb. 16, 1911, ch. 25, § 1, 1911 Wyo. Sess. Laws 40.

128. Act approved Feb. 25, 1925, ch. 91, § 1, 1925 Wyo. Sess. Laws 95.

129. Act approved Dec. 23, 1933, ch. 39, § 1, 1933 Wyo. Sess. Laws 40.

130. Act approved Feb. 18, 1937, ch. 56, § 1, 1937 Wyo. Sess. Laws 73, 74; Act approved Feb. 11, 1939, ch. 40, § 1, 1939 Wyo. Sess. Laws 48, 49.

131. Act approved Feb. 21, 1961, ch. 154, § 1, 1961 Wyo. Sess. Laws 299.

132. Act approved Mar. 6, 1969, ch. 179, § 1, 1969 Wyo. Sess. Laws 375.

133. Board of Land Comm'rs, Rules and Regulations, ch. 2, § 13(b)(ii) (Feb. 20, 1990) (Sale of State Lands).

134. Wyo. STAT. § 36-9-104 (1977).

135. Wyo. STAT. § 36-9-102 (1977).

136. Wyo. CONST. art. 18, § 1.

value.¹³⁷

The legislature has also granted a special right at the auction for "a person holding an expiring lease at the time of sale."¹³⁸ A person so qualified has the right to meet the high bid at the conclusion of the auction. It is not especially clear what an "expiring" lease is. Leases are either in effect or they are not. Only one lease can be in effect at a particular time.¹³⁹ At the time of sale a person could hold the current lease or hold one of the many leases that have expired during the last 100 years. Therefore, the statute must mean the holder of the current lease has the special right.

This special right to meet the high bid compromises the competitiveness of a public auction by discouraging potential bidders. In an unrestricted auction, each bidder has the power to make the final bid and claim the property. However, when someone holds a right to match the high bid after the gavel goes down, other bidders are stripped of that power. Without the power to definitively buy the property, potential bidders have less incentive to incur the necessary costs to attend an auction. Without enough bidders to create a competitive marketplace, the trust land will likely sell below its true value. While the Board will receive no less than the appraised value, that is little protection against the loss of true market value occasioned by a special right created by the legislature.¹⁴⁰

PUBLIC USE

A current land management issue probably never envisioned in 1890 is recreational public use. The Board adopted rules in 1988 to authorize and regulate use of state trust lands by members of the general public.¹⁴¹ Use is limited to hunting, fishing, and casual recreation.¹⁴² Camping, open fires, and off-road vehicle use are prohibited.¹⁴³

No system is in place for compensating the trusts for recreational public use. Two bills were introduced during the 1989 Legislative Session which addressed the issue. One called for the issuance of "public

137. WYO. STAT. § 36-9-102 (1977).

138. WYO. STAT. § 36-9-101 (1977).

139. Under multiple use leasing, it is possible for two or more leases for different purposes to include the same land. Under Wyoming Statutes section 36-9-101, each lessee would have the right to meet the high bid. By rule, the Board has provided a process to avoid this problem, requiring lessees to specify at the time the additional lease is issued which lessee will hold the right. Board of Land Comm'rs, Rules and Regulations, ch. V, § 4(a) (Sept. 28, 1988) (Special Use Leasing).

140. See *Deer Valley Unified School Dist. v. Superior Court*, 157 Ariz. 537, 540, 760 P.2d 537, 540 (1988); *Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 247, 47 N.W.2d 520, 523 (1951).

141. Board of Land Comm'rs, Rules and Regulations, ch. 13 (Feb. 13, 1989) (Public Hunting, Fishing and General Recreational Use).

142. *Id.* §§ 3, 4.

143. *Id.* §§ 5, 7, 8.

recreation permits"¹⁴⁴ and the other for "access tags."¹⁴⁵ Each would provide the trusts with compensation. Neither bill was enacted. The practical problems with instituting an individual permit system include the lack of enforcement capability, the low revenue to cost ratio, and the scattered location of state trust lands.¹⁴⁶ A more practical alternative would be for the Wyoming Department of Commerce to use appropriated funds to "lease" public recreational use rights from the Board. The Wyoming Game and Fish Department could do the same for public hunting and fishing rights. In any event, the state should find some way to compensate the trust beneficiaries for the use of the trust lands.

CONCLUSION

Congress created an inherent management conflict between the interests of the public and the interests of the trust beneficiaries by granting the former federal lands to Wyoming in trust. Had the lands been granted unconditionally, state officials could manage them in the same manner as any other governmental resource. Management decisions could be based on economic development, environmental protection, or other public interests. However, because these lands were granted in trust, their management is limited by the terms of the grants. Management decisions must encourage the greatest financial return to the trust beneficiaries balanced between the short and the long term.

State officials are on the front lines of this management conflict. When administering trust lands, state officials are required to function like private trustees. Yet the narrow focus of a trustee cannot accommodate the broad concerns public officials are accustomed to addressing. The state official is caught in the crossfire.

It is difficult to evaluate the Board's overall performance in protecting the interests of the trust beneficiaries during the last 100 years. In that time, the Board has made tens of thousands of individual decisions affecting state trust lands. Each action of the Board involves applying legislative enactments and constitutional requirements to a given situation. There are no records detailing all the factors the Board considered in making its decisions.¹⁴⁷

The legislature's fidelity to the land grant trusts is easily mea-

144. H.R. 199, 50th Leg., 1989 Wyo.

145. H.R. 368, 50th Leg., 1989 Wyo.

146. Interview with Paul Cleary, Deputy Commissioner of Public Lands (August 29, 1990). The school land trust received sections 16 and 36 of each township. The corpuses of other state land trusts are likewise scattered throughout the State. It would thus require substantial manpower to enforce permit requirements upon those entering and using those lands.

147. Minutes of Board proceedings have always been kept. However, these minutes are not always so detailed as to set forth the factual information which was before the Board, nor do they necessarily indicate the precise basis of Board decisions.

sured by examining the laws enacted during the state's history. The legislature has shown in the last century that it was willing to compromise the interests of the trust beneficiaries in order to benefit others.

Three mechanisms have been used to benefit the users of state trust lands. First, lease preference rights have limited the Board's ability to expose state trust lands to a competitive market. Second, statutory maximum rental rates have insulated lessees from paying true market values. Third, the lessee's right to meet the high bid at "public auction" may have discouraged other bidders and thereby reduced sales prices.

Because the Board is created, and its duties prescribed, by the state constitution, few statutes are really necessary. Unnecessary statutes simply hinder the Board's ability to exercise sound business judgment. The management of the State's trust lands is a proprietary function. To do a proper job in the business arena, a manager must be able to react quickly to changing marketplace conditions. Specific regulations enacted by the legislature dealing with interest rates and rentals limit the Board's ability to keep pace, and thereby inhibit good management.

The Wyoming Supreme Court has allowed injury to the trust beneficiaries in several cases regarding state trust lands by deferring to the judgment of the Board and the legislature. That deference was not appropriate because the state's responsibility to comply with the terms of the trusts is on a constitutional plane. Often, the court has stopped its analysis at a statutory level, never considering what the constitution may require in the management of state trust lands. Though not so designated in statute, the court, too, is a trustee, in the sense that the court is empowered and required to evaluate the State's actions in the light of trust obligations imposed upon the State by the Act of Admission. This the court has failed to do.

RECOMMENDATIONS

How can the State better function as the trustee of state trust lands?

Appropriate legislation for the next century of statehood would start with replacing the current general policy statement with the Board's policy preamble, along with the repeal of all anti-competitive statutes. A good second step would be the passage of House Bill 221 and other laws which ensure that state trust lands are available on the open market, thereby returning fair market value to the trust beneficiaries.

The greatest threat to the interests of the trust beneficiaries are competing public interests. Responsiveness to the demands of the public cannot be eliminated from the legislative or executive branches. Whether elected or appointed, state officials cannot realisti-

cally ignore the wishes of the public. Thus, enforcement of the trust terms must come from the judicial branch.

As opportunities arise, the Wyoming courts should give full effect to the trust status of the congressional land grants. With a real possibility that the courts will overturn actions that violate the terms of the grant, elected officials will be more able to resist public pressure using the law as a "heat shield." Currently, there is little Wyoming case law that state trustees can point to when trying to manage the trust lands in accord with the Wyoming Constitution.

Better than coercion from the courts would be a change in public attitude toward the trust lands. The public should understand that when viewed as a whole, the interests of the trust beneficiaries are consistent with the taxpayer's interest. Because the beneficiaries are all state-funded entities, every dollar earned by the trusts is a dollar less in taxes that Wyoming taxpayers have to part with. Clearly, this was the underlying purpose of the land grants — to provide non-tax resources for important state services. When the trusts are viewed in the proper light, the public, and state officials, should staunchly support management of state trust lands for the exclusive benefit of the named beneficiaries.