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Controlling the Blue Rash: Issues and Trends in State Land Management

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CONTROLLING THE BLUE RASH: ISSUES AND TRENDS IN STATE LAND MANAGEMENT

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I. INTRODUCTION

In the West, scholars, lawyers, ranchers, miners, foresters, farmers, legislators and government administrators argue about a multitude of facts and issues.[2] However, they would probably agree upon one matter—land and decisions about its disposition and use have been instrumental in the history and development of the American West:

> Land was the most important force that impelled the population to push across the continent. But the enticement of ever-more-bountiful agricultural production was only one strain of the siren call. Forest and mineral wealth and the speculative value of strategic locations—harbors, steamboat landings, damsites, and townsites—led to keen competition and the evolution of a class of professional land seekers—the . . . miner, the lumberman, the town developer, and . . . the power magnate.[3]

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1. The authors are, respectively, Assistant Attorney General, State of Oregon, and Senior Staff Attorney, Natural Resources Law Center, University of Colorado School of Law. Ms. Bruce was a 1991 Burlington Resources Research Fellow at the Natural Resources Law Center, and thanks the Center for their assistance and encouragement on this project. The generous support of the El Paso Natural Gas Company towards this fellowship is gratefully recognized. Thanks to Dana Rose and Carrie Berman, class of 1992, University of Colorado School of Law, for research assistance and to Rudd Mayer, Legal Assistant, for valuable editorial comments.

2. Reference to "the West" or to "Western States" is to the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

3. EVERETT DICK, THE LURE OF THE LAND at x (1970). Dick describes land as "the most important single social factor in frontier history." *Id.* at ix.

The importance of land in the development of the West is the result of a variety of factors. The sheer size of the West, the ecologic and economic value of its natural resources, the fact that most of the land is in government ownership, the aridity of the land, the climate of the West, the beauty of the landscape, and its fragile character are individually and collectively central to the importance of land and land use issues. All land managers—federal, state and private—must take them into account in managing their lands.

The eleven western states are vast. They contain approximately 753 million acres, which is about one-third of the total acreage of the 48 contiguous states of the Union.[4] The federal government owns and manages significant portions of the western states.[5] The states also have important holdings—more than 45 million acres—that are managed for diverse purposes.[6]

The federal government granted most of the state-owned land to the states upon admission to the Union. The majority of these grant lands were given to help establish a system of public education in the states.[7] The states also received grants of lands from the federal government for reclamation of swamp lands, for construction of railroads, wagon roads and canals, and for the location and support of universities, hospitals, asylums and government buildings.[8] In addition to these grant lands, all

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4. Bureau of Land Mgmt., Dep't of the Interior, 175 PUBLIC LAND STAT. 1990, at 5, Table 4 [hereinafter BLM 1990 STATISTICS.].

5. *See* SARAH BATES, THE WESTERN PUBLIC LANDS: AN INTRODUCTION, WESTERN LANDS REPORT NO. 1, Natural Resources Law Center, University of Colorado School of Law (1992). The United States owns approximately 55% or 364 million acres in eleven western states. In Alaska, there is an additional 248 million acres of federal land, comprising 68% of all lands within the state. *Id.* at 21, Table 1.

6. *See* WESTERN STATE LAND COMMISSIONERS ASSOCIATION, 1991-1992 DIRECTORY (1992) [hereinafter WSLCA DIRECTORY]. Table 1 shows acreages for all types of state lands. *See* app. Table 1. *See also* Sally K. Fairfax et al., *The School Trust Laws: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. REV. 797 (1992) (41 million acres are managed as grant lands) [hereinafter *Conventional Wisdom*].

7. *See generally* PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968). The eleven western states were admitted to the Union between 1850 and 1912. The enabling or admission acts admitting them all reserved at least two lots or sections of each township for public school purposes. *See infra* notes 13-14. Nevada, Utah, Arizona and New Mexico reserved four sections for public school purposes. Except for states admitted under the same act, no consistent language was used to make these reservations to the states. Table 3 sets out the date of admission of each state, a citation to each state's admission or enabling act, a summary of the acts' provisions concerning lands granted for public school purposes and a summary of state constitutional language implementing the grant. *See* app., Table 3.

8. SAMUEL T. DANA & SALLY K. FAIRFAX, FOREST AND RANGE: ITS DEVELOPMENT IN THE UNITED STATES 16-21 (2nd ed. 1980); BLM 1990 STATISTICS, *supra* note 4, at 4, Table 2; GATES, *supra* note 7, at 301-39. The number of sections granted to individual states and the

western states have acquired lands for park, recreation and fish and wildlife purposes.[9]

Although the amount of land owned and managed by the western states is impressive, little literature exists describing the lands, the opportunities they offer or how the lands actually are managed.[10] This article serves as an introduction to the opportunities and problems presented by management of these lands. At the same time, it suggests a set of objectives state land managers may use to provide a foundation for what has been and continues to be a patchwork of strategies in state land management. These objectives are: (1) sustaining the resource; (2) expanding recreational and other public uses of state lands; and (3) improving the financial return to the schools. Rather than mandating major changes in law, science or societal attitudes, these objectives are based on existing legal mandates, prevailing or emerging scientific views on land management, and current public values.

The article describes state-owned lands, including the types and extent of landholdings and their commercial, biological, developmental, recreational, cultural, and historical values. Next, state land management policies and practices are described, from historical roots through modern manifestations. Deeply embedded in law, policy and practice, current

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intended uses of the grant lands can be found in the enabling or admissions acts for each state. These acts generally are set out along with the state constitution in the state statutory code.

9. *See infra* text accompanying notes 232-41.

10. Several articles address individual state's responsibility for lands granted at statehood and about the problems the trust poses for the management of these lands. *See, e.g.*, John B. Arum, Comment, *Old Growth Forests on State Trust Lands—Dedicated to Oblivion?*, 65 WASH. L. REV. 151 (1990); Kedric A. Bassett, Comment, *Utah School Trust Lands: Dilemma in Land Use Management as a Possible Effect of Utah's Trust Land Management Act*, 9 J. ENERGY L. & POL'Y 195 (1989); Wayne McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525 (1982); Clinton D. Beaver, Comment, *Wyoming School Trust Lands Trapped Inside Grand Teton National Park - Alternative Solutions for the Commissioner of Public Lands*, 20 LAND & WATER L. REV. 207 (1985); Thomas W. Bade, Comment, *Safe Yield Versus Maximum Return: The Constitutionality of the Arizona Groundwater Code as Applied to State Trust Land*, 22 ARIZ. ST. L. J. 261 (1990); Matthew J. Harmer, Comment, *Utah's School Trust Lands: A Century of Unrealized Expectations*, 4 B.Y.U. J. PUB. LAW 453 (1990); Clarence E. Keys, Note, *Administration of Grazing Leases of State Lands in New Mexico*, 15 NAT. RESOURCES J. 581 (1975); Bill Eggleston, Note, *The Preferred Right to Lease State Trust Land: Ewing v. State*, 21 ARIZ. ST. L. J. 793 (1989). *Cf. Conventional Wisdom*, *supra* note 6 (challenging the assumption that a trust exists and that it is perpetual). There also is an interesting, but largely unavailable, 1980 study of state land management in the western United States commissioned by the now defunct Public Lands Institute. WILLIAM PATRIC, TRUST LAND ADMINISTRATION IN THE WESTERN STATES: THE STUDY OF THE LAWS, POLICIES, AND AGENCIES UNDER WHICH STATE LANDS ARE MANAGED IN TEN STATES. Finally, there is a 1964 study commissioned by the American Forest Products, Inc., which includes data about acreages and types of land owned by states. GOVERNMENT LAND ACQUISITION: A SUMMARY OF LAND ACQUISITION BY FEDERAL, STATE AND LOCAL GOVERNMENT UP TO (1964).

state land management decisions are best understood in this historical context. Modern realities of state land management are then presented, largely through the eyes of today's managers, incorporating the results of a survey of land management plans and procedures in the western states. This section notes existing practices that present obstacles to the objectives set out above. Finally, the article looks at trends in state land management that move in the direction of meeting desirable management objectives. Examples from several western states illustrate these trends. The paper concludes that western state land management policies and practices, while showing positive gains, need to be reviewed and reconsidered in light of the objectives stated above.[11]

II. DESCRIPTION OF STATE-OWNED LANDS

What are state lands? A trip along Interstates 25 and 90 through Wyoming from the Colorado border to the Montana border is illustrative. The most recent Bureau of Land Management Land Status Map[12] shows hundreds of state land-holdings within a two township distance on either side of the Interstates.[13] Some large consolidated parcels of state land exist between Chugwater and Wheatland, some around the Guernsey and Glendo Reservoirs, some near the Laramie Mountains between Wheatland and Douglas, some to the west of Interstate 25 between Glenrock and Casper, some nestled against the Bighorn Mountains northwest of Buffalo, and one large block of consolidated state lands east of Buffalo. However, most state parcels are one or two sections in size, and they are scattered uniformly along the distance between the borders.[14]

The land at the Colorado border and for miles beyond is broad and flat. Road cuts show very rocky soil, with no topsoil to speak of. Farther north along Interstate 25 stand eroded buttes. Here, road cuts are not needed to detect the poor quality of the soil; its surface is grey and strewn with rocks. Cattle, and signs of them, are everywhere.

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11. The discussion is not intended to analyze whether state land managers in the western states correctly interpret their legal management mandate. For a thorough discussion of this issue, *see Conventional Wisdom*, *supra* note 6.

12. UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, STATE OF WYOMING, LAND STATUS MAP (1984) (Scale 1:500,000) [hereinafter WYOMING LAND STATUS MAP].

13. Two townships is a distance of about 12 miles. A township is a unit of land measurement in the rectangular survey system. Generally, each township is six miles from north to south and from east to west. *See* DICK, *supra* note 3, at 2-22. *See also infra* text accompanying notes 110-14.

14. *Id.* A section is one square mile or 640 acres. Generally, there are 36 sections within each township.

Ranching is not the only visible land use. A very large herd of antelope just outside of Chugwater, Wyoming, is a reminder that the land is valuable habitat for other animals as well. Several lots boast large farm equipment and machinery for sale just outside of Wheatland, Wyoming. Recreational opportunities are also evident in this area, at nearby Guernsey State Park (near Guernsey Reservoir) and at Fort Laramie National Historic Site, east of the state park. Continuing north on Interstate 25, the Laramie Mountains soon close in on the west and the Platte River Valley opens up on the east. The land around Glendo Reservoir, largely treeless, supports irrigated fields and another state park.

Oil and gas pipelines and a battalion of high voltage electric lines stalk away in every direction from the coal-fired Johnston Power Plant in East Glenrock. Oil and gas wells join the cattle at Glenrock. In almost every direction, rangeland, cattle and slowly pumping gas and oil wells blanket the horizon. Further along, sheep appear at the south fork of the Powder River. Here, too, are a few oil wells, and large herds of antelope graze with the sheep.

Buffalo, Wyoming (population 3,799), gateway to the Bighorn National Recreation Area, has a National Historic District in the center of town. Judging from the disproportionate number of gas stations, motels and fast-food restaurants lining its main street, although the history of the town is rooted in ranching and mining, its present—and probably its future—has been replanted with tourism and recreation.

Nearing the Montana border, the land to the east lies in stark, eroded folds—badlands.[15] To the west is rich farmland. Plowed rows expose rectangles of black soil.

Although the vegetation and mineral resources may vary from state to state in the West, the rhythm and texture of grazing lands repeats common themes. The aridity of the land, relieved by irrigation and altitude from time to time, the cattle and farms, the mountains always nearby, the wildlife, and the growing influence of tourism and recreation all are characteristics one would find traveling through any western state.

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15. Badlands occur in many areas of the West and Midwest, and are defined generally as "a barren area in which soft rock strata are eroded into varied, fantastic forms." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 110 (unabridged edition 1981). For a discussion of badlands, albeit set in another area of Wyoming, *see* Chris Madsen, *The Other Side of Dubois*, 55 WYO. WILDLIFE 22 (1991).

A. Extent of State Lands

The eleven western states own or manage at least 45 million surface acres (see Table 1).[16] This is more than the total number of acres in all New England states added to the total acres of New Jersey and Delaware.[17] This is also slightly more acres than the whole of Washington (42,693,760 acres) and not much less than the whole of Utah (52,696,960 acres) or Idaho (52,933,120 acres).[18]

Acreage owned and managed by individual state agencies in the West is also vast. For example, the Arizona State Land Department and the Department of State Lands in New Mexico each manage more acres than the total acres of nine states, including Connecticut, Maryland and Massachusetts.[19] The Colorado State Land Department, with about 30 employees, is responsible for managing nearly as many acres as are found in the entire state of Connecticut.[20] Even the California Parks Department owns and manages more acres than the total acres of either Delaware or Rhode Island. California's largest park is about the size of Rhode Island.[21]

Although collectively or individually the western states own and manage an enormous amount of land, most of the land is not consolidated into large parcels. Land is dispersed across the states in one-mile square sections,[22] a condition described as a "blue rash."[23] For exam-

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16. Table 1 shows the type and amount of land managed by each western state. See app., Table 1. The figures in the table are best approximations of acreage, because state ownerships are in almost constant flux. Also, discrepancies may exist between acreages shown in published reports (cited in footnotes to Table 1), and figures reported by states in the responses to questionnaires, *cited infra* beginning with note 24. Where discrepancies exist for the type and amount of land as listed in Table 1, figures shown here are from the published reports cited in Table 1. Additionally, some discrepancies exist between acreages stated in different reports. *See infra* notes a] through g] at Table 1.

17. This comparison and all following comparisons are based on calculations taken from acreages shown in Table 1 (see app., Table 1) and from BLM 1990 STATISTICS, *supra* note 4, at 5, Table 4.

18. *Id.*, app., Table 1.

19. *Id.*

20. *Id.*

21. The Anza-Borrego Desert State Park east of San Diego contains about half of the acreage owned by the California Department of Parks and Recreation—or more than 600,000 acres. Telephone interview with Richard G. Rayburn, Chief, Resource Protection Division, California Department of Parks and Recreation (May 3, 1991). Rhode Island has a total acreage of 677,120. BLM 1990 STATISTICS, *supra* note 4, at 5, Table 4.

22. The scattering of the land is the result of the method used to grant the lands; i.e. granting specific sections of each township for specific purposes. *See infra* text accompanying notes 110-23.

23. Mary Cline & Michael Heyrend, *Utah's Blue Rash: A Cartographic Malady - School Trust*

ple, the almost 5.2 million surface acres managed by the Montana Department of State Lands are "scattered throughout the state in sixteen thousand plus separate parcels."[24] There are exceptions to the pattern;[25] however, Montana's situation is typical of most state grant lands.[26]

The scattering presents significant management problems,[27] yet it is sometimes beneficial or desirable. Lands owned and managed by state park or fish and wildlife departments, for example, are intentionally located throughout the states in relatively small parcels to take advantage of a variety of opportunities compatible with the departments' management mandates.[28] Also, departments responsible for managing grant lands in states with valuable mineral resources find it beneficial to have land scattered across the state in order to increase the possibilities for mineral leasing.[29]

Whether consolidated or scattered, the sheer number of acres managed by state agencies in the western states suggests the difficulty faced by these states in trying to assess and manage land-holdings.[30]

Lands in Wilderness, 7 SOUTHERN UTAH WILDERNESS ALLIANCE 3 (No. 2, Summer 1990) [hereinafter *Utah's Blue Rash*]. The term arises from the fact that state lands are shown in light blue on Bureau of Land Management ownership maps.

24. Response to questionnaire from M. Jeff Hagener, Administrator, Lands Administration Division, Montana Department of State Lands (Mar. 25, 1991) (on file with authors).

25. Oregon's grant lands are mostly consolidated. Response to questionnaire by Pam Wiley; Washington also operates an "aggressive consolidation program" that results in "many large consolidated blocks." Response to questionnaire from Nixon Handy, Executive Assistant, Commissioner of Public Lands (Feb. 26, 1991) (on file with authors).

26. *See, e.g.*, responses to questionnaires from Paul R. Cleary, Deputy Commissioner, Wyoming State Land and Farm Loan Office (Apr. 29, 1991); Winston A. Wiggins, Assistant Director, Forestry and Fire, Idaho Department of State Lands (Apr. 1, 1991); and M. J. (Jean) Hassell, Arizona State Land Commissioner (Feb. 26, 1991) (all on file with authors); interview with David Steinhoff, Assistant Attorney General for Colorado Board of Land Commissioners, in Denver, Colorado (May 2, 1991); telephone interview with Carl Kappe, Utah Department of Natural Resources (Apr. 1991).

27. *See infra* text accompanying notes 212-15.

28. *See generally* responses to questionnaires and interviews cited in notes beginning *supra* note 21.

29. Interview with Paul R. Cleary, Deputy Commissioner, Wyoming State Land and Farm Loan Office, in Cheyenne, Wyoming (Apr. 24, 1991); telephone interview with Robert Langsencamp, Assistant Commissioner for New Mexico State Lands (May 10, 1991).

30. The problem created by scattering is illustrated by the following example. The state of Connecticut has about the same amount of total acres as the number of acres managed by the Colorado Department of State Lands. Colorado is about the size of the combined acreage of Maine, New Hampshire, Rhode Island, Vermont, Massachusetts, Delaware and New York. If Connecticut were cut into one mile square sections and scattered over these eastern states, Connecticut managers would be confronted with management problems similar to the Colorado State Land Department—an agency with 29 employees and a 1991-92 budget of just under $2 million. *See* WSLCA DIRECTORY, *supra*

Add to the equation the fact that the land possesses a wide range of physical characteristics and a diversity of values and management becomes increasingly complex.

B. Values and Uses of State Lands

State lands in the West offer a remarkable range of natural resources. Only the federal government, the single largest landowner in the West, can offer as much or more variety. Although the scattered land pattern causes management problems, it also gives the states a representative cross section of the bounty (economic and non-economic) that western lands generally have to offer. States have added to the bounty by acquiring properties specifically designated for park, recreation, and fish and wildlife purposes. As a result, the 45 million acres of state-owned land in the West offers rich and diverse resources that may be valued for their economic potential or simply for their recreational, scenic or aesthetic qualities. The following is a summary of the diverse values these state lands offer.

1. Economic Uses

State lands unquestionably offer economically valuable commercial and natural resource opportunities (see Table 2). Mineral, grazing and agricultural, and commercial urban and recreational leases all earn significant revenues each year, although the per acre return for mineral, agricultural and grazing leases is very low.[31]

For example, New Mexico and Wyoming both have extremely valuable mineral, oil and gas lands. Indeed, it is one of the ironies of the admission act land grant system that New Mexico was given two extra sections in each township because of the inability of the supposedly poor quality lands to produce any income.[32] Now these lands earn approximately $135 million a year from mineral, oil and gas lease royalties and bonuses.[33] Wyoming, with less than a third of the mineral, oil and gas acres as those managed by New Mexico, earned more than $40 million in royalties and bonuses in 1991-92.[34]

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note 6. Acreages are taken from BLM 1990 STATISTICS, *supra* note 4, at 5, Table 4.

31. *See* WSLCA DIRECTORY, *supra* note 6.

32. ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY (revised and enlarged edition 1934).

33. WSLCA DIRECTORY, *supra* note 6.

34. *Id.*

Other state lands produce equally significant revenues from timber harvest activities. Washington, Oregon and Idaho all have immensely valuable timber lands. Washington's state-owned forest lands produced approximately $225 million in fiscal year 1990.[35] Idaho estimates it earned approximately $30 million in timber revenues in 1990, up from $17 million in 1989.[36]

Revenue is also produced from state-owned grazing and agricultural lands. Although in most western states these lands account for the largest number of revenue producing acres, they are leased at far below market value. Nevertheless, they produce millions of dollars each year for the western states. In fiscal year 1991-92, Arizona earned more than $14 million from its grazing and agricultural lands, and Montana earned almost $12 million.[37] Even California, with only 113,945 acres of grazing and agricultural lands, expected earnings of almost $4 million during the same 1991-92 fiscal year.[38]

Western coastal states own significant amounts (7.1 million acres) of submerged lands,[39] including the bed of the territorial sea,[40] that produce considerable revenues for the states of Washington, California and Oregon. The submerged lands are primarily used for docks, wharves and other water-related facilities. However, these lands have other commercially valuable uses. California has oil-rich submerged lands in the Santa Barbara Channel that in 1987-88 earned about $220 million in submerged land revenues.[41] Total revenues from all submerged lands in California were approximately $263 million in 1991-92.[42] Washington earned $2 million in 1990 by leasing harvesting rights for geoducks (a type of shellfish) on aquatic lands in South Puget Sound.[43] Nevada (lands under Lake Tahoe),[44] Utah (the Great

35. WASH. ST. DEP'T OF NAT. RESOURCES, 1990 DNR ANN. REP., at 42 [hereinafter WASH. ANN. REP.].

36. Telephone interview with Winston A. Wiggins, Assistant Director, Forestry and Fire, Idaho Department of Lands (May 2, 1991).

37. WSLCA DIRECTORY, *supra* note 6.

38. *Id.*

39. *Id.*

40. The territorial sea is an area within three nautical miles of a state's shoreline. *See* 1953 Submerged Lands Act, 43 U.S.C. § 1301 (1986 and Supp. 1993). The bed of this sea is claimed as state-owned submerged land. *See, e.g.*, response to questionnaire from Pam Wiley, Assistant Director, Oregon Division of State Lands (Feb. 25, 1991) (on file with authors).

41. *Conventional Wisdom*, *supra* note 6, at 836 n.147.

42. WSLCA DIRECTORY, *supra* note 6.

43. WASH. ANN. REP., *supra* note 35, at 8.

44. Telephone interview with Pamela Wilcox, Administrator, Nevada Division of State Lands (Apr. 1991).

Salt Lake), and Idaho (Payette Lake) also manage submerged lands to produce income.[45] Oregon boasts a floating condominium complex on state-owned submerged lands and also has implemented a kelp leasing program.[46]

Although a relatively small percentage of state land is commercially developed, this use provides an increasingly valuable opportunity for many western state land managers.[47] The State of Arizona produced the most commercial income of any western state during 1991-92—almost $8 million in commercial lease revenues.[48] The state owns much of the undeveloped commercial lands in the Phoenix and Tucson urban growth areas, including most of the undeveloped land within the Phoenix city boundaries.[49] Arizona has a particularly aggressive urban lands program that has produced over $75 million in sale and lease revenues since 1983.[50] Washington also has an aggressive urban land development program. The program produced $1.3 million in 1990, more than double what had been produced in 1988.[51] New Mexico owns valuable commercial urban lands south of Albuquerque that, for the most part, are still undeveloped. One parcel brought a bid of $18 million.[52] Colorado, in what must be a coup for managing state lands with urban economic value, has a producing gas well under state land on which an international airport terminal is being built.[53]

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45. WSLCA DIRECTORY, *supra* note 6.

46. Telephone interview with Annie Ojeda, Resources Management Section, Oregon Division of State Lands (Mar. 15, 1993) (condominium complex); ORE. REV. STAT. § 274.885 - .895 (1991) (kelp leasing). The kelp leasing program, however, has had very little activity in recent years, and the state is in the process of evaluating the program. Telephone message from Jerry Hedrick, Waterway Administrator, Oregon Division of State Lands (Mar. 26, 1993).

State land managers show increased interest in claiming ownership of navigable waters in the western states. The interest is evidence not only of the income producing potential of these lands, but also of the scenic and recreational opportunities state ownership can bring to the public. *See, e.g.*, ARIZ. REV. STAT. ANN. § 37-1123 (1992).

47. WSLCA DIRECTORY, *supra* note 6. In 1991-92, the western states managed 538,842 commercial acres which produced $13,168,466 or approximately $24.44 per acre. This compares very favorably with income produced from mineral acres. The 42,060,357 mineral acres managed by the western states produced $215,887,957, or approximately $5.13 per acre. *See* Table 2.

48. WSLCA DIRECTORY, *supra* note 6.

49. Interview with M.J. (Jean) Hassell, Arizona State Land Commissioner, Phoenix, Arizona (Apr. 26, 1991); *see also* 1990 ARIZ. ST. LAND DEP'T ANN. REP. 17-19 [hereinafter ARIZ. ANN. REP.].

50. Ariz. Ann. Rep., *supra* note 49, at 18.

51. WASH. ANN. REP., *supra* note 35, at 8; *compare* figures in WASH. STATE DEP'T OF NAT. RESOURCES ANN. REP. FY 1989, at 12 [hereinafter WASH. REP. FY 1989].

52. Telephone interview with Robert Langsencamp, *supra* note 29. Despite the substantial figure, the bid was rejected by the state because of opposition from the University of New Mexico, which had been working with the Land Commissioner's office to plan for development in the area.

53. Interview with David Steinhoff, *supra* note 26. *See also infra* text accompanying notes

Idaho, Wyoming, Montana and Colorado all have lands with recognized commercial recreational value. State lands in the Jackson Hole, Wyoming, area and elsewhere in Wyoming have impressive commercial recreational value. In 1990, the Wyoming State Land Board approved the sale of 650 acres in Teton County for over $5.5 million.[54] State land inholdings in Grand Teton National Park have an estimated value of $10,000 to $20,000 per acre.[55] Considering that the state owns over seven sections in the park, and that each section of land contains approximately 640 acres, it is apparent that commercial recreational development could produce considerable income for Wyoming.[56] Montana has sold, at significantly high prices, some of its valuable recreational lands to individuals seeking to acquire large blocks of land for personal use or for commercial development.[57] In Idaho, state-owned land around Payette Lake, near the town of McCall, has value as a potential destination resort.[58] Property values around the lake have been increasing at the rate of 25% per year for the past several years. Throughout Idaho, recreational cottage sites on state lands were leased for $200 per year twenty years ago. They now have a market value of as much as $2,000 a month.[59] The Colorado State Land Commission has been approached with plans for developing a ski resort on state land. Although other state lands in Colorado hold potential for recreational development, the Commission does not have the staff to effectively plan for such use.[60]

Finally, some state lands have commercial value as military or scientific sites. The Montana Department of State Lands, for example, leases state-owned land to the federal government for intercontinental ballistic missile sites and for a NASA space shuttle landing site.[61] The Department also owns land on which an abandoned military base is located. The base has a four-mile long runway, housing for 8,000 and hangers capable of holding four or five 747s each.[62]

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54. Interview with Paul R. Cleary, *supra* note 29.

55. *Id.*

56. WYOMING LAND STATUS MAP, *supra* note 12.

57. Interview with M. Jeff Hagener, Administrator, Lands Administration Division, Montana Department of State Lands, in Helena, Montana (Apr. 22, 1991).

58. Telephone interview with Winston A. Wiggins, *supra* note 36.

59. *Id.*

60. Interview with David Steinhoff, *supra* note 26.

61. Interview with M. Jeff Hagener, *supra* note 57.

62. *Id.* Although the site is ideal for military training, it also provides precious elk and antelope habitat and is a good site for the reintroduction of the endangered black-foot ferret. The site also adjoins land proposed by the Canadian government for a grassland national park. Not surprisingly,

2. Inherent Values[63]

Besides having development value, state lands under all types of agency ownership in the West offer a rich variety of recreational, natural, biological, cultural and historical value. Lands possessing natural and biological value include the Tonto Natural Bridge (the largest travertine bridge in the world),[64] a virgin limestone cave (one of the few such caves still "living" and one that will remain protected while allowing the public to explore it under close supervision)[65], two of the ten largest Giant Sequoia trees,[66] ancient redwood stands,[67] a desert wilderness park of more than 600,000 acres,[68] old growth forests,[69] hundreds of miles of Pacific dry sand beach[70] and wetlands,[71] tidelands,[72] lake and ocean islands,[73] the headwaters of the Missouri River,[74] one of the largest freshwater springs in the world (producing 338 million gallons of water a day),[75] and wilderness areas.[76] The lands also offer biological and wildlife value including hundreds of

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there is considerable opposition to its commercial or military development. *Id.* Trends in commercial development of state lands are discussed *infra* at text accompanying notes 297-326.

63. "Economic values" and "inherent values" are distinguished here to emphasize that some state land resources, though producing some collateral economic benefit, are generally viewed by the public as having independent worth.

64. Interview with Phyllis Hughes, Assistant Attorney General for Arizona Parks and Recreation, in Phoenix, Arizona (Apr. 26, 1991); ARIZONA STATE PARKS AND ARIZONA OFFICE OF TOURISM, WE'VE BEEN THINKING ABOUT YOU (1989) [hereinafter WE'VE BEEN THINKING ABOUT YOU].

65. WE'VE BEEN THINKING ABOUT YOU, *supra* note 64.

66. Telephone interview with Gary Brittner, Staff Forester, State Forest Program, California Department of Forestry and Fire Protection (Apr. 19, 1991).

67. *Id.*

68. *Id.*

69. California and Washington have considerable old growth assets. Telephone interview with Gary Brittner, *supra* note 66; and interview with Arden Olson, Division Manager, Land and Water Conservation, Washington Department of Natural Resources, in Olympia, Washington (Aug. 28, 1991). Montana has one of the largest specimens of Ponderosa Pine on state lands. *See* STATE PARK FUTURES COMMITTEE, REPORT TO GOVERNOR AND THE FIFTY-SECOND LEGISLATURE, THE STATE PARKS SYSTEM: MONTANA'S LEGACY—A NEW GROWTH INDUSTRY (1990) [hereinafter MONTANA'S LEGACY].

70. Telephone interview with Richard G. Rayburn, *supra* note 21. Oregon owns and manages scores of parks along its Pacific shore. By common law right, the public has use of all dry sand areas along the ocean shore. *See* State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969).

71. WASH. ANN. REP., *supra* note 35, at 15, 23.

72. *Id.* at 14-15.

73. *Id.* at 20-21; MONTANA'S LEGACY, *supra* note 69, at 11-12.

74. MONTANA'S LEGACY, *supra* note 69, at 13.

75. *Id.* at 12.

76. Telephone interview with Richard G. Rayburn, *supra* note 21.

acres of big game habitat and winter range; waterfowl breeding and migration areas; nesting areas for bald eagles, puffins and cormorants; spotted owl[77] and grizzly bear[78] habitats and a protected prairie dog town.[79]

Non-commercial recreational and scenic value on western state lands also abounds, including one-quarter of California's shoreline.[80] Washington owns 74% of Cyprus Island, the largest undeveloped island of the San Juan islands,[81] located in the beautiful archipelago between Washington and Vancouver Island, British Columbia. State lands also include lakes,[82] reservoirs[83] and hot springs.[84] Wyoming owns state lands inside Grand Teton National Park.[85] Utah owns state lands in Glen Canyon National Recreational Area, Dinosaur National Monument, Capital Reef National Park and Arches National Park.[86]

Finally, state lands offer a wide range of archaeological, cultural and historical opportunities. These include frontier military forts,[87] territorial prisons,[88] historic mansions of every description, battlefields,[89] ghost towns,[90] an old copper smelter stack (the tallest free-standing brick structure in the world),[91] prehistoric Native American

77. Telephone interview with Gary Brittner, *supra* note 66.

78. Interviews with M. Jeff Hagener, *supra* note 57; telephone interview with Winston A. Wiggins, *supra* note 36.

79. MONTANA'S LEGACY, *supra* note 69, at 12.

80. Telephone interview with Richard G. Rayburn, *supra* note 21.

81. WASH. ANN. REP., *supra* note 35, at 20-21.

82. *See generally*, responses to questionnaires and interviews cited in notes beginning *supra* note 21.

83. *Id.*

84. Interview with Paul R. Cleary, *supra* note 29; telephone interview with Winston A. Wiggins, *supra* note 36; responses to questionnaires by Paul R. Cleary and Winston A. Wiggins, *supra* note 26.

85. Interview with Paul R. Cleary, *supra* note 29.

86. *Utah Threatens Parks With Development*, 63 NAT'L PARKS 11 (1989).

87. Response to questionnaire by John T. Keck, Management Officer, Wyoming Department of Commerce, Division of Parks and Cultural Resources (Feb. 27, 1991) (on file with authors); MONTANA'S LEGACY, *supra* note 69; WE'VE BEEN THINKING ABOUT YOU, *supra* note 64, at 13-17.

88. Response to questionnaire by John T. Keck, *supra* note 87; WE'VE BEEN THINKING ABOUT YOU, *supra* note 64, at 13-17.

89. Response to questionnaire by John T. Keck, *supra* note 87; MONTANA'S LEGACY, *supra* note 69, at 11-14.

90. Response to questionnaire by John T. Keck, *supra* note 87; MONTANA'S LEGACY, *supra* note 69, at 11-14; response to questionnaire by Richard G. Rayburn, Chief, Resource Protection Division, California Department of Parks and Recreation (Mar. 8, 1991) (on file with authors); WE'VE BEEN THINKING ABOUT YOU, *supra* note 64, at 13-17.

91. MONTANA'S LEGACY, *supra* note 69.

buffalo jumps,[92] prehistoric Native American ruins,[93] a Spanish territorial fort,[94] petroglyphs[95] and a multitude of other historic sites.

Indeed, state lands in the West have a wealth of natural, cultural and historical heritage that is representative of western lands generally. Moreover, these values, inherent in state lands, increasingly foster economic growth. For example, out-of-state visitors to Montana's state parks contribute almost $45 million to Montana's economy, which in turn supports 1500 private sector jobs.[96] A 1987 Wyoming state parks' expenditure study reported that non-resident visitors to Wyoming state parks contribute an estimated $54 million a year to Wyoming's economy.[97] Arizona estimates that the economic benefits from 23 recreational lakes managed by the Arizona Fish and Game Department amount to approximately $130 million per year.[98] Colorado recognizes that its "wild places" form the "backbone" of its economy, whether it is the dollars brought in by people who come to spend time in the outdoors or the advantage Colorado's natural beauty gives the state when it competes for new business and industry.[99]

The benefits accruing from park, recreation, and fish and wildlife resources have caught the attention of the citizens of several states, who have shown they are willing to finance acquisition and maintenance of these resources. Arizona voters overwhelmingly passed a "public heritage" referendum in November, 1990. The referendum provides the Arizona State Parks Commission and the Arizona Game and Fish Commission $10 million each from state lottery funds for the acquisition and management of land and facilities.[100] The Great Outdoors! Colorado Citizens Committee (GO Colorado Citizens Committee) recommended several tax options to provide a temporary funding

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92. *Id.*

93. *Utah's Blue Rash*, *supra* note 23; WE'VE BEEN THINKING ABOUT YOU, *supra* note 64, at 19.

94. WE'VE BEEN THINKING ABOUT YOU, *supra* note 64, at 13-17.

95. Response to questionnaire by John T. Keck, *supra* note 87; MONTANA'S LEGACY, supra note 69; WE'VE BEEN THINKING ABOUT YOU, *supra* note 64, at 19.

96. MONTANA'S LEGACY, *supra* note 69, at 17.

97. UNIVERSITY OF WYOMING, DEPARTMENT OF GEOGRAPHY AND RECREATION, WYOMING STATE COMPREHENSIVE OUTDOOR RECREATION PLAN at 30 (1990) [hereinafter WYOMING SCORP].

98. Interview with Eugene P. Sturla, Lands Project Coordinator, Arizona Fish and Game Department, in Phoenix, Arizona (Apr. 29, 1991).

99. GREAT OUTDOORS COLORADO! CITIZENS COMMITTEE, FINAL REPORT at 2 (Dec. 1990) [hereinafter GO COLORADO REPORT].

100. Interview with Phyllis Hughes, *supra* note 64; *see also infra* text accompanying notes 335-42.

source for a Great Outdoors Trust Fund for parks, wildlife, trails and open spaces.[101] The Montana State Park Futures Committee also recommends increased funding (more than $6 million per year) for "accelerated park improvement" and suggests sixteen different revenue sources to fund the program, ranging from general fund revenues to recreational vehicle stickers and car rental fees.[102] The establishment of the Parks and Cultural Resources Division in Wyoming's Commerce Department was a recognition of the important part that recreation and tourism can play in Wyoming's economy.[103]

The GO Colorado Citizens Committee sums up the diversity of state land values in the West:

> Today we are aware that it is our wild places and their creatures, our vast elk herds and soaring eagles, that give us a sense of ourselves as Coloradans.
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> * * *
>
> As a people we are coming to understand that what is environmentally sound is also economically sound. By preserving Colorado's natural beauty we help ensure a sustainable economy for generations to come.[104]

The same may be said of the natural and scenic heritage offered by state lands throughout the West.

III. MANAGEMENT POLICIES AND PRACTICES: HISTORICAL BASIS AND ESTABLISHED BIASES

Law and policy can best be understood within the historical context from which they develop. A corollary to this principle is that attempts to change or reform law or policy are unlikely to succeed without understanding the forces that shaped the particular law or policy. These principles are as important for understanding the management of state lands in the West as they are for understanding other aspects of what Professor Charles Wilkinson calls "the law of the American West."[105]

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101. GO COLORADO REPORT, *supra* note 99, at 20-24. *See infra* text accompanying notes 341-42.

102. MONTANA'S LEGACY, *supra* note 69, at 34-42.

103. Interview with John T. Keck, Management Officer, Department of Commerce, Wyoming Division of Parks and Cultural Resources, in Cheyenne, Wyoming (Apr. 24, 1991).

104. GO COLORADO REPORT, *supra* note 99, at 2.

105. CHARLES F. WILKINSON, THE AMERICAN WEST, A NARRATIVE BIBLIOGRAPHY AND A

Many eloquent histories of the West have been published.[106] It would not be useful here to repeat what others have said so well. Similarly, scholars have adequately analyzed traditional trust land management biases such as the sometimes exclusive emphasis on maximizing economic returns.[107] However, other historic events have influenced state land management, particularly in the West. These events shed light on why management decisions often fail to achieve the objectives outlined above: sustainability, expanded public opportunities, and improving economic returns. The first historic influence is the early land ordinances that formed the basis for the federal land grants to states as they entered the Union. The second is the robust role of ranching and agriculture in the settlement of the West. Third is the impact of state land managers' relative failure to keep pace with changing conditions and demands concerning the use of state lands. The conservation movement (emphasizing commodity uses of public resources) was not even conceived of when the first western states were admitted to the Union and was only in its infancy when the last western states were admitted.[108] As that movement is transformed into

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> The principles constituting the Law of the American West often seems disconnected and arbitrary if they are studied in a vacuum. These characteristics are particularly noticeable in connection with a phenomenon that pervades policy and law in the West—the dominance of nineteenth century laws that seem outmoded by today's lights. Some of these laws (water, mining, grazing, and Indian law are perhaps the best examples) may seem outmoded but they are not arbitrary: they arose for good reason out of specific, compelling circumstances . . . . Perhaps these and other policies ought to be changed—and a key facet of public policy debate in the West involves exactly that question—but would-be reformers had better be informed to the teeth with an understanding of the historical pressures that created the old laws and the contemporary forces that have kept them in place.

Id. at 6.

106. An excellent concise history is Professor Wilkinson's lyric narrative bibliography. *Id.* *See also* DICK, *supra* note 3; SALLY K. FAIRFAX & CAROLYN E. YALE, FEDERAL LANDS—A GUIDE TO PLANNING, MANAGEMENT AND STATE REVENUES (1987); CUBBERLEY, *supra* note 32; DANA & FAIRFAX, *supra* note 8; SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1969); EDGAR W. KNIGHT, EDUCATION IN THE UNITED STATES WITH SPECIAL REFERENCE TO MINNESOTA (2d rev. ed. 1941); MATTHIAS N. ORFIELD, FEDERAL LAND GRANTS TO THE STATES WITH SPECIAL REFERENCE TO MINNESOTA (1915); GIFFORD PINCHOT, BREAKING NEW GROUND (1947); E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN; DISPOSAL AND RESERVATION POLICY 1900-1950 (1951).

107. These biases are generally based on federal enabling legislation and state constitutional provisions, set out *infra* in app., Table 3. *See Conventional Wisdom, supra* note 6; *see also* other sources cited *supra* note 10.

108. *See* DANA & FAIRFAX, *supra* note 8, at 69-97. The conservation movement worked its way into federal land management in the early part of this century with the forest and range management programs of President Theodore Roosevelt and Gifford Pinchot. The movement was characterized by federal programs designed to retain and efficiently manage public lands for the sustained economic benefit of the public. The movement's objectives were to "hold on to the [federal] reserves

a preservation movement (supporting aesthetic and amenity uses of public resources),[109] new demands are placed not only on federal lands, but on state lands as well.

A. The 1785 and 1789 Land Ordinances

More than two centuries ago, a rectangular grid was laid down, and the imprint can still be seen on the landscape of the United States. Nowhere is the grid's impression deeper than in the western states, where it continues to influence most state land management decisions. This grid was forged by the Land Ordinance of 1785[110] and the Northwest Ordinance of 1787.[111] Its imprint was stamped on the western states through their enabling or admission acts as each state was admitted to the Union (see Table 3).[112]

From the first days following the Revolution national leaders focused on how to identify, describe and settle the lands held by the young nation.[113] The rectangular grid system established by the 1785 ordinance solved the problems of identifying and describing the lands. That ordinance, and the Northwest Ordinance that followed two years

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in the face of [private] development pressures and to solidify support for the Forest Service." *Id.* at 100. *See also* DONALD PISANI, TO RECLAIM A DIVIDED WEST 329-30 (1992), *citing* HAYS, *supra* note 106 (describing the conservation movement as rooted in a belief that science and technology would produce planned and efficient progress).

109. *See* SAMUEL P. HAYS, BEAUTY, HEALTH AND PERMANENCE; ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985 at 3 (1987). The preservation movement is characterized by an emphasis on maintaining public lands in their natural state.

110. *See* 1 DOCUMENTS OF AMERICAN HISTORY, 119-21, 123, 128 (Henry S. Commanger ed., 9th ed. 1973). The land ordinance adopted by the Continental Congress on May 20, 1785, established a method for surveying and disposing of public lands ceded to the United States by individual states in the years following the Revolutionary War. Commanger, as part of his compilation of American historical documents, gives a nice sketch of the history of these cessions and various plans for organizing governments in the ceded territories.The Ordinance of 1785 required that the ceded territory be surveyed and divided into townships six miles square. Each township was to be subdivided and numbered into lots or sections one mile square. Lots numbered 8, 11, 26 and 29 were reserved for the United States for future sale. Lot number 16 of each township was reserved "for the maintenance of public schools within [the] township." A number of townships equal to one-seventh of the ceded territory covered by the Ordinance were reserved for veterans of the Continental Army. The remainder of the territory was available for public sale at no less than one dollar per acre. *Id.* at 123-24.

111. Ordinance of July 1787: The Northwest Territorial Government, Confed. Cong. (1787), *reprinted in* 1 U.S.C XLIX (1988). By this Ordinance, the Confederate Congress established the terms under which territory northwest of the Ohio River would be admitted to the Union. Article III of the Ordinance provides in part: "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at LI.

112. See app., Table 3. *See also supra* notes 6 and 12.

113. THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN xv, xvii (Vernon Carstensen ed., 1962) [hereinafter Carstensen]; CUBBERLEY, *supra* note 32, at 91.

later, created a solution of sorts to the problem of how to settle the lands. The intention behind the two ordinances was that the vast wildlands of the nation would be developed by bringing settlers to them with the promise that land could be acquired easily and cheaply.[114] The system also provided the promise of income to the national treasury from land sales.[115] Consequently, the system was a solution not only to the problem of how to settle the nation's land, but also to the problem of how to settle the nation's debts.

The two ordinances also encouraged the growth of the notion, planted much earlier in the Colonies,[116] that some system of public education should be available in the nation.[117] By the time the western states were admitted to the Union, the pattern was firmly established that as each state entered the Union, it would receive land from the federal government to help establish a system of public education. The amount of land originally ceded to the states under these provisions was vast, and the amount retained by the states is still considerable.[118]

This history has two important consequences for state land management today. The first is the largely failed notion that income from disposition or management of the grant lands could support the public school systems in the states.[119] In support of this notion, drafters of state constitutions and early statutes governing management of these lands, as well as contemporary federal and state courts, embraced the view that management of these grant lands must be exclusively for the support of public schools in the state.[120] Whether or not this view is misguided or has support in law is almost beside the point. It is a

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114. HAROLD M. HYMAN, AMERICAN SINGULARITY, THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD MERRILL ACT, AND THE 1944 GI BILL 20-24, 27 (Richard B. Russell Lectures number 5, 1986).

115. Carstensen, *supra* note 113, at xviii.

116. For example, a Massachusetts School Law of 1647 required all towns of fifty households to appoint a master to teach children to read and write and also required towns of 100 families to establish grammar schools. COMMANGER, *supra* note 110, at 29. One of the purposes of the 1687 law was to prevent the "auld deluder Satan from keeping men from the knowledge of scripture." *Id.*

117. Hyman describes the Northwest Ordinance as implanting "commitments to public education in the territorial chrysalis of future states." HYMAN, *supra* note 114, at 24.

118. See app., Table 1. *See also* GATES *supra* note 7, at 301-17 (summary of the amount and types of land granted to the western states upon their admission to the Union).

119. See app., Table 1; *Conventional Wisdom*, *supra* note 6, at 878-83 (discussing sources of, and disbursement of, revenues generated from state lands). Table 1 figures disclose that no western state produces more than 13% of its total state school budget from grant land revenues, and most states produce much less. This is despite the fact that the lands are in most cases managed exclusively for revenue production.

120. See app., Table 3. *See also Conventional Wisdom*, *supra* note 6, at 818-20 (purpose of state grant lands), and 883-87 (beneficiary of state grant lands).

view firmly held since the beginning of statehood, and continues to be vigorously espoused by state grant land managers and their attorneys.[121] Consequently, land managers have focused almost exclusively on income production from all grant lands. This is despite the fact that use for income production may impair the long-term sustainability of the land. Additionally, income production may not be the best use of the land, which may be better suited for other public benefit or use. This focus, together with the historic bias toward agricultural and grazing interests, hampers managers' ability to meet both the sustainability objective and the objective of increased public use of state lands.

The second consequence of the 1785 and 1787 ordinances is the unvarying grant of particular sections in each township for the support of schools. These grants impose a management burden that was doomed to failure almost from the start. The focus on particular section numbers, with little or no attention to the land's character, ensures that land granted for the support of schools will include some tracts with significant value other than the ability to produce income. The unvarying grant of particular sections within each township also creates unmanageable tracts, isolated and intermixed with federal and private lands across the face of each state. This pattern of distribution provides an abundance of extremely cheap grazing land for ranchers, but causes hardship for those who must manage the lands to produce income.[122] Isolated one mile square tracts of land, often lacking legal access, are not, for the most part, successful income-producing properties.[123] Despite the problems these scattered lands present to state land managers, powerful forces work to keep this pattern in place, including the important role that grazing interests play in the historical and social fabric of the West.

B. Ranching and Farming Interests: A Prominent Influence

Public lands in the West have been indelibly affected by a century of ranching and farming. These interests have been described as so

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121. State grant land managers who responded to a questionnaire all responded that the purpose for which grant lands were managed was to provide income to the school fund. Interviews with state land managers and their attorneys produced the same response. *See generally* responses to questionnaires and interviews, beginning *supra* note 21.

122. *See infra* text accompanying notes 213-15.

123. An exception to this principle is mineral land. *See* interview with Paul R. Cleary and telephone interview with Robert Langsencamp, *supra* note 29; *see also supra* text accompanying notes 27-29.

deep and long-settled that "for all practical purposes they are indigenous societies" in the West.[124]

One has only to travel for a day across any western state to recognize the truth of this statement and to appreciate what influence these interests must have on land management policy. Hardly a mile of western interstate or back road can be travelled without encountering evidence of farming or ranching.[125] If cattle and sometimes sheep are not actually seen—and that is rare—the effects of their presence are. The muddy water and trampled and eroded banks of rivers, creeks and streams bear witness to decades of ranching.[126] On the lower-lying lands where water naturally collects, rangelands give way to irrigated farms which, for the most part, produce hay. At higher elevations, where moisture is somewhat more plentiful, the rangeland gives way to vast wheat fields that stretch to every horizon.

Rural towns are few and usually small. The farm machinery businesses, feed lots, farm supply and seed stores and grain elevators that line the main streets of these towns all demonstrate that these are working towns devoted to farming and ranching. Most locals drive mud-flapped, dirt-spattered American-made trucks—not mini toy trucks so popular in more urban settings. Traditional economic and social patterns still evident in these towns today reflect an era long gone from metropolitan centers in the West. Yet, the farming and ranching interests supported by these towns helped shape land management policy in the West, and they continue to hold an essential place in land management decision-making for most western states today.

The historic importance of farming and ranching in the formation of western land management policy, and the conflict between the two interests, is well documented.[127] Much of public land policy throughout the years of Anglo settlement of the West was driven by an effort to turn arid land into productive agricultural land.[128] The effort required an enormous infusion of federal development capital[129] and

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124. WILKINSON *supra* note 105, at 45.

125. *See supra* text accompanying notes 12-15.

126. *See* DANZEL FERGISON & NANCY FERGISON, SACRED COWS AT THE PUBLIC TROUGH (1983).

127. *See, e.g.*, DANA & FAIRFAX, *supra* note 8; GATES, *supra* note 7; PEFFER, *supra* note 106; HAYS, *supra* note 106, at 49-65.

128. PEFFER, *supra* note 106, at 33-34.

129. *See* Stewart Udall, *The West and Its Public Lands: Aid or Obstacle to Progress*, 4 NAT. RESOURCES J. 1, 3 (1964). In an address at the University of New Mexico, Stuart Udall observed:

largely took the form of massive water development projects.[130] These projects were, for the most part, successful in converting areas adjacent to the reservoirs and irrigation ditches into productive lands. Not enough water can be captured and regulated, however, to transform the West's vast, arid expanses into the rich gardenland envisioned by policy-makers in the late 19th and early 20th centuries.[131] By 1920, policy-makers recognized that "the dry waste which constituted the bulk" of the West "could serve but one useful purpose—providing grazing for livestock."[132]

Today farming and ranching uses dominate the majority of state-owned land in the West. However, revenue from these uses does not contribute significantly to state grant funds.[133] As with federal lands, grazing practices in the West, unless carefully monitored and regulated, can impair the long-term sustainability of the land.[134] Nevertheless, they remain a potent influence on state land managers for one of two reasons: ranching and farming interests continue to wield considerable political power or, in many instances, this type of use holds

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> By edict of nature, nearly all of the West was, and always will be, different from the rest of our country . . . . The Plains Indians, the vast prairies, the mighty mastiff of the Rocky Mountains, and the parched deserts were all formidable barriers to settlement and migration. Its searing winds, harsh climate, uncertain rainfall and thin soils made settlement a struggle and resource planning a necessity. Moreover, the West's remoteness from eastern markets, sparse patterns of settlement, lack of transportation, and inadequate local capital made it susceptible to domination by outside entrepreneurs—and made investments of development capital by the national government an absolute necessity if orderly growth was to occur.

Id.

130. *See* HAYS, *supra* note 106, at 91-121; MARC P. REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986); DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985).

131. *See* EDWARD ABBEY, DESERT SOLITAIRE 30 (1988), suggesting this is exactly as it should be:

> There is no shortage of water in the desert but exactly the right amount, a perfect ratio of water to rock, of water to sand, ensuring that wide, free, open, generous spacing among plants and animals, homes and towns and cities, which makes the arid West so different from any other part of the nation. There is no lack of water here, unless you try to establish a city where no city should be.

Id.

132. PEFFER, *supra* note 106, at 169.

133. See app., Tables 1 and 2. *See also infra* text accompanying notes 193-99.

134. *See, e.g.*, JOHANNA WALD & DAVID ALBERSWERTH, REPORT OF THE NATIONAL WILDLIFE FEDERATION AND NATURAL RESOURCES DEFENSE COUNCIL, OUR AILING PUBLIC RANGELANDS: CONDITION REPORT-1985 (Dec. 1985) (on file with authors); RANGE ECOLOGY WORKING GROUP OF THE SOCIETY OF AMERICAN FORESTERS, PANEL DISCUSSION PUBLIC RANGELANDS AND PUBLIC POLICY-CHOICES AND CONSEQUENCES, Boston, Massachusetts (Oct. 16, 1971) (on file with authors); *see infra* text accompanying note 139 for current views on sustainable range management.

the only prospect for producing *any* income from the land.[135] Students of state grant land management have recognized that open range laws, the inaccessibility of the lands, and the lack of water put state land managers at a disadvantage in negotiating with potential lessees of most of the grant lands in the West.[136] Sensitivity to the power of the ranching and farming interests also is evident from official state reports concerning access to state land.[137] Thus, the historic bias in favor of farming and ranching interferes with the ability of land managers to work towards sustaining the resource for future uses, to experiment with new income producing opportunities, and to provide opportunities for increased public use of state lands.

Pressures to change traditional farming and ranching practices on public lands exist today. A growing national voice is demanding that ranchers pay higher grazing fees.[138] Others argue that the current debate over increasing fees may be clouding the more fundamental issue of improving range management practices to promote sustainability.[139]

C. *The Static Nature of State Land Management*

The history of the West is characterized by a rhythm of changing needs, conditions and demands—social, political and environmental. The federal government's land management policies generally have changed in response to this rhythm, albeit slowly.[140] Dana and Fairfax

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135. Interviews with M. Jeff Hagener, *supra* note 57, and M.J. (Jean) Hassell, *supra* note 49; telephone interviews with Winston A.Wiggins, *supra* note 36, Robert Langsencamp, *supra* note 29, and Tom Parker, Wildlife Land Manager, Idaho Department of Fish and Game (May 7, 1991). These state land managers mention both factors as important when considering alternative economic uses of state grant lands.

136. *See* Larry L. Henderson, History of Montana Land Grant Funds for the Schools of Montana 1938-1982, at 120-21 (1985) (unpublished Ed.D. dissertation, University of Montana).

137. *See, e.g.*, JOHN DUFFIELD ET. AL., ECONOMIC ANALYSIS OF THE VALUES OF SURFACE USES OF STATE LANDS, REPORT FOR THE MONTANA DEPARTMENT OF STATE LANDS, SUMMARY REPORT (Feb. 1993) [hereinafter MONTANA SURFACE USE SUMMARY REPORT].

138. *See, e.g., Bruce Babbitt's Landscape At Risk*, N.Y. TIMES, Oct. 31, 1993, at E16.

139. *See* R.E. Baird, *Western grazing: Boon or Bane? Two Sides Must Unite For Answer* COLORADO DAILY, May 12, 1993, at p. 2 (quoting Professor Charles Wilkinson); *see also*, Alan Savory, *Holistic Resource Management: A Conceptual Framework for Ecologically Sound Economic Modelling*, 3 ECOLOGICAL ECONOMICS 181 (Sept. 1991) (advocating a nontraditional approach to management of grazing lands wherein the lands are intensely grazed for a time, followed by a period of dormancy to allow the roots of the grass to recover).

140. *See* DANA & FAIRFAX, *supra* note 8, at 181. Early federal response to changing public attitudes about the proper use of federal lands and resources has been characterized as slow— one of "containment," designed to "recognize and placate" new attitudes "while maintaining traditional priorities." *Id.*

divide the history of federal public land policy into three periods: disposition, reservation and management.[141] Federal land policy is still responding to the rhythm of change, now driven by increasing demands for the preservation of public land. The Multiple Use Sustained Yield Act,[142] the National Forest Management Act,[143] the Federal Land Planning and Management Act,[144] and the various wilderness bills[145] are examples of the federal government's attempts to respond to the rhythm of change.[146]

In contrast to the federal government's relative responsiveness to the rhythm of change, a numbing sameness pervades state governments' approach to managing the bulk of state lands. Except for the relatively small amount of state land managed for park, recreation and fish and wildlife purposes, most state lands are managed for the same purpose and in the same manner as they were when the states were first admitted to the Union. As shown in Table 1, the vast majority of state lands are grant lands. These lands are managed according to the principle that they may only be used to produce income for the grant fund for which they were given. Although some

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141. *Id.* at 10.

> A period of disposition in which Congress disposed of the public domain lasted about 1776 until 1891. It was followed by a brief period in which lands were reserved or withheld from disposition and lasted until 1905. The period of management dating from 1905 marks the beginning of government programs to manage actively rather than simply retain the public domain.

Id. Although Dana and Fairfax concisely identify and label these periods, they are also traced in other works. *See also* PEFFER, *supra* note 106; DICK, *supra* note 3. The management period received its impetus from the conservation movement. *See supra* note 108.

Preceding these three periods, and often included as a significant era in the history of the public lands, is the time spanning from about 1780 to 1867 during which the public domain was acquired by purchase or conquest by the federal government. *See* DANA & FAIRFAX, *supra* note 8, at 7.

142. 16 U.S.C. § 528-31 (1988). This act directs the Forest Service to Manage the national forests for more than timber production and watershed protection; they must also consider outdoor recreation, range, and fish and wildlife uses.

143. 90 Stat. 2949, as amended, 16 U.S.C. §§ 1600-87 (1988). The objective of this act is to provide multiple use and sustained yield of goods and services from the national forest system in a way that "maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. § 219.1(a) (1979).

144. 43 U.S.C. §§ 1701-83 (1988). This act is the organic act for the Bureau of Land Management, and directs the agency to manage the lands for multiple use on a sustained-yield basis.

145. *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 1031-32, 1034 (1993). The wilderness bills, based on the 1964 Wilderness Act, 16 U.S.C. § 1131 (1988), are intended to select for special protection and preservation certain roadless areas within national forests, national parks and other federally-owned lands.

146. *See* HAYS, *supra* note 109, at 133. For an excellent and exhaustive study of federal land management policy and planning, *see* FAIRFAX & YALE, *supra* note 106; Coggins et al., *supra* note 145.

have questioned whether the principle is as strict as most western states interpret it,[147] it remains the principle to which state grant land managers adhere. Because of the historic influence of ranching interests[148] and the lack of comprehensive inventories of state land resource values,[149] the principle has led to state-owned lands being leased for grazing, at prices far below private grazing lease rates.

In comparing state grant land management policies to the periods described by Dana and Fairfax for federal land management, it is fair to say that while all states have emerged from the disposition period, most remain somewhere in the reservation period.[150] Only a handful of states have even begun any sort of active management or comprehensive planning for their state lands. Three dominant explanations for this are: (1) states' embracing, in both their laws and constitutions, the view that public lands should primarily be a source of income to the state, (2) the popular view that western public lands and resources are interminable, and (3) public resistance to government limitations on the exploitation of natural resources.

When most of the western states were admitted to the Union, the federal government itself was still in the disposition period, and when the last states were admitted the management period was barely in its infancy.[151] It is hardly surprising, then, that the federal government, which itself hoped to reap financial reward from disposition of its public lands,[152] passed along the notion of economic return to the new states or that the states themselves readily adopted it into their constitutions and statutes governing grant land management.[153] The same forces that drove western settlement generally—the need to put the land to use, to make it productive so that viable communities could be established — also shaped the policies that would guide management of the lands that the federal government ceded to the new states.[154]

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147. *See, e.g., Conventional Wisdom*, *supra* note 6.

148. *See supra* text accompanying notes 124-39.

149. *See infra* text accompanying notes 217-31.

150. *See supra* notes 108-09, 141.

151. *See supra* note 141. All western states but Utah, Arizona and New Mexico were admitted to the Union before 1891.

152. *See supra* text accompanying note 115.

153. See app., Table 3 for a summary of provisions of admission and enabling acts, and state constitutions dealing with grant lands. In one document or another all states adopt the principle of economic return as the guiding principle for grant land management.

154. *See* PEFFER, *supra* note 106, at 39, describing the attitude of westerners toward settlement of lands as follows:

> The West, meaning the consensus of western opinion, was insistent that the idea of the government from the very beginning had been to bring the public lands into cultivation and

Moreover, at the time the western states were admitted to the Union, the western lands and their resources were seemingly limitless; in a sense, they were. As late as 1929, after the last continental state had been admitted, after Gifford Pinchot and Theodore Roosevelt had established the vast federal forest reserves, after railroads and irrigation projects had been given their lands and after many millions of acres had been given over to homesteading, more than 400 million acres of undeveloped public lands still remained.[155] The debate was what to do with it.[156] The wisdom of the day was that "there was no need to save anything since there was such an abundance."[157] Economic exploitation of land and resources was the norm. Once the idea of economic exploitation of state grant lands was imbedded in state statutes, and particularly in state constitutions, the concept became difficult to change.[158]

A third, and related, reason state land management remains, for the most part, in a reservation period, is the western states' traditional antagonism toward what they view as "locking up" their land and resources.[159] A persistent theme of western history is the western states' opposition to the federal government's reservation of the West's valuable natural resources.[160] Land and resources in eastern states had been available for each state to use

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settlement as soon as the development of the country permitted. That principle had applied to the states west of the Alleghenies and east of the Great Plains. It should continue to apply to the West, until it, too, was settled in private ownership, under the taxing powers and general jurisdiction of the various state governments.

Id.

155. CHARLES E. WINTERS, 400 MILLION ACRES (1932); DANA & FAIRFAX, *supra* note 8, at 138-41.

156. CHARLES E. WINTERS, 400 MILLION ACRES (1932); DANA & FAIRFAX, *supra* note 8, at 138-41.

157. DICK, *supra* note 3, at x.

158. *See* Hans A. Linde, *Future Directions in State Constitutional Reform*, 67 OR. L. REV. 65 (1988), an astute observer of state constitutional law who remarked, "[c]onstitutional reformers face some formidable hurdles." *Id.* at 66. State reformers in New Mexico and Arizona recently felt the truthful sting of that remark when proposed constitutional amendments in each state to allow exchange of state grant lands with a broader group of land owners went down to sound defeat. Interview with M.J.(Jean) Hassell, *supra* note 49; telephone interview with Robert Langsencamp, *supra* note 29.

159. PEFFER, *supra* note 106, at 39; DANA & FAIRFAX, *supra* note 8, at 98-105. The so-called "Sagebrush Rebellion" of the 1970s and 1980s and the new "Wise Use" movement are a reflection of the West's continuing frustration at being what many consider shut out of having a meaningful voice in developing policy concerning resource management as well as being denied the very valuable economic benefits of development in their states. For thoughtful discussions of the issues presented by the Sagebrush Rebellion, *see* Richard M. Mollison & Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97 (1982); Johanna H. Wald & Elizabeth H. Temkin, *The Sagebrush Rebellion: The West Against Itself—Again*, 2 UCLA J. OF ENVTL. L. AND POL'Y 187 (1982).

160. *See, e.g.*, source cited *supra* note 58.

or develop as they saw fit; use and development in the West was not in the states' discretion.[161] Given the western states' belief that they have been denied benefits available to their sister states in the east, it probably is not remarkable that they hang on tenaciously to the notion that those lands within their control—primarily state grant lands—should be devoted to economic use and development.

Underlying these reasons for western states' historic approach to land management and hindering current opportunities for change is the importance of farming and ranching interests.[162] For decades, these interests have controlled most state-owned lands through leasing,[163] and the leased state lands are regarded by many lessees as "their property," barely distinguishable from their privately owned property.[164] Even though the land may be valuable for other purposes—wildlife habitat or recreation—state land managers are loath to use it for those purposes without the acquiescence of the lessee.[165]

Western history, with its myriad of resource development laws and policies, has played an integral role in shaping state land policy. Trust notions are embedded in this legal framework and attributed to such solid precepts. Nevertheless, other potent influences—the land ordinances, the powerful grip of decades-old agricultural practices, and the static nature of state land management—are very real and illustrate the difficulty state land managers have in meeting the objectives of sustainability, expanding recreational and other public opportunities, and improving the financial return to schools.

IV. CURRENT MANAGEMENT REALITIES: RECOGNIZING THE HURDLES

Compelling historical arguments can be made for maintaining the status quo in state land management, such as individual and community reliance on traditional state land leasing practices. Equally compelling reasons exist, however, for western states to re-evaluate state land management practices,

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161. DANA & FAIRFAX, *supra* note 8, at 105.

162. *See supra* text accompanying note 135.

163. A comparison of the figures in Tables 1 and 2 shows that those with agricultural or grazing interests lease approximately 85% of all state grant land in the West. See app., Tables 1 and 2.

164. *See, e.g.*, interviews with M. Jeff Hagener, *supra* note 57, Jay Adkins, Assistant Attorney General for Arizona Game and Fish, in Phoenix, Arizona (Apr. 26, 1991), Clint Beaver, Assistant Attorney General for Wyoming State Land and Farm Office, Cheyenne, Wyoming (Apr. 24, 1991).

165. State and wildlife departments and parks departments do not bid against grazing lessees. They lease state grant land only if there is no existing lease or the lessee agrees to sell his or her interest to the agency. *See generally* interviews beginning *supra* note 21. Although this undoubtedly makes practical and political sense, it is questionable whether it makes sense in terms of wise land and resource management.

particularly with regard to grant lands—and to work toward meeting the objectives set out above.[166] These objectives reflect present-day public values that have changed and become more diverse over the past hundred years. Additionally, views on land and natural resources use and management have changed. As a result of lessons from our nation's history, the focus is shifting from maximum utilization to sustainability of lands and resources. Finally, commercial opportunities for state lands have exploded in some areas of the West, allowing states to improve revenue production from these lands for the benefit of the schools.

The demographics of western states have changed dramatically since the end of World War II.[167] Not only have populations grown, but also the West is increasingly urban; with urbanization comes public demand for different uses of all types of public lands. State land managers consistently mention the effects of changing demographics as an important force for change in the way state lands are managed.[168] An Arizona assistant attorney general noted that 96% of Arizona's population now resides in cities and urban areas, and that reapportionment resulting from the latest census will "radically change the face of the legislature from rural to urban."[169] As population grows and western states urbanize, interest in non-consumptive uses of state lands also grows.

In addition, the science of western land management is vastly different today than it was one hundred years ago. We see the irreversible harm to land and riparian corridors caused by overgrazing, and better understand what needs to be done or avoided to sustain western land and water resources. Secondary impacts of traditional land use practices are better understood as well, which requires changes in practices to ensure sustainability of resource production and use.[170]

Finally, a rapidly growing market is developing for commercial land opportunities that promise lucrative returns for landowners throughout the West. As noted earlier, Wyoming received over $5.5 million in 1990 for the

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166. *See* GATES, *supra* note 7, at 772.

167. *See generally* HAYS, *supra note* 109.

168. Telephone interviews with Winston A. Wiggins, *supra* note 36, Gary Brittner, *supra* note 66, Richard G. Rayburn, *supra* note 21. *See also* interviews with James P. Domino, Outdoor Recreation Planner, Parks Division, Montana Department of Fish, Wildlife and Parks, Helena, Montana (Apr. 22, 1991), M. Jeff Hagener, *supra* note 57, Eugene P. Sturla, *supra* note 98. One Wyoming land manager, in contrast, stated there was little public interest in changing grant land management. Interview with Paul R. Cleary, *supra* note 29.

169. Interview with Jay Adkins, *supra* note 164.

170. *See generally* U.S. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970) (referring to the management of federal lands but offering lessons for state lands as well).

sale of 650 acres in Teton County, near Yellowstone National Park.[171] In 1991 and 1992, revenue from over a half million acres of commercially developed state lands throughout the West exceeded $24 million.[172] Arizona's commercial land-holdings in Tucson and Phoenix produced almost $8 million in 1992, and Washington's revenues from commercial properties more than doubled between 1986 and 1990.[173]

Given these cultural, scientific and market conditions in the West today, are states incorporating changes into their land management decisions? In some areas, particularly related to increased public recreational opportunities, the answer is yes. State legislatures are increasingly called upon to change priorities for state land management. "People who just want to go out and experience the out-of-doors [are] becoming a very prominent voice" in state land management.[174] This voice has changed long-established policies concerning public access to grant lands in Colorado and Montana.[175] It has also led to an unsuccessful attempt in the Idaho legislature to change management objectives for state grant lands.[176] With voter approval, California has sold bonds every four years since the 1950s in order to acquire state park lands, which include one-quarter of the state's coastline.[177] One-third of these park lands are in or near urban areas.[178] Even lightly populated New Mexico recognizes the need to acquire and develop park lands with the requirements of urban residents in mind. A legislatively mandated priority for New Mexico park managers is to "help meet recreation and open space demands of metropolitan area residents by emphasizing park or recreational areas within easy access of population centers."[179]

However, for many state lands in the West, real or perceived impediments prevent reaching beyond current policies and practices to respond to the changing conditions. One formidable obstacle is the narrow way in which states have viewed the obligation to maximize income from grant lands.[180] Another obstacle is old land classification and pricing standards that underval-

171. *See supra* text accompanying note 54; *see infra* text accompanying notes 297-326.

172. *See* WSLCA DIRECTORY, *supra* note 6.

173. *See* ARIZ. ANN. REP., *supra* note 49; WASH. ANN. REP., *supra* note 35.

174. Interview with Jay Adkins, *supra* note 164.

175. *See infra* text accompanying notes 330-34.

176. Telephone interview with Winston A. Wiggins, *supra* note 36.

177. Telephone interview with Richard G. Rayburn, *supra* note 21.

178. *Id.*

179. N.M. STAT. ANN. § 16-2-11(c)(2) (1987).

180. *See infra* text accompanying notes 185-205. State admission acts and constitutions often describe the obligation as a "trust." See app., Table 3. State land managers and courts have interpreted the obligation to impose a fiduciary responsibility to produce income from the lands. *See* authorities cited *supra* note 10.

ue economic opportunities for state lands.[181] Isolated ownership and poor inventories make it difficult for states to set goals in a comprehensive manner, and a lack of adequate funding may prevent the effective implementation of goals that are developed. Finally, because state land management is carried on by several different agencies with sometimes conflicting objectives, internal tension may hinder change that would lead to more effective management.

A. Grant Land Managers' Dilemma

Nowhere are obstacles to meeting modern demands and objectives more formidable than in the area of grant land management. One author, concisely explaining the unique status of grant lands, states that they are not "public lands in the common sense of collective ownership for common benefit. Whether the land management objectives be timber, grazing, minerals or agriculture, grant land management is a form of proprietary management for specific trust benefit."[182] To accommodate other legitimate public objectives such as environmental regulation, preservation of habitat, outdoor recreation, and related "intangible amenities," the trust must be compensated.[183] "In effect, the state must pay itself to transfer resource benefits from trusts to the public."[184] This unique status poses a serious obstacle to achieving the objective of diversifying public use of grant lands and does not always foster sustaining the resources the lands offer. Ironically, it also is not producing significant revenues for schools. Some of the causes of these failures are described in the next sections.

1. The Sacred Trust

More than 70 million acres of land in the West were granted to the states upon admission to the union.[185] The enabling or admission acts and the constitutions of the states expressly or impliedly required that these lands be

181. *See infra* text accompanying notes 206-11.

182. Thomas R. Waggener, *Public Lands, State Lands — Whose Lands? State Forestry on State Lands*, 16 WESTERN WILDLANDS 24, 29 (Fall 1990). The author served as staff economist and policy analyst for the Public Land Law Review Commission, whose report is cited *supra* note 170.

183. Thomas R. Waggener, *Public Lands, State Lands — Whose Lands? State Forestry on State Lands*, 16 WESTERN WILDLANDS 24, 25-26 (Fall 1990). *See also* interview with Paul R. Cleary and telephone interview with Robert Langsencamp, both *supra* note 29; response to questionnaire from Nixon Handy, Executive Assistant, Washington Commissioner of Public Lands (Feb. 26, 1991); and authorities cited *supra* note 10.

184. Waggener, *supra* note 182, at 27. Not all scholars agree with this view. *See, e.g.*, *Conventional Wisdom*, *supra* note 6, at 906-07.

185. PUBLIC LAND LAW REVIEW COMMISSION REPORT (1970), *supra* note 170, at 244.

managed to produce revenue for the states' public schools.[186] One Idaho study describes this experiment as a "sacred trust."[187] An Oregon attorney general opinion describes it as "a solemn agreement."[188]

To even suggest that these grant lands might be managed for other purposes and values than the immediate production of income led one state attorney to respond that it would be "thumbing our noses at constitutional law" to do so.[189] Another commented that the state had "no alternative" but to use the school lands exclusively to produce income.[190] In Oregon—a state with relatively permissive language in its Admission Act and constitution—a 1992 attorney general opinion firmly rejected any notion that the law allows use of grant lands for any purpose inconsistent with producing revenues for public schools.[191] Similarly, in Utah, following the appointment of a legislative task force to consider managing trust lands for a broader range of public purposes, the state legislature in 1992 actually strengthened the traditional goal of maximizing revenue production. It adopted an amendment to state land management laws expressly subordinating an existing, more flexible management directive that allowed consideration of different types of use to "standard trust administration principles."[192]

Although grant land managers clearly understand their management mandate and conscientiously manage the lands to achieve the required result, grant lands contribute an insignificant percentage of the state school budget.[193] Only in New Mexico and Wyoming —both lightly populated, mineral rich states—do the lands produce more than ten percent of the state school budget.[194] Doctoral candidates, who have studied state school lands, have lamented for decades the inability of the lands to produce adequate income for public schools:

> During the early years, it was the hope of many that income from school lands would totally support the cost of public schools. This has

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186. See app., Table 3.

187. J. O'LAUGHLIN, IDAHO'S ENDOWMENT LANDS: A MATTER OF SACRED TRUST REPORT NO. 1, IDAHO FOREST, WILDLIFE AND RANGE POLICY ANALYSIS GROUP (1990) [hereinafter IDAHO'S ENDOWMENT LANDS].

188. 46 Op. Oregon Att'y Gen. 8223 (July 24, 1992) [hereinafter Oregon AG Opinion].

189. Interview with Clint Beaver, *supra* note 164.

190. Interview with David Steinhoff, *supra* note 26.

191. Oregon AG Opinion, *supra* note 188.

192. UTAH CODE ANN. § 65A-2-1 (Supp. 1992). Prior to this amendment, the multiple-use directive, which allowed land managers to consider different uses, was to be carried out "consistent with trust responsibilities."

193. See app., Table 1.

194. *Id.*

> been proved to be a vain hope but the land grants played a significant role in the development and growth of public education in the United States.[195]
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> * * *
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> There was a vain and unfulfilled hope by some in the early days of our country that revenues generated by school lands would be sufficient to totally support schools. This would not have been the case, even though the lands and investments had been perfectly managed. What the land grants did accomplish, however, was to relieve the tax burden of the citizens who had to support the schools. In addition, the grants generated state interest in the schools.[196]
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> * * *
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> From the beginning, it was realized that the schools would need money to operate. Paradoxically, the lands which were granted for this purpose supplied little income in the early years, and in reality, these lands have never yielded great sums to the total cost of public education in Arizona.[197]

A recent doctoral candidate even questioned whether western state land management practices are effective in maximizing returns to beneficiaries.[198]

In no instance is income from the school lands generating more than 13% of the total state school budget, and in most instances it is generating much less.[199] The inability of grant lands to produce significant revenue for school support is made more frustrating by the fact that many grant lands offer opportunities beyond the simple production of income for schools. Additionally, management for income production, in some situations, can have irreversible effects on the resources the lands provide—resources a prudent trustee might conserve for future income management potential.[200] Given

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195. Henderson, *supra* note 136, at 18.

196. James E. Pingrey, An Analysis of the Growth and Administration of the Wyoming Common School Permanent Fund (1977) (unpublished Ed.D. dissertation, University of Wyoming).

197. Frank H. Gladen, Jr., An Historical Survey of Public Land and Public Education in the State of Arizona from 1863 to 1960, at 268 (1962) (unpublished Ed.D. dissertation, University of Arizona, College of Education). *See also* Harmer, *supra* note 10.

198. Jon Souder, Economic Strategies for the Management of School and Institutional Trust Lands: A Comparative Study of Ten Western States (1990) (unpublished doctoral dissertation, University of California at Berkeley, Graduate Division, Wildland Resource Science).

199. See app., Table 1 which shows that revenues from state lands comprise from one to thirteen percent of the state school budget. Colorado, for example, receives about $25 million annually from state lands, which amounts to about 2.8% allocated to the annual education budget. Of this amount, 60% is generated from mineral operations, including coal, oil and gas, and sand and gravel. The balance comes from grazing, crop production, and other surface leases. *Id.*

200. *See Conventional Wisdom*, *supra* note 6, at 900-08. The following description of one par-

the demand generated by changed demographics, western states may soon be forced to follow the suggestion of one author who argues that school grant land managers have more flexibility than they exercise.[201]

Alternatively, states could amend their admission acts and constitutions to allow more flexibility in managing grant lands. In addition to Utah's efforts to amend state law,[202] three western states recently considered proposals to change, or sought changes to their constitutions to gain more flexibility in state grant land management. Arizona and New Mexico—states whose constitutions restrict or prohibit exchange of grant lands—attempted remedial constitutional amendments in the late 1980s, and both states were defeated in this effort. Land commissioners in both states attributed the defeat to a myriad of ballot measures on the ballot at the same time, and a general public sentiment to vote against ballot measures.[203] Idaho considered adopting a more flexible

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ticular parcel of state grant land in Utah illustrates the tension existing between the real or perceived requirement to produce immediate income for school support and the opportunity for advancing other objectives, while at the same time holding the grant lands for future income production (e.g. tourism or recreational concessions):

> Lower Mule Canyon lies about 20 miles west of Blanding, in San Juan County [Utah]. The Canyon is not subtle or gradual in its beginnings. A gentle slickrock wash leads you to a stunning site: the canyon emerges from what appears to be a cave hollowed out in the sandstone below your feet. It is a seep, a perennial spring from which water pours first into a clear pool some 40 feet across and then dives spectacularly 500 feet to the canyon floor. The well-known site is known as "Cave Canyon Tower Ruins." Seven rock towers are located along the perimeter of the basin, overlooking the pool. These round towers are believed to have been constructed by the Anasazi Indians well over a thousand years ago. Whether their purpose was to guard this spectacular water source, to mark some spiritual site, or for some purpose as yet undetermined, they stand as a unique archeological treasure.
>
> The Cave Canyon Tower Ruins lie on a school trust section that carries with it the legal baggage imposed by Utah's enabling act to maximize economic return. The state of Utah has for many years leased this ground to a local San Juan County rancher for livestock grazing (arguably a use that will never reap great monetary benefits for the state). In 1979 the lessee, evidently dissatisfied with the condition of grass, resolved to improve his range. With the assistance of the state he chained the entire section, without regard for the archaeology. The damage was staggering. For the sake of a dozen or so cows this "rancher land steward" managed to destroy countless archaeological sites, adding injury to insult of cow trails and dung already liberally spread across the landscape.

Id.

The Utah State Archaeologist estimated that $400,000 would be required to mitigate damage to the area. Many of the sites were lost forever. Despite this finding, the Utah Division of State Lands continued to ignore the archaeological resources on the grounds that these sites produced no income for the trust. *Utah's Blue Rash*, *supra* note 23, at 4-5. Although tension between the requirement to produce immediate income from grant lands and the opportunity to advance other objectives that may suffer by doing so is not often as dramatic as in the Utah example, similar tension exists on grant lands in every western state. *See, e.g.*, Arum, Bassett, and Beaver *supra* note 10; Albert W. Stone, *Legal Background on Recreational Use of Montana Waters*, 32 MONT. L. REV. 1 (1971).

201. *See Conventional Wisdom*, *supra* note 6, at 908; *see also* Oregon AG Opinion, *supra* note 188.

202. *See supra* text accompanying note 192.

203. Interview with M. J. (Jean) Hassell, *supra* note 49; telephone interview with Robert

standard for state land management, but abandoned the idea when a state commissioned report recommended against such a change.[204] Ohio, in 1968, was successful in getting Congress to allow the state to use the proceeds from grant land sales for any purpose the state determines is proper.[205]

2. Failure to Obtain Market Value for Grant Land Uses

While states are holding onto the notion of the sacred trust, valuable lands are being leased at far below market value because of enduring classifications and standards that no longer apply. An example of this is Oregon's leasing of certain submerged lands for residential and recreational use—particularly the leasing of submerged state land in connection with the Hayden Island development on the Columbia River. Submerged lands along the shoreline of Oregon's navigable waters were historically leased to timber companies as log raft sites at about $250 an acre annually.[206] Now adjacent to a posh residential development on the uplands, the shoreline of Hayden Island in the Columbia River is lined with houseboat and mooring sites, most leased to one of 350 upland residents.[207] The homesites and marina are inextricably linked. Hillman Properties leases the marina sites on submerged lands for about $15,000 per year.[208] With 350 homesites, revenues from the combined marina and homesite development gross about $2.5 million annually.[209] Yet the state leases the submerged lands along the shoreline to Hillman Properties for only $480 an acre annually.[210] This is an increase over the historical price of $250 an acre, but it hardly approaches market value. Recently, the entire Hayden Island development, including the company's interests in state land leases, was sold by Hillman Properties for $23 million.[211]

3. Scattered Holdings

Dispersed lands may be desirable for some state land managers,[212] but for grant land managers in general, the prevailing ownership pattern of two

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Langsencamp, *supra* note 29.

204. Telephone interview with Winston A. Wiggins, *supra* note 36; IDAHO'S ENDOWMENT LANDS, *supra* note 187.

205. Pub. L. No. 90-304, 82 Stat. 120 (1968).

206. Telephone conversation with Jerry Hedrick, Waterway Administrator, Oregon Division of State Lands (June 9, 1993).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See infra* text accompanying notes 232-34.

sections of land to a township presents a management problem. Most commonly, scattered state sections are surrounded by U.S. Forest Service or Bureau of Land Management lands which are managed for different and not always compatible purposes.[213] On some lands, the state owns only the mineral or surface estate and the federal government owns the balance. Not only do these types of ownership patterns reduce the amount of income state land managers can expect from the lands, but they also make active management very difficult. Most grant land agencies do not have enough staff or administrative budget to effectively monitor the amount of land for which the agencies are responsible. As a result, most grant land managers express a desire to consolidate lands.

Consolidation programs focus mainly on state/federal exchanges and have met with varying degrees of success. Washington and Oregon have accomplished quite a bit in consolidating state timber lands, and Arizona has completed some consolidation of grazing lands.[214] Exchanges of state lands which are land-locked within national parks, monuments and recreation areas have been more difficult to achieve.[215]

Until non-mineral grant lands can be consolidated, it is unlikely that the objectives of increased revenues or sustainability can be met. Lack of consolidation leaves the state with little choice but to continue to lease the lands for grazing. Lack of consolidation also interferes with increased public use either because of lessee opposition or lack of public easements to reach the lands.

B. Other State Land Management Obstacles

The difficulties described above are peculiar to grant lands. However, western states manage millions of acres of non-grant lands.[216] The following

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213. *See, e.g.*, discussion *infra* accompanying notes 259-74. Problems also confront state and federal land managers where there are private inholdings surrounded by public lands. *See* FRANK GREGG, FEDERAL LAND TRANSFERS: THE CASE FOR A WESTWIDE PROGRAM BASED ON THE FEDERAL LAND POLICY AND MANAGEMENT ACT, AN ISSUE REPORT FOR THE CONSERVATION FOUNDATION, Washington, D.C., at 16 (1982). Gregg observes that these private inholders have "leverage over the use of surrounding lands . . . otherwise attractive and available for public outdoor and recreational use . . . " *Id.*

214. Interview with M.J. (Jean) Hassell, *supra* note 49; responses to questionnaire from Pam Wiley, *supra* note 40, and Nixon Handy, *supra* note 183.

215. *See infra* text accompanying notes 256-74. *See also* Donald E. Lindemann, Stewardship of State Lands in the Western United States: A Comparative Analysis (1987) (unpublished masters thesis, Colorado State University). Lindemann, in his comprehensive study of state land management, cautions that federal/state land exchange programs are frequently complex and not always mutually beneficial due to differences regarding, among other things, policies on hardrock mining, application of multiple-use directives, state requirements on payment in lieu of taxes to local governments (federal agencies pay, state agencies do not), and levels of management activity. *Id.* at 88.

216. See app., Table 1.

issues, which may also challenge federal and local public land managers, confront both grant and non-grant managers of state-owned lands.

1. Lack of Inventories

Many states have no complete inventory of their land-holdings. State lands are often titled in the name of one of several state agencies such as the fish and wildlife agency, or the parks and recreation agency, with no comprehensive inventory or state-wide, multi-agency geographic information system.[217] Most inventories that are done are completed by the managing agency, with little or no coordination with other state land-owning agencies. These managing agencies frequently rely on Bureau of Land Management maps to delineate boundaries.[218] In discussing the utility of an integrated inventory and planning mechanism for all state lands, one manager said such an inventory would be an "extraordinary asset."[219] He went on to add, however, that it is unlikely that such a system would be implemented in his state due to a lack of "tools, will and funding."[220]

Two "tools" missing in most states are reliable inventories of the land owned by individual agencies and an effective geographic information system.[221] With respect to inventories, one candid land manager commented that, when his agency began a recent inventory effort, he was surprised to learn that the extent and location of agency land-holdings was not known.[222] His agency is not alone in lacking reliable information about land-holdings. New Mexico, for example, has no inventory of the non-mineral potential of its grant lands,[223] and no systematic inventory or mapping of its wildlife values.[224] Idaho only inventories its grant lands

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217. *See* TERESA RICE, DISCUSSION PAPER: STATE AND LOCAL PUBLIC LANDS, WESTERN LANDS REPORT NO. 6, NATURAL RESOURCES LAW CENTER, UNIVERSITY OF COLORADO SCHOOL OF LAW 9 (1993). Geographic Information System (GIS) is a term used to describe a mapping process in which different geographic features, such as water and mineral formations, are compared through spatial relationships.

218. For example, Montana and Wyoming do not have their own mapping systems. Rather, they rely on Bureau of Land Management or U.S. Forest Service maps showing land ownerships. Response to questionnaire from Paul R. Cleary, *supra* note 26; interview with Winston A. Wiggins, *supra* note 36.

219. Interview with James P. Domino, *supra* note 168.

220. *Id.*

221. *See supra* note 218.

222. Conversation with Gary Gustafson, Director, Oregon State Land Division, in Salem, Oregon (May 1993). The Oregon State Land Division is currently conducting a comprehensive inventory of all lands. The Oregon Department of Forestry is conducting an inventory of, and developing a plan for, grant forest lands on behalf of the Oregon State Land Board. This planning process is intended to develop a variety of uses on these forest lands, historically used only for timber production.

223. Interview with Robert Langsencamp, *supra* note 29.

224. Response to questionnaire from Bill Montoya, Director, New Mexico Department of Fish

every ten years.[225] Montana inventories its grant lands once during a lease term, but then only to classify the acreage as grazing, agricultural or "special use."[226] For the most part, the inventories that exist only consider the present use of the land, or, in the case of grant lands, revenue producing uses. Most western states are only now beginning to develop a GIS. No state has a fully integrated GIS for all land managing agencies, although Oregon and Arizona have rudimentary integration among agencies.[227] Under what seems to be the common model, each land managing agency develops its own GIS, often resulting in incompatible systems between state agencies.[228] Some state land management agencies have developed no GIS system.[229] For example, Idaho's Department of State Lands had funding to acquire GIS hardware and software, but no funding for personnel to develop the system.[230]

Since the majority of state-owned lands are grant lands managed to produce revenue, more attention to land inventory is warranted. The reason for the lack of attention to this issue may lie in the fact that the vast majority of these lands are scattered grazing lands. Nevertheless, with increasing public interest in how public lands of all types are managed, the time has arrived for state land management agencies to begin a structured, comprehensive inventory of their lands. As one critic of federal land management commented, it is time for land managers to stop "muddling through" and begin developing a new framework for management.[231] Comprehensive inventories of all state land-holdings would

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and Game (Mar. 6, 1991).

225. Response to questionnaire from Winston A. Wiggins, *supra* note 26.

226. Response to questionnaire from M. Jeff Hagener, Administrator, Lands Administration Division, Montana Department of State Lands (Mar. 25, 1991).

227. In Arizona, the State Lands Division does GIS work for other agencies on a contract basis, and when its staff has the time. Interviews with M.J. (Jean) Hassell, *supra* note 49, and Gary Irish, Project Manager, Resources Information System, Arizona State Lands Division, in Phoenix, Arizona (Apr. 29, 1991). The State Department of Energy is responsible for GIS services in Oregon. Response to questionnaire from Pam Wiley, *supra* note 40.

228. Interview with Gary Irish, *supra* note 227.

229. Telephone interview with Winston A. Wiggins, *supra* note 36 and response to questionnaire from Paul R. Cleary, *supra* note 26 (grant lands); response to questionnaires from James P. Domino, Outdoor Recreation Planner, Parks Division, Montana Department of Fish, Wildlife and Parks (Apr. 1, 1991), David Talbot, Administrator, Oregon Department of Parks and Recreation (Feb. 1991) and John T. Keck, *supra* note 87 (park lands); interview with Eugene P. Sturla, *supra* note 98; response to questionnaire from Bill Montoya, *supra* note 224 (wildlife lands). Arizona will use some of the funds it receives from the recently adopted Heritage Fund to put all its land and water rights on the State Lands GIS. Interviews with Sally Lanier, GIS Coordinator, Habitat Branch, Arizona Fish and Game Department, in Phoenix, Arizona (Apr. 29, 1991), and Eugene P. Sturla, *supra* note 98.

230. Telephone interview with Winston A. Wiggins, *supra* note 36.

231. Ryan L. Dudley, *A Framework for Natural Resources Management*, 30 NAT. RESOURCES

provide managers with the framework needed to meet modern demands and objectives.

3. Lack of Funding: Park, Recreation and Fish and Wildlife Lands

Statutory mandates for park and recreation and fish and wildlife managers are relatively clear and unambiguous. Provisions governing acquisition of these lands facilitate the management objectives by assuring that only those lands suitable for the mandated management purposes may be acquired. New Mexico's statute governing park and recreation land acquisition and management is an example of one which sets out very detailed standards governing what types of lands may be acquired and how they must be managed.[232] Idaho's statute governing acquisition of fish and game lands and Oregon's statute governing acquisition of park lands are more representative in that they concisely define specific purposes for which such lands may be acquired.[233]

Park lands and fish and wildlife lands are purposely scattered across the western states to take advantage of the unique characteristics which support the purposes for which the lands are acquired and managed.[234] Though most states have one or two large parks or wildlife areas, most of the lands managed for these purposes are in small parcels.[235]

J. 107, 108 (1990).

232. N.M. STAT. ANN. § 16-2-11 (1987) (park lands).

233. IDAHO CODE § 36-104(7) (Supp. 1993) (fish and game lands); OREGON REV. STAT. § 390.121(1) (1991) (park lands).

234. Responses to questionnaires from John T. Keck, *supra* note 87, Richard A. Costello, Land, Recreation and Facilities Manager, Washington Department of Fisheries (Feb. 27, 1991) (on file with authors), James P. Domino, *supra* note 229, Bill Montoya, *supra* note 224, W.A. Dokken, Chief of Operations, Idaho Department of Parks and Recreation (Mar. 6, 1991), Chuck GrandPre, Wildlife Program Specialist, Colorado Division of Wildlife (Feb. 26, 1991), Richard G. Rayburn, *supra* note 90, James E. Burton, Development Branch Supervisor, Arizona Game and Fish Department (Apr. 4, 1991), and David Talbot, *supra* note 229. The final report of Colorado's Great Outdoors Colorado! Citizens' Committee shows the practical and public service purpose for scattering small parcels of park lands across a state. Studies reported by the committee show that 70% of Colorado's 2.3 million people visit a state park at least once a year. *See* GO COLORADO REPORT, *supra* note 99, at 6. A nationwide U.S. Forest Service survey quoted in the report shows that 75% of all outdoor recreation hours in the United States are spent in state and local parks located close to the home of the visitor. *Id.* at 20.

235. *See, e.g.*, response to questionnaire from John T. Keck, *supra* note 87. Boysen State Park in Wyoming contains 39,545 acres, but most state parks in Wyoming are small parcels, some of which are less than an acre. *See also*, MONTANA'S LEGACY, *supra* note 69, at 11-14. Montana has 60 state parks, half of which are less than 100 acres and most of those are under 50 acres. Similarly, Idaho's fish and game lands are located on 411 parcels, 71% of which are under 150 acres and more than 50% of which are under 50 acres. IDAHO DEPARTMENT OF FISH AND GAME'S LAND ACQUISITIONS AND MANAGEMENT PROGRAM REPORT NO. 3, IDAHO FOREST, WILDLIFE AND RANGE POLICY ANALYSIS GROUP 24, Table IV (1990).

Given the clear legislative directive to managers of these types of lands, it is not surprising that managers surveyed expressed satisfaction that the lands they managed were particularly well suited to the management purpose. Management problems described by these managers did not concern the suitability of lands for the management purpose—they focused instead on funding. Maintaining the integrity of the lands has been difficult because of the lack of funds for maintenance or active management.

Lack of funding has its most serious impact on facility maintenance, although it also has an effect on a manager's ability to enforce rules and regulations.[236] Park land managers frequently describe their lands and facilities as literally "falling apart."[237] Lack of funding has led to park closures in both California and Arizona.[238] Closures in Arizona ironically came just as the state park system received new funding.[239]

Most states rely on user fees to support acquisition and management of park and fish and wildlife lands.[240] It is difficult to assess how much these fees can be increased without pricing some users out of the market or reducing the number of people who use these lands and facilities. The major problem confronting these state land managers is how to assure continued widespread public use of these lands while at the same time generating additional income to pay for the lands' maintenance. Innovative funding mechanisms for support of these lands may provide at least a partial solution.[241]

4. Sibling Rivalry

Each western state owns considerable acreage. However, each state's ownership and management of state-owned lands is divided among several

236. Interview with John T. Keck, *supra* note 103 and response to questionnaire from Richard Evans, Operations Coordinator, Arizona State Parks Department (Mar. 9, 1991).

237. Interviews with John T. Keck, *supra* note 103, James P. Domino, *supra* note 168, and Phyllis Hughes, *supra* note 64.

238. Telephone interview with Richard G. Rayburn, *supra* note 21 and interview with Phyllis Hughes, *supra* note 64.

239. The new funding, called the Heritage Fund, is discussed *infra* at text accompanying notes 335-42.

240. User fees might include the cost of a hunting or fishing license, or a general access fee for individual or group licenses or permits, like the $3 per person per day authorized by the New Mexico Public Lands Commission for activities on state lands other than hunting and fishing. *See generally* MULTIPLE USE OF COLORADO STATE TRUST LANDS, PUBLIC ACCESS ALTERNATIVES, A REPORT TO THE STATE BOARD OF LAND COMMISSIONERS, COLORADO DEPARTMENT OF NATURAL RESOURCES 3-4 (Oct. 30, 1991) [hereinafter COLORADO ACCESS REPORT].

241. *See infra* text accompanying notes 335-42.

agencies and commissions.[242] Moreover, each managing agency or commission has a different statutory or constitutional mandate for managing its lands and these mandates may conflict.

The difference in management mandates often leads to tension between state land managers. The director of Idaho's State Land Department summed up the problem: "[a]t times . . . the department's mandate to manage for financial return conflicts with the objectives of other agencies or organizations who prefer a different result."[243] He cited, as an example, the difficulty in developing a recreation community at Priest Lake because other agencies and interests want to maintain the lake in a pristine condition.[244] An Idaho state wildlife manager observed that his department would like to bid against recreation leases of grant lands in order to open the lands for wildlife and public recreation use. His department has not pushed this idea because it "has enough problems" with the Department of State Lands without adding this additional conflict.[245] In Arizona, grant land lessees often use their leases to block access to other state and federal public lands, creating essentially private hunting, fishing and recreation preserves.[246] In Wyoming, state park managers were disappointed in the sale and development of grant lands near Jackson Hole because of the loss of public recreational opportunities on the land. The state park agency simply did not have the funds to pay market value for the property.[247] Some western state parks and recreation and fish and wildlife managers express frustration at their inability to use or manage grant lands for non-economic values without paying for the privilege.[248]

The boom in commercial recreational development is a good example of how conflict may arise between grant land and other state land managers.[249] While potentially creating a fiscal bonanza for grant land managers, development potential often presents problems for non-grant land managers.[250] For example, marshlands valuable for waterfowl habitat

242. See app., Table 1. Agencies in many states do not own fee title to lands they manage. Rather, lands are leased to them for specific purposes or the agency may have a contract or agreement with another state or federal agency to manage lands for a particular purpose. Interviews and responses to questionnaires, *supra* notes 234-35.

243. Telephone interview with Winston A. Wiggins, *supra* note 36.

244. *Id.*

245. Telephone interview with Tom Parker, Wildlife Land Manager, Idaho Department of Fish and Game (May 7, 1991).

246. Interview with Jay Adkins, *supra* note 164.

247. Interview with Paul R. Cleary, *supra* note 29.

248. Interviews with John T. Keck, *supra* note 103 and James P Domino, *supra* note 168.

249. *See infra* text accompanying notes 251-52.

250. *Id.*

management, at one time appraised as nearly valueless swampland, are now appraised at recreational market value because of the interest in the lands for private hunting reserves.[251] The Idaho Department of Parks and Recreation is concerned because of the impact such a change will have on existing non-commercial recreational uses:

> Idaho has received very high demand for quality recreation land by land developers. The lure of the mountains is being spread to the heavy populous states around the country by the land developers that hope to make 'a killing' in land development. This could have an adverse effect on the quality of life and specifically the recreation opportunity that presently exists in the state of Idaho.
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> * * *
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> Because of this, many of the areas that have been used for recreation have been or are being lost. New ones will have to be set aside in order to meet the future desires of residents and visitors. It is also necessary to protect existing and new areas for interpretation, illustration, and educational purposes those (sic) natural, historical, cultural and scientific values of these areas to avoid their being lost as recreational resources.[252]

Also, interagency tension exists between park and fish and wildlife agencies. Fish and game managers often perceive that sportsmen pay for everyone.[253] This perception stems from the fact that recreational use of fish and wildlife lands and "watchable wildlife" programs (e.g. short hikes to view wildlife) have increased enormously over the past decade.[254] These uses and programs are free to the public; it is the revenue produced from hunting and fishing licenses that continues to fund acquisition and maintenance of the fish and wildlife lands and non-game programs.[255]

These barriers create roadblocks to change. Land managers confront a difficult or slow process in responding to current public demands, improving resource management practices, and capitalizing on sound com-

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251. Telephone interview with Tom Parker, *supra* note 245.

252. PROCEDURE TO IDENTIFY AND EVALUATE AREAS OF OUTSTANDING NATURAL, SCIENTIFIC, CULTURAL, HISTORIC OR RECREATION VALUE IN IDAHO STAFF REPORT TO THE IDAHO DEPARTMENT OF PARKS AND RECREATION, RESOURCE DEVELOPMENT DIVISION 2 (undated) (on file with authors).

253. Interviews with Jay Adkins, *supra* note 164, and James P. Domino, *supra* note 168; *see also* HAYS, *supra* note 109, at 111-15.

254. Interviews with Jay Adkins, *supra* note 164, Eugene P. Sturla, *supra* note 98, and James P. Domino, *supra* note 168; *see also* HAYS, *supra* note 109, at 111.

255. Interviews with Jay Adkins, *supra* note 164, Eugene P. Sturla, *supra* note 98, and James P. Domino, *supra* note 168; *see also* HAYS, *supra* note 109, at 111.

mercial opportunities. The challenge for managers is to identify mechanisms for transcending these barriers. The following section describes some non-conventional approaches emerging in some western states.

V. TRENDS: BLUEPRINTS FOR MANAGING THE BLUE RASH

Improving state land management need not entail a complete revamping of existing practices. Many existing land management practices can and will continue. However, modifications will be necessary for long-term sustainability of the resources, to allow compatible uses of the resources or, in the case of grant lands, to improve the financial return to the trust.

Rather than devising policy that is the brainchild of a crisis situation, some states are beginning to plan, design and implement modified and innovative approaches to state land management that help meet modern demands and objectives. In general, the trends described here embrace a greater level of state regulation and control over a wider range of uses of state lands. Positive movement towards the objectives outlined above—sustainability, expanding public opportunities and improving economic returns—is evident in many of these strategies. More specifically, consolidation and exchange efforts should lead to more efficient management. Efficiency both reduces state management costs and increases opportunities for economic and other uses. Trends in resource marketing—new methods of selling commodities from state lands—and commercial development by the states has already improved economic returns for some states. They also give land managers more direct control over disposition of the resource. Trends such as stewardship incentive programs—allowing a lessee to receive a benefit for improved management practices—will place state lands on a track toward more sustainable management. Finally, state efforts to undertake inventories of their land-holdings and, in some cases, establish a hierarchy of uses based on economic and inherent land values, works towards achieving more than one objective. Lands holding the best potential for recreational and other public use, thus expanding public uses, will be distinguished. Lands whose best use is economic development, thus improving economic returns, will also be identified.

While the following examples are not exhaustive and may not address all modern management objectives, they do serve as indicators that some state legislators and land managers are beginning to critically examine and modify historical laws, policies and practices that may no longer serve the best interests of the state, its citizens and its natural resources.

A. Getting a Better Handle on the Holdings: Inventory, Consolidation and Exchange

As discussed above, badly fragmented ownership patterns reduce income that can be realized from state lands and increases management costs and problems. As a result, some states have made efforts to consolidate state lands in a manner that results in larger adjacent blocks of state-owned lands.[256] In many places throughout the West, state lands are surrounded by federally-owned lands, making purchase of these lands impossible.[257] Even where the surrounding lands are in private ownership, budgetary constraints may prevent the outright purchase of surrounding lands. Land exchanges offer a tool to accomplish consolidation where federal lands are involved and without the need for special funding. Federal exchanges, where successful, benefit the federal government by consolidating their land-holdings. Private exchanges benefit the private landowner, by providing the owner with a comparable parcel of land.

Nevertheless, state land exchanges, particularly with the federal government, are not a simple task. A problem for many western states is federal intransigence in helping state grant land managers convert their fragmented holdings into consolidated parcels by the exchange of state and federal lands. The exchange process is often lengthy and uncertain, captured by one federal land manager recently in the phrase "it ain't over till its over."[258]

Nowhere is this inflexibility caused by scattered holdings felt more acutely than in Utah, where virtually no state grant lands have been consolidated and where significant portions of state grant lands are locked inside national parks, monuments and wilderness areas.[259] Beginning in 1981, Utah undertook a four year planning process not only to release those state lands within federal parks, but also to consolidate its checkerboard holdings into manageable and more productive parcels.[260] The process, termed "Project Bold," proposed federal legislation to facilitate federal exchanges to consolidate the state's 2.5 million grant land acres,

256. These states include Utah, Washington, Oregon and Arizona. *See supra* text accompanying notes 214-15, and *infra* text accompanying notes 260-74.

257. *See supra* text accompanying notes 212-13.

258. Bureau of Land Management Director Jim Baca, referring to the Utah Land Exchange, at meeting in Boulder, Colorado, Sept. 19, 1993.

259. *See* Harmer, *supra* note 10. More than 16,000 acres of Utah Grant Lands are located within national park service lands and Indian reservations. *Id.* at 455.

260. UTAH DEPARTMENT OF NATURAL RESOURCES, PROJECT BOLD: A PROPOSAL FOR UTAH LAND CONSOLIDATION AND EXCHANGE (1985) [hereinafter PROJECT BOLD].

located in 5,000 sections scattered throughout the state, into 47 large land blocks.[261] Under Project Bold, the state undertook an inventory of lands proposed for exchange and developed a method for valuing the mineral and surface interests.[262] The state also designed methods to protect grazing, mineral and water rights, as well as a plan for sharing revenues from lands exchanged between the federal and state governments and dealing with payments in lieu of taxes to counties.[263]

Despite careful planning, Project Bold was never implemented. No official statement has articulated a reason for the project's demise, but commentators on the plan have suggested a few.[264] The failure is attributed in part to the complexity of the plan's valuation process and to the fact that exchanges were not implemented through wholly legislative action.[265] A Utah state land manager cites the "fragile coalition" of state support combined with federal distrust of Utah's ability to protect non-economic values as the primary reason for the plan's failure.[266] Lack of state support is attributed to a perception, shared by many in Utah, that state lands are "islands of sanctuary" in a sea of federal lands.[267]

The aftermath of Project Bold was a creative state proposal that was not popular with either the federal government or Utah's citizenry. In 1989, the Utah Board of State Lands and Forestry proposed to sell or otherwise market its inholdings in national parks and monuments unless the federal government agreed to exchange certain valuable recreation

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261. *Id.* For an excellent historical review of PROJECT BOLD, *see* Scott M. Matheson & Ralph E. Becker, Jr., *Improving Public Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, 33 ROCKY MTN. MIN. L. INST. § 4.03[1] (1988).

262. PROJECT BOLD, *supra* note 260, at 145-56.

263. *Id.* at 79-91, 96-125, and 131-39. Revenue sharing methods had to be developed because the Federal Mineral Leasing Act returns 50% of mineral leasing revenues to the state and identifies priorities for use of the moneys. 30 U.S.C. § 191 (1988). The Act also specifies distribution for moneys going to the federal government. Some mechanism had to be developed in the exchange plan to address these requirements. Similarly, the plan had to address the effect of the proposed exchange on county lands, because under the Payments in Lieu of Taxes Act, 31 U.S.C. § 6901-07 (1983 & Supp. 1993) (the federal government compensates counties for property taxes the county would receive if the federally owned lands were in private ownership).

264. *See, e.g.*, Matheson & Becker, *supra* note 261.

265. *Id.* at 4-41 to 4-42.

266. Telephone interview with Carl Kappe, *supra* note 26.

267. *Id.* Federal lands comprise more than two-thirds of Utah's acreage. See app., Table 1.

An unstated, but undoubtedly important, additional factor in the plan's failure is the effect it would have on the well-entrenched interests of grazing leases. *See supra* text accompanying notes 124-39. It would not be in the interests of these lessees to have state lands consolidated and thereby possibly removed from their exclusive use. *See also* GREGG, *supra* note 213. Gregg describes the problems unconsolidated rangelands pose for state and federal managers. Private landowners may control large areas by having a small inholding located in an otherwise publicly owned area. *Id.* at 16.

lands on Lake Powell.[268] If the public had misgivings about Project Bold, it had even less enthusiasm for the state's land marketing proposal. "[p]ublic reaction to this proposal was immediate and overwhelmingly negative, and the proposal has since been informally withdrawn."[269] This opposition undoubtedly reflects a modern interest in public access and use of state lands—an interest that would be severely affected by sale of state lands to private parties.

Undeterred by prior failures, Utah continued its effort to increase revenues to public schools by resolving its problem of scattered holdings. In 1993, Congress passed a $200 million land exchange bill that will give Utah mineral revenues from: (1) coal rights (not yet under lease) in national forests and BLM lands; (2) coal rights and royalties from existing leases in national forests; and (3) royalties from other leased minerals on federal lands in Utah.[270] In exchange, Utah will transfer to the U.S. ownership of more than 200,000 acres of grant land inholdings in national parks, national forests and Indian reservations.[271] Utah will receive less than 4,000 acres of federal land as a result of this exchange.[272]

Although this exchange will undoubtedly improve Utah's revenues to public schools, it removes a considerable amount of land from its direct control and puts it into federal hands. Some may oppose an increased federal presence in Utah.[273] Nevertheless, the exchange appears to foster modern management objectives—albeit by divided public management. School revenues are increased by mineral revenues from federal lands. Also, sustainability and public opportunities are enhanced by the relatively more progressive management the lands will receive under federal ownership.[274]

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268. DIVISION OF STATE LANDS AND FORESTRY, UTAH DEPARTMENT OF NATURAL RESOURCES, DRAFT GENERAL MANAGEMENT PLAN: MARKETING OF UTAH TRUST LANDS INHELD WITHIN NATIONAL PARK SYSTEM UNITS AND INDIAN RESERVATIONS (1989) [hereinafter DRAFT UTAH PLAN]; *see also Utah Threatens Parks With Development*, 63 NATIONAL PARKS 11 (1989).

269. Harmer, *supra* note 10, at 465. Utah's experience with PROJECT BOLD and its subsequent marketing proposal says something about public opinion on the value of state lands. The citizens of Utah value state lands for more than their ability to produce income. The public may be willing to support the preservation of non-economic values of state lands even if it means less income to the school fund and a consequent increase in taxes to make up the lost income.

270. Pub. L. No. 103-93, 107 Stat. 995 (1993).

271. *See* PUB. LANDS NEWS, Vol. 18, No.17, pp. 9-10 (Aug. 8, 1993); PUB. LANDS NEWS, Vol. 18, No.10, pp. 6-7 (Sep. 13, 1993); PUB. LANDS NEWS, Vol. 18, No.11 (May 11, 1993).

272. *See supra* note 270; *see generally* articles cited *supra* note 271.

273. *See, e.g.*, PUB. LANDS NEWS, *supra* note 271.

274. *See supra* text accompanying notes 140-65.

Integrated inventories, consolidation and exchange offer western states a vehicle for more efficient land management. Inventories allow for determining the best use for the lands considering the diverse public and private demands and management objectives. By blocking up land-holdings states can, in many places, meet non-economic management objectives while at the same time reaping higher economic returns from those lands designated for this purpose.

B. Improving Traditional Uses

The move toward improving traditional uses, represented by the examples that follow, appear to result from a perceived need to respond to a combination of the demand for increased revenue from grant lands and the demand for long-term sustainability of state land resources. Although still in their planning or experimental stages, these examples illustrate how state land managers struggle to meet the challenge of changing expectations.

1. Direct Resource Marketing

Rather than view themselves as merely landlords that lease lands to private businesses who then produce and market natural resources from state lands, some states are taking control of marketing their own resources. The programs will maintain revenues to the state while modifying traditional extractive practices to enhance the longevity of the land and resource.[275] The programs also give state managers more control over the management of the land and resources.[276]

The Washington Department of Natural Resources, the largest wheat producer in the state, has for years marketed its own wheat, which adds considerably to the state's ability to produce revenues from its agricultural lands.[277] This technique is being considered to solve Oregon's current problem in managing a more controversial state resource—timber. Timber management practices often receive criticism and here provide an example of what states can do to improve this traditional state land use.

The Oregon Department of Forestry and the Oregon State Land Board has begun a feasibility study for marketing its own timber from

275. Memorandum from Jim Brown, Oregon State Forester, to the Oregon Board of Forestry and the State Land Board (May 21, 1993).

276. *Id.*

277. Interview with Nixon Handy, Executive Assistant, Washington Commissioner of Public Lands, Olympia, Washington (Aug. 28, 1991); *see also* WASH. REP. FY 1989, *supra* note 51, at 10.

state lands.[278] The decision to conduct the study was based on the state's desire to increase management flexibility, to avoid lawsuits arising from timber sale contract terminations necessitated by finding threatened or endangered species in sale areas, and to increase revenues from timber harvests.[279]

2. Stewardship Incentives

Under the leadership of then State Lands Director Jim Baca, the New Mexico State Land Office initiated a "Range Stewardship Incentive Program."[280] The stated goal of the program is to recognize and reward "the accomplishments of those lessees who, over the years, have consistently practiced a strong land ethic."[281] Program rules explain that the lessees must demonstrate, through an independent range inspector, that they have been "good stewards of their leased state land."[282] The program is aimed at improving those state range lands that are currently in poor or fair condition.[283] Lessees who qualify—those who receive the necessary evaluation from a qualified range specialist—receive a 25% reduction in grazing fees.[284] In 1993, the first year of implementation for the program, ten leases involving over 78,000 acres of range lands have qualified and the lessees are paying a reduced grazing fee.[285] The discount will continue for five years or until the permit expires. The State Land Board is working with the Soil Conservation Service and the Bureau of Land Management to expand the benefits of the program.[286]

Arizona has also begun to develop a range improvement program. The core of the program is a multi-agency plan known as "Coordinated

278. Memorandum from Jim Brown, *supra* note 275.

279. *Id.*

280. RICE, *supra* note 217, at 24, *citing* NEW MEXICO STATE LAND OFFICE, INFORMATION BROCHURE ON THE NEW MEXICO RANGE MANAGEMENT INCENTIVE PROGRAM, SLO Sup. 2.1 (Aug. 1992).

281. *Id.*

282. Commissioner of Public Lands, New Mexico State Land Office, State Land Office Rule 8.014 (Dec. 1, 1992). Neither the phrase "strong land ethic" or "good stewards" is defined in the rules.

283. Telephone conversations with Mary DuBose, Manager, Grazing Bureau, Surface Division, New Mexico State Land Office (Feb. 25, 1993); Gilbert Borrega, Land Use Specialist, Field Division, New Mexico State Land Office (Feb. 25, 1993).

284. *See supra* note 82.

285. *Id.*

286. *Id.* For example, the existing fee for the requisite range evaluation discourages participation by ranchers whose allotments are less than 640 acres. The Board and the Service hope to provide evaluations for free, or at reduced cost, to smaller allotment holders. *Id.*

Ranch Plans."[287] These plans set a schedule for range improvements, establish a rangeland monitoring program, and design a grazing system that allows for periods of "plant rest" to promote growth during the growing season.[288]

Washington has what the state calls "special lands policies" that encourage the identification of state forest lands having "special ecological features" for removal from traditional timber land management.[289] The program was developed to meet the dual objective of protecting sensitive trust timber lands and obtaining additional school construction funds.[290] The state legislature, in 1989, approved a creative funding mechanism that is achieving both goals.[291] Over $150 million was appropriated to the Department of Natural Resources to compensate the trust for identified trust lands that are to be protected as Natural Area Preserves or Natural Resource Conservation Areas.[292] The portion of the purchase price attributed to the land value is then retained by the Department of Natural Resources for the purchase of lands to replace the lands being set aside for protection.[293] Replacement lands are to be "good quality, income-producing forest land."[294] The balance of the purchase price—the amount representing the value of the timber—is deposited into the school construction account. In most cases, the timber value accounts for approximately 90% of the purchase price.[295]

C. Development of Non-Traditional Uses

Increasing pressure to provide opportunities for recreation and other public uses, along with the continuing obligation to earn income from state lands, has prompted some states to go beyond conventional uses of state-owned lands. Some of this change is in response to the changing demography discussed earlier—changes have led to an increased demand for public access and opportunities on state lands.[296] Other trends in this area are the result of states looking for ways to improve economic returns

287. Lindemann, *supra* note 215, at 83 (discussed in RICE, *supra* note 217, at 13).

288. *Id.*

289. *See* WASHINGTON DEPARTMENT OF NATURAL RESOURCES, WASHINGTON TRUST LAND TRANSFER PROGRAM (Jan. 1993) (discussed in RICE, *supra* note 280, at 13-14).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *See infra* text accompanying notes 327-44.

from state lands, in some cases exploiting the more lucrative opportunities offered by commercial development.

1. Commercial Development

If state lands are going to continue to make a meaningful contribution to state school funds, grant land managers must look for new ways to produce income. Aside from the few states, like New Mexico and Washington, that earn significant revenues from oil and gas and timber use respectively, western state lands do not generate significant revenues.[297] Most state land uses do not generate high fees per acre.[298] For example, grazing leases, which cover about 30 million state grant lands in the West, generate less than $8 per animal unit month (AUM) annually in rental fees.[299] Some western states owning lands in urban areas or other suitable locations are considering commercial leasing and development as a potentially lucrative source of revenue.[300] Arizona's urban land management program, discussed below, is an example. Washington also recognizes the potential of urban land development, and has undertaken its own aggressive program.[301] Revenues from urban land uses ranged from $550,000 in 1986 to $1.3 million in 1990.[302] Even where states own no land in an urban area, like Phoenix or Seattle, opportunities exist to benefit from commercial development; commercial recreational development opportunities provide the best example.[303]

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297. *See supra* text accompanying notes 31-36.

298. See app., Table 2.

299. *See* JON A. SOUDER & SALLY K. FAIRFAX, WESTERN STATES SURVEY RESPONSES, STATE LANDS PROJECT, DEPARTMENT OF FORESTRY AND RESOURCE MANAGEMENT, at Table 7, University of California, Berkeley (Dec. 1989); Jon A. Souder, Economic Strategies for the Management of School and Institutional Trust Lands: A Comparison Study of Ten Western States at Tables 2-2a and 2-2b (1990) (Ph.D. dissertation, Department of Forestry and Resource Management, University of California, Berkeley).

An animal unit month is the "amount of forage required to feed a cow, a cow and her calf, or two yearlings for a month." SHARMAN A. RUSSELL, KILL THE COWBOY: A BATTLE OF MYTHOLOGY IN THE NEW WEST 17 (1993). *See* LAURENCE A. STODDART ET AL., RANGE MANAGEMENT 219-56, 271-76 (3rd ed. 1975) (for a technical discussion of animal nutrition as it relates to range management).

300. Managers in Arizona, Colorado, Idaho, New Mexico, Oregon, Washington, and Wyoming mentioned interest in increased commercial development as a means to increase revenues from grant lands. Interviews with M.J. (Jean) Hassell, *supra* note 49, David Steinhoff, *supra* note 26, Paul R. Cleary, *supra* note 29; telephone interviews with Winston A. Wiggins, *supra* note 36, Robert Langsencamp, *supra* note 29, and Nixon Handy, *supra* note 277; telephone conversation with Jerry Hedrick, *supra* note 206.

301. WASH. ANN. REP., *supra* note 35, at 8.

302. *Id.*

303. *See supra* text accompanying notes 54-60.

"Diversification" is the guiding principle long-time Arizona State Land Commissioner Jean Hassell uses.[304] Arizona offers an excellent example of innovative grant land management in the West. For a decade, a debate ensued in Arizona over what to do with hundreds of thousands of acres of state land just outside of Phoenix and Tucson.[305] These lands represent essentially the only developable acreage near these urban areas.[306] Historically, these lands were leased for grazing at five cents an acre,[307] "[b]ut, while it [had] always been accepted that cattle can dine courtesy of the state, opening up the territory to people was unthinkable."[308] The debate culminated in 1981, when the Arizona Legislature enacted the Urban Lands Act which allows active development of almost 600,000 acres of state grant lands in and adjacent to Phoenix and Tucson.[309]

The statute requires a general plan for all state-owned urban lands in Arizona. This plan must define permissible uses and establish policy for the use and management of the lands.[310] The Act allows the Commissioner to designate certain urban lands for development pursuant to a plan that can be drawn up by the State Lands Department or by a development plan permittee.[311] In either case, the site-specific plans must be consistent with the Department's general plan.[312] When a development plan is adopted, the Land Department determines whether to sell or lease the lands after completing a comprehensive report on land values and projected earnings.[313] If lands are reclassified as a result of a development plan, any existing lease is immediately terminated.[314] The existing lessee has a preference to purchase or release the land, but only if the lessee matches the highest bidder.[315]

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304. Interview with M.J.(Jean) Hassell, *supra* note 49.

305. For a good summary of this debate, *see* Pam Hait, *Arizona's Trust Lands: A Plum for Developers?* PLANNING 18 (Dec. 1977).

306. Interview with M.J. (Jean) Hassell, *supra* note 49.

307. Grady Gammage, Jr. & Karen L. Schroeder, *The Bureaucrat as Developer: The Frustrations and Promises of Arizona's Urban Lands Disposition Program*, 48 URB. LAND 11 (Feb. 1989).

308. Hait, *supra* note 305, at 19.

309. ARIZ. REV. STAT. ANN. §§ 37-331 to 339.04 (1981).

310. ARIZ. REV. STAT. ANN. § 37-334 (1981).

311. *Id.* § 37-334. The costs of developing a plan under a permit are not compensated until the plan is implemented, and may not be compensated even then unless the Commissioner approves the costs as necessary development costs. If the planner is not the successful bidder for the lease or sale of the land, the successful bidder must compensate the planner in an amount determined by the Commissioner.

312. *Id.*

313. *Id.* § 37-335(F).

314. *Id.* § 37-212. The Lands Commissioner is required to classify all grant lands as suitable for agriculture, grazing, homesite, commercial, timber, urban planning, exchange or community site for planning purposes.

315. *Id.* § 37-335.

The Act also provides for development of self-contained communities in urban areas, a provision that arguably could encourage urban sprawl, but has not been a problem according to Commissioner Hassell.[316] In his view, growth is going to take place with or without state participation. The Urban Lands Act allows growth and development to occur in an "environmentally sensitive way" and provides a good framework for coordinating with local officials to plan growth.[317]

The economic value of recreation lands[318] has led Idaho to actively market state-owned recreation lands for commercial recreation development.[319] Rental and lease values for recreation lands have increased dramatically in recent years, with rental income from cottage sites at Priest Lake increasing from $150,000 in 1985 to just under $600,000 in 1989.[320] When five undeveloped lots near McCall were offered for lease at public auction in 1988-89, bidding was active and resulted in premium bids ranging from $2,200 to $16,000 per site.[321]

Submerged lands also offer commercial development potential. Oregon boasts a floating condominium complex on state-owned submerged lands in Astoria, near the mouth of the Columbia River.[322] The state is also looking at issuing leases for "floating restaurants" and other types of commercial use of these lands in addition to the more traditional wharf and dock leases.[323] In fact, a major port facility and commercial development is planned for Oregon's submerged lands and state lands adjacent to them near the mouth of the Columbia River.[324] Submerged lands, in many states, have not been effectively managed to protect their natural resources and to produce revenue for the state.[325] Like Oregon, other western states are trying to get a better handle on the management of submerged lands both to generate funds and to prevent environmental degradation of these areas.[326]

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316. Interview with M.J. (Jean) Hassell, *supra* note 49.

317. *Id. See* ARIZ. REV. STAT. § 37-339 et seq. (1986 & Supp. 1992), which requires that the potential for sprawl be considered. *Id.* § 37-339.01. However, the determination of whether sprawl will occur is based on public testimony which is subject to subjective and discretionary interpretation by the decision-maker.

318. *See supra* notes 54-60 and accompanying text.

319. Interview with Winston A. Wiggins, *supra* note 36.

320. 15 IDAHO DEP'T OF LANDS ANN. REP. 15 (1989).

321. *Id.*

322. Telephone conversation with Annie Ojeda, Resources Management Section, Oregon Division of State Lands (Mar. 15, 1993).

323. *Id.*

324. Telephone conversation with Jerry Hedrick, *supra* note 206.

325. For example, in Washington, submerged lands under Puget Sound have been subject to unauthorized dumping of sewage. Brian Boyle, *Politics and the Public Trust Doctrine*, 6 LAND LINES No. 2, at 3 (Winter 1992). *See also supra* text accompanying notes 206-11.

326. *See, e.g.*, ARIZ. REV. STAT. § 37-1123 (1992). The Arizona legislature has recently passed

2. Expanding Recreation and Access

A few western states, prompted by pressure from recreational interests, regulate access to state lands for recreational use.[327] In this way some of the areas that were previously closed to the public have been opened up for some type and level of public use. Access for hunting, fishing, and other recreational uses on state lands leased for grazing, agricultural or timber leases was possible in some states but, where allowed, may have required the consent of the lessee.[328] Access is now governed by rules and fees established by the state land management agency.[329] Fees are assessed through different mechanisms, including individual land access licenses, commercial guide and outfitting permits, and payment to the grazing or farming lessee.[330] In the latter case, the lessee might have the option to pay for the right of access, or could actively manage for recreational use.[331]

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a law to clarify and possibly expand state jurisdiction over submerged lands and waterways. Toward a similar objective, the State of Oregon filed a lawsuit to establish navigability for state title purposes and thus the states' right to regulate and tax a thriving sand and gravel operation. Telephone conversation with Jane Ard, Assistant Attorney General, State of Oregon (Mar. 22, 1993).

327. *See* STATE OF COLORADO BOARD OF LAND COMMISSIONERS, PUBLIC ACCESS SURVEY OF OTHER WESTERN STATES (Apr. 17, 1992) [hereinafter COLORADO ACCESS SURVEY]. As noted in this report, Oklahoma and Utah continue to allow the agricultural or grazing lessee control access, though this practice is uncommon today. Conflicts have escalated in recent years between would-be recreational users and grazing and agricultural lessees. COLORADO ACCESS REPORT, *supra* note 240, at i, pp. 3-4.

328. *See* COLORADO ACCESS SURVEY, *supra* note 327. Whether access to state grant lands requires the consent of the lessee or must be for a fee is based on historic practice. For example, free public access to leased grant lands for non-commercial recreational and wildlife use has historically been the practice in Idaho, Wyoming and Oregon. Telephone interview with Winston A. Wiggins, *supra* note 36; interview with Paul R. Cleary, supra note 29; response to questionnaire from Pam Wiley, *supra* note 25.

In contrast, Arizona, Colorado, New Mexico and Montana have no traditional practice of allowing free public use of grant lands. In Montana, only through litigation were grant lands opened up for public use. Interview with M. Jeff Hagener, *supra* note 57. There now is a $5 annual fee (for a license) for hunting and fishing use. *Id.* Three dollars of the annual fee goes to the school fund, $.50 goes to the agent selling the license and $1.50 is deposited into a fund for recreational programs on state lands. *Id.*

The Arizona Attorney General has taken the position that the state may not allow free public use of grant lands. No one has formally challenged this position. Interviews with Jay Adkins, *supra* note 164, and M.J. (Jean) Hassell, *supra* note 49.

The New Mexico Game and Fish Department (NMGF) has leased an easement allowing access to grant lands since August 1989. Interview with Robert Langsencamp, *supra* note 29. NMGF pays $50,000 annually for the easement but this figure may soon increase to $250,000 a year. *Id.* The easement permits access only to lands that can be reached by public roads. *Id.* Colorado's leased grant lands were opened up for public use only recently following the completion of a comprehensive study. *See* COLORADO ACCESS REPORT, *supra* note 240.

329. *See* COLORADO ACCESS SURVEY, *supra* note 327.

330. *See* MONTANA SURFACE USE SUMMARY REPORT, *supra* note 137, at 39-40.

331. *Id.*

The Colorado State Land Board's adoption of a new Multiple Use Policy for state trust lands is illustrative of the trend to increase public access to leased grant lands. The 1992 policy was adopted following two years of investigation by the Board and a citizens' task force appointed by the Board.[332] This group considered the concerns of recreational groups as well as concerns of existing lessees.[333] Farmers and ranchers wanted assurances that increased public access would not impair the quality of the land for their uses nor add to their costs of operation.[334]

3. Innovative Funding Mechanisms

Many of the trends discussed above have the primary or incidental benefit of generating additional revenue for the state while allowing state land managers to consider a broader range of purposes in managing their lands. In some cases, states are charging a beneficiary directly for the use of lands or resources, for example, by charging market value for commercial leases. Access for recreational use is a land use for which the state can be compensated. Increasingly, recreational uses, including hunting and fishing, are in high demand and are highly valued. Recreational users have the ability and willingness, in many cases, to pay for their use.[335]

For other, more public, state land uses, such as the preservation of an area for its aesthetic and possibly recreational value, states are finding ways to generate fees from other sources to pay for benefits enjoyed by the public at large, or by a more dispersed beneficiary.[336] Washington's "special lands policies" program for timber lands, directed toward the protection of state lands with "special ecological features," is an example of this strategy. Rather than appropriate funds directly for the school construction account, the legislature has approved funding to purchase sensitive trust lands. About 90% of the purchase price is deposited into the school construction account, while about ten percent (the land value) is used to purchase replacement lands more suited to income production. This program provides a funding mechanism that provides school funds while preserving sensitive state lands.[337]

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332. *See* COLORADO ACCESS REPORT, *supra* note 240. *See also Multiple-Use Policy Targets 500,000 Acres*, THE DENVER POST 8D (Nov. 25, 1992); State Land Board Announces Final Comment Period for Proposed Multiple-Use Policy, press release, Colorado State Board of Land Commissioners (Oct. 19, 1992) (on file with authors).

333. *See* COLORADO ACCESS REPORT, *supra* note 240.

334. *Id.*

335. *See* MONTANA SURFACE USE SUMMARY REPORT, *supra* note 137, at 39-51. Under Colorado's new access policy multiple use and increased access will be permitted, for a fee, on about 50% of Colorado's three million surface acres of trust lands. *See supra* notes 332-34 and accompanying text.

336. *See, e.g.*, Arizona's urban lands program, *supra* notes 304-17 and accompanying text.

337. *See* WASHINGTON DEPARTMENT OF NATURAL RESOURCES, WASHINGTON TRUST

Arizona voters, in 1990, authorized new funding for state parks and fish and wildlife agencies.[338] The Heritage Fund authorizes $10 million of lottery funds each year to be split equally between the parks and fish and wildlife departments.[339]

Legislation implementing the initiative authorizes those departments to spend the funds only for particular purposes.[340] Through a constitutional amendment,[341] Colorado voters approved the adoption of a trust fund that, like Arizona's Heritage Fund, will provide funds for parks, wildlife, and recreation that will come, in part, from the state lottery.[342]

An additional funding mechanism for Arizona has been the development of urban properties under the state's Urban Lands Act.[343] The benefits of the Act for urban planning have been questioned,[344] but the Act clearly has been extremely successful in producing income for Arizona's public schools. Although representing only .05% of the total acreage of Arizona's revenue producing grant lands, the urban lands have earned 26% of grant land revenues ($7.9 million) in 1991-92.[345] As a result of this program, commercial revenues increased 613.9 % between 1978 and 1990.[346] The Urban Lands program remains the centerpiece of Arizona grant land strategic planning, with goals of producing $20-60 million per year from land sales, and increasing urban leasing revenues by $500,000 to $1 million per year by fiscal year 1994-95.[347]

LAND TRANSFER PROGRAM (Jan. 1993).

338. *See supra* note 100 and accompanying text.

339. Interviews with Eugene P. Sturla, *supra* note 98, and Phyllis Hughes, *supra* note 64.

340. ARIZ. REV. STAT. § 41-503 (1992) (Parks); ARIZ. REV. STAT. §17-296 to 298 (1993 Supp.) (Fish and Game).

341. COLO. CONST., art. XXVII, amend. 8 (1992).

342. See GO COLORADO FINAL REPORT, *supra* note 99. Additionally, Montana law designates a certain percentage of all oil and gas revenues to fund the acquisition and maintenance of state parks. Interview with James P. Domino, *supra* note 168.

343. *See supra* notes 304-17 and accompanying text.

344. *See, e.g.*, Gammage & Schroeder, *supra* note 307, at 14-15.

345. WSLCA DIRECTORY, *supra* note 6; interview with M.J. (Jean) Hassell, *supra* note 49.

346. ARIZ. ANN. REP., *supra* note 49.

347. ARIZONA STATE LAND DEPARTMENT, STRATEGIC PLAN SUMMARY FOR THE 1990S (Aug. 1990) (on file with authors). As a result of a 1982 court decision, Oklahoma has been offering state land leases only at public auction, and has significantly increased revenues received from the land as well as opened up the lands to non-traditional uses. In Oklahoma Association v. Nigh, 642 P.2d 230 (Okla. 1982), the Oklahoma Supreme Court struck down a state law limiting rental fees and interest rates for farming and grazing uses of state land. Since this case, all state land leases are let to the highest bidder, regardless of intended use. This change has significantly increased revenues to the trust which over the past ten years have doubled from an average of $4 million a year to an average of $8 million a year. At the same time, more lands have been opened to non-traditional uses including hunting, fishing and other recreational pursuits. Letter from Carol Ford, Secretary, Oklahoma Commissioner of the Land Office (Jan. 5, 1993); telephone conversation with Carol Ford (Feb. 17, 1993).

VI. CONCLUSION

The size, beauty, power and utility of our western lands make the land precious to those lucky to travel through it, and even more precious to those who live on it. The variety of resource values is enormous, and choosing between them is seemingly impossible. But choices have already been made, some of them long ago. Admission acts and state constitutions have historically presented a considerable stumbling block to grant land managers, manifested in an ostensibly exclusive objective of revenue production. At the same time, other historical and institutional barriers have limited states' ability to capitalize on opportunities for enhancing revenue production. These hurdles—in law, history, and traditional agency practices—are not insurmountable. Progress is evident in the trends seen in some western states. Some scholars argue that state land managers in general have the legal flexibility to manage grant and other state-owned lands for a broad range of public values, within the confines of the "sacred trust." With a grasp of contemporary public demands, resource management principles, and market forces, state land managers are beginning to take a look at the choices that already have been made and to explore other or better options as the rhythm of the West migrates toward the next century.

APPENDIX

Table 1

STATE	STATE LAND DEPARTMENT - GRANT LANDS									PARK DEPT.[a]	FISH AND WILDLIFE DEPT.
	% of acreage owned by federal government[a]	% of land grant acreage[a]	% of total state school budget[b]	total surface grant land acres[c]	total mineral acres[c]	submerged acres[c]	agriculture and grazing acres	forest[a]	urban[c]	total acreages	total acreages
AZ	43%	13%	2.5%	9,372,932	251,689	-0-	8,500,000[b]	120,000	300,000	45,000	256,210b (24,250 fee)
CA	46%	.6%	unreported	580,747	760,696	3,300,000	113,945[c]	71,317[a]	16	1,283,995 (1,124,239 fee)	unreported
CO	36%	4%	2.8%[b]	2,956,248	4,037,043	-0-	2,861,636[c]	unreported	8,347	unreported	450,000[b]
ID	64%	5%	8%	2,467,000	3,000,000	308,343	1,717,854[c]	865,000	85	41,670	116,101[c]
MT	31%	6%	5.4%	5,163,872	6,196,634	-0-	560,000 AG.[b] 4,100,00 GZ.	500,000	-0-	276,702 (51,206 fee)	207,743[d]
NE	85%	.004%	unreported	2,976	2,976	100,000	-0-[c]	unreported	-0-	unreported	unreported
NM	31%	12%	unreported	9,400,000	13,400,000	-0-	8,800,000[c]	unreported	17,128	unreported	160,000[b]
OR	49%	1%	1%	774,000	2,300,000	800,000	630,000[b]	830,000[d]	45	89,159	131,525[c]
UT	64%	7%	1%[a]	3,746,260	4,698,316	1,500,000	3,275,605[c]	unreported	-0-	?[f]	?[f]
WA	29%	7%	8%	2,936,830	3,268,829	2,000,000	1,100,605[c]	2,100,000[d]	1,500	unreported	395,229[g]
WY	50%	6%	13%	3,646,000	4,000,000	-0-	3,646,000[c]	200,000	-0-	120,000	119,132[e]

a] Percentages were calculated from acreage date set out in 1990 ASSOCIATION DIRECTORY (Western States Land Commissioners Association 1990) and 173 PUBLIC LAND STATISTICS 1989, Table 4, p. 5 (U.S. Dept. of Agriculture, Bureau of Land Management 1989).

b] The figures shown were reported by state land managers in response to a questionnaire sent to them in February 1991 or in personal interviews.

c] 1990 ASSOCIATION DIRECTORY (Western States Land Commissioners Association 1990).

d] Reported acreage includes non-grant lands. The state forestry department in California, Oregon and Washington all manage a combination of grant and non-grant lands. Non-grant lands in Oregon and Washington include tax forfeiture lands that are managed for the benefit of counties from which they were obtained. OR. REV. STAT. § 30.110 et seq. (1991). Response to Questionnaire by Pam Wiley (Oregon); infra, n 40; 1990 Washington Annual Report, infra, n 35 at 24-42. California non-grant forest lands are operated as demonstration forests. Interview with Gary Britner, infra, n 66. The counties in which the forests are located receive in lieu payment from the state based on forest land taxation of private lands. Id., Calif. Code - 4654.

e] C. WISE and J. O'LAUGHLIN, IDAHO DEPT. OF FISH AND GAMES LAND ACQUISITION AND LAND MANAGEMENT PROGRAM I, 22 (Report No. 3, Idaho Forest, Wildlife and Range Policy Analysis Group 1990).

f] In a 1985 report, the Utah Department of Natural Resources reported that the state owned 253,319 acres of recreation and wildlife lands. The report does not give a breakdown of these figures nor does it report which state agency owns them. PROJECT BOLD: A PROPOSAL FOR UTAH LAND CONSOLIDATION AND EXCHANGE 297 (Utah Dept. of Natural Resources 1985). The Wise and O'Laughlin paper shows the Utah Division of Wildlife Resources owns 361,204 acres. Id. at 22.

g] Utah's School Trust Lands: A Century of Unrealized Expectations, supra, n 10.

h] Telephone conversation with John Wilkes, Commissioner, Colorado State Board of Land Commissioners (Oct. 1992).

Table 2

AGRICULTURAL/GRAZING, MINERAL, COMMERCIAL LEASE REVENUES

State	Agricultural and Grazing Areas Leased	Surface Acre Lease Revenues	Agricultural/ Grazing Income Per Acre	Mineral Acres Managed	Mineral Royalties and Bonuses	Mineral Income Per Acre	Commercial Lease Acres	Commercial Lease Revenues	Commercial Income Per Acre
AZ	8,574,072	$14,481,310	$1.69	160,289	$16,080,748	$100.32	487,041	$7,976,041	$16.38
CA	113,945	$3,950,000	$34.67	760,696[d]	$320,000[d]	[a]	[b]	[b]	[b]
CO	2,758,483	$5,493,720	$1.99	4,038,593	$8,264,440	$2.05	29,544	$482,650	$16.34
ID	2,000,800	$2,464,600	$1.23	3,000,000	$308,200	$0.10	135	$1,305,000	$9,666.67
MT	4,612,700	$11,959,082	$2.59	6,196,634	$5,767,624	$0.93	-0-	$25,000[c]	[c]
NV	-0-	$700[a]	unreported	unreported	unreported	unreported	unreported	unreported	unreported
NM	8,700,000	$8,484,017	$0.98	13,400,000	$134,795,665	$10.06	20,577	$899,755	$43.73
OR	600,000	$264,000	$0.44	2,300,000	$405,000	$0.18	45	$164,000	$3,644.44
UT	3,275,605	$1,275,000	$0.39	4,698,316	$8,671,000	$1.85	-0-	-0-	-0-
WA	1,100,000	$6,013,385	$5.47	3,268,829	$955,280	$0.29	1,500	$2,341,000	$1,560.67
WY	3,643,000	$2,997,001	$0.82	4,237,000	$40,320,000	$9.52	-0-	-0-	-0-
TOTALS	35,378,605	$57,382,815	$1.62	$42,060,357	$215,887,957	$5.13	538,842	$13,168,446	$24.44

Source: WSLCA Directory (1992), supra, n 6.

[a] The Directory does not explain this anomaly.
[b] California figures are excluded, because the Directory does not distinguish commercial lease acres or revenues from all other types of surface lease acres or revenues.
[c] The Directory does not explain the source of this revenue. A conversation with Montana's Lands Administration administrator disclosed that Montana issues some commercial recreation licenses (e.g., for guide services) for use of its lands. Interview with M. Jeff Hogener, Appendix A. This $25,000 commercial income was not used in computing the per acre commercial revenue total.
[d] These figures do not include acres leased or revenues received from submerged lands (off shore oil and gas leases), which produced $262,963,000 in FY 1991-92. WSLCA Directory, id.

APPENDIX (CON'T)

Table 3

PROVISIONS GOVERNING GRANT LANDS[a]

STATE	DATE OF ADMISSION	ENABLING OR ADMISSION ACT PROVISION		STATE CONSTITUTIONAL PROVISIONS	
		CITATION	LANGUAGE	CITATION	LANGUAGE
Oregon	1859	Admission Act, 11 Stat. 383, ch 33 (1859)	Sections 16 and 36 are granted "for the use of schools ..."	Article VIII § 5(2)	"Manage lands ... with the object of attaining the greatest benefit for the people of the state, consistent with the conservation of this resource under sound techniques of land management."
Colorado	1876	Enabling Act, 18 Stat. 475, ch 139 (1875)	Sections 16 & 36 granted "for the support of schools."	Article IX § 10	It is the "duty of the board to provide for the location, protection, sale or other disposition in such manner as will secure the maximum possible amount therefore ... ."
Montana[b]	1889	Enabling Act, 25, Stat. 676, ch 222 (1889)	Sections 16 and 36 granted "for the support of public schools." Section 11 of the Act requires advertising and public sale, sets acreage price, requires exchange for equal value and near-equivalent area. Easements or property interests must be for "full market value," proceeds of sale or permanent disposition goes to permanent fund for "support and maintenance of the public schools."	Article X § 11(2)	"Held in trust for the people to be disposed of ... for the respective purposes" for which they were granted.
Washington[b]	1889	Enabling Act, 25 Stat. 676, ch 180 (1889)	Same as for Montana	Article XVI(1)	"Held in trust for all the people."
Idaho[c]	1890	Admission Act, 26 Stat. 215, ch 656 (1890)	Sections 16 and 36 granted "for the support of common schools ..." All lands granted for educational purposes shall be disposed of only at public sale the proceeds of which constitute a permanent fund.	Article 9, § 8	"Protection, sale and rental ... under such regulations as ... prescribed by law ... in such manner as will secure maximum long term financial return to the institutions to which they were granted ... [L]ands shall be carefully preserved and held in trust."

[a] California is not included in the following figures dealing with grant lands because it did not receive any grant land on its admission to the Union. Arguably it is not under the same trust obligations as those imposed on other states. See Gates, supra, n 7 at 301. Nevada is not included because it holds less than 3,000 acres of grant lands.

[b] Montana and Washington were admitted under the same enabling act. Provisions governing school grant lands are identical for both states.

[c] Idaho and Wyoming, although admitted in the same year, were not admitted under the same admission act.

APPENDIX (CON'T.)

Table 3, Cont'd.

STATE	DATE OF ADMISSION	ENABLING OR ADMISSION ACT PROVISION		STATE CONSTITUTIONAL PROVISIONS	
		CITATION	LANGUAGE	CITATION	LANGUAGE
Wyoming[4]	(1890)	Admission Act, 26. Stat. 222, ch 669 §§ 4-5 (1890)	Sections 16 and 36 granted for "support of common schools"; disposal of these lands must be at public sale with proceeds going to the permanent fund. Interest from the fund is for the "support of ... schools". Lands may be leased "under such regulations as the legislature shall provide".	Article 18, § 3 Article 18, § 1	Sale is subject to limitations of the Admission Act and direction of the Legislature. Sales shall be at public auction to "realize the largest possible proceeds." The board is subject to limitations of the constitution and "such regulations as may be provided by law". Land shall be "disposed of only at public auction to the highest bidder."
Utah	1896	Enabling Act, 28 Stat. 107, ch 138 § 6 (1894)	Sections 6, 2, 16, 32 and 36 are granted "for the support of common schools."	Article XX	Lands "shall be held in trust for the people, to be disposed of as provided by law."
Arizona[4]	1912	Enabling Act, 36 Stat. 557, ch 310 §§ 24, 28 (1910)	Sections 2, 16, 32 and 36 are granted "for the support of common schools"; the land "shall be held in trust" disposed of to highest and best bidder at public auction (applies to sales and leases as well as sales and leases of timber or other natural products). The legislature may prescribe the conditions for exchanges.	§ 1	Lands are held in trust.
New Mexico	1912	Enabling Act, 36 Stat. 557, ch 310 §§ 6, 10 (1910)	Same as Arizona §§ 24 and 28.	Article XII § 12	"All lands granted ... shall be exclusively used for the purposes for which they were granted ... ."

[4] Arizona and New Mexico were admitted under the same enabling act. Although the language governing grant lands is identical, each state's provisions are in separate sections of the act.