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Comment

WYOMING'S LAST GREAT RANGE WAR: The Modern Debate Over the State's Public School Lands

INTRODUCTION

Throughout the sometimes wild history of Wyoming, range wars have been fought for numerous reasons. Grazing boundaries, water, fences, sheep, and rustling have all, at one time or another, instigated disputes over various portions of Wyoming cattle and sheep country. Fortunately, range wars today are not settled on the dusty prairie with Peacemaker Colt pistols and Winchester rifles; rather, modern disagreements are fought with lawyers and with the pen, in the courts and in the arena of public opinion.

Today's debate over the proper management of Wyoming's public school lands combines all the ingredients of an historic western feud.¹ Ranching interests argue that lands should be managed to benefit the important stockgrower industry; environmentalists insist the lands must be managed for the good of the environment; industrialists demand sale and development; and public education lobbyists battle for the interests of the public education system. Put bluntly, this disagreement is about money, land, and politics—range wars have been fought over less.

BACKGROUND

The enabling act of each of the public land states admitted into the Union since 1802 included grants of designated sections of federal lands for the purpose of supporting public schools.²

1. Much of the modern debate over the management of the state school lands focuses on the leasing of various pieces of state school land for less than the property's real fair market value. *See infra* notes 56-123 and accompanying text. Revenue lost from a policy of awarding less than fair market value leases is most apparent when a lease of state lands is awarded to the lesser of two competing bids, as demonstrated by a lease recently awarded by Wyoming's Board of Land Commissioners. Tim Newcomb, *You Judge the Law: Our State Lands*, CASPER STAR-TRIBUNE, March 28, 1998, at A9. This decision cost the state permanent fund \$31,000 over the duration of a ten year lease. *Id.* This comment is meant to explore whether Wyoming law allows management decisions of this type to be made concerning state public school land.

2. *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (citing *United States v. Morrison*, 240 U.S. 192, 198 (1916)). "Between 1803 and 1962 the United States granted a total of some 330,000,000 acres to the states for all purposes. Of these, some 78,000,000 acres were given in support of common schools."

Section 4 of Wyoming's Act of Admission describes the lands granted by the federal government to the State of Wyoming.³

Sections numbered 16 and 36 in every township of said proposed state, and, where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one-quartersection, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools⁴

Wyoming's Act of Admission also restricts the sale or lease of these lands by the state.⁵

All lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for mineral, grazing, agricultural, or other purposes, provided that the term of agricultural and grazing leases shall not exceed 10 years⁶

The Wyoming Constitution accepts these grants for "educational purposes,"⁷ establishes criteria for the sale or lease of these lands,⁸ and creates a Board of Land Commissioners with authority for the "direction, control, leasing, and disposal" of the granted school lands.⁹ Furthermore, the Wyo-

Lassen v. Arizona, 385 U.S. 485, 461 n.3 (1968) (citing THE PUBLIC LANDS, SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 88th CONG. 1st SESS., 60 (Comm. Print 1963)).

3. Act of Admission for Wyoming, 26 Stat. 222, Ch. 664, § 4 (1890) [hereinafter Wyoming's Act of Admission].

4. *Id.*

5. *Id.* at § 5.

6. *Id.*

7. WYO. CONST. art. XVIII, § 1.

The State of Wyoming hereby agrees to accept the grants of land heretofore made, or that may hereafter be made by the United States to the state, for educational purposes, for public buildings and institutions and for other objects, and donations of money with the conditions and limitations that may be imposed by the act or acts of congress, making such grants or donations.

Id.

8. *Id.* "Such lands shall be disposed of only at public auction to the highest responsible bidder, after having been duly appraised by the land commissioners, at not less than three-fourths the appraised value thereof, and for not less than \$10 per acre. . . ." *Id.*

9. *Id.* at § 3 (as amended by laws 1921, Senate Joint Resolution No. 2, p.293).

The governor, secretary of state, state treasurer, state auditor and superintendent of public instruction shall constitute a board of land commissioners, which under direction of the legislature as limited by this constitution, shall have direction, control, leasing and disposal of lands of the state granted, or which may be hereafter

ming Constitution dictates that the Board of Land Commissioners shall be under the "direction of the legislature as limited by this constitution."¹⁰

The constitution also demands that funds derived from the established management policies be placed in a "perpetual fund[] for school purposes."¹¹ The constitution deems the revenues "trust funds in the care of the state, which shall keep them for the exclusive benefit of the public schools."¹²

While the language of the federal government's public school land grants varies significantly from state to state, the vast majority of courts that have discussed these land grants have found that the grant and acceptance of these lands creates an enforceable trust.¹³ The Wyoming Supreme Court has ruled that "[s]chool lands are . . . held in trust by the state, and the trust must be administered wisely and prudently so that its aim may be reasonably attained."¹⁴ The intended beneficiary of this trust is, of course, the public schools.¹⁵

This comment explores the legal parameters of this trust relationship, and asks whether the state is legally obligated to manage the trust so as to maximize income from the lease of public school lands. Two events inspired the purpose and timing of this comment. First, in 1995 the Wyoming Supreme Court declared the Wyoming school financing system unconstitutional.¹⁶ This decision put the short- and long-term financing of Wyoming

granted for the support and benefit of public schools, subject to the further limitations that the sale of all lands shall be at public auction, after such delay (not less than the time fixed by congress) in portions at proper intervals of time, and at such minimum prices (not less than the minimum fixed by congress) as to realize the largest possible proceeds. And said board, subject to the limitations of this constitution and under such regulations as may be provided by law shall have the direction, control, disposition and care of all lands that have been heretofore or may hereafter be granted to the state.

Id.

10. *Id.* Furthermore, WYO. CONST. art. XVIII, § 4 states: "The legislature shall enact the necessary laws for the sale, disposal, leasing or care of all lands that have been or may hereafter be granted to the state . . ." *Id.*

11. *Id.* art. VII, § 2.

12. *Id.* art. VII, § 6.

13. See *County of Skamania v. State*, 685 P.2d 576, 580 (Wash. 1984) (writing that "[e]very court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees."); but see *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 181-82 (1856) (holding that the land grant was to the state directly); *Alabama v. Schmidt*, 232 U.S. 168, 173-74 (1914) (holding that the gift to the state was absolute); see *infra* notes 42-44 and accompanying text.

14. *Frolander v. Ilsley*, 264 P.2d 790, 799 (Wyo. 1953).

15. See WYO. CONST. art. VII, § 6.

16. *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). The court struck down the existing system, holding that the quality of education must be nearly identical regarding per pupil spending everywhere in the state. *Id.* at 1279. For a detailed examination of the educational finance debate, see Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Consti-*

public education in question.¹⁷ With the statewide school system facing a potential funding deficit, many eyes have looked to the state public school lands as a potential source of increased revenue. Second, recent action by the Wyoming State Legislature,¹⁸ and by the Board of Land Commissioners,¹⁹ has heightened the current debate in Wyoming over proper management of state school lands.

This comment focuses on the use of the state public school lands for grazing. Of course, grazing is not the only income-producing use of the state public school lands, nor is it the greatest source of revenue.²⁰ However, it is the most pervasive use of state school lands in Wyoming²¹ and brings important and powerful state grazing interests into the often political decision-making process.²² The focus on grazing leases helps to define the scope of the debate, allowing a better understanding of the major issues facing the management of state school lands.

HISTORY

The public school land grants to the western states originated in the surveying and purchase of the Northwest Territory in 1785.²³ While the idea of granting land for the support of education was not new to the establishment of the Northwest Territory,²⁴ the creation of the Northwest Territory is significant for two reasons. First, the Northwest Land Ordinance of 1785 initiated a land surveying practice that became the standard for surveying each of the western land acquisitions that followed.²⁵ The surveying method started with the eastern edge of the new Northwest Territory and continued west into and across California, Washington, and Oregon.²⁶

tutional Structure, and the Separation of Powers Doctrine, 32 LAND & WATER L. REV. 281 (1998).

17. *Campbell County*, 907 P.2d at 1238.

18. In 1997, the Wyoming legislature revised the leasing statute with regard to the criteria for granting leases for agricultural purposes. See WYO. STAT. ANN. § 36-5-105 (Michie 1997). The new statute still does not demand the highest market value for the state school lands. See *infra* notes 60-74 and accompanying text.

19. See *supra* note 1.

20. Agricultural leases account for 10.3% of all state land trust revenue. Oil and gas leases account for 58.4%, trona leases 11.7%, coal leases 10.7% and land sales account for 3.3%. OFFICE OF STATE LANDS & INVESTMENTS, THE WYOMING STATE LAND TRUST: AT A GLANCE, 4.

21. *Id.* at 5.

22. Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 LAND & WATER L. REV. 1, 10 (1994).

23. *Papasan v. Allain*, 478 U.S. 265, 268 (1986).

24. See Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 803-4 (1992) (citing HOWARD C. TAYLOR, THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND ORDINANCES, 12-22 (1922)).

25. *Papasan*, 478 U.S. at 268 n.3.

26. *Id.*

At the point where the Ohio River crosses the Pennsylvania border, a north-south line—a principal meridian—was to be run and a base line westward—the geographer's line—was to be surveyed; parallel lines of longitude and latitude were to be surveyed, each to be 6 miles apart, making for townships of 36 square miles or 23,040 acres Each township was to be divided into lots of one mile square containing 640 acres.²⁷

Second, the Land Ordinance of 1785 contained language reserving “lot No. 16, of every township for the maintenance of public schools within the said township.”²⁸ The exact reasons behind this grant are debatable. However, in *Papasan v. Allain*, the Supreme Court of the United States indicated that the federal government's emerging school lands policy was a combination of an overall desire to encourage education, a congressional desire to accelerate the disposition of western lands at a higher price, and a manifestation of an attempt to put the public-land states on some sort of equal footing with the original states in terms of taxable property.²⁹ Specifically, with regard to taxable property, it was necessary to grant lands to offset the large amounts of land the federal government owned, which was not taxable by the states.³⁰

As the federal government allowed the new western states into the union, the policy of granting lands for the support of public schools continued.³¹ However, while the basic pattern of school land grants was generally consistent between states, the specific provisions of the grants varied by state and over time.³² For example, while the original grant in the Land Ordinance of 1785 contained a grant of one section per township,³³ later states (including Wyoming) received two sections per township,³⁴ finally Utah, New Mexico, and Arizona received four sections per township.³⁵ This discrepancy seems best explained by the fact that the state lands in the newer western states were thought to be worth considerably less than the similarly numbered sections in the states originally constructed from the Northwest Ordinance.³⁶

Another significant difference between grants is to whom the land was

27. *Id.* (quoting P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 72 (1968)).

28. *Id.* at 268 (quoting 1 LAWS OF THE UNITED STATES 565 (1815)).

29. *Id.* at 269 n.4 (citing *Andrus v. Utah*, 446 U.S. 500 (1980) (Powell, J., dissenting)).

30. *Id.*

31. Throughout this comment, references to the western states include: Arizona, California, Colorado, Idaho, Montana, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming.

32. *Papasan*, 478 U.S. at 270.

33. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 59-74 (1968).

34. *Id.* at 313-14.

35. *Id.* at 312-16.

36. *See Lassen v. Arizona*, 385 U.S. 458, 463 n.7 (1967).

granted. For example, in Ohio, the first of the Northwest Territory land grant states to receive school lands, section sixteen was "vested" in the legislature.³⁷ However, in the grants immediately following the grant to Ohio, Congress gave the lands to the township directly, specifically for the support of schools in that township.³⁸ Finally, in the most recent grants, including grants to the western states, Congress granted lands for the benefit of the schools, to be administered by the state.³⁹

A final difference among the grants is whether the initial grant could be considered an outright gift to the states for a specific use, or whether the grant of land came in the form of an express trust with the state as the administrator.⁴⁰ This dichotomy is created partly by differences in statutory language, and partly by accepted court decisions interpreting the enabling act language of each individual state.

For example, the land grant to Michigan is written simply, "to the state for the use of schools."⁴¹ The United States Supreme Court, in *Cooper v. Roberts*, interpreted this language as a direct and complete grant to the state.⁴² "[T]he grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on [the state's] public faith."⁴³ The Court followed that decision in *Alabama v. Schmidt*, where it interpreted a similar grant to Alabama: "The gift to the State is absolute, although, no doubt, as said in *Cooper* . . . 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary"⁴⁴

In contrast to the Alabama and Michigan grants are the grants contained in the Enabling Acts of Arizona and New Mexico.⁴⁵ They state that all the public school lands granted "shall be by the said state held in trust."⁴⁶ The United States Supreme Court in *Ervien v. United States*⁴⁷ and *Lassen v. Arizona*⁴⁸ interpreted this language as unequivocally creating a real, enforceable trust that demands prudent management to achieve the goals of the

37. Ohio Enabling Act, 2 Stat. 175 (1802).

38. See, e.g., Indiana Enabling Act, 3 Stat. 290 (1816); Alabama Enabling Act, 3 Stat. 491 (1819).

39. This trend began with the Michigan Enabling Act in 1836, which contains language, "to the State for the use of schools." Michigan Enabling Act, 5 Stat. 59 (1836). Following 1845, the type of grant used in Michigan generally became the norm. See *Papasan v. Allain*, 478 U.S. 265, 270 (1986).

40. *Papasan*, 478 U.S. at 270.

41. Michigan Enabling Act, 5 Stat. 59 (1836).

42. 59 U.S. (18 How.) 173, 181-82 (1856).

43. *Id.* at 182.

44. 232 U.S. 168, 173-74 (1984) (citations omitted).

45. Arizona 1912 Enabling Act, 36 Stat. 557, ch. 310, § 28 (1910); New Mexico 1912 Enabling Act, 36 Stat. 557, ch. 310, § 10 (1910). These Enabling Acts are identical.

46. See *supra* note 45.

47. 251 U.S. 41 (1919).

48. 385 U.S. 458 (1967).

trust.⁴⁹ Therefore, any action by the state that does not allow the state public schools to reap the full benefit of the school lands violates the trust and is void.⁵⁰

Land grants to the western states other than Arizona and New Mexico occupy the middle ground of enabling act language.⁵¹ That is, the enabling acts of these states do not specifically say that the lands are granted "in trust," but judicial interpretations of these provisions have unequivocally held that a trust relationship does in fact exist between the state and the public schools.⁵² Perhaps tellingly, *Ervien v. United States* and *Lassen v. Arizona* have become prominent authorities in cases involving public school land.⁵³ Due to the differences in enabling act language, later state and federal court decisions could have limited both *Ervien* and *Lassen* by characterizing both decisions as simply interpretations of the Arizona and New Mexico enabling acts. However, courts have chosen not to do so.⁵⁴ While courts frequently cite *Ervien* and *Lassen* as support for the position that a trust exists, they make no significant mention of the unique textual requirements of the New Mexico and Arizona land grants, that the lands "shall be held in trust."⁵⁵

The treatment of state public school land issues has overwhelmingly indicated the willingness among western states to accept that a trust relationship exists between the state and the public schools. However, despite the consensus that a trust exists, deciding what management decisions violate the trust relationship continues to be a volatile issue in state public school land questions.

49. *Id.* at 466-69.

50. *Id.* at 468.

51. In *Branson Sch. Dist. RE-82 v. Romer*, the court described the Colorado situation as a "hybrid between the earlier, precatory acts of Alabama and Michigan, and the more specific act of Arizona - New Mexico. The question then becomes on what side of the line should the Colorado Enabling Act be placed. I hold that it creates an enforceable trust." 958 F. Supp. 1501, 1515 (D. Colo. 1997).

52. *See, e.g., County of Skamania v. State*, 685 P.2d 576, 580 (Wash. 1984) (stating that "[e]very court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.").

53. *See, e.g., id.* at 580; *National Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918-19 (Utah 1994); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 236-37 (Okla. 1982); *Branson Sch. Dist.*, 958 F. Supp. at 1514; *Department of State Lands v. Pettibone*, 702 P.2d 948, 953 (Mont. 1985); *but see National Parks & Conservation*, 869 P.2d at 924 (Durham, J., concurring). *See also*, Tacy Bowlin, *Rethinking the ABC's of Utah's School Trust Lands*, 1994 UTAH L. REV. 923, 936-41 (1994).

54. *See, e.g., County of Skamania*, 685 P.2d at 580; *National Parks & Conservation Ass'n*, 869 P.2d at 918-19; *Nigh*, 642 P.2d at 236-37; *Branson Sch. Dist.*, 958 F. Supp. at 1514; *Pettibone*, 702 P.2d at 953; *but see National Parks & Conservation*, 869 P.2d at 924 (Durham, J., concurring).

55. *See, e.g., County of Skamania*, 685 P.2d at 580; *National Parks & Conservation Ass'n*, 869 P.2d at 918-19; *Nigh*, 642 P.2d at 236-37; *Branson Sch. Dist.*, 958 F. Supp. at 1514; *Pettibone*, 702 P.2d at 953; *but see National Parks & Conservation*, 869 P.2d at 924 (Durham, J., concurring).

THE ISSUE IN WYOMING

In Wyoming, the current crisis in the financing of state public education has intensified arguments that the state, as the trustee of the school lands, has a duty to maximize earnings from the lease of the state public school lands.⁵⁶ The argument is straightforward: The intended beneficiary of the state school lands is the state public education system; therefore, the lease or sale of any of the school lands for less than fair market value violates the trust and is null and void. An integral part of this argument is the belief that in order to maximize income from the lease of the lands, the state should not artificially depress the fair market rental of these properties in an attempt to benefit interest groups other than the state public schools.⁵⁷

Specific to the issue of grazing leases, questions can legitimately be asked about the legality of recent state legislation that directs the Board of Land Commissioners to accept leases at times for less than optimum value. Arguably, the intended beneficiary of this statutory framework is, at least most directly, the cattle industry.

The Wyoming Constitution, like the constitutions of many of the land-grant states, directs that the Board of Land Commissioners, under the direction of the legislature, shall have control over the leasing and disposal of the state school lands.⁵⁸ Pursuant to this constitutional provision, the Wyoming legislature has recently promulgated guidelines for the leasing of state school lands for agricultural purposes.⁵⁹ The new provisions seem to contain language that leaves state lands susceptible to less than optimum value rentals.

Wyoming statute section 36-5-101 addresses the required qualifications of lessees of state school lands and the criteria for establishing the rental price for the state school land in question.⁶⁰

(a) No person shall be qualified to lease state lands unless that person has reached the age of majority, and is a citizen of the United States, or has declared an intention to become a citizen of the United States. No person or legal entity shall be qualified to lease

56. In *National Parks & Conservation*, 869 P.2d at 918, the Utah court held that all trustees owe fiduciary duties to the beneficiaries of the trust. The duty of "loyalty requires a trustee to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust." *Id.* (citing WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 170 (4th ed. 1987)).

57. See, e.g., Tim Newcomb, *You Judge the Law: Our State Lands*, CASPER STAR-TRIBUNE, March 28, 1998, at A9; Deidre Stoelzle, *Making the Most of Grazing Fees*, CASPER STAR-TRIBUNE, Oct. 25, 1998, at A10; *infra* note 140.

58. See *supra* notes 7-12 and accompanying text.

59. See *infra* notes 60-74 and accompanying text.

60. WYO. STAT. ANN. § 36-5-101 (Michie 1997) (as amended by 1997 Wyo. Sess. Laws ch. 200).

state lands unless he or it has complied with the laws of this state and is authorized to transact business in this state.

(b) The rental of any lease awarded shall be based on an economic analysis and shall reflect at least the fair market value for the same or similar use of the land based upon a formula adopted by the board using the following criteria:

(i) Readily available data averaged over an adequate number of years to remove any radical fluctuations;

(ii) Factors which reasonably reflect the true market value of state leases;

(iii) Parameters within which the board can be responsive to changing resource conditions, market demand and industry viability;

(iv) Factors which reasonably reflect the contributions made by the lessee.⁶¹

By limiting fair market value analysis to "same or similar use" of the land, the statute limits the influence of non-grazing and non-agricultural uses when determining the rental value of the land. This limitation consequently shrinks the potential bidding pool. Also, the statute indicates that any price-fixing formula adopted by the board shall attempt to limit "radical fluctuations" in the rental price. This too potentially prevents the school trust fund from receiving optimum value for the school trust lands. The statutory framework does not allow the permanent fund to be compensated for radical upward fluctuations in the value of state school lands.⁶²

Furthermore, the rental price of any lease awarded must be based, at least in part, on "[p]arameters within which the board can be responsive to changing . . . market demand and industry viability."⁶³ Even though the exact requirements of this statute are unclear, it seems to benefit the ranching community directly. The question can then legitimately be asked: If the goal of the trust is to achieve maximum income from the school lands, why is the legislature concerned about market demand and industry viability?⁶⁴

The importance of the rental formula established by the legislature in

61. *Id.*

62. WYO. STAT. ANN. § 36-5-101(b)(i) (Michie 1997).

63. WYO. STAT. ANN. § 36-5-101(b)(iii) (Michie 1997).

64. The mission statement of the Office of State Lands and Investment states that the assets are to be managed so as "to enhance value and optimize economic return in the interest of the State's schools and institutions," and "in a manner that promotes socioeconomic growth and stability in Wyoming." See *supra* note 20, at 4 (emphasis added). If the goal of the trust is to achieve maximum income from the school lands, it seems at least questionable that the Board of Land Commissioners can consider whether leasing decisions should be designed to promote socioeconomic growth and stability in Wyoming. See *infra* notes 85-120 and accompanying text.

section 36-5-101 becomes clear when read in conjunction with Wyoming statute section 36-5-105(a). This latter provision can be broken into three parts.

First, section 36-5-105(a) establishes a preference for the localized lease of state school lands to interests that find the lease of the lands important to their ranching operation.⁶⁵

All state lands leased by the state board of land commissioners, for grazing and other agricultural purposes shall be leased in such manner and to such parties as shall inure to the greatest benefit to the state land trust beneficiaries. Except as herein provided, preference shall in all cases be given to applicants who are bona fide resident citizens of the state qualified under the provisions of W.S. 36-5-101, and to persons or legal entities authorized to transact business in the state, having actual and necessary use for the land and who are the owners, lessees or lawful occupants of adjoining lands. . . .⁶⁶

Second, the statute reaffirms the position expressed in Wyoming statute section 36-5-101(b) that the “fair market value” of the rental is not to be determined by open bidding, but rather it must be based on a formula adopted by the legislature and Board of Land Commissioners.⁶⁷

Except as herein provided, preference shall in all cases be given to applicants who . . . offer to pay an annual rental at not less than fair market value, as determined by the economic analysis pursuant to W.S. 36-5-101(b), for the use of the forage or other commodity available annually on the land for a period of ten (10) years.⁶⁸

Third, section 36-5-105(a) establishes an important preference right to renew once an existing leaseholder matches the “fair market value” of the land.⁶⁹

An applicant who is the holder of an expiring lease, and has paid the rental when due, and has not violated the provisions of the lease, and is qualified under the provisions of W.S. 36-5-101, shall have a preferred right to renew such lease by meeting the highest bid offered which is based on the fair market value, using the formula developed by the board pursuant to W.S. 36-5-101(b), for the same or

65. WYO. STAT. ANN. § 36-5-105(a) (Michie 1997).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

similar use of the land.⁷⁰

Therefore, as a result of Wyoming statute section 36-5-105(a), a potential lessee, with a desire to offer more than the set "fair market value" could lose the opportunity to lease state land to an existing leaseholder.⁷¹ In other words, the statutory framework artificially restrains true "free-market bidding" by capping rental values to a formula based on industry viability, attempting to prevent absentee ownership, and attempting to promote industry stability.⁷² The state public school fund loses out on the revenue that could have been gained if the process had been opened up to true competitive bidding.⁷³

While the Wyoming Supreme Court has long recognized the existence of the school trust, it has failed to deem similar statutes unconstitutional.⁷⁴ In *Alamo Drainage District v. Board of County Commissioners*, the Wyoming Supreme Court was forced to decide if a lien held by the state school permanent fund against the Alamo Drainage District was superior to the state's general tax lien against the drainage district.⁷⁵ The court found that recognizing the superiority of the tax lien would directly threaten the permanent school trust fund.⁷⁶ Consequently, the court adopted harsh language in its attempt to protect the school trust fund.⁷⁷ "[T]he fund is intended to be a

70. *Id.*

71. A case currently before the Wyoming Supreme Court challenges the constitutionality of this renewal preference. Joan Barron, *Wyo Top Court Asked to Rule on State Lands*, CASPER STAR-TRIBUNE, Nov. 10, 1998, at A1. The leasing decision involved a state grazing lease on 640 acres of state trust land in Laramie County. *Id.* at A10. The Board of Land Commissioners was faced with a choice between two competing bids of \$6,000. *Id.* The Board awarded the lease to the existing leaseholder based solely on the statutory renewal preference. *Id.*

72. See WYO. STAT. ANN. §§ 36-5-101, -105 (Michie 1997).

73. Other aspects of current Wyoming legislation on state school lands can be criticized for artificially limiting the amount of income received by the state school permanent fund. Wyoming statute section 36-5-105(b) allows for the sublease of state school lands. Section 36-5-105(b) states that "in no event shall the lands be subleased unless one-half (1/2) of the excess rental is paid to the state." WYO. STAT. ANN. § 36-5-105(b) (Michie 1997). This statute can reasonably be criticized for two reasons: (1) it demonstrates that often the original lease rentals are undervalued; and (2) the state school fund loses out on one-half of the excess rentals of the property. If the nature of the trust relationship is such that the exclusive beneficiary of the trust property is the public schools (see *infra* notes 85-120 and accompanying text), this statute, which allows individual lessees to benefit by pocketing one-half of the excess sublease rental, seems to violate Wyoming's Act of Admission. Also, Wyoming statute section 36-5-111 states that "[a]ny applicant applying to lease state lands upon which there are . . . improvements of any kind, belonging to or made by another . . . shall before receiving the lease, pay to the director for the benefit of the owner or maker of any improvement . . . the contributory value thereof." WYO. STAT. ANN. § 36-5-111 (Michie 1997). Put simply, a new lessee must pay for the improvements made by the old lessee; this even though Wyoming Statutes sections 36-5-110 and 36-5-111 allow the old lessee to remove any improvements he or she has made. Forcing a new lessee to compensate an old lessee for improvements increases the cost of leasing school land and artificially lowers the fair market value of the property.

74. See *infra* notes 75-87 and accompanying text.

75. 148 P.2d 229 (Wyo. 1944).

76. *Id.* at 234.

77. *Id.*

permanent one, and it is the policy of the state to preserve it; and any statute which infringes or conflicts with such a provision is, of course, invalid and uneffective [sic].”⁷⁸

While *Alamo Drainage District* would seem to be a definitive statement about the care and management of the permanent school fund, the Wyoming Supreme Court has not cited it in later cases as dictating any management principles for the granted lands themselves.⁷⁹ For example, in *Mayor v. Board of Land Commissioners*, the Wyoming Supreme Court faced a statutory framework that not only created a preference for renewal, but also contained statutory language stating that “[a]ll state lands leased by the state board of land commissioners for grazing purposes shall be leased in such manner and to such parties as shall inure to the greatest benefit to the state.”⁸⁰ A reasonable interpretation of this statute is that the Wyoming legislature attempted to make the “state,” rather than the public schools, the primary beneficiary of the state school lands. The court in *Mayor* seemed to hold that the legislature had properly created co-beneficiaries:

Instances may readily be suggested where it would be a far greater advantage to both the people of the state and the schools thereof that the lands be withheld from lease. There are many other advantages and benefits to be taken into consideration in such matters other than obtaining a specified amount of revenue.⁸¹

In *Frolander v. Ilsley*, the Wyoming Supreme Court again upheld the Board of Land Commissioners’ decision to receive less than optimum value on a lease of state school lands.⁸² The court examined a statute that forced the Land Board to consider the cattle industry when making leasing decisions.⁸³

The statute clearly shows that the legislature meant to make it the policy of the state to recognize equities in those who have built up a

78. *Id.* (quoting 56 C.J. *School & School Districts* § 34 (1932)).

79. See Wayne McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525 (1982). Professor McCormack argues that the enabling act restricts the use of proceeds from school trust lands, but is silent or is at least less restrictive about managing the land itself. *Id.* If this were the case then the state school lands would be no different than other state sovereign lands. *Id.* Under the “emerging public trust” doctrine, as advocated by Charles F. Wilkinson, these lands would be held in trust for the public generally and would not be held to a specific public education trust. See Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980); but see *National Parks & Conservation Ass’n v. Board of State Lands*, 869 P.2d 909, 919-20 (Utah 1994) (rejecting the idea that the enabling act does not dictate trust principles for the management of state school lands).

80. 192 P.2d 403, 409 (Wyo. 1948) (quoting 2 W.C.S. § 24-113 (1945)).

81. *Id.* at 411.

82. 264 P.2d 790 (Wyo. 1953).

83. *Id.*

ranching business in the state which should be considered in passing upon applications for renewal of expiring leases, and that the absence of such policy would be injurious if not destructive to that industry.⁸⁴

The court accepted this statute as valid, even though the state school permanent fund would receive less money in the short term from the rental of that particular piece of state school land.⁸⁵ The court's treatment of the trust obligation between the state and the public schools was short and to the point.⁸⁶

School lands are . . . held in trust But prudence and wisdom do not, we think, require that it must be so administered as to destroy or diminish the value of the ranching interests of the state which form a large part of the source from which our schools are nourished. We see no reason why the interest of the trust and that of the ranchers in the state may not be harmonized so as to result in the best interest of the state as well as of the schools.⁸⁷

The result in *Frolander* leads to one of two interpretations: (1) the Wyoming Supreme Court found that the trust could properly be administered with the state's ranching interests and the state's public schools as co-beneficiaries; or (2) management policies that advance the cattle industry benefit the state's overall economy and, thus, indirectly benefit the state's public education system.

THE CASE FOR A SINGLE BENEFICIARY AND MAXIMUM INCOME

Many recent state and federal court decisions support the viewpoint that the public school system should be the sole beneficiary of public school land management policies.⁸⁸ *Lassen v. Arizona* has become a hallmark for this position.⁸⁹ *Lassen* involved a condemnation action by the Arizona Highway Department for a road easement across state school lands.⁹⁰ Payments to the state school permanent fund were discounted by what the state believed would be future enhancements in value to the remaining portion of

84. *Id.* at 794 (quoting *Kerrigan v. Miller*, 84 P.2d 724, 729 (Wyo. 1938)).

85. In *Frolander*, renewing the lease would have realized to the state a yearly rental of \$74; denying the renewal and granting the lease to Ms. Frolander, the state fund would have received a yearly rental of \$211.20. *Id.* at 792.

86. *Id.* at 799.

87. *Id.*

88. See *infra* notes 89-123 and accompanying text.

89. 385 U.S. 458, 465 (1967).

90. *Id.* at 459-60.

state school land created by the construction of the road.⁹¹ The United States Supreme Court refused to accept the state's reasoning behind the less than fair market value payment for acquiring the easement across the school lands.⁹² The *Lassen* Court ruled instead that Arizona's Enabling Act "indicated congress' concern both that the grants provide the *most substantial support possible* to the beneficiaries and that *only those beneficiaries profit* from the trust."⁹³ Consequently the Court ruled that the State of Arizona had to fully compensate the trust in money for the full-appraised value of any rights of way the state acquired over trust lands.⁹⁴ In other words, current fair market value had to be paid to the permanent fund.

Alamo Land & Cattle Co. v. Arizona continued this hard-line approach of ensuring that the state's land management policies exclusively benefited the state's public education system.⁹⁵ In *Alamo Land & Cattle Co.*, the Court specifically stated that any lease of state school land had to be for full value.⁹⁶

[T]he trust is to receive, at the time of its disposition of any interest in the land, the then full value of the particular interest which is being dispensed. . . . Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void. . . .⁹⁷

Furthermore, in *United States v. 111.2 Acres of Land*, a federal district court confronted a Washington statute that granted portions of state school lands to the federal government without compensation.⁹⁸ Even though Washington attempted to give the lands to the United States (the original grantors of the land), and despite that the federal government wanted to use the lands for irrigation projects that would benefit the state, the federal district court held that the outright donation violated Washington's enabling act.⁹⁹ The court further held that the United States was required to pay full market value in order to acquire state school lands.¹⁰⁰

In *Oklahoma Education Ass'n v. Nigh*, the Oklahoma Supreme Court encountered state statutes that allegedly violated the trust obligations of the

91. *Id.* at 460.

92. *Id.* at 466.

93. *Id.* at 467 (emphasis added).

94. *Id.* at 469.

95. 424 U.S. 295, 303, 305 (1976).

96. *Id.*

97. *Id.*

98. *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042 (E.D. Wash. 1968).

99. *Id.* at 1046, 1049.

100. *Id.* at 1050.

state in three ways.¹⁰¹ First, the statutes established maximum rents the commissioners could charge when leasing state school lands.¹⁰² Second, the statutes limited the amount of interest the commissioners could charge in making farm loans and selling state school trust property.¹⁰³ Third, the statutes established a renewal preference for the lease of state school lands.¹⁰⁴ The preference for renewal required the commission to award the renewal if the current lessee acted in good faith and complied with the requirements of the existing lease.¹⁰⁵ The renewal preference did not require the current lessee to exceed or match other bids.¹⁰⁶

The Oklahoma Supreme Court first found that the granting of state lands in the Enabling Act created a powerful trust obligation between the state and the Oklahoma public schools.¹⁰⁷

The State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from the use and disposition of the trust property No act of the legislature can validly alter, modify or diminish the State's duty as Trustee of the school land trust to administer it in a manner most beneficial to the trust estate and in a manner which obtains the maximum benefit in return from the use of trust property or loan of trust funds.¹⁰⁸

The Oklahoma Supreme Court then declared the statutory framework unconstitutional.¹⁰⁹ The court found that any use of the land below fair market value was, in effect, a subsidy to the cattle industry at the expense of state public schools.¹¹⁰ The court held that the state could not manage the public school lands for the benefit of local ranching and farming interests.¹¹¹

Yet another important attack on the dual beneficiary management of state school lands occurred in *County of Skamania v. State*.¹¹² In *County of*

101. 642 P.2d 230 (Okla. 1982); OKLA. STAT. ANN. §§ 86.1, 89, 260.2 (West 1976). This case takes on added significance in that the statutory scheme at issue in *Nigh*, is, in many ways, similar to Wyoming's. See WYO. STAT. ANN. §§ 36-5-101, -105 (Michie 1997). A Wyoming court that follows the reasoning of the *Nigh* court would most likely have difficulty finding Wyoming's current leasing statutes permissible under the state's Act of Admission. See *supra* notes 60-74 and accompanying text.

102. *Nigh*, 642 P.2d at 235.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 235-236.

108. *Id.* (citing *Lassen v. Arizona*, 385 U.S. 458 (1967)).

109. *Id.* at 236.

110. *Id.*

111. *Id.*

112. 685 P.2d 576 (Wash. 1984).

Skamania, the Washington Supreme Court was faced with a statutory leasing scheme that allowed timber companies to default on existing state leases on state public school lands.¹¹³ By not forcing the timber companies to honor the existing leases, the net face value of the contractual claims released totaled somewhere between \$70,000,000 and \$90,000,000.¹¹⁴ A downturn in timber prices that threatened to cause bankruptcies in the timber industry and defaults on lease payments motivated the Washington legislation.¹¹⁵

[The state argues that] enforcing the contracts would involve too much risk and uncertainty in litigation, hurt competition in the timber industry and thereby reduce the price of timber in the future, and produce no immediate income to the trusts. By modifying the contracts to encourage performance and preserve the timber industry, it is argued that the Legislature acted in the best interests of the trusts, both for the long-term and the short-term.¹¹⁶

The Washington Supreme Court ruled that even though the legislature may have considered the interests of the public school system in its deliberations, its primary purpose in enacting the legislation was to benefit the forest products industry.¹¹⁷ The court found that this demonstration of divided loyalty resulted in a breach of trust, and that the legislation fell far short of the state's constitutional duty to seek "full value" for the trust assets.¹¹⁸

Another case that supports the position that the state school lands must be managed for the exclusive benefit of the public schools is *National Parks & Conservation Ass'n v. Board of State Lands*.¹¹⁹ In that case, the Utah Board of Land Commissioners had to choose between retaining a section of state school land within Capital Reef National Park in order to protect its scenic and aesthetic values, and exchanging the property for industrial lands worth 150% of the original parcel's value.¹²⁰ While acknowledging the benefit the general public would receive by protecting the inherent environmental value of the original grant, the Utah Supreme Court upheld the board's decision to exchange the property.¹²¹

In short, trust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be adminis-

113. *Id.* at 579.

114. *Id.*

115. *Id.* at 581.

116. *Id.*

117. *Id.*

118. *Id.*

119. 869 P.2d 909 (Utah 1993).

120. *Id.* at 911-12.

121. *Id.* at 916-22.

tered for the general welfare of the state . . . Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people. . . .¹²²

The Utah Supreme Court was clear. The trust could not be prudently administered if the preservation or protection of non-economic, environmental values resulted in the diversion of trust assets or resources.¹²³

COMMENT

Wyoming's acceptance of the state school lands created a solemn bilateral contract between the state and the federal government.¹²⁴ This agreement, in turn, created a trust between the state and the state public education system.¹²⁵ The state holds state school lands in trust for the benefit of the public schools;¹²⁶ all state land management decisions must be made for "the support of common schools."¹²⁷

The trust relationship accepted by Wyoming is one dimensional, but it need not be simplistic in its application. The mandate that the state manage school lands "for the support of common schools" cannot be satisfied through a statewide leasing scheme of any kind. The trust obligations cannot be reduced to one-size-fits-all arguments advocating "open bidding" or blind, unsupported preferential treatment for certain segments of the cattle industry. Wyoming should not follow foolhardily the recent tide of jurisdictions that advocate maximum income to the permanent fund at any cost.¹²⁸ The trust relationship between the public schools and the State of Wyoming ultimately must be administered at the level of individual leasing decisions.

Wyoming's current land laws must be evaluated against the demands of the trust relationship created by Wyoming's Act of Admission. The mandate presented by the act of admission is simple: state lands must be managed "for the support of common schools."¹²⁹ However, at the level of individual leasing decisions, proper trust management is often complicated and difficult.

122. *Id.* at 919 (quoting *Kanaly v. State*, 368 N.W.2d 819, 824 (S.D. 1985)).

123. *Id.* at 916.

124. *Papasan v. Allain*, 478 U.S. 265, 292 (1986) (citing *Andrus v. Utah*, 446 U.S. 500, 507 (1980)).

125. *See supra* notes 89-123 and accompanying text.

126. *See supra* notes 89-123 and accompanying text.

127. Wyoming's Act of Admission § 4.

128. *See supra* notes 89-123 and accompanying text.

129. Wyoming's Act of Admission § 4.

One reason individual leasing decisions are difficult is that the trust language remains constant regardless of any motivation behind an individual leasing decision. In other words, the trust obligation does not vary depending on whether the lease ultimately results in a giveaway to a wealthy rancher, a subsidy to a marginal rancher, a tool in preserving an ecosystem, or a means of promoting a vital state interest. As written, the state land trust singularly demands that state lands be managed "for the support of common schools."¹³⁰ The trust relationship between the public schools and the State of Wyoming is built into the state's act of admission, and therefore it is un-moving and uncompromising.¹³¹ Wyoming's Act of Admission creates a legally enforceable backdrop for every decision the State of Wyoming and its agencies make.¹³²

The result of this trust language is that one-size-fits-all management schemes have the potential to cause some individual leasing decisions to violate the trust obligation. For example, the heart of Wyoming's current agricultural leasing law establishes a renewal preference and a market oriented leasing scheme.¹³³ Arguably, this limitation on true free market bidding for state land leases is designed to support Wyoming's important agricultural community, or at least, is designed to make Wyoming's leasing law responsive to the needs of that community.¹³⁴ Whatever the purpose, the statutes have the potential to reduce income to the permanent fund.¹³⁵

130. *Id.*

131. However, this position should not be confused with one that believes the school trust demands maximum profit to the permanent fund. See generally *National Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 923-24 (Utah 1993) (Durham, J., concurring):

[S]uppose an applicant proposes to build a toxic waste disposal facility on trust land at the head of a major water source. If the applicant offers more money than the trust could ever hope to receive from any other use, a strict requirement of undivided loyalty to the school trust arguably would require the state to accept the project. . . . It would be ludicrous to *force* the state to make the sale and allow the project, notwithstanding health, environmental, or other consequences, simply because approval would provide the greatest monetary return to the school trust fund.

Id. Not only does this argument demonstrate the fallacies of an unbending leasing policy to maximize income, it lends further support to the position that all individual leasing decisions must maximize the long-term benefits to the state's public education system. See *supra* notes 85-120 and accompanying text. It is the trust that is unwavering, not the need, necessarily, to maximize profit to the permanent fund. A runaway toxic waste dump that turns the region into a waste-zone generates income, but it does not benefit the long-term interests of the trust.

132. See *supra* notes 2-15 and accompanying text.

133. See *supra* notes 60-74 and accompanying text.

134. See *supra* notes 60-74 and accompanying text.; see also, Tim Newcomb, *You Judge the Law: Our State Lands*, CASPER STAR-TRIBUNE, March 28, 1998, at A9; *supra* note 64.

135. See *supra* notes 56-74 and accompanying text. The Wyoming Supreme Court in *Frolander v. Ilsley* justified a previous, but similar, statutory scheme by linking the welfare of the public schools with the welfare of the ranching industry. 264 P.2d 790, 799 (Wyo. 1953). "[P]rudence and wisdom do not, we think, require that [the trust] must be so administered as to destroy or diminish the value of the ranching interests of the state which form a large part of the source from which our schools are nour-

A system that contains a statewide renewal preference and artificially restricted lease prices, such as Wyoming's, can result in the public schools being harmed in both the long- and short-term.¹³⁶ If a more efficient, more productive, ranching operation is willing to pay a higher rental, then the lease should be awarded to that operation. By the same token, a rancher who needs the state land to keep his operation viable, and is willing to pay more for the lease, should be allowed to rebut the renewal preference granted to a leaseholder whose state leases are only a small portion of a larger business.¹³⁷ In these cases, the state should receive the highest possible income a lessee is willing and able to pay. It must lease that particular portion of state land for the sole benefit and "support of common schools."¹³⁸

Does this mean, however, that Wyoming should consider only the proposed rental price in its leasing decisions? Not-necessarily. The trust relationship is written "for the support of common schools," not for the "support of the permanent fund."¹³⁹ A pure open bidding system would be one where each portion of state land is offered by auction to the public at

ished." *Id.* Is such a position viable today? The answer to this question is unclear. Undoubtedly, Wyoming's agriculture and ranching production is important to the state's economy. The Department of Administration and Information, Division of Economic Analysis, forecasts that in 1999 gross farm income will amount to \$900,530,000 and earnings to the 16,820 estimated farm workers and owners will total \$88,570,000. Farm related activity will pump \$811,960,000 into the Wyoming economy. THE EQUALITY STATE ALMANAC 21-22 (5th ed. 1997). However, no hard data exists explaining the connection between the Wyoming leasing statutes and the overall health of the cattle industry, or for that matter, the state's public education system. *Frolander* is correct if it suggests that the trust relationship allows management decisions to look to factors other than revenue generated to the permanent fund. 264 P.2d at 794. However, *Frolander* is wrong when it suggests that this can be accomplished through a statewide "one-size-fits-all" management scheme. *Id.*; See also, *Mayor v. Board of Land Commissioners*, 192 P.2d 403, 409 (Wyo. 1948) ("There are many other advantages and benefits to be taken into consideration in [leasing decisions] other than obtaining a specific amount of revenue.").

136. Evidence exists that Wyoming state lands are currently undervalued. GRASSROOTS ADVOC., Vol. 3, No. 14, Oct. 19, 1998, at 6. Currently, Wyoming's rental values are established pursuant to Wyoming Statutes sections 36-5-101 to 36-5-105. Wyoming currently leases a single Animal Unit Month (AUM) for an average of \$3.50. *Id.* However, the average rental for leases with more than one bidder increases to \$11.65 per AUM. Joan Barron, *Wyo Top Court Asked to Rule on State Lands*, CASPER STAR-TRIBUNE, Nov. 10, 1998, at A1. As a comparison, in South Dakota, a single AUM leases for \$5.19-\$30; in Nebraska, a single AUM leases for \$16 to \$24. GRASSROOTS ADVOC., Vol. 3, No. 14, Oct. 19, 1998, at 6. Total revenue generated from state land grazing leases in Nebraska (a total lease of 1.2 million acres) last year was \$20,000,000. *Id.* The total amount generated from state land grazing leases in Wyoming (a total lease of 3.5 million acres) last year was \$3,500,000. *Id.* However, differences in soil and grass quality may account for disparity in revenue generated per acre by the state lands. Telephone interview with Phillip Ellis, former board member of the Wyoming Stockgrowers Association (Sept. 1, 1998). Thus, it is not entirely clear how much, if any, Wyoming's leasing system undervalues the state school land.

137. The 116 largest grazing leaseholders in Wyoming (who comprise only one percent of all farmers and ranchers in Wyoming) currently have a legislatively-protected monopoly on one-third of the total 3,500,000 acres of state lands. *Schools Subsidizes [sic] Fat Cats Through Grazing Fees*, GRASSROOTS ADVOC., Vol. 2, No. 12, July 8, 1998, at 17.

138. Wyoming's Act of Admission § 4.

139. *Id.*

large.¹⁴⁰ The state would allow no preference for existing leaseholders, citizenship, age, or to specific land uses.¹⁴¹ The lease would simply be awarded to the highest bidder. The bid of $X + \$10$ would receive the land over a bid of X .

However, if this policy were implemented statewide it would suffer from the same fallacies that permeate Wyoming's current leasing scheme.¹⁴² For example, consider a situation where the Board of Land Commissioners faces lease applications from two potential lessees: leasing decision A would award a state land lease to a working ranch with six employees for a rental amount of X , while leasing decision B would award a lease to a horse owner who wants the state land as winter pasture for his two recreational trail horses. Leasing decision B would result in a rental price of $X + \$10$. A pure open bidding system would award the lease to the recreational horse owner based on the additional \$10 that would flow to the permanent fund. But decision B would not necessarily benefit the public schools. If leasing decision B would cause the working ranch to scale back and lay-off even a single employee, the decision could harm the public schools.¹⁴³ A single employee would make available to a local economy, and indirectly to a local school system, more benefits than the \$10 generated to the permanent fund by leasing decision B.¹⁴⁴ The state would not have managed that particular portion of state land "for the support of common schools." This leasing decision could legitimately be challenged as violating Wyoming's Act of Admission.

Due to the geographic isolation and limited access of many portions of state school land, most leasing decisions will in fact concern grazing

140. Two former members of the Board of Land Commissioners, State Auditor Dave Ferrari and Secretary of State Diana Ohman, advocated a more market-oriented approach to state land leasing decisions. Mr. Ferrari recently told a Wyoming newspaper that, "I can't grasp the concept of accepting less on a state lease than the market would provide." Deirdre Stoelzle, *Making the Most of Grazing Fees*, CASPER STAR-TRIBUNE, Oct. 25, 1998, at A10. The Casper Star-Tribune also reported that "[a]dvocates of raising the state's . . . grazing fee have generally supported letting fair-market prices indicate the lease payments." *Id.* The use of the free-market language, however, is deceiving. What most "free-market" advocates support is a minimum rental price with no ceiling, which is not a free-market system. Without such a minimum price, many portions of state land that have limited access or are completely landlocked by private land would have no market. The lease rates for these parcels would be nominal.

141. See *supra* notes 60-74 and accompanying text.

142. See *supra* notes 136-38 and accompanying text.

143. Note that damage to the trust may occur even if something as dramatic as a reduction in payroll does not occur. Due to the considerable expense involved in producing and marketing just one calf, a leasing decision that causes even an insignificant reduction in a ranching operation may produce long-term damage to the trust. See *supra* note 135. Ranching related expenditures are spent directly in Wyoming. This is money made available to local economies. This money translates into jobs, housing, and the stabilization of local communities. All of these things are necessary "for the support of common schools." See *supra* notes 80, 82 and accompanying text.

144. See *supra* note 143.

leases.¹⁴⁵ In many areas, grazing is the best and most suitable use of state school lands.¹⁴⁶ Grazing, unlike many other uses of state lands (such as sale and development) is a renewable resource.¹⁴⁷ Therefore, the stewardship aspects of sustained grazing should not be discounted in leasing decisions.¹⁴⁸ Grazing, if managed correctly, can be utilized as a continual source of income for the permanent fund.¹⁴⁹

However, the Board of Land Commissioners, when making leasing decisions, should also consider uses other than grazing.¹⁵⁰ Because of the amount of money at stake, the recreational value of specific portions of state land should be considered in individual leasing decisions. For example, hunting and fishing has become a vital industry in Wyoming. In 1996, sportsmen spent \$337,000,000 while hunting and fishing in Wyoming.¹⁵¹ Antelope hunting, a common use of state school lands, by itself pumped a total of \$15,000,000 into the state and local economies.¹⁵² With over 5,000 square miles of property under state control in Wyoming,¹⁵³ management decisions on state land will benefit or detract from the health of wildlife populations statewide. The state public schools have a vested interest in ensuring that these figures remain stable or increase.

In some situations, quality wildlife habitat equates directly with the economic benefits generated by the hunting and fishing industry.¹⁵⁴ Therefore, portions of state land that contain critical wildlife habitat could be managed for the benefit of the environment. The Board of Land Commis-

145. Telephone Interview with Phillip Ellis, former board member of the Wyoming Stockgrowers Association (Sept. 1, 1998); *see also*, Bruce & Rice, *supra* note 22, at 21-22.

146. Telephone Interview with Phillip Ellis, former board member of the Wyoming Stockgrowers Association (Sept. 1, 1998).

147. *Id.*

148. *See generally* State v. Babcock, 409 P.2d 808, 810 (Mont. 1966) (quoting the Montana State Board of Land Commissioners: "If a competing bid is considerably higher, there is danger that the lessee will not fulfill his term because of inability to make money or that he will cut corners on good husbandry practice").

149. *See supra* note 146.

150. *See* Fairfax, *supra* note 24, at n.284. The authors of *The School Trust Lands* argue that "if the land is to be used in support of schools, perhaps the best way to do that is to use the trust assets, in part, to enhance the local tax base on which the local schools depend." *Id.* at 870. The sale of school lands may provide more overall benefits to school finance than indefinite leasing because not only does it provide immediate investment capital for the state school funds, but it also gives ownership to private individuals which supports the local tax base. *Id.* (citing Segner v. State Inv. Bd., No. 587-489319, slip op. at 11 (Ramsey County Dist. Ct., Aug 11, 1988)). This is an example of a suggested management scheme that does not benefit the permanent fund (a loss of perpetual revenue), but it does benefit the school beneficiaries. In an individualized management scheme (*see supra* notes 124-49 and *infra* notes 151-61 and accompanying text) some parcels of state land perhaps would best benefit the trust if they were sold.

151. THE EQUALITY STATE ALMANAC 71 (5th ed. 1997).

152. *Id.*

153. *Id.* at 69.

154. *See supra* note 143.

sioners could perhaps act well within the trust obligation if it were to manage these portions of state land for wildlife and recreational well being. Conservation groups should be allowed to lease portions of state lands for the benefit of wildlife populations. Perhaps conservation groups could even "lease" reductions in animal unit months on specific portions of overgrazed state lands. Decisions that benefit the environment can, in some circumstances, support the common schools. The possibilities are great. The trust obligation, as written into Wyoming's Act of Admission, does not direct how the school lands should be specifically managed—it only directs that they be managed "for the support of common schools."¹⁵⁵

The key factor in the management of state school lands is that each and every lease issued by the Board of Land Commissioners must have as its goal the benefit of Wyoming's public education system. In *County of Skamania v. State*, the Washington Supreme Court weighed the benefits and injury to the public schools that would result from two conflicting management proposals.¹⁵⁶ Ultimately the court found that the state had failed to act "in the best interests of the trusts."¹⁵⁷ Perhaps the best lesson to be gleaned from *County of Skamania* is not the court's holding that income to the permanent fund must always be maximized,¹⁵⁸ but rather that land managers should use a thorough decision-making process to determine what actually is in the best interest of the public schools.¹⁵⁹

The problem, of course, with a more individualized leasing system is the possibility of added administrative costs. Obviously, the more findings that need to be made, the more expensive the leasing system becomes to operate. One way to lower costs to the permanent fund would be to shift administrative costs to potential lessees. For example, a statewide leasing scheme could create a rebuttal presumption in the legality of an individual leasing decision. A competing lessee could make challenges to that individual leasing decision to the Board of Land Commissioners, or to a separate state agency.¹⁶⁰

155. Wyoming's Act of Admission § 4.

156. 685 P.2d 576 (Wash. 1984).

157. *Id.* at 583.

158. *Id.*

159. See *supra* notes 124-58 and *infra* notes 160-61 and accompanying text.

160. Currently the board of land commissioners consists of the governor, the superintendent of public instruction, the secretary of state, the state treasurer, and the state auditor. WYO. CONST. art. XVIII, § 3. Obviously the job description of these individuals contains considerably more than the disposition of state lands. One solution would be to elect a state land board that deals specifically with state land issues. Note, however, that a considerable administrative structure already exists, including an Office of State Lands and Investments, and the availability of hearings to protest individual leasing decisions. See *State Supreme Court Reviewing Grazing Lease Preference*, LARAMIE DAILY BOOMERANG, November 11, 1998, at A7. Furthermore, at this stage, there is no way of evaluating how contentious these leases will

Wyoming's state land laws need to be changed. Currently, the state is not managing individual portions of state land for the "support of common schools." The result of the current system is that Wyoming's state lands generate less than a net seven cents per acre for the permanent fund,¹⁶¹ and create no known indirect benefits to the state's public education system. However, Wyoming should not rush into an equally uncompromising "open bidding system." The trust itself is uncompromising, and therefore the leasing scheme cannot be.

CONCLUSION

Wyoming's Act of Admission creates a trust relationship between the state of Wyoming and the Wyoming public education system. This trust is legally enforceable, and management decisions that do not advance the interests of the public schools are null and void. The mandate presented by the trust relationship is simple: state school lands must be managed "for the support of common schools." The obligations created by this language not only govern the policies of a broad statutory framework, but they also govern individual leasing decisions made by the Board of Land Commissioners. The trust language is unbending and unwavering. Therefore, narrowly defined leasing schemes that are generally applicable to all leasing decisions have the potential to cause individual leasing decisions that violate the trust obligations of the state.

Individual leasing decisions must be structured such that a viable connection exists between management decisions and the overall welfare of the state public education system. The Wyoming legislature should create a leasing system that allows for a thorough decision-making process to take place at the level of each individualized leasing decision. Such a system would better ensure that management decisions made by the Wyoming legislature or the Board of Land Commissioners do not violate the trust created by Wyoming's Act of Admission.

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become. Currently, only slightly more than 1 percent of all annual lease rentals involve competing applications. Joan Barron, *Wyo Top Court Asked to Rule on State Lands*, CASPER STAR-TRIBUNE, NOV. 10, 1998, at A10. If a rebuttable presumption in a statewide leasing scheme is created, few leases may be challenged. Any assumption about the costs of administration in a new system, at this point, would be speculation.

161. GRASSROOTS ADVOC., Vol. 1, No. 2 at 6.