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Thinking the Unthinkable: States as Public Land Managers

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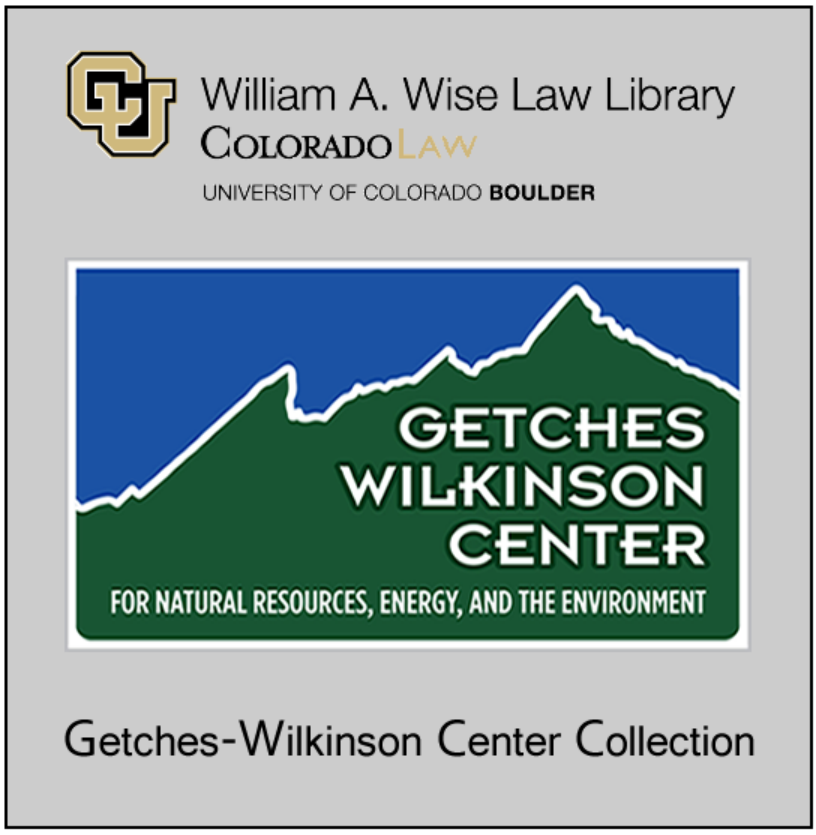

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THINKING THE UNTHINKABLE:
STATES AS PUBLIC LAND MANAGERS

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Summary

The purpose of this paper is emphasize the importance of thinking broadly about institutional arrangements for the management of western federal public lands. My principle task is to put some thoughts about states and state management of public resources into the intellectual mix. I shall do so happily, emphasizing state trust lands which, I believe, have much to add to our thinking about why we want to have public resources (if indeed we do), and about alternative tools for achieving the goals implicit in that decision.

This information about state trust lands is specifically not a part of a plea, explicit or implicit, to turn the now-federal lands over to the states. It is, however, nested in a larger agenda. My broader point has to do with the intellectual tools we bring to a discussion of public resources. I think our concepts are impoverished, totally dominated by one model, and inadequate to address the issues that confront us. The progressive era model of centralized, scientific decision making that has been the only string in our conceptual bow almost literally for our entire experience with public resource management. It has been so dominant and deeply defended that (1) we have not even seen alternative models within our midst and (2) we presently do not have at hand many intellectual resources to deal with the unmistakable collapse of that system. I will underscore and address that issue as I try to add the state trust lands into our intellectual quiver of concepts.

The first part of this paper will focus on patterns of thought and advocacy that have long blinded us to alternative concepts of public resources and resource management. In that blindness, we have been unable to engage in meaningful public or academic debate about the whys and wherefores of public resources. We have been trapped, at numerous points in this century and twice in the last twenty years, in largely irrelevant outbursts of petulance.

Those outbursts have allowed a small set of public resource users to focus on the issue of title--who owns the public lands--when the more important issue is one of control. We

real alternatives to discuss. Indeed we are lacking indeed any useful way to distinguish between title and control, (I hope it may occur to some that I have been reading Rose, Property and Persuasion (1994) and have profited from it) or more precisely and tragically, between federal title and right reason. We have confused federal with public, hence we rhapsodize the public-ness, noting that each of us Americans "owns" almost three acres apiece, and fail to note that the public-ness probably means merely political. We look at title without eyes and do not see that the instruments of management dominated by the self interest of commodity users and the managers themselves. When we do not like the results our limited vocabulary forces us into a series of emotionally scarring and ultimately fruitless family fights.

The states and both their potential as managers and their stake in outcomes, have been, I will argue, particular victims of those feuds. The states have always owned land and managed land and other important public resources. Historically, water and wildlife have been viewed as property of and/or the appropriate domain of state level decision making. State management thereof has never been uncontroversial, nor have the states' more recent forays as principle implementers of air and water quality control programs, coastal zone management been without critics and disappointments. But states are, nonetheless, the principle front line managers designated specifically by Congress to preserve or encourage state primacy in dozens of resource management programs. Similarly, states and their political subdivisions have long exercised paramount, if not exactly exclusive, authority over most forms of zoning and local land use planning.

Thus, the states and their political subdivisions have an enormous stake in both the management of the now-federal lands, and much to teach about alternatives. However, when we encounter the specific issue of whether the states could or ought to participate more fully in management of public resources now owned by the federal government and managed by some or all of the major federal land management agencies, we enter an analytical void dominated, as noted above, by vitriol regarding marginal issues. I believe that this time, finally, we may have reached the point where we could begin to have important discussions of why and how to manage public resources. I shall conclude my introductory remarks with some suggestions as to why I think that is so.

The second and major part of the paper will put some flesh on the bones of the most obvious--right under our noses--set of institutional alternatives for thinking about public resources, the state lands. I will put the trust lands into the context of state lands more

generally, and briefly relate a compressed history of the land grant program. An even more compressed recitation of the trust notion and how it operates in public land management will follow, built around four themes: clarity, accountability, enforceability, and perpetuity. With those basics out of the way, I will recount three stories--each involving a major trust land dispute. The goal is to suggest ways in which the trust mandate might expand and clarify our thinking about public resources. In the final story, I shall focus on the lease as the core of trust land management in an effort to demonstrate the utility of looking at tools of control and management rather than at title in our effort to understand what public lands are for.

Some of my stories may suggest to some of you--depending on your perspective--that the trust land mandate is a good way--or a lousy one--to manage public resources. Certainly, I have been accused of wanting to turn the national forests, or some subset thereof, into a state land trust. I hope to avoid that misconception here. The state land trusts have much to teach us. Understanding their management can help clarify issues, identify alternatives, and underscore that we have a lot more in our intellectual pantry than the federal/multiple-use model. State trust land management is our nation's oldest and most consistent land policy. But neither states nor the trust concept is a silver bullet that will solve our public resource management debates. Our problems are diverse, deeply regionalized and localized, and too complex for any more one size fits all solutions. Before we have another one of these horrendously destructive family fights, we must get much clearer about the issues and the alternatives.

Part I. Impoverished Intellectual Tools for Discussing the Goals of Public Resource Management and Alternative Means of Achieving Them or How States Came To Be Regarded as "Venal and Incompetent" and "State Management of Federal Lands" Unthinkable

A. General Intellectual and Political Trends

The answer to the question "How did the states fall into such general disrepute" has two basic components. General intellectual and political trends affect how the states are regarded at any point in history. Particular components of the public resources debate reflect and sometimes intensify those larger patterns. The first part of this section will with callous brevity chart some general contours of the ebb and flow in the relative evaluation of state and federal governments and conclude that we are at a point in our

national history at which the more virtuous level, or perhaps more accurately, "who stinketh the most" is not at all clear.

1. The Early Palmy Days of State Supremacy

The states preexisted the central government and were displaced gradually and unevenly as the "superior sovereign." (Roach, "The Founding Fathers: A Reform Caucus in Action," 55 American Political Science Review 799 (1961) is probably as good a place to start as any. See also, Matson and Onuf, A Union of Interests: Political and Economic Thought in Revoloutionary America (1990).

2. The Gradual Expansion of the Federal Government

It is a matter of much discussion when the federal government emerged for the first time as the "dominant sovereign." Certainly for most purposes, the Civil War was pivotal. In the context that most interests us, the rise of the bureaucratic state, particularly in the form of the emergence of public resource management and management agencies, the key period is probably the 1870s. It was at that point, as James Q. Wilson notes, when growth in the federal government for the first time began to exceed growth in the postal service. Before the 1870s, expansion of the federal bureaucracy occurs primarily in the Post Office, and reflects the expanding geographic reach of the nation. Following the 1870s, growth in the federal government could no longer be attributed to growth in the Post Office alone. Between 1861 and 1901, more than 200,000 civilian employees were added to the federal service, and only 52 per cent of them were in the Postal Service. James Q. Wilson writes that "what is striking about the period after 1861 was that the government began to give formal, bureaucratic recognition to the emergence of distinctive interests in a diversifying economy." (Wilson, "The Rise of the Bureaucratic State," 41 The Public Interest (1975).

The country was evolving from a coalition of localities and small towns into a nation. (See Wiebe, The Search for Order: 1877-1920, 1967). This emergence of the federal government was very closely related to the emergence of science as a/the basis of legitimacy in public policy, and the centralization that accompanied that shift. This familiar point about the rise of the progressive era is indelibly made by Samuel P. Hays in Conservation and the Gospel of Efficiency, (1960), which is fruitfully read with Wiebe (supra) in the other hand.

3. The General Decline of the States

This is another long and complex story, too rich to do more in this context than point to a few indicators. For openers, one might look to William Riker (Federalism: Origin, Operation, Significance, [1964]) for a hint of the broad strands of thought and policy that are summarized in the "decline of the states" trend. "Thus," his study concludes, "if one disapproves of racism, one should disapprove of federalism." (at 155).

States and states rights generally were not viewed as centers of progressive action during much of this century. Although it is wholly reasonable to blame the aftermath of the Civil War and the residue of slavery, the Advisory Commission on Intergovernmental Relations, In Brief: State and Local Roles in the Federal System (1981) summarized a long and impressive line of political science analysis which suggested that the states were ineffectual partners in the federal system because "they operated under outdated constitutions, fragmented executive structures, hamstrung governors, poorly equipped and unrepresentative legislatures, and numerous other handicaps." (at 3).

4. What Goes Up Must Come Down

A subsequent ACIR report, significantly entitled The Federal Role in the Federal System: The Dynamics of Growth: A Crisis of Confidence and Competence (A-77, 1980) suggests that somewhere, and again for present purpose of suggesting cycles in evaluation it is not crucial to be extremely specific as to when, the worm turned. The reformation and modernization of state governments, and their increasing efficacy and ambition is another well documented story, one which is appropriately supported by reference to the growing state role in environmental regulatory programs passed during the late 1960s and 1970s. (Briefly summarized in Cowart and Fairfax, Public Lands Federalism: Judicial Theory and Administrative Reality," 15 Ecology Law Quarterly 375 (1988), 409-413.)

5. A Motor for These Cycles

Let me flatter myself by assuming that I have at least suggested the legitimacy of the argument that evaluation of federal and state governments cycles. (If you really want to

make yourself ill contemplating academic theories, little has more potential to achieve that goal than the evolution of theories of federalism, which I have humanely just spared you. Cakes are the featured analogy, and another merciful summary, also of my own devising, can be found in "Old Recipes for New Federalism," 12 Environmental Law 945 (1982). It was prepared for the last time we went through one of these little Sagebrush Rebellion/federalism spasms and will save you some pain if you want ready access to the earlier literature.)

Presuming myself to be on safe ground, therefore, when I assert that evaluation ebbs and flows, let me suggest a mechanism for that motion. Surely it is neither the insightful commentary of scholars, nor the useful involvement of that putative umpire of federalism, the Supreme Court. (See Cowart and Fairfax, supra, at 380-81; see also Fairfax, Andrews and Buschbaum, "Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't," 59 Washington Law Rev. 417 (1984).). The motor consists of nothing more surprising than advocates looking for a better deal: if mother says no, ask grandmother. There is much chatter in literature, most of it easily dismissed, searching for inherently federal or necessarily state or local functions. We can, largely by force of tradition come up with a few (land use planning and education are local) beyond the obvious initial commitments regarding post offices, coinage, and the military (which are federal.

I am asserting that the major reason the balance of power in a policy arena, or the balance of public favor shifts is because advocates of particular causes believe they can cut a better deal by embracing or avoiding a specific sovereign at a particular time. When one has money and one does not, that obviously stacks the deck. When neither has very much, as is presently the case, the debate is reopened and the obvious virtues of one level, as opposed to any other, become less clear.

B. The Same Cycles in the Context of Public Lands and Resource Management

For good or ill, and I will argue that it is for decidedly ill, much of that general ebbing and flowing in thought and evaluation, has been lost on students of public resource management. The first pivotal period of state ascendancy, during which was formed the template for virtually the next 150 years of Congressional policy toward public domain resources, has been nearly totally obscured. Because of intellectual models and stories told and retold about the glory days at the onset of conservation, which is, of course,

nothing less than the onset of federal ownership and management, we are in a poor position to appreciate the alternatives and options that inhere in an ebb and flow. Public resource management has become little Johnny One Note, and a rather poor and impoverished note at that.

1. The Palmy Days of State Dominance in the Public Lands and Resources Field

a. Not surprisingly, there is in the public resources field a period analogous to the one discussed above in which the states were utterly pivotal in decision making in the arena.

i. The initiation of the public domain and the structure of the first 150 years of federal experience with land disposition were defined largely by the terms and conditions of the state land cessions of the 1780s and the statutes that the Confederated Congress enacted, without authority, to deal with the ceded lands. Thus, most of the important, structural decisions regarding the public domain were made under the Articles of Confederation. I refer, of course, to the General Land Ordinances of 1785 and 1787 and the state land cessions that surrounded those two legislative enactments. (For a basic introduction to the cessions, see Jensen, "The Cession of the Old Northwest," 23 Mississippi Valley Historical Review 27 (June, 1936) and Gates, History of Public Land Law Development , A Report prepared for the Public Land Law Review Commission (1968). See also Hibbard, A History of the Public Land Policies, (1924); Robbins, Our Landed Heritage: The Public Domain 1776-1936 (1942); and the references cited, particularly Gates.) For an exhilarating discussion of key issues in the 1780s see Onuf, Statehood and Nation: A History of the Northwest Ordinance (1987, 1992).

ii. The General Land Ordnance of 1785 provided for the rectangular survey (See, for example Johnson, Order Upon the Land: The U.S. Rectangular Survey and the Upper Mississippi Country (1976); Treatt, The National Land System: 1785-1920 (1910), especially Chapter 2) and sale of western lands. It also initiated the program of land grants for schools, providing that lot number 16 in every township would be reserved "for the maintenance of public schools within the said township."
The Northwest Ordnance, passed two years later, provided a system for territorial governance and transition to statehood. (See Tansill, "Admission of States into the Union: a Brief Summary of Procedures," Library of Congress Congressional Research

Service, #F 2200 70-156 GGR, (1960, 1970), and more generally, the analysis of the accession process in Souder and Fairfax researched by Karen Bradley.)

2. The Withering of the States In Public Lands Policy Discussion

a. This rich period of negotiating the nature of the nation and its present importance for understanding both ancient documents (like the Constitution) and the full range of choices and alternatives that confronted us then and now, is all but lost on modern participants in and students of public lands policy. Part of the problem is the troubling tendency of otherwise apparently knowledgeable scholars to assert that the acquisition of the public domain began in 1805, with the Louisiana Purchase. (Coggins, Wilkinson, and now Coggins, Wilkinson and Leshy have repeated this transparent nonsense for three editions of their standard text. See Federal Public Land and Resources Law (1993), at 45-46 . Lopping off the first forty years distorts the story and conceals issues, choices, and options.)

b. A more pervasive problem is the way we present conservation history. When referencing the public domain we speak, traditionally, in terms of three periods: acquisition, disposition, and retention. (Originating, perhaps, with Stephenson, Political History of the Public Lands from 1840 to 1862: From Preemption to Homestead (1917), and being quite fully elaborated in Culhane, Public Lands Politics (1981).

i. The emphasis of the tale has two corrosive components: the reification of the federal title as the irreducible epicenter of resource management, and the vision of implacable foes, good guys and bad, that accompanied the shift.

There is of course, an element of truth in the wisdom of retention. The rise of science as the basis of public decision making was not an evil idea, and it still has defenders. Others, of course, have argued persuasively that the science of the progressive era agencies was and continues to be self-serving, clearly falsified, and upon reflection, a fairly consistent disaster (See, for example, Schiff, Fire and Water: Heresy in the Forest Service (1960); Olson, The Depletion Myth (1972); Chase, Playing God in Yellowstone (198); and most recently Nelson, Public Lands, Private Rights: The Failure of Progressive Era Management (1995).

Nevertheless, the way we tell our story puts federal ownership of the resources as the heart, if not the totality of the policy. This leaves us thinking that there is no other way to be. It has also had substantial consequences for other institutional components of governance. The implications of state centered science for local institutions are enormous. (See Hays, supra, especially at 275-76; see also Fortmann and Fairfax, "American Forestry Professionalism in the Third World: Some Preliminary Observations," 11 Population and the Environment 259 (1990). Local people and institutions, it is important to note, were specifically identified as the problem which said centralized science based agencies were going to cure.

ii. It is little wonder then, that the rise of national government sapped the vitality and legitimacy of state and local institutions and denied the federal agents access to locals' experience with the resource and insight into local prorates for defining solutions to allocation and management disputes. Scientific management, suffice it to say, was specifically designed to achieve those goals. The emphasis on retention and federal management has always had as a crucial part of its assumptions that local folks, local priorities were bad, and the solution to resource allocation problems lay in displacing them with scientifically trained representatives of the federal government.

An essential aspect of the sell job on federal science was, accordingly, to divide the world into good and evil participants in the debate. This presumption that the good guys were for and bad guys against lies like a dense fog over the whole story of 20th century conservation. (See for example, Pinchot, The Fight For Conservation (1910), excoriating the "special interests" or more recently Wilkinson inveighing against "the Lords of Yesteryear" in Crossing the Next Meridian (1992).

Several points are obvious about this durable screed. First, there is no avoiding the plain and simple fact that is that the shift to federal land retention benefited huge segments of the resource management industry, such as it was. It does not take a rocket scientist to understand that large cattle operators embraced a leasing system for "their" public grazing areas as a means of excluding homesteaders and sheep operators. Similarly, the timber holders were well aware that withdrawing public timber from the market would enhance not diminish the value of their property. The idea that public lands reservations were a victory forced upon a reluctant resources industry by aroused conservationists is a half, quarter, or eighth truth that has confounded reasonable discussion of the subject ever

since. Second, these stereotypes continue to wound and divide in stupendously wrongheaded ways that render the public dialogue on these issues abysmal.

iii. Again, I feel compelled to suggest a motor for this process of concealment and miscasting of motives. My hypothesis, fully explored elsewhere regarding one small but central aspect of the tale, lays the blame at the feet of lazy historians and enterprising bureaucrats. The major history of the key "shift" legislation was written by Jonathan Ise, at the behest of, with the support of, and with full access to the personal files of Gifford Pinchot. Ise devised the familiar "miracle of 1891 and 1897" story of the forest reserves--no legislative history, a feckless Congress needing prodding from folks like GP, and the whole familiar kettle of fish. That single source has been relied upon for every major history since then, and few have done the full research necessary to unwind the real roots. My brief sortie was sufficient to establish a long and complex legislative history for both acts, and the sad trail of footnotes that has pushed Pinchot's self-serving pap to the level of unquestioned verity. (See Fairfax and Tarlock, "No Water for the Woods: A Critical Analysis of United States v. New Mexico," 15 Idaho Law Rev. 509 (1979) discussing alternative views of the history of the 1891 and 1897 acts.)

5. Consequences of This Inadequate Intellectual Tool Kit

One of the obvious consequences of our narrow view of public resources and how to manage them is that when a dispute comes up, we have very little flexibility in what we say to each other. Hence, we have become, as I have argued above, locked in a series of hysterical outbursts that deepen the stereotypes and the distrust because they do not address the basic issues.

a. One way to underscore the paucity of the debate is to note the failure of academics to elucidate the full range of what is possible. Trying to understand 22-50 state programs and their history is a little much to be parceled out in the two-three year blasts of publication that is required at most research institutions. Hence, very little in the way of comprehensive or comparative data on state programs is available. It is easier to focus on one or two programs run by one federal agency. When states emerge from these shadows, they are frequently simply slandered. One particularly egregious example is a Sagebrush Rebellion era volume by Marion Clawson. On the basis of absolutely no data whatsoever, Clawson vilifies state land managers and management. Drawing on his own "considerable knowledge of state land administration over the past four decades" he

writes, with careful indirection, about the "states incompetence and veniality based on many [albeit none mentioned] episodes of the past; he configures the state managers as less competent than the federal agencies; "the worst of both worlds: that is still public land, not private, and state-managed rather than federally managed." (Clawson, The Federal Lands Revisited (1983) at 188-89).

b. Another way to suggest the veracity of the same point is to note the number of times that we find long term participants in this debate arguing fundamentally at odds with their own oft-stated goals or transparent self interest.

First, take the case of Nevada, where both citizens and diverse government entities have long been leading advocates of giving the federal lands to, or less plausibly, back to, the states. (Nevada ex rel. Board of Agriculture v. United States 512 F.Supp 166 (D.Nev. 1981), aff'd 699 F.2d 486 (1983) and Resource Concepts, Inc., Carson City, Nevada, Identification of Public Land Transfer Issues and Preliminary Comparative Economic Analysis, Prepared for the Eureka County Board of County Commissioners, 11-22-94; but see letter Frankie Sue del Pappa, Attorney General to Edward L. Perry, County Alliance to Restore the Economy and Environment, 9-17-93, Appendix A). This is in spite of the clear and oft documented fact that Nevada is consistently among the biggest gainers of federal subsidies on federal lands and would be among the biggest losers if the lands were transferred. (Nelson has been compiling these data for decades, most recently in "Essay: Transferring Federal Lands in the West to the States: How Would It Work," Points West Chronicle 6 (Winter, 1994-95); see also Congressional Research Service, "BLM Revenues and Expenditures," July 28, 1995.)

Second, take the case of the ranchers. Episodically (reviewed in Cowart and Fairfax, 383, ff and references cited therein) they demand the opportunity to purchase or otherwise receive title to "their" federal grazing allotments. This is patently absurd. They could not, in general, afford to purchase the lands at anything approaching fair market value, and could not, in many instances, afford to maintain and pay taxes on the lands if donated. Nevertheless, the cry continues. (Public Lands News is, over time, an excellent source on this general posturing.)

It seems likely that both Nevada and the ranchers have clearly understood the issue of title versus control. As Peffer made clear so many decades ago, (The Closing of the Public Domain, 1951) the title issue in both cases is likely strategic: arguing about title

creates a means to bash the bureaucrats and increase your control. Nevertheless, the focus on title and taking title does not appear to be in the interests of either the State of Nevada or the ranchers.

Least explicable of all is the consistent rush of environmentalists to defend the federal agencies whenever the title issue is raised. Having spent two thirds of the 20th century pointing out, with considerable accuracy and disappointingly less impact, the flaws of federal management, the enviros embrace of the feds in Sagebrush Rebellion type dust ups is not merely sad and ironic. It is proof beyond necessity of the bankruptcy of our ideas on the subject of public resources. When pressed, we have precious little to offer each other beyond what we already have.

C. Summary.

Problems in clearly seeing the states are not unique to public domain policy, but they are peculiarly debilitating in this field. Hiding behind the apparently salubrious notion of non-partisan science, which remains, however soured in the post-Silent Spring world, the ultimate source of legitimacy in our culture, is the deeply problematic federal land retention syndrome. This heavily promoted virus sealed us in an analytic void. We know very little of any other way to approach resource management, even those which have been in place since 1785. As a result, our public discourse on the subject is intense, vitriolic, full of destructive stereotypes, and almost utterly beside the point. The state trust lands are not proffered as an alternative to federal management, but as one route to enriching our impoverished vocabulary, one set of alternatives in action, one widely dispersed array of experiences that can diversify our notion of what public resources are for and how to manage them.

II. Why is This Becoming Thinkable

After such a long and emphatic critique of our ability to discuss these issues, or even to frame them in a meaningful way, perhaps some explanation is necessary about why I continue to write this paper. Five thoughts occur which make me optimistic about the present conversation.

A. One important aspect of the currently more nuanced and substantive debate can be traced to the evolution of a viable grass roots environmental movement. Its positions on issues of locus of power and the priorities of public resource management are significantly different from the positions of the national groups. (High Country News and Northern Lights frequently reflect this richer dialogue. See for example IX Northern Lights (Winter, 1994) on "Wise Use.") This grass roots environmental dialogue most emphatically includes, indeed is in part defined by the fact that it includes, many ranchers, and those dependent on western commodities. Perhaps what unites these new consensus seekers is a shared antipathy for "expresso by fax" (Snow, "Cappuccino Cowboy," id., at 3) but it does reshape the conversation to have this new breed in the room.

B. A second important variable is that economists have finally penetrated the discussion. This is not, in itself a panacea. In fact, to the contrary, there is probably considerably more gibberish being written these days about the virtues of free market economics than about the veniality of the states. (See Menell, "Institutional Fantasylands: From Scientific Management to Free Market Environmentalism," 15 Harvard Journal of Law and Public Policy 489 (1992). Nevertheless, economists, with their diverse tools and propensities for evaluating tradeoffs are no longer dismissed as merely the spear carriers of commodity interests. There presence at the table has enriched the discussion.

C. A third factor is the gradual encroachment of landscape level thinking. Folks have been trying for years to tell the Forest Service that they were not the only game in town--that, for example, an even flow of logs from national forests would not produce an even supply of timber to mills unless the Forest Service were the only supplier. The conversation has broadened, and more and more participants seem to be getting it. (See also, the discussion of "Myth of the Green Blob" in Cowart and Fairfax, at 410, or virtually any of the recent discussions of sustainability or "ecosystem management." See, for example, Dixon and Fallon, "The Concept of Sustainability: Origins, Extensions, and Usefulness for Policy," 2 Society and Nat Res. 73 (1989). For a terse distinction between sustainability and sustained yield, see Souder, Fairfax and Ruth, "Stainable Resources Management and State School Lands: The Quest for Guiding Principles." 34 Natural Resources Journal 271 (Spring, 1994), Part II.

D. Fourth, we are witnessing a major, unmistakeable decline in the capabilities and resources of the federal management agencies. (Discussed in Cowart and Fairfax, supra,

in its milder, pre-reinventing government manifestation. For a different approach to the same general topic see Nelson, Public Lands, Private Rights, The Failure of Scientific Management (1995).

E. Finally, least noticed in these parts, but ultimately perhaps the most important, the observation that the problems experienced in the west are also being experienced in the east, and indeed in many parts of the world, is starting to refocus the discussion in interesting ways. (I have notes in the small zippered pocket of my hand bag, made on the proverbial cocktail napkin, for an article that Margaret Shannon and Char Miller and I promised to Ed Marston on this subject at the Las Vegas meeting of the American Society for Environmental History. That reflected conversations following papers by Karl Hess and Jon Christian at that meeting. The paper went into the circular, but the idea is a crucial one.) The fact that these issues of the appropriate locus of control over resources are ubiquitous means that the federal government is likely neither the cause of all the problems nor the source of all the solutions. Obviously in the western United States, where the federal government is the major landowner in many jurisdictions, it must be dealt with. But the fact that many of the same issues are also confronted in West Texas, Vermont, Botswana, and Brazil suggests that we can over attend to the fed's presence.

These five factors are among those that suggest to me that perhaps we are ready now, to a degree that we have not been for most of this century, to think about alternative ways of organizing to manage what we have only recently come to think of as "federal lands." With that thought in mind, we now turn to the core of this paper, a brief introduction to states as land managers, with an emphasis on state school and trust lands.

III. States as Managers of Lands

The paucity of research on state lands referenced above limits us to only the most tentative generalizations about even such basic facts as the extent of state land ownership. (The best and perhaps the only recent work on the subject is "State Lands and Resources" in 2 Different Drummer (Summer, 1995). This puts a crimp in discussions of one, clearly the most important aspect of states as land managers. Before proceeding, however, it is appropriate to notice that the states do and/or could play at least two other roles.

First, it is important to appreciate the role that the states presently play as partners and as managers and regulators of lands admixed with federal lands. The federal lands do not exist, as noted above, as the green or pink blob that shows up on AAA maps.

Second. as a spin off from managing their own lands, states could, and do, frequently act as "little laboratories," cites of experimentation with tools and approaches that spread to other states and occasionally even to the federal government. (O'Toole and I are at odds on this important point, which he attributes [Different Drummer, at 2] to Republicans. There is actually a fairly interesting political science literature on the subject. See Boeckelman, "The Influence of States on Federal Policy Adoptions," 20 Policy Studies Journal 365 (1992) and Souder and Fairfax, "Federalism as Little Laboratories, Yes, No, and Maybe: The State School Trust Lands," Paper presented at 1990 Annual Meeting of Western Political Science Association, Newport Beach, CA. The concept actually originated with Justice Brandeis in New State Ice Co. v Liebmann (1932) discussed in Osborne, Laboratories of Democracy (1988).)

A. State Land Management in General

Returning to our major topic, I address first state land management in general, and then the state trust lands in particular.

1. A Brief and Pathetic Historical Overview of State Managed Lands

Although there are important exceptions, (California's Save the Redwoods League and New York's Adirondack Park comes immediately to mind), it is reasonable to start with the gross observation that state park and forest management systems appear to owe their scope and shape to the Depression, tax reversions, and the support of federal aid programs such as the CCC. (The general literature is sparse and all cited in Different Drummer, supra. See particularly, Tilden, State Parks: Their Meaning In American Life (1962) and Clar, "State Forestry" in Clepper and Meyer, American Forestry: Six Decades of Growth (1960) , at 209 ff. Tilden is quite clear that even prior to the Depression, the National Park Service was mid-wifeing a "state parks movement" (which also was gaining its most intense support from the American Automobile Association) in order to prevent dilution or embarrassment of the national parks concept. See vi, 10, 15.) The story on hunting lands managed by states is more complex, but the state's holdings appear to be largely the result of acquisitions under the Pittman-Robertson Act. See

Langenbach, "Restoring a Land Base" in USDI, Fish and Wildlife Service, Restoring America's Wildlife: The First 50 Years of the Federal Aid in Wildlife (Pittman Robertson Act) (1987), at 69-78.

2. How Much Lands Do the States Own and Manage? We Do Not Know and That Alone Should Tell You Something

Because I will be focusing here on state trust lands, I shall focus my comments on those primarily western states in which those lands occur. Taking Western States Lands Commissioner's data regarding the extent of trust and institutional lands and adding to it O'Toole's recent data from Different Drummer on the extent of state forest and park lands in those same states, and data from the US Fish and Wildlife Service regarding sport fish and wildlife habitat purchased for the states with Pittman Robertson funds, I did come up with a total for the subject states of about 183 million acres of state owned park and forest land. The total jumps another 20 million acres if you add in the subsurface estate owned by the various state trusts. (See Souder and Fairfax, State Trust Lands (1996) and "State Lands and Resources," 2 Different Drummer (Spring, 1995) for data and data sources. Randy and I have discussed whether by adding his forest data and our trust land data, I would double count some lands. After some discussion, we conclude that I have. I also include about 600,000 acres in both Washington and Oregon which are managed by the states but technically owned by the counties. Nevertheless, O'Toole and I concur, [for what that's worth] that this probably represents a low end estimate of state ownership.)

Suffice it to say, paraphrasing Bob Nelson, (see Souder and Fairfax, "Foreword," for State Trust Lands) there are three major land management systems in the west: the Forest Service, the BLM, and the states. The third and least familiar has much to teach us.

B. State Trust Lands--History and Mandate

1. The history of state trust lands is treated in detail in Fairfax, Souder and Goldenmann, "The School Trust Lands: A Fresh Look at Conventional Wisdom," 22 Envt'l Law 797 (1992) and Souder and Fairfax, State Trust Lands, and the references cited therein. Here, I skim the cream.

Beginning with Ohio in 1803 and ending with Alaska in 1959, Congress reserved and then granted to newly joining states increasing amounts of land to support common

schools and other public institutions, such as hospitals and insane asylums. Early grants were to townships and were lost or sold in much the same process, or lack thereof, that accompanied the primary disposal of the public domain.

However, interest groups supporting public education flourished throughout the 19th century and brought increasing pressure on states to retain and secure the grant lands. Added momentum toward orderly approaches to the lands was added when states rather than townships were made grant recipients at mid-century. The states established permanent school funds to pool and distribute the receipts. This allowed standardization of what constituted a school and signals increasing state level attention to protection and management of the grants, which were, probably as a result of the permanent fund paraphernalia, increasingly described by state constitutions as "trusts." (I differ again with O'Toole (see Different Drummer, at 2) that federal conditions on the grants rather than state initiatives are crucial in what he describes as the states "marginally better fiscal manage[ment]." The strings were not federal in this instance but the result of state constitutional provisions. Not until 1910 did the federal enabling act for Arizona and New Mexico make any discernible attempt at "strings." The definition and spread of different protective measures in state constitutions is a clear example of the little laboratories principle. Frequently the vector of innovation transfer was individuals with experience in one state moving west to help write the constitution of subsequent states. See, for example, Beadle, Memoirs of W. H. H. Beadle, Robinson, ed., (1906), and the Beadle Club, still extant in South Dakota to protect and enhance the school lands.)

State trust land management appears to have been dominated by lessees and an emphasis on local development, in combination with the professional ideologies of the underlying management groups--not all that different from federal land management--until the middle of the 20th century. At that point--the key dispute is described in Lassen v. Arizona [385 U.S. 458 (1966)]-- beneficiaries and concerned trust managers in a series of states successfully sought protection for the school and related trusts.

3. The Trust Mandate

It is important to be clear that when we speak of school and related trusts, the trust referenced is not the public trust, which limits the ability of the sovereign to alienate public rights in the bed and banks of navigable waters and related resources, but rather a

"beneficial" trust, of the kind that an indulgent grandmother would instruct a bank officer to manage for the benefit of her grandchildren.

I. The facts and issues of the Lassen case should illustrate the core of the mandate. The Arizona Highway Department sought to use granted lands for a public highway. The state enabling act granting the lands was clear both that the lands were not to be acquired for use for less than their fair market value, and to guarantee that, had specified and defined the manner in which the lands had to be offered for sale. It had nevertheless come to be the tradition in Arizona, and elsewhere, that states simply took school lands for highway and related purposes. Not infrequently an offset or enhancement argument was made, a common feature of early eminent domain cases of the day [grist for the "givings" topic that seems to be emerging in the context of "takings,]), that the enhancement in the value of the remaining parcel was sufficient to repay the property owner for the land taken, hence no compensation was required. (See, generally, Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in State Courts," 5 Perspectives in U.S. History 329 (1971).

In Lassen, the U. S. Supreme Court made unmistakable that the lands granted in Arizona were a trust that were to be honored, with full and undivided loyalty to the beneficiaries. A spate of similar cases, frequently forbidding state legislatures from setting maximum prices for trust resources or managers allowing/requiring preference right renewal of agricultural leases followed. (Nebraska actually beat everybody to the punch with the first of the modern agency changing cases: State ex rel. Ebke v. Board of Educ. Lands and Funds, (154 Neb 244, 47 N.W. 2d 520 (1951). The most recent and interesting cases are probably County of Skamania v. State of Washington, 685 P.2d 576 (Wash., 1984); Oklahoma Education Association v. Nigh, 642 P.2d 230 (Okla. 1982); State v. University of Alaska, 624 P.2d 807 (Alaska 1981); ASARCO v. Kadish 109 S. Ct. 2037 (1989). Here again I take issue with O'Toole, Different Drummer, at 2, who asserts that "state reform is no faster than the slackwater behind a Bureau of Reclamation dam." In the state trust lands field, the opposite appears to be true: a few well placed beneficiary originated law suits have radically altered the priorities and the outcomes in state trust land offices." See generally, Souder and Fairfax, especially at 33-36.

ii. A trust is a fiduciary relationship in which the trustee holds and manages property for the benefit of a specific beneficiary. The major obligation of the trustee is to act with "undivided loyalty" to the beneficiary. We summary the full panoply of

responsibilities under four general headings: clarity; accountability; enforceability; perpetuity. (See Souder, Fairfax, and Ruth, at 278 ff and Restatement (Second) of Trusts, Sections 2, 3, and 4, (1959) or, in relatively plain English, Bogert, Trusts (1987).

Clarity--the trust mandate is clear and simple. The goal is to make the trust productive for the specified beneficiary. Because it is crystal clear (relatively speaking) what the trustee is supposed to be doing, it is easy (again, relatively speaking) to figure out whether or not she is doing it.

Accountability--is key in a public policy setting. The trustee is obligated to deal openly and honestly with the beneficiary and to maintain and furnish records about receipts, disbursements, and management. It is relatively simple to obtain basic data about trust land management that facilitates analysis of whether the trustee is doing her job.

Enforceability--these obligations have been defined in centuries of litigation and judges have enormous experience in the field and proceed with vigor to protect the beneficiary.

Perpetuity--the trustee is obligated to preserve the productive capacity of the trust. Although a beneficial trust is not necessarily perpetual (it could end, for example, when the grandchild graduates from College), the permanent school fund makes the school trusts peculiarly emphatic about the long term commitment of trust management.

Without belaboring the obvious, this mandate is significantly different from the rather mushy commands and Byzantine procedural requirements that afflict the federal land management agencies. (Discussed mercifully briefly in Souder, Fairfax and Ruth, at 276-79 and the many references cited therein.)

4. So What

So, we readily concede that state trust lands are different from federal multiple use management lands. Does it matter and what can we learn from it? I do not want to scare you, but clever probers of footnotes in this piece have probably already devined that I have, with my colleague Jon Souder, written a long and very interesting book on that subject. Rather than just read you the book, or better, urge you to go buy it and read it yourself, I am going to do two things. First, I am going to tell a few little stories about disputes involving trust lands. Those stories are selected to present an array of situations

in which the trust mandate appears to teach something about alternatives in public land management. Second, I am going to return to my opening remarks lamenting the acquisition-disposition-retention triptych and make a plea that such reifications of title--and the implicit article of faith that who holds the title makes a huge difference--and urge instead that we look at management tools and priorities. I shall focus on the lease as the core tool of all land management, state, federal, public and much private and hence as the appropriate unit of analysis for understanding alternative approaches to land management, public or private, state or federal.

a. Stories

1. Subsidizing Agriculture and Grazing in Oklahoma--The first story concerns wresting control over the grazing and agricultural land leasing program from the lessees. If you are looking for perfection in trust lands management programs, you will be disappointed. Nothing about the trust mandate indemnifies the managers against the political realities in which we all operate. But, the trust mandate has a central role in defining the political environment of the debate which this story underscores. The Oklahoma story is recent but classic example of using the trust mandate to shift the balance between the lessee and the manager.

The state legislature had enacted statutes which set maximum agricultural and grazing fees, limited the amount of interest the Commissioners could charge when making farm loans and when selling trust property, and allowed existing lessees a preference right to release "their" allotments if they were in full compliance with the terms of their lease. (Nigh, supra, at 233, note 1). The beneficiaries, in the form of the Oklahoma Education Association sued, charging that all three legislative enactments violated the state constitution. They won on all three counts. The court stated that "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." (at 235) The Court simply stated that "a State may not use school land trust assets to subsidize farming and ranching." (at 236) Respondents asserted that conservation and prevention of waste were also important concerns, and that "attainment of maximum return to the trust is not a controlling factor." The Court agreed, noting, however, that this does not render the question of income "an unimportant factor," and asserting instead that "[c]onservation necessary to protect the value of the lands leased can be adequately controlled by lease provisions and conditions, and by reasonable conservation regulations

..." rather than by "rental discounts" or the ability "to borrow trust funds at below market interest rates." (at 237-38).

As a result of this decision, Oklahoma went through a protracted and painful process which changed the fee structure, established minimum lease fees, eliminated preference right leasing and offered expiring leases at auction. The result is an 80% increase in revenues received by the state.

Several points stand out. First, subsidies, hidden and otherwise, are considerably easier to address on trust lands than on multiple use lands. The clarity of the trust mandate, although it does, as the Nigh court emphasizes, attach great importance to income, can be very effective in plugging leaks in the management system. Second, those whose primary concern is land protection or environmental quality probably do not care particularly or are not satisfied by an 80% increase in revenues will have to focus on issues other than subsidies. The clarity of the mandate helps sort out that strain in the debate. Finally, the new system in Oklahoma has required the Commission to increase the program staff. Their presence is more than compensated for by the revenue gain--the trust mandate is no kinder to subsidizing managers than subsidizing lessees. We are not in a position to respond to questions about whether increased monitoring of lease compliance improves stewardship or resource protection, but it is one worth evaluating when weighing the pros and cons of profit oriented management. (Discussed in Souder and Fairfax, 107-09). The fundamental challenge presented by the trust lands is to the assumption that "for profit" management is somehow incompatible with public land ownership. In the clear and well understood constraints of the trust mandate, it is arguable that there is a better chance for achieving diverse public goals than on the public lands where political influence distorts the basic questions of who pays and who benefits.

2. The Washington Asset Repositioning Program and the Notion of a Portfolio of Assets--The trust mandate creates a peculiar and interesting spin in issues which involve wresting management from traditionally dominant lessees. It has a starkly different flavor in preservation vs development debates, due to its emphasis on undivided loyalty. The trust creates a tension between general public benefit, on the one hand, and benefit for the beneficiary on the other. One of the real contributions of this tension is that when discussing trust resources, it is imperative to be clear about what constitutes general public benefit. Is aesthetic preservation a general public benefit? Is creating jobs, or a stable tax base a general public benefit? One of the questions which Nigh obscures is

whether or not the trust beneficiaries, which are after all, the schools, do better when the trust is producing a profit, or when its resources are managed to create the strongest possible base for property taxes, which provide the vast majority of support for schools. Washington State, which draws the vast majority of its trust revenues from timber harvesting, was unable to avoid those and similar questions. They responded in a privileged--that is, cash intense--but suggestive program.

In Washington's program, revenues earned on sale of renewable resources from common school lands is allotted to the school construction fund. In the 1980s, which demand for construction money rose, timber harvests became controversial and many areas previously thought to be valuable primarily for timber were seen to have "values beyond income production." Many of those areas were located on the Olympic Peninsula. The legislature established the "Trust Land Transfer Program" which enabled the State DNR to reposition its assets while compensating the trust for environmentally sensitive areas shifted to parks and maintaining deposits in the school construction fund. Basically, the program consisted of appropriations which purchased trust lands with high timber and environmental values. The timber was not cut. The portion of the value that was attributable to the standing timber was deposited in the school construction fund. The land portion of the value was retained in the trust to purchase replacement timber production lands. And the lands and unharvested timber were turned over to the state parks or other appropriate agencies to manage. (Washington State, DNR, "Trust Land Transfer Program" handout, n.d.)

Superficially, this story underscores the obvious: if you have the money, you can buy your way out of many environmental conflicts. There are other, more important lessons, however. One is the importance of the attitude that is prevalent among state trust managers that they manage assets for a public beneficiary rather than specific acres as a sacred trust. The state trust land managers' notion of assets rather than sacred acres lends itself to an even more important component of trust land management, the notion of the portfolio. The notion of the portfolio invites us to put aside the traditional division of attention in public resource management--focusing agency by agency and resource by resource--and looking instead at all of the assets in the trust and how they are managed.

This is an especially invigorating perspective in the context of the trust lands because of the existence of the permanent funds. Again, many people object as a matter of principle to managing public lands for profit. However, the portfolio concept invites inquiry into

issues of intergenerational equity and conservative resource management that do not come up in the absence of the permanent fund and beneficiary. One simple illustration should suffice. If the goal of resource development is to produce a high level of returns for the beneficiary, it does not make sense to invest in development of resources that will not produce a profit. Further, if the returns are placed in a permanent fund, and the fund does not grow at a rate at least equal to the inflation rate, then developing the resource does not make sense. Flexibility regarding the location and extent of assets is an asset in itself.

Second, this story underscores the importance of being clear about what is being subsidized, why, and by whom. The legislature appropriated public funds to make the trust whole; the trust provides a ready and open accounting system whereby school construction is not pressured into subsidizing aesthetic preservation.

Finally, I note the specific difference between the clarity and accountability of the trust mandate as opposed to the decision making process on ostensibly public federal lands: when the beneficiary who cannot be traded away in a political process, it is easier to talk clearly about who is paying whom and how much. (We are much intrigued by the number of trusts that are being established as part of mitigation programs. See for example The Platte River Whooping Crane Habitat Maintenance Trust, Inc.: The First Ten Years--1979-1989, booklet, n.d. The trust is soon to be subject of a master's thesis by Darla Guenzler to whom I am grateful for material on this case.)

3. The Lease: Tool Kits with Emphasis on The Notion of a Conservation Buyer

Prolonged contact with the state trust lands has forced an important realization upon me. The states, like the federal government (and, indeed, many private land holders), have decided almost without exception not to invest to develop the resources under their authority. They lease them out to others to make the investment. Lessees, or concessionaires, or timber purchasers, or whatever you call them in whatever particular program you are analyzing, are pretty much the same, over time and irrespective of ownership (to an important extent that includes private as well as diverse public lands). The lease is a common instrument--one designed to allocate risk and rights between the owner and the user or developer of a property. I emphasize this common tool because it suggests that it is possible to strip public resource management of its historical and emotional mumbo jumbo--such as that contained in the ideology of the shift to retention

which I have explicated --and talk in nuts and bolts terms about who controls the resource and to what ends.

An interesting dispute in Idaho (see High Country News, frequently but most comprehensively "'Unranchers' reach for West's state lands," 26 HCN 1 (July 25, 2994); Egan, "In Idaho, Wiley Opponent Who Takes on Ranchers," New York Times, 7-21-95, p. C-18. The story fails to mention that unlike the larger story which it accompanies, the Wiley Opponent is working on state lands; see also Idaho Watersheds Project, Inc., v State Board of Land Commissioners, CV-94-1171, Plaintiffs and Commissioner's Opening Briefs) underscores the importance the tools of trust land management, specifically, the lease. Briefly stated, an environmental organization in Idaho, the Idaho Watersheds Project, has been trying, with limited success, to lease state grazing lands which the organization believes (and according to plaintiff's opening brief, the BLM and the Forest Service concur) are overgrazed. To date, the Idaho Board of Land Commissioners and the Idaho legislature have prevented the organization and its president Jon Marvel from obtaining a lease, this in spite of the fact that he has been not merely high bidder but apparently the only bidder in one of several contested lease auctions. This dispute focuses, among other things, on the importance of talking about tools, specifically the details of the lease.

First, when reviewing this dispute, one would want to know about bidder qualifications. It is typical for land owners to express some minimum qualifications before considering leasing property. The land owner wants to make sure that the lessee has sufficient qualifications to that they will be able to pay the rent. One should ask what are the qualifications in Idaho for bidding on a grazing lease? And, how do the qualifications relate to the goals of the program? How do they compare to the qualifications in similarly situated states and on federal lands? Who gets gains and loses control given the bidder qualification requirements?

Second, one might look at the process for allocating a lease, and its length. Does the lease ever expire, in fact or technically? How do others find about that and how do they participate in the process of evaluating and bidding on the lease? Again comparing several similarly situated states and the federal government would be suggestive. Again, who gains control from the lease provisions.

The Marvel issue also raises the question of whether a lessee is allowed to not use the grazing lease. Is it permissible under the rules to abstain from grazing, or does that amount to forfeiture of the lease. Again, comparing federal and state rules would be instructive.

It is difficult to tell from a distance, but the apparent facts suggest that the Idaho Land Board is not acting in accordance with the best interests of the beneficiary. The high bidder has been consistently rejected for reasons that have no clear basis in the rules or goals of the trust. That is the bad news about trust land management in this instance: it is not, as previously noted, immune to the political pressures that surround us all. But, the good news is that the question has come up. It is a little difficult to imagine transporting this scenario to federal lands, where bidder qualifications require that you own a "base property," where permits do not expire but rather are sold with the base property, and where non-use is tolerated but not permitted. It is also difficult to see you could unravel these issues to understand what was happening without looking at the terms and conditions of the lease.

IV. Conclusion

Having saved what some would consider the worst for last, I am not about to conclude by arguing that state land management is a panacea, or that state trust lands provide a model which Congress ought to emulate in disposing of federal lands to the states. I am impressed by the utility of the trust concept in clarifying and addressing a growing number of complex situations.

I am also impressed by the utility of the trust concept as a clear and clearly understood alternative to the political setting in which political decisions are made on the federal public lands. (I have for years resisted calling them federal lands at all, preferring to emphasize the long buried importance of the states in their history and management by calling them public lands. Since beginning work on the trust lands I have begun to call the federal public lands "political lands," which my students probably regard as just another of my peculiarities. See, therefore, Snow, "The Pristine Silence of Leaving It All Alone," 9 Northern Lights 10 (Winter, 1994), at 12. also calling them political lands. I am in distinguished compay.) The trust defines an institutional context in which goals are clear and consistent, and accountability is possible. These elements seem appropriate components for whatever rethinking is to be undertaken in public resource management.

I would certainly prefer to see the lands added to the school lands trust than turned over to the legislature for further consideration. But I am increasingly convinced that who holds title to a parcel of land makes very little difference. What matters is the tools and terms under which the land is managed.

Hence, I am concerned by the enormity of what we do not know about state land management and the need to explore further the full range of tools and lessons that those diverse programs embody before we reach decisions in this debate. I have concluded that such an exploration would be most profitably aimed at understanding the lease as the instrument of management on not only state and federal lands, but as they link public to private lands as well. There, in the lease, an instrument which is common and well understood, rather than in the exotica of particular agency cultures, histories, and planning and management programs, I believe we can find tools that work in particular settings to balance specific risks and benefits. In this post modern world, where there are no silver bullets, no one size fits all soloutions, no single grazing fee that is appropriate for the entire western United States, this focus seems to me to be the most promising path to fruitful debate and helpful, hopeful outcomes.