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Condemnation without Compensation: How Environmental Eminent Domain Diminishes the Value of Montana's School Trust Lands

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If it is now the belief of my fellow men, who call themselves the public, that their good requires victims, then I say: The public good be damned, I will have no part of it!

Ayn Rand, ATLAS SHRUGGED, 447 (1957)

I. Introduction

Montana is one of a unique collection of states privileged with possessing school trust lands and saddled with the responsibility of their management. These lands, scattered across the Montana landscape, comprise some 5.1 million surface acres, and 6.3 million mineral acres.[1] Uses of these lands include timber, grazing, agriculture, mining fee recreation, and commercial development; all with a common theme of generating revenue for the benefit of the public schools. The Montana public schools are the beneficiaries of a trust set up nearly a century ago by agreement between the federal government and the territorial government of Montana. That decision to bind state land managers to a fiduciary duty is as prudent now as it was then. In a time when the demographics and values of Montana are rapidly changing, the need for strict guidance in land management is crucial. This paper seeks to establish that the state trust lands are unique, that the nature of the ownership of

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1. *See* JON SOUDER AND SALLY FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT AND SUSTAINABLE USE (1996). *See also* STATE OF MONT. DEP'T. OF NATURAL RESOURCES & CONSERVATION, ANNUAL REPORT FOR FISCAL YEAR 1998, 1-99 (1998).

these lands is quasi-private, and that their management must likewise be afforded the security afforded all private property. Second, the paper will examine the threat to the trust created when environmental interests inhibit the trustee's management prerogative. Finally, I will suggest a methodology by which such laws might be reviewed, and by which the future security of trust land management might be increased.

II. Background: Contracting for Land

The term "state trust lands" describes those lands granted to the then Territory of Montana by Congress by way of the Enabling Act of 1889.[2] This federal law established the States of Montana, North and South Dakota and Washington from the existing Dakota, Montana and Washington Territories.[3] The Enabling Act set forth the terms by which these four new states would be admitted to the United States. The Act reads in part as follows:

> That upon admission of each of said states into the Union sections numbered sixteen and thirty-six in every township of said proposed states where such section, 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 subdivision of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of the common schools . . . .[4]

Ordinance Number I appended to the Act accepts the sixteenth and thirty-sixth sections in the seventh paragraph: "The state hereby accepts the several grants of land from the United States to the State of Montana, mentioned in an act of congress . . . Approved February 22, 1889, upon the terms and conditions therein provided."[5]

Finally, Ordinance No. II , appended to the Act, established the terms under which the first Constitution of the State of Montana would be ratified or rejected.[6] By 1889, the State of Montana had acquired both the sixteenth and thirty-sixth section of each township and the "in lieu" selection lands in instances where

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2. *See* Enabling Act of 1889, 25 STAT. 676.
3. *See id.*
4. *Id.* § 10.
5. MONTANA ORDINANCE NO. I, at § 7 (1889).
6. *See* MONTANA ORDINANCE NO. II (1889).

the sixteenth or thirty-sixth section in a particular township had been previously divested. The language of these documents, simply read on their faces, demonstrates that the lands were granted by the federal government for the support of the public schools; and the soon to be formed State of Montana agreed to accept the lands with the accompanying constraints.

It is important to note that Ordinance No. I specifically states: ". . . The ordinances in this article shall be irrevocable without the consent of the United States and the people of said state of Montana."[7] Thus, not only had the fledgling State of Montana agreed by virtue of Ordinance No. I to abide by the restrictions placed upon the school sections, the state has also agreed that the purposes for which the school lands were dedicated could not be altered without the consent of both Congress and the people of Montana.

In 1889, Montana also ratified its first constitution. Article XVIII of the 1889 constitution states:

> All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been granted, donated or devised; and none of such land, nor any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law . . . [Emphasis added].[8]

Though the Montana constitution was amended in 1972, this particular language from the 1889 constitution was carried over in its entirety. Section 11 of Article X of the 1972 Constitution states:

> All lands that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised. [Emphasis added].[9]

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7. MONTANA ORDINANCE NO. I (1889) at § 6.
8. MONT. CONST. of 1889, art. XVIII, (1889).
9. MONT. CONST. art. X, § 11 (1972).

Continuity from the original 1889 land grants has been maintained. The restrictions on the use of the federally granted school lands which certainly bound the Territory of Montana, remain binding on the modern State of Montana.

III. The Trust: Fact or Fiction?

It is a common debate in nearly all of the school trust states as to whether the trust management mandate is real, or whether the trust is merely honorary and the states should feel free to manage the lands for a far wider class of public beneficiaries. The tension stems from the inherent conflict between those interests that would see trust lands utilized for preservationist goals and those who adhere to the trust obligation to generate revenue. It is undeniable however, that trust generalities are inappropriate, and as Professors Jon Souder and Sally Fairfax point out, each trust land state's enabling act, constitution and subsequent legislation must be examined on a state by state basis.[10]

As discussed previously, Montana possesses an enabling act and two constitutions. The question follows: do these documents comprise a trust? The existence of a school trust has been defined by some scholars as requiring three elements: manifestation of an intent to impose duties which are enforceable in court; the existence of a beneficiary; and finally, a property interest held for the benefit of a beneficiary.[11] However, just as Souder and Fairfax point out the need to assess each school trust individually to determine its characteristics, the statutes and court rulings of each state must also be examined to ascertain whether the trust is real and enforceable; or whether it is honorary and susceptible to broad interpretation and modification by the trustee.

Examining the nature of a state's general trust law is the methodology employed by at least one author in an attempt to discredit the court's use of private trust principles in the Washington State case of *County of Skamania v. State.*[12] Arum concluded:

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10. *See* Sally K. Fairfax, Jon A. Souder, Gretta Goldemman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 842-847. (1992).

11. *See id.* at 852, (citing the RESTATMENT (SECOND) OF TRUSTS § 24(2) (1959)).

12. *See* John B. Arum, *Old-Growth Forests on State School Lands-Dedicated to Oblivion?-Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151 (1990) *criticizing* County of Skamania v. State, 102 Wash. 2d 127, 685 P.2d 576 (1984).

> The Washington Supreme Court's application of private trust principles in *County of Skamania v. State* was unnecessary and unwise. The Washington Enabling Act and the state constitution do not create a trust because the requisite manifestations of intent are lacking.[13]

Souder and Fairfax also argue that state courts engaging in rote reliance on the *Lassen*[14] and *Ervien*[15] decisions, without regard for the particularities of state law, are misguided.[16] Accepting that premise for arguments sake, let us examine the particularities of Montana law in an effort to screen any taint that Lassen or *Ervien* might impose.[17]

Arum premised his argument that private trust theory was inappropriate on essentially two foundations: one, that the requisite element of intent on the part of Congress or the state constitutional framers is absent; and two, that private trust principles conflict with public trust principles when applied to resource management issues.[18] This section will not address his normative claim regarding the appropriateness of applying trust principles, but rather will discuss only the issue of trust formation.

Fortunately, the Montana Code specifically describes the methods by which a trust may be created, particularly the necessity of intent in perfecting a trust.[19] The Montana Code focuses on the trustor's intent as the pivotal issue in recognizing a trust - manifestation of the trustor's intent to create a trust is mandatory to the

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13. *Id.* at 168.
14. *See* Lassen v. Arizona Hignway Dep't., 385 U.S. 458 (1967).
15. *See* Ervien v. United States, 251 U.S. 41 (1919).
16. *See Fairfax, supra* note 10, at 845-46.
17. *See Jeff Oven and C. Voight, Wyoming's Last Great Range War: The Modern Debate Over The State's Public School Lands*, 34 LAND & WATER L. REV. 75, 81 (1999), noting that courts have not found it necessary or appropriate to distinguish Arizona and New Mexico's unique enabling acts in applying Lassen and Ervien to trust land cases in other states.
18. *See Arum, supra* note 12, at 168-69.
19. MONT. CODE ANN. § 72-33-202 (1999) 72-33-201 MCA (1999) lists the following five methods for creating a trust:

> a declaration by the owner of the property that the owner holds the property as trustee;
> a transfer of property by the owner during the owner's lifetime to another person as trustee;
> a testamentary transfer of property by the owner to another person as trustee;
> an exercise of power of appointment to another person as trustee; or
> an enforceable promise to create a trust.

creation of the trust.[20] However, a simplistic reliance on this law is misplaced. Section 72-2-301 was enacted in 1989;[21] it is an adoption of the California Probate Code Annotated of 1987,[22] which is itself an adoption of the Restatement (Second) of Trusts.[23] None of these various sources are particularly relevant to an examination of the congressional and state intent in 1889. Rather, attempting to construe the intent of the Congress and of the state of Montana in accepting the state trust lands must be viewed in terms of the law in effect at the time of the transfer. Gleaning the meaning of laws from a survey of legislative intent presents a pitfall for the unwary,[24] and consequently, this inquiry shall be limited to only two sources: the trust laws in effect at the time the lands in question were ceded, and the Montana court decisions addressing trust formation.

One of the earliest cases to address the issue of the lands granted to Montana by virtue of the Enabling Act was *State ex rel. Bickford v. Cook*.[25] This case, decided only seven years after Montana became a state, determined that the congressional lands granted to the state in 1889 for the purpose of constructing public buildings in the state capitol were in fact to be managed as a trust. The court stated:

> The state, by Ordinance No. 1, §7, has accepted these lands for the purposes specified. . . The state is an agent to carry out the objects of the donation. The funds created by the statute is a trust fund established by law in pursuance of the act of congress . . . The state cannot use the fund created by this act for any purpose except as provided for by the act of congress. The state officers have no control over it, except to carry out the trust relation . . . All this seems very clear to us from the law. It is also in full accord with the decision of the supreme court of Washington[26]

The decision by this court represented an early judicial determination on the nature of the lands granted by the Enabling

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20. *See* MONT. CODE ANN. § 72-33-202 (1999) states: "A trust is created only if the trustor properly manifests an intention to create a trust." This parallels the language in the RESTATEMENT (SECOND) OF TRUSTS § 23 (1959).

21. *See* MONT. CODE ANN. § 72-2-301 (1989).

22. *See* CALIF. PROB. CODE ANN. § 15201 (West 1987).

23. RESTATMENT (SECOND) OF TRUSTS § 23 (1957).

24. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, (1997).

25. *See* State ex rel. Bickford v. Cook, 43 P. 928 (Mont. 1896).

26. *Id.* at 930.

Act. It did not specifically address the school trust lands, but the principle is the same—those lands granted by Congress for specific purposes and accepted by the state are to be managed as a trust.

While the *Bickford* court did not elaborate in its opinion by what process it determined the existence of trust, other courts, not temporally distant, have discussed trust formation. *Mantle v. White*[27] discussed in some detail the mechanisms whereby a trust could be created. The *Mantle* court undertook a survey of existing authorities in an effort to ascertain the legal requirements establishing a trust.[28] The court concluded that

> . . . there is no magic in the word "trust" or "trustee," and any agreement, however informal, which indicates with reasonable certainty the intention of the trustor to create a trust, the acceptance of acknowledgment thereof by the trustee, and the subject, purpose and beneficiary, will be held sufficient . . .[29]

How then does the language of the 1889 Enabling Act, the Montana Constitution and the appended Ordinances, square with these trust elements? The intent of the congressional trustor can be estimated by looking closely at the purposes of the grants. The use of the lands was for the support of the common schools.[30] This use was explicit and exclusive, and for the benefit of a third party not the grantee. Finally, the grant was made in perpetuity. While the term "trust" is nowhere used in the Enabling Act, it seems axiomatic, as it did to the *Bickford* court, that the grantor's intent was that these lands should be held as a trust for the indefinite benefit of the common schools.

The State of Montana certainly accepted the lands for the limited purposes for which they were granted; and in the case of both Montana Constitutions, the "magic words" are present.[31] Though the pertinent language speaks of the subject lands being "held in trust for the people," the trust mandate is restricted with the conjunctive "for the respective purposes for which they have been or may be granted, donated or devised."[32] Read together, the plain meaning of the these constitutional provisions is to accept the land grants for the very specific purposes which Congress sets

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27. *See* Mantle v. White, 132 P. 22 (Mont. 1913).
28. *See id.* at 24.
29. *Id.* at 25. This holding is in accord with the later RESTATEMENT (SECOND OF TRUSTS, § 24(2) (1959).
30. *See supra* note 2.
31. *See supra* notes 6 and 7.
32. *See id.*

forth. The lands were to be managed for those purposes by the state as trustee *ad infinitum*; why else would there be language in Ordinance No. 1 requiring the mutual consent of Congress and the citizens of Montana to alter the purpose of the grant?[33] Finally, the subject, purpose and beneficiary are perhaps the easiest elements to recognize, as the purpose and beneficiaries of the grants of Sections 16 and 36 are clearly set forth in the Enabling Act and the Montana Constitution.[34]

The events surrounding Montana's acceptance into the Union as a state meet the elements the *Mantle* court laid out in its 1913 opinion for the creation of a trust. Though the *Bickford* court rendered its decision prior to *Mantle*, there is no reason to suspect that the court's rationale for deciding that the congressional grant of lands was a trust is without merit. Rather, most of the trust authorities relied upon in *Mantle* were available when the *Bickford* opinion was drafted.[35] One must presume that the *Bickford* court was aware of the state of trust law, as the opinion goes so far as to state that the existence and nature of the trust is "very clear to us from the law."[36]

Only two years subsequent to *Bickford*, the Montana Supreme Court again had the opportunity to contemplate a different, yet very analogous issue. In *State v. Collins* [37] the court scrutinized the 1881 grants by Congress of seventy-two sections in the territories of Dakota, Montana, Arizona, Idaho and Wyoming for the use and support of a university upon each territory's admission as a state; grants containing language similar to that found in the Enabling Act of 1889.[38] Justice Hunt, also the author of the opinion in *Bickford*, delivered the opinion of the court. Citing to its opinion in *Bickford*, the court ruled that the grants to, and acceptance by, the respective territories of 72 sections each, was also held to comprise a trust to be managed by the state as trustee.[39] Thus, before 1900, the Montana Supreme Court already had the opportunity on two occasions, to decide the nature of the lands granted to Montana by the Enabling Act. Consistently, the court determined that the Enabling Act and the legislative

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33. *See supra* note 7.
34. *See id.*
35. The court in *Mantle* cites to 1 Perry on Trusts and Trustee §82 dated 1872; and Flint on Trusts and Trustees §34, dated 1890.
36. *See* Brickford v. Cook, 43 P. 928, 930 (1898).
37. State ex rel. Dildine v. Collins, 53 P. 1114 (Mont. 1898).
38. Enabling Act of 1889, 25 Stat. 676, §14.
39. *See Collins*, 53 P. at 1113-1114.

acceptance of those lands by the state, with the attached trust language found in the Constitution, was sufficient to evidence the establishment of the state as the trustee of these lands.

These early cases are by no means unique in Montana jurisprudence. The Montana Supreme Court has generated a long line of cases consistently finding that the lands granted to Montana by virtue of the Enabling Act of 1889 implicate a trust relationship between the state as trustee and the respective beneficiaries.[40] The aforementioned criticism that state courts have blindly relied upon *Lassen* and *Ervien* is not particularly relevant in Montana. Only the *Pettibone* decision discusses the effect of the federal school trust land cases.[41] However, the Montana cases relied upon by the *Pettibone* court do not rely upon the holdings in *Lassen* and *Ervien*.[42] In fact many predate *Lassen* and *Ervien*.[43] The argument that state trust land law is built upon a foundation of sand

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40. *See* State ex rel. Koch v. Barrett, 66 P. 504 (Mont. 1901) ("We think the manifest intent of congress was to create a permanent endowment, which was to be preserved inviolate; and to require that the revenues derived therefrom should be faithfully applied to the support of the institutions created, and not be diverted to other purposes", *Id.* at 507.); *see* State ex rel. Galen v. District Court in and for Sanders County et al., 112 P. 706 (1910) ("It has been repeatedly held that the fund created from the sale of lands granted to the state by the federal Congress for a particular purpose is a trust fund 'established in pursuance of the act of Congress'." *Id.* at 707.); *see* State ex rel. Gravely v. Stewart, 137 P. 854 (Mont. 1913) ("The grant of lands for school purposes by the federal government to this state constitutes a trust" [cites omitted] *Id.* at 349); *see* Rider v. Cooney, 23 P.2d 261 (Mont. 1933); *see* Toomey v. State Bd. of Land Comm., 81 P.2d 407 (Mont. 1938) ("We agree with the primary contention that the state is a trustee in this instance [citations omitted] and that a trustee must strictly conform to the directions of the trust agreement . . As has already been pointed out the state of Montana is a trustee of those lands granted by the United States government to the states for common schools." *Id.* at 414.); *see* Texas Pacific Coal and Oil Co. v. State et al, Williams et al. v. State et al., 234 P.2d 452 (Mont. 1951) (concurring with State ex rel. Galen v. District Court in and for Sanders County et al.); *see* Thompson v. Babcock, 409 P.2d 808 (1966) (concurring with State ex rel. Gravely v. Stewart.); *see* Jerke v. State Dep't of Lands, 597 P.2d 49 (Mont. 1979) ("The proposition that public land is held in trust for the people is well settled", *Id.* at 296.); *see* Jeppeson v. Dep't of State Lands, 667 P.2d 428 (Mont. 1983) ("It is well settled that the lands granted by the federal government to the states for support of public schools constitute a trust, and that the state is trustee of those lands." *Id.* at 431.); Dep't of State Lands v. Pettibone, 702 P.2d. 948, 951 (1985) ("The 1889 Montana Constitution accepted these lands and provided that they would be held in trust consonant with the terms of the Enabling Act.". *Id.*

41. *See Pettibone*, 702 P.2d at 953.

42. *Id.* at 953-56.

43. *See e.g., Koch, Galen* and *Gravely*, *supra* note 40, were all decided prior to *Ervien. Koch, Galen, Gravely, Rider, Toomey, Texas Pacific Coal and Oil Co.*, and *Thompson*, *supra* note 40, were all decided prior to *Lassen.*

does not ring true in Montana[44]—Montana courts have independently reached the conclusion that the school trust lands are trust assets to be managed as such.

The *Pettibone* decision, described by Professors Souder and Fairfax as producing "some interesting language about the sanctity of trust lands"[45], does in fact contain very powerful utterances by the Montana Supreme Court. The court emphasized that "this court [citations omitted] and other courts" have consistently held that any infringement on the use or management prerogatives of the State that effectively devalue school lands is impermissible."[46] What then are the types of restrictions that *Pettibone* would glean impermissible?

IV. Restrictions on the Use or Management of School Trust Lands

There are a number of forces which are able to exert pressure on the management of the state trust lands. The Board of Land Commissioners and the Department of Natural Resources and Conservation, their respective roles are spelled out in the law, both directly influence trust land decisions.[47] Certainly, the legislature exerts control over agency trust land management and the executive branch. Last, but not likely least, the courts are entwined in determinations of the bounds and discretion of the trustees. All of these entities are quite capable of modifying the management scheme of trust lands, though by differing mechanisms. The important question addresses not the means, but rather, whether limitations or safeguards exist to protect the value of the trust from restrictions imposed upon generating revenue from the school trust lands.

V. The Nature of Trust Assets

The Montana school trust lands comprise 5.1 million acres and generate roughly 27 million dollars each year for the trust.[48] The value of these lands can be defined by their ability to generate an income stream to the trust.[49] As one might expect, any force which tends to restrict that income stream also reduces the value of

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44. *See supra*, note 10 at 845-846.
45. *See id.*
46. *See Pettibone*, 702 P.2d at 956.
47. *See generally* MONT. CODE ANN. §§ 77-1-202 & 77-1-301 (1997).
48. *See* SANDER & FAIRFAX, *supra* note 1 at 60-61.
49. ALVIN L. ARNOLD, REAL ESTATE INVESTOR'S DESKBOOK, 1.04[5] (1987).

the lands by virtue of constricting the property rights of the landowner.[50] Montana, unlike some western school trust states, has retained 86% of its originally granted acres. This is the second highest rate of retention among the 24 states receiving state trust grants.[51] Though liquidating the trust lands to seek investment vehicles with greater rates of return is possible, the trustees of the Montana lands have historically not pursued that strategy. This paper does not question the wisdom of that decision, but rather notes that as a consequence, the lands must be appraised solely for the income stream they are capable of producing.

VI. Managing for Economic Return

Foremost of the considerations is the general principle that school trust lands should be managed for income production over an indefinite duration.[52] Such management requires a return to the trust in the short run, but also the longterm appreciation of the income producing potential of the lands.[53] Thus, capturing the full market value of the trust land assets, as mandated by *Pettibone*, requires a sustainable methodology—one that should be theoretically designed to maximize the land's income stream indefinitely.

However, costs are incurred in the management of the lands for income generation. Souder and Fairfax describe "transaction costs" as such items as ascertaining the leasing capacity of state lands, and putting those lands up for bid.[54] I would suggest that management costs be defined more broadly to include the costs imposed on the trust, and the reduction in income generation in the face of meeting environmental regulatory requirements.[55]

Montana trust land managers are constrained by the regulatory requirements of such laws as the Montana Environmental Policy Act[56], the Natural Areas section of the Wild and Scenic Resources

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50. W. DAVID KLEMPERER, FOREST RESOURCE ECONOMICS AND FINANCE, 472 (1996). For a recent discussion of this issue in the context of forest regulation, *see* David B. Kittredge, Jr., et al., *Regulation and Stumpage Prices: A Tale of Two States,* 97 J. OF FORESTRY 12 (1999) (Number 10). The authors argue that such regulation may not reduce the value of the timber component of a parcel. It must be noted though, as the authors acknowledge, that there have been numerous publications that support the tenet that forest practices regulation will have an negative economic impact on timber value.

51. *See* SOUDER & FAIRFAX, *supra* note 1, at 48.

52. *See generally* RESTATEMENT (SECOND) OF TRUSTS (1959).

53. *See id.*

54. *See* SOUDER & FAIRFAX, *supra* note 1 at 87.

55. *See* KLEMPERER, *supra* note 50, at 84-85.

56. *See* MONT. CODE ANN. § 75-1-101 (1999).

Act[57], the multiple-use land management mandate,[58] the constitutional requirement that trust management not preclude the public's right to recreate on the trust lands,[59] the constitutional guarantee of a clean and healthful environment[60], and even the requirements of the trustee's own programmatic plan for the management of the forested trust lands.[61]

These restrictions create two tensions in trust land management. First, and perhaps more obvious, is the conflict of interest created in managing a trust asset for more than the exclusive benefit of the beneficiary. Facially, this should not present a difficult problem for the trustees—Montana law is clear on the duty owed by a trustee.[62] Thus, any suggestion that a less rigorous trust responsibility, as that arguably set forth in the Restatement Third of Trusts, might apply to Montana trust land management is misplaced.[63]

The Montana Code clearly establishes the parameter within which a trustee may operate.[64] Of particular note are Section 103 directing that "The trustee has a duty to administer the trust solely in the interest of the beneficiaries"[65] and Section 105(1) stating: "The trustee has a duty to not use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust."[66] Finally, Section 114(1) directs that: "The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would use to accomplish the purposes of the trust as determined from the trust instrument."[67]

These restrictions on a trustee's ability to manage for any other use than the best interest of the beneficiary are quite clear—yet they often come into conflict with the statutes outlined above. For

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57. *See* MONT. CODE ANN. § 76-12-103 (1999).
58. *See* MONT. CODE ANN. § 77-1-203 MCA (1999).
59. *See id.*
60. *See* MONT. CONST. art. II, § 3 (1972).
61. *See* MONT. DEP'T OF NATURAL RESOURCES CONSERVATION, MONTANA STATE FOREST LAND MANAGEMENT PLAN, FINAL ENVIRONMENTAL IMPACT STATEMENT AND RECORD OF DECISION (1997).
62. *See* MONT. CODE ANN. § 72-34-101, *et seq.* (1999).
63. *See* Jeppeson v. Dep't of State Lands, 667 P.2d 428, 431 states that the Board of Land Commissioners must manage the trust according to the "highest standards."
64. *See* MONT. CODE ANN. § 72-34-101 (1999).
65. *See* MONT. CODE ANN. § 72-34-103 MCA (1999).
66. *See* MONT. CODE ANN. § 72-34-105 (1999).
67. *See* MONT. CODE ANN. § 72-34-114(1) (1999).

example, it seems quite baffling how a trustee might ensure multiple-use and recreational access, if complying with those requirements strangles the stream of revenue. The *Pettibone* court did not believe such an accommodation could be reached in applying trust principles.[68]

A common rationale used to soothe this conflict is to allege that the trust exists for the general benefit of the public, not to be managed for the sole benefit of the beneficiary—as the "traditional view" of trust law would require.[69] The Montana Supreme Court has been unwilling to accept this view.[70] And with good cause. To open the trust mandate door even a crack guarantees the complete abrogation of the trust management obligation—as soon as one public or non-beneficiary use is accommodated, where then can the line be drawn as to which public uses are void? The trustees and the legislature are then free to allocate the trust resources according to political expediency. The dilemma created by conflicting management mandates is thus important to the value of the trust insofar as management decisions would compromise capturing the sustainable, full market value of the lands' income stream.

VII. Condemnation Without Compensation

Perceiving an open and notorious violation of the trustees' obligation to the beneficiaries of the trust, an aggrieved party has the remedy of a legal challenge to the offending management regime.[71] When the impact to the trust is more insidious however, it may go undetected and unchallenged. This is clearly the case with the inverse condemnation effect that environmental laws and regulations have on the worth of trust lands. While many of these laws carry the weight of popular public support, Montana law nonetheless recognizes a cause of action for the reduction in the value of private property due to the regulatory activities of the state.[72] Montana courts have distinguished between a regulation enacted as legitimate exercise of the state's police power, and those

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68. *See* Dep't of State Land v. Pettibone, 702 P.2d 948 (1985).

69. *See Fairfax, Sander & Goldemmen, supra* note 10; *see also Arum supra* note 12.

70. *See id.*

71. *See* Montanans for the Responsible Use of the Sch. Trust v. State of Montana ex rel. Bd. of Land Comm'rs. and the Dep't. of Natural Resources, 98-535, 1999 WL 992731 at *8 (Mont. decided Nov. 2, 1999).

72. *See* Knight v. City of Billings, 642 P.2d 141 (Mont. 1982).

enacted which negatively impact private property in order to provide a public good.[73] As the court noted, discerning between these two positions is not always an easy task.[74] The court has determined that laws of the former type are valid, not requiring compensation to the landowner, while laws of the latter type demand compensation to the landowner under the terms of the Montana Constitution.[75]

This paper will not delve into the federal regulatory takings standard, insofar as Art. II, § 29 of the Montana Constitution guarantees a landowner a greater degree of protection from the eminent domain powers of the state than does the federal constitution.[76] A discussion of the United States Supreme Court's ruling in *Lucas*,[77] and the line of cases preceding and following it will be limited to noting that as Professor John Horwich[78] and others[79] suggest, the federal standard does not require that the entirety of the economic value of the property be eliminated before a "taking" will be recognized. Accordingly, the Montana Supreme Court has clearly held that an inverse condemnation may occur when far less than "almost all" of the value of the property is taken.[80] Though the later decisions in *McElwain v. County of Flathead*[81] and *Kudloff v. City of Billings*[82] found takings not to occur in circumstances where less than the entirety of the land's value was abrogated, critics of these decisions have noted their inconsistency with both prior Montana case law and with the Supreme Court cases addressing partial takings.[83] It is unacceptable to fail to

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73. *See* The State of Montana, Dep't of Highways v. City of Helena, 632 P.2d 332, 335 (Mont. 1981).

74. *See id.*

75. *See* MONTANA CONST. article II, § 29.

76. This point is persuasively argued by Dringman in *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245 (1994). The fundamental difference being the "or damaged" language in Article II, §29 of the Montana Constitution.

77. *See* Lucas v. South Carolina Coastal Council 112 S. Ct. 2886 (1992), *rev'g and remanding* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991).

78. *See* John L. Horwich, & Hertha H. Lund, *Montana Supreme Court Unnecessarily Misconstrues Takings Law*, 55 MONT. L. REV. 455 (1994).

79. *See* ROBERT D. MELTZ, *et al*, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AMD ENVIRONMENTAL REGULATION (1999).

80. *See* Knight v. Billings, 642 P.2d 141 (Mont. 1982); Adams v. Dep't of Highways, 753 P.2d 846 (Mont. 1988).

81. McElwain v. County of Flathead, 811 P.2d 267 (Mont. 1991).

82. Kudloff v. City of Billings, 860 P.2d 140 (Mont. 1993).

83. *See* Horwich *supra* note 78; *see also* Dringman *supra* note 76.

recognize that a partial diminution of the value of real property is not actionable as a taking.

VIII. Preventing Takings of School Trust Lands for Public Purposes

Though Art. II, § 29 of the Montana Constitution does reference the taking of private property, the distinction between taking private property for public use and taking public property for public use is not so vast as one might expect. In *City of Three Forks v. State of Montana State Highway Commission*, the court held that property owned by a city was guaranteed the same constitutional protections as that owned by a citizen.[84] The court refused to exclude property held by a public entity, such as a city, from the eminent domain protections assured to private property owners. It should be simple to see the analog with trust lands. Though owned by the state, the lands are held by the state merely as a trustee; the trustee has an ongoing duty to ensure the revenue stream from those lands flows uninterrupted. While it would be an absurdity to argue that the State of Montana cannot manage its own lands in a manner that may lead to a reduction in the value of those lands, such is not the case with state trust lands.

The Private Property Assessment Act defines private property as "all real property, including but not limited to water rights."[85] It makes no distinction between property held by a private individual and property held by a public entity such as city or, in this case a public trustee. In that sense, it reinforces the holding in *City of Three Forks*. Surely, such an argument would be valid were the lands in question held by the State of Montana for the investment benefit of the Public Employees Retirement Fund.

In those instances where the State of Montana or any other governmental entity seeks to exercise its right of eminent domain over state trust lands, either with a physical invasion of property as in *City of Three Forks*, or by virtue of a regulatory condemnation, the result must be the same: compensation is due the trust when the taking is not a valid exercise of the state's police power. Any other result would be directly violative of both Art. II, Sec. 29 of the Montana Constitution, *City of Three Forks*, and of the *Pettibone* decision.

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84. *See* City of Three Forks v. State Highway Com'n, 156 Mont. 392, 395-96, 480 P.2d 826, 828 (1971).

85. *See* MONT. CODE ANN. § 2-10-103(2) (1999).

IX. When is a Taking a Valid Exercise of the Police Power?

Logically, a test to determine whether an action of the state is a valid police power, or whether compensation is owing the landowner must evolve. Montana courts have struggled with this difficult question.[86] The test explicitly set forth in *McElwain* states:

> . . . The question to determine whether a land-use regulation is properly invoked is whether the regulation is substantially related to the legitimate State interest of protecting the health, safety, morals, or general welfare of the public, and utilizes the least restrictive means necessary to achieve this end without denying the owner economically viable use of his land.[87]

The manner in which the court dealt with the issue of whether the entirety of the property's economic value has been diminished is not compelling in this example. As cited earlier, there are fundamental flaws in such an analysis.[88] Additionally, the *McElwain* court was faced not with lands whose sole purpose is the generation of income, but rather a residential parcel being subjected to a sewage restriction. The subject property was not explicitly an investment: whose value and purpose are defined solely by its income stream. Therefore, I suggest that the loss of the economic value element of the *McElwain* test is not appropriate in determinations of the existence of a valid exercise of police power on state trust land.

There are additional reasons for this position. The preemptive power of the federal enabling acts and the respective constitutional adoptions by various states have been discussed in *Pettibone*,[89] and directly addressed in two federal cases.[90] These cases stand for the proposition that a state's enabling act and supporting constitutional provisions supercede any conflicting laws or later adopted constitutional provisions which may affect the granted trust lands. Consequently, though the *McElwain* court divines that so long as some economically viable use of the property remains, the taking

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86. *See* McElwain v. County of Flathead, 811 P.2d 1267 (Mont. 1991).
87. *See id.* at 1270.
88. *See supra* note 83.
89. Dep't of State Lands v. Pettibone 702 P.2d. 948, 953 (Mont. 1985). [citing Board of Trustees for the Vincennes Univ. v. State of Indiana, 55 U.S 268 (1852) and Springfield Township v. Quick, 63 U.S. 56 (1859).
90. Board of Trustees for the Vincennes Univ. v. State of Indiana, 55 U.S 268 (1852) and Springfield Township v. John H. Quick, Auditor 63 U.S. 56 (1859)].

is not compensable; such a ruling, if applied to school trust lands, is violative of the Enabling Act of 1889 and the Montana constitutional provision ratifying it. Thus, any requirement that the property lose all value must fail. Specifically, any constriction of the income stream must be compensable in those instances where a valid police power is not being exercised.

There are both legal and practical reasons for this position. The legal rationale was well summarized by the Utah Supreme court's language in *National Parks and Conservation Ass'n v. Board of State Lands*:

> The implied intent of the grant was to maximize the economic return from the land for the benefit of the university. This intent cannot be accomplished if the use of the land is restricted to any significant degree.[91]

Further,

> . . . When economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that the unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized.[92]

Though not binding precedent in Montana, the *National Parks* holding is consistent with *Pettibone*. As these courts have recognized, permitting a diminution of the revenue stream will lead to its eventual demise. The concurrence in *National Parks* though, is perhaps equally effective in establishing the counterargument. Justice Durham stated that:

> Taken to its logical extreme, a strict requirement of undivided loyalty in managing trust lands would lead to absurd results. It would require the state to allow any use of any tract of trust land, free from all regulation, as long as the trust received enough money. In theory, a business using trust land would be exempt from safety, pollution and similar laws because compliance with these laws would make the enterprise less profitable,

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91. *See* National Parks and Conservation Assoc. v. Board of State Lands, 869 P.2d 909 (Utah 1994), [citing State v. Univ., of Alaska 624. P.2d 807, 813 (Alaska 1981).

92. *See id.* at 921.

> thereby reducing the amount a business would be willing to pay for the land.[93]

In her haste to satirize the majority's ruling, Justice Durham skipped over the essential point, and the basis of my suggested test. The majority, in a footnote, addressed her concerns and the focus of that test:

> Justice Durham's argument that the majority holds that a trustee's duty of loyalty precludes consideration of all other legal duties other than maximizing the monetary benefit to the beneficiaries is incorrect. Clearly, trustees have a duty to act according to applicable law . . . This does not mean that the state can enact legislation that violates the terms of the trust. Clearly, however, general laws enacted pursuant to the police power are not likely to violate the terms of the trust.[94]

The police power is the crux. In those instances where there is a valid exercise of this power, the trustee must comply with those laws. It would be absurd, as Justice Durham suggests, that any activity carried out on state lands, no matter how illegal or harmful, could not be prevented by the state if it led to a reduction in revenue. I do not suggest that *Pettibone* stands for that result. Rather, the trust is subject to costs incurred only by those laws which are compliant with the anti-nuisance doctrine; and do not merely produce a public good. In other words, the laws must prevent a harm from occurring; one which, if permitted to occur between two private parties, would be actionable in tort.[95]

X. The Test of Common Law Nuisance

The nuisance exception to takings has traditionally been advocated as a defense to the argument for compensation.[96] In those instances where a government legitimately advance the interests of public health, safety and welfare, no compensation would be due a landowner impacted by the regulation in question. It has been asserted that *Lucas* stands for the proposition that an inverse condemnation claim can be disabled by a showing that the

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93. *See id.* at 923.
94. *See id.* at 921, n.9.
95. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).
96. *See* MELTZ ET AL, *supra* note 79, at 185.

land use regulation prevents some common law nuisance from occurring.[97]

The nuisance exception can be utilized as a sword as well as a shield. Unless the condemnor can demonstrate that the regulation satisfies an anti-nuisance purpose, compensation is due the condemnnee. This position, advocated by Professor Richard Epstein,[98] is the only method by which the state's ability to exercise its power of environmental eminent domain can be checked. If not, in any given instance the argument can be made that an environmental law prevents a potential harm to the health and welfare of the public, and therefore, is a valid exercise of the state's police power. In those instances, neither a private property owner nor the trustee would be entitled to compensation for an inverse condemnation. Professor Epstein addresses this very hazard:

> . . . The simple invocation of an environmental stake is not sufficient to justify government action under the police power; everything turns on what the state does. Condemnation of land for a national park is but an extreme example of governmental action that may be desirable but outside the scope of the police power. In dealing with intermediate cases, the ultimate question remains as before: is the regulation an attempt to control the defendant's wrong or to provide a public benefit?[99]

With this mind, the courts should require a showing that a law impacting trust lands would prevent a tortious nuisance from occurring: otherwise, the trust must be compensated for any resultant management or transactional costs. For example, the Montana Environmental Policy Act (MEPA) imposes costs of some 1.27 million dollars annually on trust land management.[100] MEPA is strictly procedural: imposes no substantive goals that the land manager must meet.[101] As such, it cannot on its face satisfy Professor Epstein's anti-nuisance test, and consequently should be presumed to be an invalid exercise of the state's police power over

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97. *See id.* at 189.
98. *See* EPSTEIN *supra* note 95.
99. *See id.* at 121.
100. *See* MONTANA DEP'T OF NATURAL RESOURCES AND CONSERVATION, INTERNAL MEMORANDUM PREPARED FOR THE HOUSE NATURAL RESOURCES COMM. (1999 Legislature).
101. *See* Ravalli Co. Fish & Game Ass'n, Inc. v. Montana Dep't State Lands, 903 P.2d 1362 (Mont. 1995).

trust assets. Therefore, all costs imposed upon the trust lands in complying with this law are compensable.

Other laws dictate similar findings. The Natural Areas law states:

> . . . The legislature recognizes the fact that the school trust lands are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of the state; that it is the duty of the board of land commissioners to administer this trust so as to secure the largest measure of legitimate and reasonable advantage to the state; and hereby declares the preservation of natural areas, whether trust or other lands, for the enjoyment and inspiration of future generations to be an object worthy of legislative action helpful to the well-being of the people of the state and also declares that the preservation of natural areas on state trust land has sufficient value to present and future education to meet the state's obligation for the disposition and utilization of trust lands as specified in the Enabling Act.[102]

This law very clearly contemplates no prevention of harm, but rather exclusively seeks to provide a public benefit—again, not a valid exercise of the police power. As the *National Parks* court recognized, compensation by the state to the trust would be necessary for any preservationist use of trust lands.[103] The Montana Attorney General's office has similarly opined that in order to designate state trust as natural areas, the school trust must be compensated for the value of those lands.[104] The author of that opinion likewise determined that:

> . . . The requirement of compensation for school trust lands used for any purposes other than 'the support of common schools' is unavoidable absent the express consent of Congress. That uses such as highways, parks or natural areas might generally benefit

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102. *See* MONT. CODE ANN. § 76-12-103 (1999).

103. The Montana Supreme Court in Montanans for the Responsible Use of the School Trust v. Montana, *ex rel.* Board of Land Commissioners, No. 98-535, 1999 MT 263 (1999), recently affirmed the trust mandate expressed in Pettibone. The court relied upon private trust principles in determining that trust property must be managed for the beneficiary alone, not for the benefit of the trustee or any third party. The language of Section 76-12-103, if applied without compensation to trust lands, would invariably conflict with both Pettibone and this decision. MONT. CODE ANN. § 76-12-103 (1999).

104. *See* 36 OP. MONT. ATT'Y GEN. 492 (1976).

> the public is immaterial because they simply go beyond the narrow condition of the grant in the Enabling Act.[105]

While that author's conclusions were reached by relying largely upon the *Lassen* decision, that alone is insufficient to invalidate the opinion. Rather, the conclusion parallels that of this paper, though this paper established early that it would not rely upon *Lassen*, *Ervien,* or their progeny.

Professor Thomas Power has recognized the management ramifications of laws of this type on the trust. He suggests: "The lost income (if any) associated with amenity-driven management could then be deposited in the school trust account by the state legislature as a payment to the schools for the use of the trust land to provide those amenities."[106] This line of thought has been concretely demonstrated in the Washington State conservation easement associated with deferring timber harvest on 25,000 acres in the Loomis State Forest for approximately 13 million dollars.[107]

The multiple-use management statute, by which the Board of Land Commissioners is to temper its decisions, is yet another example.[108] This statute directs the board to manage so that the school trust lands "are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust. . ."[109] This directive necessarily implies that utilization concur with the trustee's responsibility. A fiduciary breach would result from any management decision that was premised upon solely meeting the needs of the "people". Should such a decision serve only to provide a benefit to the people, without accompanying revenue to the trust, such as providing elk hunting opportunities rather than merchantable timber, the validity of the decision would be additionally suspect on the basis that trust land value had been taken, without any link to a common law anti-nuisance purpose. Unless it could be demonstrated that meeting the needs of the people was not in fact the provision of a public benefit, but rather a means of regulating the trustee's offsite impacts; and those impacts, if

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105. *See id.* at 513.

106. *See* Thomas Power, Montana's State Forests, Schools and Quality of Life: An Economic Analysis 1-45 (1996) (unpublished manuscript on file with the *Dickinson Journal of Environmental Law and Policy*.

107. *See* Joel Connelly, $3 Million is still needed to save a wild state forest, Seattle Post-Intelligencer (June 30, 1999) at 133; <http://www.seattle-pi.com/pi/national/loom30.shtml>. Donors Pitch in to Rescue Loomis, *Last-Minute Gifts Spare State Forest From Logging*, SEATTLE POST-INTELLIGENCER, July 7, 1999, at A1.

108. *See* MONT. CODE ANN. § 77-1-203 (1999).

109. *See id.*

performed by a private landowner, would constitute tortious behavior, costs associated with its compliance would require the trust be compensated.

The legislature is not the only arm of government capable of confusing a valid exercise of the police power with a compensable taking. In *State v. Bernhard*, the court made the bold and frightening statement that:

> Article II, Section 3, 1972 Montana Constitution declares that the right to a "clean and healthful environment" is an inalienable right of a citizen of this state. Consistent with this statement and the cases cited, we hold that a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police powers in section 69-6802 and M.A.C. 16-2.14(2)-S 14261.[110]

Though limited to specific statutes, such a ruling, that the preservation or enhancement of aesthetic values is within a state's police powers, certainly cannot meet any common law anti-nuisance test. Professor Epstein summarizes the hazard:

> The law of eminent domain dispenses with the need for consent when the taking is for a public use, for which the public leisure and aesthetic pleasure surely qualify. But where the taking goes forward, the law of takings does not dispense with the need for compensation . . . [quote omitted] The rationale is that people should never be allowed to take by majority vote without compensation what they would have to pay for if they acted cooperatively in their private capacities. To allow otherwise would cause a mass migration from the market and to the political process.[111]

Where can the threat from illicit political forces be clearer than in the case of the Montana school trust land trustees? If a "mass migration to the political process" occurs in Montana, what better forum than before the state's five highest elected officials?

The question of the effect of the constitutional language ensuring a "clean and healthful" environment is one of some debate.[112] The "clean and healthful" language generates no

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110. *See* State v. Bernhard, 568 P.2d 136, 138 (Mont. 1977).

111. *See* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STANFORD L. REV. 1369, 1387 (1993).

112. *See* Carl W. Tobias & Daniel N. McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority*. 41 MONTANA L. REV. 177 (1980). The Montana Supreme Court has recently issued a ruling on this issue in Montana Environmental Information

inherent conflict with the trust mandate, so long as instances prompting the court's holding in *Bernhard* do not arise. When such a conflict occurs, the test remains the same as for any other law—bona fide anti-nuisance laws will not require takings compensation to the trust. In the absence of a nuisance abatement purpose, even a constitutional provision nonetheless entails trust reimbursement. *Vincennes Univ.* and *Springfield Twp.* both generally held that the federal preemptive effect of the Enabling Act trumps any later constitutional provision-including Article II, Section 3 of the 1972 Montana Constitution.[113]

XI. Timber Revenue: A Specific Example

MEPA and the courts have mandated that the trustee prepare a programmatic Environmental Impact Statement—the State Forest Land Management Plan (SFLMP)—setting forth the management strategy for the forested trust lands.[114] That strategy, as expounded by the preferred alternative Omega, reflects a number of public concerns and provides public amenities at the expense of revenue generation.

For example, biodiversity is a prime consideration of the SFLMP.[115] Providing biodiversity, the plan argues, is necessary for the long term health of the trust corpus in this case, the forests.[116] The SFLMP does not go on to explain, nor demonstrate, the economic benefit in either asset appreciation or risk reduction inherent in managing for biodiversity. It is fair to presume then that the SFLMP caters to managing for biodiversity as a means of reducing political friction and of providing an amenity sought by the public.

The costs incurred by the trust in managing for biodiversity can be substantial. Managing for the habitat of single species, for example the black-backed woodpecker, can incur costs as high as

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Center v. Dep't of Environmental Quality, No 97-455, 1999 MT 248 (1999). The scope of the ruling was narrow and did not apply to a trust land issue. Speculation on its effect on trust land management is not warranted at this time.

113. *See* Vincennes Univ. v. State of Indiana 55 U.S. 268 (1852); *see also* Springfield Twp. v. Quick, 63 U.S. 56 (1859); MONTANA CONST., art. II, § 3 (1972).

114. *See* MONTANA DEP'T OF NATURAL RESOURCES AND CONSERVATION, STATE FOREST LAND MANAGEMENT PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT (1996).

115. *See id.* at 1-13.

116. *See id.*

$105,000 on a small 278 acre timber sale.[117] Managing for such a species in this manner is fallacious. First, the black-backed woodpecker is considered by the DNRC as merely a "sensitive" species.[118] That classification carries no legal protection under any substantive law, but rather reflects a concern of wildlife professionals and the public. Certainly, the concerns of wildlife professionals and the public have merit, but not at the expense of the trust beneficiaries. Though the SFLMP alleges their role in sustaining a diverse and healthy forest, it does not provide the evidence to support this claim, nor an appraisal of the monetary benefit to the trust of such an amenity.[119]

Additionally, it remains a mystery how the protection of a species' habitat in any way prevents a tortious off-site impact. Were a private landowner to eradicate black-backed woodpecker habitat, there would be no public recourse, regardless of the protest of the wildlife biology profession. Setting aside such areas in comport with the SFMLP should be recognized as a taking, and the $105,000 in foregone revenue should be reimbursed to the trust.

Retention of large trees as a means of snag recruitment is yet another example. One to two (1-2) trees, 21 inches in diameter breast height, must be retained depending on the nature of the harvest site.[120] Snags, it is argued, provide certain habitat elements for particular wildlife species. It is again difficult to ferret out the benefit to the trust, though the costs certainly are clear. The annual cost of snag retention can be conservatively estimated at between $112,800 and $225,000, depending on the nature of the harvest sites.[121] Provided this volume of timber is deferred each year, the net present value of the deferral is correspondingly between $2,820,000 and $5,625,000.[122] The trust should not be burdened with this loss, unless and until the alleged benefits to the trust can be quantified. In the interim the trust must be compensated for the provision of snags and any associated public benefits.

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117. Personal Interview with John Hayes, DNRC Forester, Plains Unit (July 13, 1999). The reference is to the Boyer Creek Salvage Sale.

118. *See supra* note 114 at IV-119; STATE FOREST LAND MANAGEMENT PLAN IMPLEMENTATION GUIDANCE, SS-2, 9,10 (1998).

119. *See id.* at RMS-108.

120. *See id.* at BIO-42.

121. This calculation was based upon a 21" DBH tree yielding 500 board feet; a price of $200/thousand board feet; an average of 1,128 acres logged each year to which the snag recruitment is applied and personal conversation with Scott McCleod, DNRC Forest Improvement Section Supervisor (August 23, 1999).

122. At a discount rate of 4%

This type of problem is not merely limited to specific instances, but is systemic. The Sustained Yield Study which determined the volume of timber that may be harvested from trust lands annually is premised upon the terms of the SFLMP.[123] In determining the sustained yield figure, the Study applied a series of constraints to the biological sustained yield figure, some requirements found in the law, some not to arrive at the current figure.[124] One in particular, a figure for old-growth retention, is nowhere mandated in law, but is rather another creation of the SFLMP. A conservative estimate of the reduction in annual harvest attributable to old-growth retention is 2 million board feet.[125] This translates into a loss of at least $400,000 in revenue per year.[126] The net present value of that figure is substantial—$10,000,000.[127] It must be noted that this figure is supremely conservative and likely underestimates the true cost to the trust of old-growth deferral.[128]

Insofar as retaining old-growth is the provision of a sought after public amenity, the SFLMP certainly accomplished that goal. However, the fact remains that there is no anti-nuisance purpose furthered by reducing old-growth harvest. Certainly, no cause of action in tort is available against a private land owner for liquidating his old-growth forests. Accordingly, if the SFLMP is an expression of the public's will that old-growth be treated with deference, the trust should be compensated for the value of that good. Professor Power failed to recognize that his "amenity-driven management" is already occurring, but the trust is not capturing the value.[129] The trust beneficiaries are largely unaware that public values are driving management, without the net worth of those values being clearly established prior to decision-making.[130]

There should of course be examples of environmental laws that meet the anti-nuisance test. The Streamside Management Zone Act

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123. *See* JAMES D. ARNEY, THE ANNUAL SUSTAINED YIELD OF MONTANA'S FORESTED LANDS 4 (1996).

124. *See id.* at 33-36.

125. *See id.*

126. At an $/mbf price of 200.

127. At a discount rate of 4%.

128. Personal Interview with Scott McLeod, DNRC Forest Ecologist (July 30, 1999).

129. *See Power supra* note 106.

130. *See* LAWRENCE S. DAVIS AND K. NORMAN JOHNSON, FOREST MANAGEMENT (1987) p. 375, suggesting that in an environment of "open, quantified, and analytical" decision-making, such values be obtained prior to a decision, not as the post hoc revealed values of the decision-maker. The Montana SFLMP noticeably lacks such a quantification.

(SMZ) is one.[131] This law was designed to prevent downstream harm from occurring as a result of upland forest practices. Insofar as such upland restrictions may lead to decreases in the price of trust land stumpage,[132] I would nonetheless suggest that it would be quite futile to argue that the SMZ law is not a valid exercise of state police power-any resultant costs incurred by the trust would not require compensation.

The Total Maximum Daily Load[133] (TMDL) law may prove to be an example of another. This law was enacted "to provide a comprehensive program for the prevention, abatement, and control of water pollution."[134] The goal is broad, and it remains to be seen whether the law will in fact prevent negative downstream impacts that would otherwise be tortious if between private parties. If so, any resultant reduction in trust land production due to compliance with the law would likewise not be compensable.

These few examples are not an exhaustive list, but rather demonstrate how the value of the trust's income steam could be assured by applying a test that is both legally supportable and pragmatic. Unfortunately, the trend in trust land management has been quite the opposite. Rather than seeking a means to ensure the trust lands continue to serve the role for which they were granted, the movement has been in the other direction-towards a new, allegedly more sustainable, more flexible management regime.[135]

XII. The Value of Trust Lands for the Next 100 Years

It should strike any reader of any the multitude of contempo-

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131. *See* MONT. CODE ANN. § 77-5-301 *et seq.* (1999).
132. *See* ARNOLD, *supra* note 49, at 339.
133. *See* MONT. CODE ANN. § 75-5-701 *et seq.* (1999).
134. *See id.*
135. *See* Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, NAT. RESOUCES & ENERGY (Summer 1997); *see also* Bruce M. Pendery, *Utah's School Trust Lands: Constitutionalized Single-Puprose Land Management*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 319 (1996); Utah's *School Trust Lands: Dilemma in Land Use Mangment and Possible Effects of Utah's Trust Land Management Act*, 9 J. of Energy L. & Pol'y 195 (1989); Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL L. 797 (1992); Jon A. Souder, et al., *Sustainable Resources Management and State School Lands: The Quest for Guiding Principles*, 34 NAT. RESOURCES J. 271 (Spring 1994); John B. Arum, *Old-Growth Forests on State School Lands-Dedicated to Oblivion?-Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151 (1990); Wayne McCormack, *Land Use Planning and Management of State School Lands*, UTAH L. REV. 525 (1982).

rary writings advocating sustainable management of the state trust lands, or of those describing a crisis in the protection of the trust corpus that, though frequent, these arguments are patently disingenuous. The lands in question have been intensively managed by states in many cases for over a century[136] and still manage to produce the revenues for which they were granted.[137] The intellectual dishonesty lies not in arguing that societal changes demand changes in management of these lands, but rather the arguments improperly urge those changes be instituted via the very mechanisms the original trust grantor sought to prevent—subversive manipulation of land use. It is certainly possible that a shift has occurred in the public notion of what "value" these lands should provide: old-growth, wildlife habitat, biodiversity, aesthetic and spiritual refuges the list is virtually endless. Arguments have certainly been made that the changing demographics in Montana will result in new methods whereby the value in trust lands and natural resources generally might be recovered.[138] However, the efforts of the new trust land pendants appear more intent on seeking a way to invent a new theory of trust management rather than a bona fide discussion of enacting legitimate management alternatives.

There is no inherent conflict between rigorous trust land management as historically envisioned and the public trust doctrine that appears more often in an attempt to expand the trust purposes and beneficiaries.[139] The discretion afforded the Board of Land Commissioners certainly permits the use of trust lands for purposes other than traditional extractive industries. However, the public trust icons-wildlife and old-growth-are legitimate management goals only when the value they provide the public can be captured for the benefit of the trust. Unfortunately, it is all too common that the management of trust lands is confused with the murky management regimes of federal lands.[140] For example, the Montana Department of Natural Resources has recently begun investigating the feasibility of a consensus process, whereby interested public groups will have a hand in shaping the implementation of the Department's

136. *See* SOUDER & FAIRFAX, *supra* note 1, at 20-21.
137. *See id.* at 50-51.
138. *See Power, supra* note 106; THOMAS MICHAEL POWER, LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE (1996).
139. *See* Aram, *supra* note 12.
140. *See* James D. Moore, *Public Rights in Public Lands*, 32 MONT. L. REV. 147, 158 (1971).

old-growth policy.[141] Only two questions need be asked in such a forum: does the public wish old-growth to be retained, and if so, how much is the public willing to compensate the trust for that amenity.

Professors Souder and Fairfax argue that the conventional trust management wisdom is misplaced and that the land can legally be managed to provide other public goods for a greater number of public beneficiaries within the framework of the trust.[142] Their argument seeks to skirt the difficult issue. What they suggest is a tempering of the rigid income exploitation aspect of the land with a public trust effort. As this paper suggests, the Montana school trust is real and exists for the sole benefit of the beneficiary described in the 1889 Enabling Act. As this paper points out, the only way in which the purpose of the trust may be altered is by the mutual consent of the people of Montana and Congress.[143] Clever arguments and novel interpretations of a trustee's duties do not diminish the language of the law. This is not to suggest that the role the trust lands play is forever etched in granite. Rather, over the course of a century, it is more than likely that the uses to which trust lands may be best suited have also evolved. However, the fact remains that the only manner in which that use can be altered is as described above.

The efforts of Professors Souder and Fairfax and others are unfortunately having a negative impact on the ability of the Montana trustees to see clearly what is their role. The Board of Land Commissioners, having a relatively clear duty, is assailed by special interests, legislation and judicial opinions that cloud the legal issues. The result is an ever tightening management role, one in which the ability to wring the largest flow of income over the longest possible term is diminished. Political pressure, coupled with the numbing writings of the non-traditional trust advocates, creates an environment wherein the trustees can no longer ascertain their trust obligations, nor meet their trust responsibilities.

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141. Letter from the Montana Consensus Council to a List of Preliminary Stakeholders. (August 19, 1999). (on file with the author); MONTANA CONSENSUS COUNCIL, OLD-GROWTH FORESTS ON STATE TRUST LANDS (November 4, 1999). Such an approach, with the intent of conserving old-growth for the benefit of the general public, without accordant compensation to the trust, would violate the trustee's undivided duty to the beneficiaries. *See supra* note 103.

142. *See* Fairfax et al, *supra* note 10.

143. *See supra* note 7.

XIII. Conclusion

There is no doubt that establishing of the goals of trust land management is a political process; political forces drove the original formation of the trust estates, and political winds influence their management now. However, there is a distinct difference between the political solution provided by law, and the surreptitious change which is occurring. Rather than permit *fait de accompli* tactics in an effort to discredit the current trust mandate, any change to the strict revenue mandate must be in accord with the Enabling Act-let the people of Montana and the original grantor mutually decide the fate of these lands. Until such time, the trust lands must be managed for the exclusive benefit of the designated beneficiaries. Environmental laws and regulations interfering with such revenue generation must be closely scrutinized, for the spectre of inverse condemnation will erode the revenue stream if left unchecked. If such laws result in even a partial taking, they must be challenged and prevented from siphoning away the beneficiaries' interest. It is the obligation of the trustees to safeguard the revenue stream, and should they fail, the beneficiaries must be aware of the costs imposed, and be willing to take action accordingly in their own best interest.