

# STATE TRUST LAND REVENUE DIVERSIFICATION THROUGH CONSERVATION

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## *Abstract*

*Western states oversee tens of millions of acres of state trust lands granted to them by the federal government more than a century ago to fund public education and other public services. Traditionally, these lands have been leased for energy development, timber harvesting, livestock grazing, and other consumptive uses to generate income for the trust's beneficiaries. However, evolving markets and societal values present both novel opportunities and challenges for state trust land managers. This Article finds that states are not only permitted but obligated to consider revenue generation through conservation or other nonconsumptive uses to meet their enduring trust responsibilities. This finding is not a reinterpretation of state trust land mandates to make preservation and biodiversity a top-down priority, but instead, an opportunity to leverage bottom-up interest in conservation use of state lands to generate additional and more diversified income. The Article then describes the obstacles that often hinder conservation use of state trust lands and examines practical considerations for integrating conservation uses into existing trust land management frameworks, offering insights into the future of state trust land management.*

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## I. INTRODUCTION

In July 2023, the Wyoming Office of State Lands and Investments (WOSLI) leased the rights to a 640-acre section of state trust land to raise revenue for public schools.<sup>1</sup> The isolated parcel, located along the New Fork River south of Pinedale, Wyoming, sits above a natural gas field and is part of a critical migration corridor known as the Path of the Pronghorn.<sup>2</sup> Each year, the Sublette Pronghorn Herd travels along this corridor, the longest animal migration route in the continental United States, as it migrates from its summer habitat in Grand Teton National Park to its winter habitat in Wyoming’s Red Desert, nearly 150 miles to the south.<sup>3</sup> The leased section—dubbed “Parcel 194”—sits at a bottleneck within this migratory pathway, through which pronghorn must travel to avoid landscape features and human development to cross the New Fork River.<sup>4</sup>

The winning bid for the oil and gas lease on the 640-acre section was \$19 an acre, netting \$13,170 (including fees) for the Wyoming school trust fund account.<sup>5</sup> Conservation groups expressed frustration with the Office of State Lands and Investment’s decision to lease this section, decrying that the “income generated is insignificant compared to the value Wyomingites place on our big game species[.]” and appealed the leasing decision.<sup>6</sup> The Wyoming Board of Land Commissioners moved forward with the lease and declined public demands to add stipulations to the lease to protect the migration route.<sup>7</sup>

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<sup>1</sup> See Mike Koshmrl, ‘*Path of the Pronghorn*’ Bottleneck Leased for Development at \$19/Acre, WYOFIL (July 25, 2023), <https://wyofile.com/path-of-the-pronghorn-bottleneck-leased-for-development-at-19-acre/> [<https://perma.cc/QGD5-WZ9R>].

<sup>2</sup> See *id.* The news of the state land leasing decision was particularly troubling as it came after a devastating winter in 2022/2023 during which approximately 75% of the formerly 43,000 strong Sublette Pronghorn Herd perished due to “an unusual, inverted low-elevation snowpack and a mycoplasma bovis outbreak.” *Id.*

<sup>3</sup> See *id.* The Path of the Pronghorn that is located within the nearby Bridger Teton National Forest is federally protected, but beyond the Forest Service boundary, the State of Wyoming has yet to designate and protect the rest of the migration corridor, although it has indicated an interest in doing so since 2019. See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* The total amount of revenue generated for Wyoming’s school trust fund account would also include royalties generated from oil and gas production on the parcel. These revenues, while uncertain, are often significantly higher than bonus bids and annual rental payments. See generally Birch Malotky, *A New Lease on State Land: How Conservation Is Hoping to Buy a Seat at the Land Management Table*, W. CONFLUENCE (Mar. 24, 2022), <https://westernconfluence.org/a-new-lease-on-state-land/> [<https://perma.cc/FX2S-XF8G>].

<sup>6</sup> Letter from Lisa McGee & Meghan Riley, Wyo. Outdoor Council, to State Bd. Land Comm’rs (July 21, 2023), <https://wyofile.com/wp-content/uploads/2023/07/OSLI-Parcel-Withdrawal-Letter-WOC-7-21-23.pdf> [<https://perma.cc/5CDB-3ATR>].

<sup>7</sup> See Mike Koshmrl, *Wyoming Sides with Industry, OKs ‘Path of the Pronghorn’ Lease As-Is*, WYOFIL (Oct. 6, 2023), <https://wyofile.com/wyoming-sides-with-industry-oks-path-of-the-pronghorn-lease-as-is/> [<https://perma.cc/EAN3-HTDJ>].

Oil and gas lease sales like the one along the New Fork River fulfill Wyoming's fiduciary duty to generate revenue from state trust land to benefit the state's schools and other public beneficiaries.<sup>8</sup> However, conservation groups likely could have offered the State of Wyoming the same revenue, or more, to conserve the migration corridor bottleneck for the benefit of the struggling Sublette Pronghorn Herd. While conservation groups have demonstrated a willingness to participate in such markets in the past, Wyoming has discouraged conservation bidding by voiding past auction results when such groups outbid oil and gas companies.<sup>9</sup> For example, in 2020, the Wyoming Outdoor Council, a local conservation group, was the high bidder on an oil and gas lease in southwest Wyoming's Red Desert only to see the state cancel the lease because the group did not intend to drill for oil.<sup>10</sup> And in the wake of the Parcel 194 lease, the Wyoming Legislature passed a bill directing the Board of Land Commissioners to adopt rules defining who could bid on a lease.<sup>11</sup> In response to the legislation, the agency has issued a rule that prevents conservation groups from bidding on proposed oil and gas leases and gives the agency discretion to financially penalize them if they are the highest bidder for such leases.<sup>12</sup>

The conflict over Parcel 194 in Wyoming is just one example in a long history of conflict over developing vs. conserving state trust lands throughout the West.<sup>13</sup> In Arizona, for example, the environmental group Forest Guardian successfully bid on two state land grazing leases for which they offered twice the amount the previous lessee had offered.<sup>14</sup> However, the Arizona State Land Department rejected the applications because they did not intend to use the leases for grazing.<sup>15</sup> And in Idaho,

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<sup>8</sup> See WYO. CONST. art. VII, §2.

<sup>9</sup> See Malotky, *supra* note 5.

<sup>10</sup> See *id.*; see also Bryan Leonard & Shawn Regan, *Conservation Groups Should Be Able to Lease Land to Protect It*, HIGH COUNTRY NEWS (Jan. 25, 2022), <https://www.hcn.org/articles/public-lands-conservation-groups-want-to-buy-land-to-protect-it-one-problem-its-often-illegal/> [<https://perma.cc/GT6S-7YNU>].

<sup>11</sup> See H.B. 141, 67th Leg., Budget Sess. (Wyo. 2024) (directing the Board of Land Commissioners to define who's a qualified bidder for proposed oil and gas leases and imposing a penalty, equal to the amount of their bid, on any unqualified applicant that is the high bidder on a proposed oil and gas lease).

<sup>12</sup> See Jenifer E. Scoggin, *Order Adopting Emergency Rules and Regulations Chapter 18 - Leasing of Oil and Gas*, DIR. WYO. OFF. STATE LANDS & INVS., (June 6, 2024), <https://drive.google.com/file/d/1ujFIAEpUqzN1Paj2hO2dU2zpGrHEDe5p/view> [<https://perma.cc/Q2W8-SHHW>] (defining "qualified bidder" to exclude anyone not engaged in the good faith exploration or production of oil and gas as the primary focus of their business).

<sup>13</sup> See Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 NAT. RES. J. 135, 156–59, 169–72 (2019); see also Shawn Regan, *Why Don't Environmentalists Just Buy the Land They Want to Protect? Because It's Against the Rules*, REASON (Dec. 2019), <https://reason.com/2019/11/18/why-dont-environmentalists-just-buy-the-land-they-want-to-protect-because-its-against-the-rules/> [<https://perma.cc/LP56-J9FM>] (describing several examples of conservation groups attempting to bid on state land leases for conservation purposes).

<sup>14</sup> See generally *Forest Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001) (en banc).

<sup>15</sup> See *id.* at 366.

the Idaho Watershed Project attempted to bid on grazing leases on Idaho state trust land.<sup>16</sup> Yet, the Idaho State Board of Land Commissioners determined the group was not a “qualified applicant” and rejected them as a bidder.<sup>17</sup> In both instances, courts later determined that the states must consider conservation groups’ bids regardless of their intent to graze based on the state’s fiduciary trust responsibilities to maximize revenue for trust beneficiaries.<sup>18</sup> Beyond leasing state land for conservation uses, there has also been local conflict over state trust land conservation sales, particularly when state trust land is sold to the federal government to expand federal public land holdings.<sup>19</sup> These examples, among others, demonstrate that, at least in certain instances, neither conservation demand nor financial resources are a significant obstacle to the conservation of state trust lands. Instead, legal, procedural, and political barriers pose the main challenge.<sup>20</sup>

Conservation use of state trust land—which broadly includes conservation leases and licenses, conservation easements, and other conservation land sales, transfers, and exchanges—is a market-based form of environmental conservation that provides the opportunity to conserve land and resources while still generating revenue.<sup>21</sup> Conservation use can be viewed as using the land to generate revenue from attributes valued for conservation, such as wildlife habitat, open space, or other environmental amenities.<sup>22</sup> Conservation use can be exclusive or coexist with other compatible uses of the same land.<sup>23</sup> It can be relatively passive in nature, or it can

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<sup>16</sup> See *Idaho Watersheds Project v. State Bd. Land Comm’rs*, 982 P.2d 367, 368–69 (Idaho 1999).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 371; see also *Forest Guardians*, 34 P.3d at 371.

<sup>19</sup> See, e.g., Rob Hotakainen, *Wyoming Board Puts Brakes on Plan to Sell Grand Teton Land*, E&E NEWS (Dec. 7, 2023, 4:21 PM), <https://www.eenews.net/articles/wyoming-board-puts-brakes-on-plan-to-sell-grand-teton-land/> [<https://perma.cc/B3QV-VKFF>]; see also THE WILDERNESS SOC’Y, *OUR WILD FOR SALE: UTAH LANDS ON THE CHOPPING BLOCK*, <https://www.wilderness.org/sites/default/files/media/file/Utah%20-%20report%20-%20public%20land%20sell-off.pdf> [<https://perma.cc/TP73-2XCT>] (last visited June 30, 2024).

<sup>20</sup> See Leonard & Regan, *supra* note 13, at 159.

<sup>21</sup> See *id.* at 135; see generally Bryan Leonard, Shawn Regan, Christopher Costello, Suzi Kerr, Dominic P. Parker, Andrew J. Plantinga, James Salzman, V. Kerry Smith & Temple Stoellinger, *Allow “Non-use Rights” to Conserve Natural Resources*, 373 SCIENCE 958 (2021); see also Temple Stoellinger, *Valuing Conservation of State Trust Lands*, A.B.A. (Mar. 3, 2023), [https://www.americanbar.org/groups/environment\\_energy\\_resources/resources/trends/2023-march-april/valuing-conservation-state-trust-lands/](https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2023-march-april/valuing-conservation-state-trust-lands/) [<https://perma.cc/G5L7-DPU3>].

<sup>22</sup> See PETER W. CULP, ANDY LAURENZI, CYNTHIA C. TUELL & ALISON BERRY, *STATE TRUST LANDS IN THE WEST: FIDUCIARY DUTY IN A CHANGING LANDSCAPE* 42 (2015), <https://www.lincolnst.edu/app/uploads/legacy-files/pubfiles/state-trust-lands-in-the-west-updated-full.pdf> [<https://perma.cc/2YTF-ZTMS>] (noting that conservation of state land “can be considered the use of land to prohibit adverse effects that will impair conservation values and/or affirmative rights to manage the land for specific conservation purposes such as wildlife habitats, cleaner water, and recovery of endangered species populations”).

<sup>23</sup> See *id.*

include affirmative rights to manage the lands for specific conservation purposes such as habitat or wetland restoration.<sup>24</sup> While market-based approaches to conservation have resulted in significant conservation success for private land and private resources through tools like conservation easements and habitat leases,<sup>25</sup> their use has been more muted in the conservation of state land and resources. The limited application of these tools on state trust lands is the result of historical laws and policies that narrowly define acceptable uses of those lands and resources as well as the lack of developed processes for conservation use of state lands.<sup>26</sup>

America's natural resource laws, originally designed to promote development, also constrain efforts to protect and conserve resources. This is because historic state and federal natural resource laws were developed when the policy focused on encouraging settlement and promoting the development of public resources.<sup>27</sup> To prevent monopolization and speculation, these laws often include use-it-or-lose-it requirements along with narrow definitions of valid uses and users.<sup>28</sup> Today, these restrictions limit conservation groups from participating in markets to conserve public resources for nontraditional uses, such as habitat conservation, which are typically not defined as valid "uses."<sup>29</sup> They also establish a preference for extractive uses, even when conservation interests are willing to pay more to protect resources from development.<sup>30</sup> The result is that public and state land conservation can often only be advanced via top-down restrictions or administrative withdrawals of lands

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<sup>24</sup> See *id.*

<sup>25</sup> See NAT'L CONSERVATION EASEMENT DATABASE, <https://www.conservationeasement.us> [<https://perma.cc/5Q7Q-2BWU>] (last visited June 30, 2024, 10:14 PM). According to the National Conservation Easement Database, private landowners have enrolled more than 37 million acres in conservation easements in order to protect open space, wildlife habitat, watersheds and more. See *id.* See also *Habitat Leasing*, W. LANDOWNERS ALL., <https://westernlandowners.org/policy/habitat-lease/> [<https://perma.cc/A869-ZZQ3>] (last visited June 30, 2024, 10:14 PM); Shawn Regan, Benjamin T. Foster, Brian Yablonski, Kristin J. Barker & Arthur D. Middleton, *Developing New Tools to De-Risk Wildlife Occupancy on Private Lands*, CONSERVATION SCIENCE AND PRACTICE, Aug. 2024, at e13216.

<sup>26</sup> See Leonard & Regan, *supra* note 13, at 136. Market-based conservation efforts involving public resources do exist and are slowly growing. For example, in 2012, the Trust for Public Land "bought out federal energy leases" in Wyoming's Hoback Basin, securing 58,000 acres of land for environmental and recreational uses. *Id.* at 164–65. This deal was possible because the Wyoming Range Legacy Act enabled third-party environmental groups to purchase the mineral leasing rights from federal lessees and provided authority for the federal government to subsequently retire the area from oil and gas leasing, thus preventing future development. *Id.* In another example, in Oregon, thanks to a state statute that recognizes water flows for fish, wildlife, and recreation as a beneficial use, private conservation groups have successfully converted existing flow rights to instream flow rights, "which are then held in trust by the State." *Id.* at 176–77. Oregon has successfully completed 1,800 instream flow transactions. *Id.*

<sup>27</sup> See Leonard et al., *supra* note 21, at 959.

<sup>28</sup> See *id.* at 958–59, 960 tbl.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 959.

from other uses, inciting conflict between consumptive users and conservation goals.<sup>31</sup> The inability to directly participate in markets or acquire rights for conservation purposes forces these groups to rely on indirect methods like lobbying for administrative action or pushing new regulations.<sup>32</sup> This approach inevitably creates tension with established users who view such top-down interventions as threats to their livelihoods and historical access rights, often leading to expensive and protracted legal battles.<sup>33</sup>

Western water law, with its stringent “use it or lose it” doctrine, exemplifies the challenges and potential solutions in adapting historic natural resource laws to accommodate conservation demand.<sup>34</sup> Most western states allocate water for particular beneficial uses, and water rights can be lost via abandonment or forfeiture if water is not put to a beneficial use.<sup>35</sup> Historically, water administrators did not consider conservation to be a valid use of water rights. So, in-stream flows for fish habitats and other ecosystem services could only be secured through regulatory (and uncompensated) curtailment of existing water rights.<sup>36</sup> Beginning in the 1980s, many states began recognizing in-stream flows for environmental purposes as a valid “use” of water, allowing individuals, conservation and sportsmen’s organizations, and state agencies to purchase water rights for the environment, thus providing a mechanism to supply more water in streams while compensating existing users.<sup>37</sup> Designating conservation as a valid “use” of public natural resources is a crucial step in creating market-based frameworks that weigh the competing uses of resources based on the values people ascribe to them while compensating historical users for significant changes.

Although state trust lands have historically been used for consumptive purposes, the trust duty to maximize long-term financial returns for beneficiaries does not inherently favor these uses over conservation.<sup>38</sup> Instead, it presents a unique opportunity to advance conservation through markets.<sup>39</sup> State trust lands, recognized and interpreted as trusts, are governed by a fiduciary duty to manage them to

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<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* at 960.

<sup>35</sup> *See generally* JASON ANTHONY ROBISON, LAW OF WATER RIGHTS AND RESOURCES 358–63, 400–07 (2023 ed. 2023).

<sup>36</sup> *See generally* Laura Ziemer, Timothy Hawkes, Michelle Bryan & Kevin Rechhoff, *How the West Is Won: Advancing Water Law for Watershed Health*, 42 PUB. LAND & RES. L. REV. 81 (2020).

<sup>37</sup> *See* LEON F. SZEPTYCKI, JULIA FORGIE, ELIZABETH HOOK, KORI LORICK & PHILIP WOMBLE, NAT’L FISH & WILDLIFE FOUND., ENVIRONMENTAL WATER RIGHTS TRANSFERS: A REVIEW OF STATE LAWS 8–9 (2015), [https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1016&context=instream\\_all](https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1016&context=instream_all) [<https://perma.cc/CH6D-KTZ4>]; *see also* Brandon Scarborough, *Environmental Water Markets: Restoring Streams Through Trade*, PERC POL’Y PAPER SERIES NO. 46, 12–18 (2010).

<sup>38</sup> *See* Leonard & Regan *supra* note 13, at 136, 143.

<sup>39</sup> *See id.*; *see also* Stoellinger, *supra* note 21.

generate revenue for the benefit of the trust beneficiaries, primarily public schools.<sup>40</sup> Given the trust's perpetual nature, managers are obligated to balance short-term income with the long-term value of trust assets.<sup>41</sup> As new markets for nonconsumptive use emerge, the current challenge for state trust land managers is to develop and maintain a diversified portfolio to generate both short-term and long-term value for current and future trust beneficiaries.<sup>42</sup>

Beginning in the 1960s, economists recognized the significant benefits of preserving wild places, including ecosystem services and “existence” or “non-use” values.<sup>43</sup> Although early work emphasized the importance of public land as a locus for preservation in the face of market forces favoring resource development, the benefits of conservation and recreational uses of public land are increasingly valued in markets.<sup>44</sup> Today, there is evidence that economic activity generated by recreation on public land may exceed extractive uses in some contexts.<sup>45</sup> Furthermore, there is additional evidence that environmental groups are increasingly willing to bid against traditional resource users in public auctions, participate in conservation leasing markets, or engage in conservation-motivated purchases to advance conservation uses of state land.<sup>46</sup>

Nearly all states with trust land are pressured to expand opportunities for conservation-oriented use to capitalize on the burgeoning conservation, outdoor recreation, and tourism economies.<sup>47</sup> In fact, courts in Idaho and Arizona have ruled on the fiduciary necessity of considering bids from conservation entities.<sup>48</sup> This

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<sup>40</sup> See Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States*, 48 NAT. RES. J. 303, 327 (2008) (explaining that public schools are the beneficiaries of approximately 80% of all the trust land revenue assets, “with the remaining 20% aiding universities, prisons, counties, mental health care, and hospitals”).

<sup>41</sup> See Memorandum from Tobin Follenweider, WSLCA Asset Mgmt. Comm. Chair, to WSLCA Members, 3, 7 (Sept. 14, 2016), <https://www.statetrustland.org/uploads/1/2/0/9/120909261/wslca-principles-of-state-trust-portfolio-management.pdf> [<https://perma.cc/MUW6-LWXB>] (explaining that intergenerational equity requires that “[t]he trustees of endowed institutions are the guardians of the future against the claims of the present. Their task in managing the endowment is to preserve equity among generations.”).

<sup>42</sup> See *id.* at 3.

<sup>43</sup> See John V. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 777–78, 781 (1967).

<sup>44</sup> See Anthony C. Fisher, John V. Krutilla & Charles J. Cicchetti, *The Economics of Environmental Preservation: A Theoretical and Empirical Analysis*, 62 AM. ECON. REV. 605, 609–10 (1972); see generally John V. Krutilla, Anthony C. Fisher, William F. Hyde & V. Kerry Smith, *Public versus Private Ownership: The Federal Lands Case*, 2 J. POL’Y ANALYSIS & MGMT. 548 (1983).

<sup>45</sup> See Margaret Walls, Patrick Lee & Matthew Ashenfarb, *National Monuments and Economic Growth in the American West*, 6 SCI. ADVANCES, 554–55 (2020).

<sup>46</sup> See Leonard & Regan, *supra* note 13, at 145, 157; see also Leonard et al., *supra* note 21, at 959.

<sup>47</sup> See Davis, *supra* note 40, at 331–32.

<sup>48</sup> See generally *Idaho Watersheds Project v. State Bd. Land Comm’rs*, 982 P.2d 367 (Idaho 1999); see generally *Forest Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001) (en banc).

movement is not a reinterpretation of state trust land mandates to make preservation and biodiversity a top-down priority, but instead it is an effort to leverage bottom-up interest in conservation use of state lands to generate income equivalent to or even greater than what other uses would bring.<sup>49</sup>

This Article describes the potential for states to expand opportunities for revenue generation through the conservation use of state trust lands within the context of their distinctive legal and policy frameworks. Because each state manages trust land differently, this Article primarily focuses on the opportunity to expand conservation use on state trust land in the nine western states that hold the majority of trust land: Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming.<sup>50</sup> In Part II, this Article provides a brief history of the creation of state trust lands, presents an overview of the general trust requirements, and shares the historical and current use and revenue-generation trends from these lands. In Part III, this Article explores the remaining barriers and questions associated with conservation-use rights on state trust lands. Finally, in Part IV, this Article defines and discusses the existing and emerging opportunities for states to conserve trust land while also generating revenue for beneficiaries.

## II. HISTORY, TRUST MANDATE, AND MANAGEMENT OF STATE TRUST LAND

As state trust land scholars Jon Souder and Sally Fairfax note, state trust lands have a “long, complex, and important” history that “is woven deeply into the process by which the nation was formed.”<sup>51</sup> The following Section summarizes the history of state trust lands, describes the trust mandate applied to the land and revenue generated and provides an overview of current state trust land management.

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<sup>49</sup> See Leonard et al., *supra* note 21, at 959; see Leonard & Regan, *supra* note 13, at 159, 178–79.

<sup>50</sup> While 23 states hold state trust land, many of these states have retained only a small fraction of the original lands. See CULP ET AL., *supra* note 22, at 15. “Nevada, for example, holds only around 3,000 acres of its original 2.7 million acre grant.” *Id.* In contrast, Arizona, Montana, and Wyoming still retain more than 80% of their original land grants. *Id.* While California and Nevada are within the contiguous eleven western U.S. states, they contain less than 500,000 acres of state trust land and were not included as a primary focus in our analysis. Alaska was also granted state trust lands and currently holds more than 110 million acres, however because it is not a contiguous western state, it was not included in our analysis. *Id.* at 11.

<sup>51</sup> JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 17 (1996).



*A. History of the State Land Grant Program*

State trust lands can be traced back to the original American colonies, which began supporting schools through land endowments before the Revolutionary War.<sup>52</sup> After the war, the Continental Congress turned its attention to policies to govern the formation of new states in the western territories.<sup>53</sup> Included among these discussions was the idea of land grants, a concept borrowed from existing colonial practices specifically aimed at funding educational institutions. This historical approach set the stage for the state land grant program that played a significant role in the economic development of the American West.<sup>54</sup>

The federal government granted land to newly admitted states to support schools, viewing this practice as a way to encourage public education.<sup>55</sup> The land grants had an economic foundation in addition to encouraging education.<sup>56</sup> Eastern states had an already established property and tax base to fund schools, while newly formed western states had few resources to fund their fledgling governments.<sup>57</sup> These western states also contained vast amounts of federal public domain land.<sup>58</sup> Without federal support, newly established western states would have struggled to prioritize and fund education.<sup>59</sup> Concerns about the management of western lands and “the establishment of a well-educated citizenry” spurred the passage of the General Land Ordinance of 1785 and the Northwest Ordinance in 1789.<sup>60</sup> Together,

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<sup>52</sup> See CTR. ON EDUC. POL’Y, PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND GRANT PROGRAM: A BACKGROUND PAPER FROM THE CENTER ON EDUCATIONAL POLICY 5 (2011), <https://files.eric.ed.gov/fulltext/ED518388.pdf> [<https://perma.cc/8QHH-TS3X>] (stating “there was already general consensus in favor of using the ‘public bounty’ for the support of common schools” as opposed new taxes).

<sup>53</sup> See *id.*

<sup>54</sup> See SOUDER & FAIRFAX, *supra* note 51, at 18.

<sup>55</sup> See CTR. ON EDUC. POL’Y, *supra* note 52, at 2.

Many of the founders viewed education as a primary way to ensure citizens were prepared to exercise the freedom and responsibilities of a democratic society. By the end of the 18th century, there was a general consensus in favor of using public funds to support public schooling for the common good.

*Id.*

<sup>56</sup> See *id.* at 6.

<sup>57</sup> See *id.* at 6 (citing CULP ET AL., *supra* note 22).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*; Fairfax et al. highlight in a footnote in their 1992 article that “[u]nder the Articles of Confederation, known an unloved for their allegedly sapless central government and powerful states, Congress actually imposed a uniform education policy and a means for funding it on the states.” Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENV’T. L. 797, 806 n.24 (1992).

<sup>60</sup> See CTR. ON EDUC. POL’Y, *supra* note 52, at 6–8. The article noted that

these laws “laid out how federal land would be used and distributed; how territories would be surveyed, divided, and governed; and by what process new states were to be formed from those territories.”<sup>61</sup>

Through the General Land Ordinance of 1785, adopted under the Articles of Confederation, the Continental Congress established the Public Land Survey System.<sup>62</sup> The General Land Ordinance of 1785 granted the federal government authority to settle western public domain lands for the first time.<sup>63</sup> The Public Land Survey System, or the “rectangular system of surveys,” is a method of subdividing and describing land into townships that measure approximately six miles on each side.<sup>64</sup> Townships are divided into 36 sections, each containing one square mile, or 640 acres.<sup>65</sup> Once surveyed, the General Land Ordinance of 1785 called for the reservation of “lot No. 16 of every township for the maintenance of public schools within the said township.”<sup>66</sup> Two years later, the Northwest Ordinance established a system of governance for the territories and the process by which they could apply for statehood. The Northwest Ordinance specifically required that “schools and the means of education shall forever be encouraged.”<sup>67</sup>

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[i]t is important to remember that these two ordinances did not apply to all land in the U.S., but only to land held by the federal government in public domain. However, after the revolution and subsequent acquisitions through wars and purchases by the government, this federal land included almost all the territory west of the Mississippi.

*Id.*

<sup>61</sup> *Id.* at 6.

<sup>62</sup> See *Happy Anniversary! Land Ordinance of 1785 and the Homestead Act of 1862*, U.S. DEP’T INTERIOR BUREAU LAND MGMT. (May 19, 2019), <https://blm-egis.maps.arcgis.com/apps/Cascade/index.html?appid=0db4f5b1d03d47d2bc68d4d81c7dc63c> [<https://perma.cc/Y3DT-M9SU>].

<sup>63</sup> See *id.*

<sup>64</sup> *Rectangular Survey System*, U.S. DEP’T INTERIOR BUREAU LAND MGMT., [https://glorerecords.blm.gov/reference/default.aspx?id=05\\_Appendices03\\_Rectangular\\_Survey\\_System](https://glorerecords.blm.gov/reference/default.aspx?id=05_Appendices03_Rectangular_Survey_System) [<https://perma.cc/8V25-M2RX>] (last visited Aug. 10, 2024) [hereinafter *BLM Rectangular Survey System*]. Thomas Jefferson is said to have proposed the rectangular survey system. See *About the Public Land Survey System*, MIN. & LAND RECS. SYS. (Nov. 17, 2023), <https://mlrs.blm.gov/s/article/PLSS-Information> [<https://perma.cc/DCH9-8KG8>].

<sup>65</sup> See *BLM Rectangular Survey System*, *supra* note 64.

<sup>66</sup> WASH. STATE DEP’T NAT. RES., *THE FEDERALLY GRANTED TRUSTS: WHAT MAKES THEM UNIQUE* (1999), <https://www.statetrustland.org/uploads/1/2/0/9/120909261/fedtrusts.pdf> [<https://perma.cc/BCV3-EBAG>]. Initially grants were made to townships, which created a problem as townships had no formal governing body. See *id.* Michigan became the first state to become the direct recipient of the grants. See *id.*; see also Roscoe R. Hill, *Journals of the Constitutional Congress 1774–1789*, 32 J. CONT’L CONG. 339, 342–44 (1936) (edited from the original records in the Library of Congress).

<sup>67</sup> An Act to Provide for the Government of the Territory Northwest of the River Ohio (The Northwest Ordinance), ch. 8 art. 3, 1 Stat. 50, 52 (1789). Under the Northwest

It wasn't until the admission of Ohio to the Union in 1803 that the federal government's promise of the General Land Ordinance to grant section 16 in every township was honored.<sup>68</sup> Ohio's Act of Admission granted section 16 in every township "to the inhabitants of each township, for the use of schools" and "where such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same" were selected.<sup>69</sup> All states entering the Union after Ohio received land grants from the federal government to support their public schools, with only a few exceptions.<sup>70</sup>

Ohio's Statehood Admission Act became a foundation for future statehood acts but not a prescribed formula.<sup>71</sup> Over time, Congress became more generous in the amount of land it granted to states.<sup>72</sup> While Ohio and preceding states that entered the Union received one section per township, starting in 1850 with California and Oregon, Congress began granting two sections per township (sections 16 and 36).<sup>73</sup> Then, in 1896, starting with Utah's accession, states began receiving four sections per township (sections 2, 16, 24, and 26).<sup>74</sup> The four-section grants continued with the accession of Arizona and New Mexico in 1910.<sup>75</sup> Souder and Fairfax speculate that the grant of four sections per township may have been because the land in Utah,

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Ordinance, territories could petition for admission to the Union once its population reached 60,000. *Id.* at art. 5. The admission process was not straightforward. It was complicated by the civil war, the removal of Native Americans, and other political factors that often resulted in years of negotiation with Congress. *See id.* at 8; *see* SOUDER & FAIRFAX, *supra* note 51, at 22–24. Admission was also a back-and-forth negotiation that often lasted decades. Fairfax et al., *supra* note 59, at 808.

<sup>68</sup> *See* SOUDER & FAIRFAX, *supra* note 51, at 22–24.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* Texas, as a former independent republic, did not have federal public domain lands and therefore did not receive school lands. *See id.* at 22. Hawaii, a former independent constitutional monarch and then U.S. territory, through its statehood Act, ratified a trust established on royal lands to support schools and received all lands held by the United States at the time of statehood as state trust land. *See id.* at 23–24.

<sup>71</sup> *See id.* at 24.

<sup>72</sup> *See* CULP ET AL., *supra* note 22, at 10 (further explaining that in addition to granting more sections of state land to the states, "Congress also began granting more generous amounts of land to underwrite county bonds and to support other public institutions, such as state universities and agricultural colleges; schools for the deaf, dumb, and blind; penitentiaries; and public buildings").

<sup>73</sup> Fairfax et al., *supra* note 59, at 813–14. As the federal government's policy over public domain lands "shifted from disposition to retention," Congress began to exempt reserved federal lands (forests, parks, and Tribal reservations) from the land grants. *Id.* at 815. "For example, in the 1889 'Omnibus' Enabling Act for North Dakota, South Dakota, Montana, and Washington . . . stated that the provisions granting sections in every township did not apply to federal land reservations." *Id.* Utah's enabling act included a similar provision. *See id.* However, Arizona and New Mexico were successful in removing that provision from their Enabling Acts and "select[ed] land in lieu of sections contained in national forests." *Id.* at 815–16.

<sup>74</sup> *See id.* at 814.

<sup>75</sup> *See id.*

Arizona, and New Mexico was arid; therefore, more granted land as needed to raise revenue to support schools. Alternatively, it could have been the result of the new western states' growing political power.<sup>76</sup>

In total, 77.6 million acres of granted school land were given by the federal government to states to support schools.<sup>77</sup> Much of that land was eventually sold to private parties by the states. Today, only about 46 million acres remain, nearly 40 million of which are located within the nine western states included in our analysis.<sup>78</sup> Sale of the granted land was not originally authorized, but leasing the land was not a viable choice with so much free federal land for the taking.<sup>79</sup> In 1827, Ohio successfully petitioned Congress for authority to sell granted land, “and thereafter, school lands were generally sold.”<sup>80</sup> States established prior to 1850 have either sold off all or a significant portion of the land they were granted.<sup>81</sup> For example, California, which joined the Union in 1850, now holds only 10% of its originally granted lands.<sup>82</sup> In contrast, newer states still hold most of their granted lands, likely mirroring the federal policy shift from disposition to retention and likely also in response to the efforts of a growing public school lobby to protect the trust grants. For example, Arizona, Montana, and Wyoming still hold 80% of their granted land.<sup>83</sup>

Granting lands was, in many ways, the easy part; what to do with the land was a more difficult question.<sup>84</sup> To ensure that trust assets were not wasted, Congress began to add more specific prescriptions in state enabling acts.<sup>85</sup> The prescriptions

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<sup>76</sup> See SOUDER & FAIRFAX, *supra* note 51, at 27.

<sup>77</sup> See CTR. ON EDUC. POL'Y, *supra* note 52, at 3 (citing DAVID TYACK, THOMAS JAMES & AARON BENAVIDE, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954 13–14 (1987)); Fairfax et al., *supra* note 59, at 832; see CULP ET AL., *supra* note 22, at 1.

<sup>78</sup> Jillian Jurica, *Demystifying State Trust Lands: History & Interactive Guide of Access Regulations & Allowed Activities*, ONX MAPS (Oct. 7, 2022), <https://www.onxmaps.com/blog/state-trust-land-history-regulations-activities-and-more> [<https://perma.cc/TAC7-E639>].

<sup>79</sup> See Fairfax et al., *supra* note 59, at 807 n.25.

<sup>80</sup> *Id.* at 821. In restating the often-stated sentiment that much of the originally granted land and its potential benefit to schools and education was lost “due to incompetence, indirection, and corruption.” *Id.* at 807. However, they note “much of the loss was connected to the states’ decision to sell the lands rapidly to spur settlement and supporting early schools.” See *id.* The authors suggest the perceptions of mismanagement may have been overplayed as what would be most beneficial to current students would have likely deprived earlier students. See *id.*

<sup>81</sup> CTR. ON EDUC. POL'Y, *supra* note 52, at 14.

<sup>82</sup> See *id.*

<sup>83</sup> See CULP ET AL., *supra* note 22, at 15.

<sup>84</sup> See generally Fairfax et al., *supra* note 59.

<sup>85</sup> See CTR. ON EDUC. POL'Y, *supra* note 52, at 11 (citing TYACK ET AL., *supra* note 77, at 14); see also Fairfax et al., *supra* note 59, at 822. Congress copied language from recently passed state constitutions and inserted it into subsequent state enabling acts. See *id.* They also suggest that while the courts have viewed additional Congressional prescriptions on state land grants as “federal punishment for bad state behavior,” their data suggests that the courts failed to understand this process of recycling state constitutional language as the reasoning for the increasing prescription enabling act language. *Id.*

included price controls for the sale and lease of the land and even prohibitions on the use of the land for sectarian or denominational schools.<sup>86</sup> For example, in 1875, when Colorado entered the Union, its Enabling Act provided that school property had to be sold “at a public sale for not less than \$2.50 a per acre.”<sup>87</sup> By the time New Mexico and Arizona were admitted to the Union, their acts included detailed prescriptions and specified rules for the leasing of the land, the size and price of the lands that could be sold, the periods during which the lands could be auctioned, and the appraisals of the lands’ “true value” prior to the auction.<sup>88</sup>

The land-granting language in state Enabling Acts also changed over time. Ohio’s Enabling Act granted lands reserved for “the use of schools,” while Colorado requires that the lands be used “for the support of common schools.”<sup>89</sup> While not all Enabling Act language was the same, all created state lands encumbered by a duty to manage them for the benefit of fostering education.<sup>90</sup> Yet, certain variations (discussed below) have led to many differences in how states manage their trust lands.<sup>91</sup>

After Michigan established a permanent fund to house the proceeds from state school land leases and sales, other states adopted the same approach.<sup>92</sup> Ultimately, beginning with Colorado, Congress required it.<sup>93</sup> Also, beginning with Colorado, Congress began allowing “in lieu” grants, which allowed states to select other sections if homesteaders, railroads, Indian reservations, or other federal reservations already occupied the designated sections.<sup>94</sup> In lieu grants allowed states to select contiguous blocks of land, or more profitable lands, instead of the scattered and piecemeal sections in every township.<sup>95</sup>

Congress began providing additional lands to the states so that they could finance railroads and other infrastructure or, in advance of statehood, support territorial governments.<sup>96</sup> Supplementing these grants, Congress passed the Morrill Land-Grant Act in 1862, granting land for colleges, and the Jones Act in 1927 which granted states the mineral rights in all previously granted lands.<sup>97</sup>

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<sup>86</sup> See CTR. ON EDUC. POL’Y, *supra* note 52, at 11 (noting that North Dakota, South Dakota, Montana, Washington, Idaho, and Wyoming have similar prescriptions in their Enabling Acts).

<sup>87</sup> Fairfax et al., *supra* note 59, at 821 (citing the Enabling Act, 1875 Leg., 43rd Sess. § 14 (Colo. 1875)).

<sup>88</sup> See CTR. ON EDUC. POL’Y, *supra* note 52, at 11–12 (citing PETER W. CULP, DIANE B. CONRADI & CYNTHIA C. TUELL, TRUST LANDS IN THE AMERICAN WEST (2005), <http://opportunitylinkmt.org/wp-content/uploads/2015/07/Trust-Lands-in-the-American-West.pdf> [<https://perma.cc/QVE8-UNRX>]).

<sup>89</sup> *Id.* at 10, app. tbl. A.

<sup>90</sup> *See id.* at 10–13.

<sup>91</sup> *See generally id.*

<sup>92</sup> *See id.* at 12–13.

<sup>93</sup> *See id.* at 12.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See* CULP ET AL., *supra* note 22, at 10.

<sup>97</sup> *See id.* at 10.

The scope of the school land grants is worth noting as “[n]ever before had land trusts been established on such a systematic or grand scale.”<sup>98</sup> Souder and Fairfax note that “[v]ery few programs in this or any other nation have such a deep, clear past or such a consistent core.”<sup>99</sup> Today, 30 states have state trust lands, comprising a land mass “double the holdings of the U.S. [National] Park Service and rivals that of the U.S. Forest Service.”<sup>100</sup>

### B. *The Trust Mandate*

State trust lands stand out from other public resources due to the explicit purpose for which they were granted: to support public schools.<sup>101</sup> This purpose remains today and has been interpreted to impose a fiduciary responsibility for states to manage and use these lands to generate sustainable revenue for public schools.<sup>102</sup> Over time, this fiduciary responsibility began to be articulated as a formal trust arrangement with the states acting as the trustee.<sup>103</sup>

Fairfax et al. dispel the notion that the federal government intentionally created trust obligations in the early broad state enabling acts; instead they found that the creation of trusts in these early states arose implicitly and from commitments made in state constitutions or statutes.<sup>104</sup> In later states, particularly New Mexico and Arizona, Congress began to intentionally use language to create a trust.<sup>105</sup> Thus, specific articulations and definitions of a state land trust and their obligations must be examined at the state level – through a review of each state’s enabling act, constitution, and state statutes – although general statements about state land trusts can be made (and are made in the section below).<sup>106</sup>

To create a formal trust, three elements must be present.<sup>107</sup> First, there must be an expression of intent, meaning the person who creates the trust must manifest “an intention to impose duties which are enforceable in the courts.”<sup>108</sup> Second, there

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<sup>98</sup> CTR. ON EDUC. POL’Y, *supra* note 52, at 7.

<sup>99</sup> SOUDER & FAIRFAX, *supra* note 51, at 1.

<sup>100</sup> Ada C. Montaque, Samuel J. Panarella & Peter Yould, *Renewable Energy Development on State Trust Lands*, 32 DUKE ENV’T L. & POL’Y F. 177, 180–81 (2022) (citing SOUDER & FAIRFAX, *supra* note 51, at 5).

<sup>101</sup> See SOUDER & FAIRFAX, *supra* note 51, at 1.

<sup>102</sup> See *id.* at 1–2.

<sup>103</sup> See *id.*

<sup>104</sup> See Fairfax et al., *supra* note 59, at 809 (“Nor, contrary to the assertions of many court and scholarly discussions, was there a pattern of Congress imposing a trust agreement on the states.”).

<sup>105</sup> See, e.g., CULP ET AL., *supra* note 22, at 12 (noting that the New Mexico-Arizona Enabling Act of 1910 “provided that the granted lands were to be held ‘in trust’ for the purposes specified (public education, universities, penitentiaries, and so forth)”).

<sup>106</sup> See CULP ET AL., *supra* note 22, at 12.

<sup>107</sup> See Fairfax et al., *supra* note 59, at 852.

<sup>108</sup> *Id.* at 852 (quoting RESTATEMENT (SECOND) OF TORTS § 25 cmt. a (AM. L. INST. 1959)).

must be a beneficiary who is the person for whom the benefits are intended.<sup>109</sup> Finally, there must be a “property interest that is in existence or ascertainable and is to be held for the benefit of the beneficiary” (i.e., the trust corpus).<sup>110</sup> In the context of the state land grants, the federal government is the trustor, the entity that provided the property or asset to establish the trust. States became the trustee responsible for managing the trust according to the trustor’s instructions (albeit limited instructions). The public-school systems (and other named groups including universities, penitentiaries, and hospitals), in turn, became the beneficiaries. And the corpus of the trust includes both the lands and the funds arising from their sale, lease, or use.<sup>111</sup>

Although earlier court decisions found a trust responsibility associated with state school lands,<sup>112</sup> the Supreme Court of the United States did not recognize a legally binding trust until its decisions in *Ervien v. U.S.* and *Lassen v. Arizona*.<sup>113</sup> In *Ervien*, the Supreme Court interpreted the Arizona-New Mexico’s Enabling Act of 1910, which provided that the granted lands “shall be by the said state held in trust,” to restrict New Mexico’s ability to use funds derived from state trust lands for the advertising of resource and advantages of the state.<sup>114</sup> In *Lassen*, the Supreme Court extended this holding to the state’s use of trust land and found the Arizona State Land Commissioner’s granting of material sites and rights of way to the state highway program without compensation, contrary to the Arizona-New Mexico Enabling Act.<sup>115</sup> That act, the Court held, “unequivocally demands both that the trust receive the full value of any land transfer from it and that any funds received be employed only for the purposes for which the land was given.”<sup>116</sup> The Court ultimately required that Arizona “compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands.”<sup>117</sup>

Relying on a review of over 500 cases, Souder and Fairfax find that *Lassen* represents the “starting point for a series of modern cases that rely on trust principles to answer ancient issues about the granted lands.”<sup>118</sup> They found that since *Lassen*,

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<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 878.

<sup>112</sup> *See CULP ET AL.*, *supra* note 22, at 12.

<sup>113</sup> *See generally* *Ervien v. United States*, 251 U.S. 41 (1919); *see generally* *Lassen v. Arizona ex rel. Arizona Highway Dep’t*, 385 U.S. 458 (1967).

<sup>114</sup> *Ervien*, 251 U.S. at 45–47.

<sup>115</sup> *See Lassen*, 385 U.S. at 466.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 469.

<sup>118</sup> SOUDER & FAIRFAX, *supra* note 51, at 34. In an earlier law review article, the same authors suggest that because Supreme Court decisions on the subject of state trust land have been dominated by cases in Arizona and New Mexico, the trust principles enshrined in a few Supreme Court cases “have come to dominate judicial understanding of school grants” which has eroded the differences in enabling acts, rounding out angles and leaving us with an

virtually all western states whose courts have considered the issue have found the explicit or implicit creation of a trust.<sup>119</sup> Western courts have found justification for the intent to establish a trust through a review of the history and text of state enabling acts (Colorado),<sup>120</sup> state constitutions (Utah),<sup>121</sup> and even state statutes (Wyoming).<sup>122</sup> Notably, “all of the western states except California recognize some form of trust responsibility associated with their [state] lands . . . .”<sup>123</sup>

The fiduciary duty placed on state land managers “operates as a constraint on discretion of the state and requires that lands be managed in a manner consistent with the best interests of the trust.”<sup>124</sup> However, the state land fiduciary duty is unique from traditional trust duties.<sup>125</sup> This is because, unlike a normal trustee, states are both a trustee and a government with various policy goals that may conflict with managing state trust lands to maximize value for beneficiaries.<sup>126</sup> Moreover, states

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assumption that grants and trusts are all basically the same. *See* Fairfax et al., *supra* note 59, at 842–47.

<sup>119</sup> *See* CULP ET AL., *supra* note 22, at 13; *see also* County of Skamania v. Washington, 685 P.2d 576, 580 (Wash. 1984) (stating land grant trusts are “trusts that impose upon the state the same fiduciary duties applicable to private trustees”).

<sup>120</sup> *See* Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 633–35 (10th Cir. 1998) (finding justification for the trust based on a review of the history of the Colorado Enabling Act, determining that restrictions on the sale of state trust land showed sufficient intent to create a trust).

<sup>121</sup> *See* Dist. 22 United Mine Workers of Am. v. State of Utah, 229 F.3d 982, 988–90 (10th Cir. 2000) (finding no sufficient restrictions to demonstrate an intent to establish a trust in the Utah Enabling Act, but instead finding the Utah Constitution did impose such restrictions and therefore created a trust).

<sup>122</sup> *See generally* Riedel v. Anderson, 70 P.3d 223 (Wyo. 2003) (finding that neither the State’s enabling act, nor its constitution imposed a trust on its state trust land since neither included specific restrictions). However, the court found Wyoming statutes imposed a trust responsibility on the management of state trust lands. *See id.* at 235.

<sup>123</sup> CULP ET AL., *supra* note 22, at 13.

<sup>124</sup> PETER W. CULP, DIANE B. CONRADI & CYNTHIA C. TUELL, TRUST LANDS IN THE AMERICAN WEST 26 (2005), <http://opportunitylinkmt.org/wp-content/uploads/2015/07/Trust-Lands-in-the-American-West.pdf> [<https://perma.cc/R6MF-NTPP>] [hereinafter CULP ET AL., TRUST LANDS]; *see also* Kadish v. Ariz. State Land Dep’t, 747 P.2d 1183, 1186 (Ariz. 1987) (indicating the fiduciary duties imposed on the state by virtue of the school trust are “duties of a trustee and not simply the duties of a good business manager”). Although the trustor (federal government) and the beneficiary (public school systems) held constant, the trustee responsible with managing state school lands changed over time. *See* SOUDER & FAIRFAX, *supra* note 51, at 2. Initially townships were designated as the manager of state school lands, then Congress began granting school lands to individual counties in each state, and finally to the states directly. *See* CTR. ON EDUC. POL’Y, *supra* note 52, at 10 (noting that while it may have made sense to grant school lands to townships or counties in the settled Midwestern territories, it did not make sense in the West where populations centers were sparse). Eventually, the trusteeship of the granted school land was transferred to state. *See id.*

<sup>125</sup> *See* CULP ET AL., *supra* note 22, at 25.

<sup>126</sup> *See id.* at 27–28.



can pass laws regulating land use, which may raise complications when applied to trust land.<sup>127</sup>

Some suggest the most important fiduciary duties placed on state trust land managers include the duty to follow the settlors' instructions, the duty of good faith, the duty of prudence, and the duty to preserve the trust assets.<sup>128</sup> In the state trust land context, following the settlors' instructions requires administering the trust asset by Congress's intent as laid out in the state enabling acts.<sup>129</sup> However, as noted above, Congress provided few details in many state enabling acts, leaving state constitutions, state statutes, and state courts to fill in the details. Ultimately, the trustee may have broad management discretion.<sup>130</sup>

The duty of good faith requires that the trustee act "honestly and with undivided loyalty to the interests of the trust and its beneficiaries."<sup>131</sup> This means that state trust land managers must prioritize the interest of trust beneficiaries rather than pursuing their or the state's policy priorities or those of a third party.<sup>132</sup> The duty of prudence requires that the trustee act "with due care, diligence, and skill in managing the trust."<sup>133</sup> This requires that the trustees utilize the appropriate expertise, diversify the portfolio to manage risk, exercise due care in decision-making, and continuously monitor and adapt trust-related decisions.<sup>134</sup> Finally, the duty to preserve the trust assets requires that "the trustee manage the assets with a long-term perspective, ensuring that the trust can satisfy both the present and future needs of the beneficiary."<sup>135</sup> The duty to preserve requires that the trustee "manage the trust corpus in a manner that will ensure that the trust will remain undiminished to serve the needs of future beneficiaries in perpetuity."<sup>136</sup>

Increasingly, courts noted that the most important characteristic of the state trusts is perpetuity because trusts are intended to "endure and provide benefits from generation to generation without a foreseeable end."<sup>137</sup> The perpetual aspect of the trusts has significant implications for the common fiduciary requirement that the

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<sup>127</sup> See *id.* at 27–28 (stating for example, compliance with state environmental laws may hold state managers to a higher standard than that of traditional trustees).

<sup>128</sup> See *id.* at 25–26; alternatively, authors Souder and Fairfax articulate four general principles that guide trust land management: "clarity, accountability, enforceability, and perpetuity." SOUDER & FAIRFAX, *supra* note 51, at 3.

<sup>129</sup> See CULPET AL., *supra* note 22, at 25–28.

<sup>130</sup> See *id.*

<sup>131</sup> *Id.* at 25; see also Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 918 (Utah 1993) (*rev'd on other grounds by* Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 973 (Utah 2006)) ("The duty of loyalty requires a trustee to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust.").

<sup>132</sup> See CULPET AL., *supra* note 22, at 25.

<sup>133</sup> *Id.*

<sup>134</sup> See *id.* ("[C]ourts have recently found that this prudence standard should be applied to investments not in isolation but in the context of the overall trust portfolio.").

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 25–26.

<sup>137</sup> *Id.* at 30.

trusts be managed for the exclusive benefit of the trust beneficiaries and to extract maximum economic returns.<sup>138</sup> While the traditional trust doctrine emphasized maximum economic returns for trust beneficiaries, the modern interpretation of the trust doctrine includes greater flexibility in portfolio management and incorporates the concepts of balanced risk and return and the management of long-term sustainability.<sup>139</sup> This requires state land trust managers to look beyond revenue maximization to intergenerational equity which may require investing portfolios in management strategies that maintain healthy trust assets for future generations.<sup>140</sup>

In conclusion, state trust land managers must balance several key criteria in their decision-making. These include prioritizing long-term sustainability, managing risks through diversification, preserving trust assets, and complying with state-specific legal frameworks and requirements. Managers must also strive for intergenerational equity by balancing current revenue generation with maintaining assets for future beneficiaries. By considering these factors, managers can maximize current returns while ensuring the long-term viability of trust lands. This approach allows them to fulfill their fiduciary duties and support public schools now and, in the future, which aligns with the trust's perpetual nature. Ultimately, this balanced approach opens the door for conservation uses of state trust lands which presents an opportunity to generate current revenue while maintaining the land's long-term viability.

### *C. Common Uses of State Trust Lands*

Perhaps unsurprisingly, state trust lands are managed quite differently than U.S. Forest Service and Bureau of Land Management lands, which are subject to multiple-use mandates that elevate policy and political considerations relative to income generation.<sup>141</sup> Consistent with states' fiduciary duty to raise revenues from trust lands, these lands have traditionally been subjected to "fairly intense extractive policy" compared to federal lands.<sup>142</sup> Steven Davis noted that, as of 2008, the 600 million acres of federal public land generated on average \$1.29 billion in gross annual revenue, while state trust lands generated \$4.5 billion but from approximately one-sixth as many acres.<sup>143</sup> This equates to roughly 15 times more revenue per acre on state trust land compared to federal public lands.<sup>144</sup>

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<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See Federal Land Policy and Management Act of 1976 (FLMPA)*, 43 U.S.C. § 1701; *see Multiple-Use Sustained Yield Act of 1960 (MUSYA)*, 16 U.S.C. § 528.

<sup>142</sup> Davis, *supra* note 40, at 330.

<sup>143</sup> *See id.*

<sup>144</sup> A related analysis of state and federal lands in Montana, Idaho, New Mexico, and Arizona found that state trust agencies produce far greater financial returns than federal land agencies. *See HOLLY FRETWELL & SHAWN REGAN, DIVIDED LANDS: STATE VS. FEDERAL MANAGEMENT IN THE WEST* 4 (2015), <https://www.perc.org/wp-content/uploads/2015/03/15>

Within the nine western states analyzed, there is substantial heterogeneity in the amount and spatial distribution of state trust lands and the associated natural resource endowments.<sup>145</sup> Some states, such as Oregon, opted to dispose of the majority of their trust lands via sales relatively soon after obtaining them.<sup>146</sup> On the other end of the spectrum, Arizona and New Mexico boast the largest trust land holdings because their enabling acts granted them four 640-acre sections per township that were more difficult to sell due to restrictions in their enabling acts and the quality of the land.<sup>147</sup>

The pattern of state land holdings is also relevant for trust managers.<sup>148</sup> Trust lands primarily retain their original pattern of two or four sections per township, resulting in a checkerboard pattern of discontinuous parcels scattered across the landscape and often embedded within a larger block of federal land.<sup>149</sup> In Montana, for example, the 5.2 million acres of state trust land is divided into 16,000 individual parcels.<sup>150</sup> This checkerboard pattern of state trust land is often referred to as the “blue rash” because state trust parcels are typically depicted in blue on U.S. Geological Survey land use maps.<sup>151</sup>

To date, much of the value of state trust portfolios consists of illiquid, low return assets that are geographically dispersed throughout each state.<sup>152</sup> This typical pattern of state school lands in the West has had significant consequences on the management of those lands.<sup>153</sup> State trust lands are checkerboarded, meaning they are surrounded by federal and private lands that pose access, coordination, and management challenges.<sup>154</sup> John Ruple and Robert Keiter have noted that

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0303\_PERC\_DividedLands.pdf [<https://perma.cc/6CJB-YJBG>]. The states generated an average of \$14.51 per dollar spent on land management, while the U.S. Forest Service and Bureau of Land Management generated only 73 cents per dollar spent. *Id.*

<sup>145</sup> Fairfax et al., *supra* note 59, at 832 (denoting three distinct classes of state land ownership). In the first category is Arizona and New Mexico, states who received four sections per township, and retain the largest amount of land. *See id.* In the next category is a middle group of states including Utah, Montana, and Colorado, who have sold some or much of their land, as well as Washington, Idaho, and Wyoming who “have held onto most of the lands” they were granted. *Id.* In the final category is Oregon and California, which have sold most of their land and therefore have the least. *See id.* at 832–33.

<sup>146</sup> *See* CULP ET AL., TRUST LANDS, *supra* note 124, at 122.

<sup>147</sup> *See* Fairfax et al., *supra* note 59, at 832; *see also* Arizona-New Mexico Enabling Act of 1910, ch. 310, 36 Stat. 557, 563, 574, 561–65, 572–75 (1911).

<sup>148</sup> *See* Fairfax et al., *supra* note 59, at 834.

<sup>149</sup> *See* Davis, *supra* note 40, at 331–32.

<sup>150</sup> *See id.* at 332.

<sup>151</sup> *See id.*

<sup>152</sup> *See* Memorandum from Tobin Follenweider, *supra* note 41, at 3.

<sup>153</sup> *See* Fairfax et al., *supra* note 59, at 834–36. In a 2022 article, economists Eric Alston and Steven Smith note the initial scattered placement of state trust land led to lower levels of resource development left many state trust land sections covered in naturally occurring land cover like grass and forests. *See* Eric Alston & Steven M. Smith, *State Trust Lands and Natural Resource Use in the US Northwest*, 2 J. HIST. POL. ECON. 583, 606 (2022).

<sup>154</sup> *See* Fairfax et al., *supra* note 59, at 834.

“[f]ragmentation and conflicting management objectives invite conflict, especially when preservation and development mandates collide.”<sup>155</sup> They also point to Montana, where federal and private lands block 1.2 million acres of state land.<sup>156</sup> Profitably leasing landlocked parcels can be challenging, particularly when a state land parcel is located within sensitive federal public lands, such as a National Monument, which can significantly reduce the state’s ability to generate revenue from the property. Not surprisingly, some states have pursued land sales and exchanges with federal and private landholders to consolidate state sections into compact and efficient management units.<sup>157</sup>

Across states, trust lands are leased for various revenue-generating activities, including grazing, agriculture, timber harvest, mineral extraction, commercial development, and recreation.<sup>158</sup> Fairfax et al., have placed the revenue received from state land into “three basic sources: royalties from the sale of nonrenewable resources, usually oil, gas, coal, and minerals; revenues from the sale of granted trust lands; and revenues from the use of renewable resources, usually agriculture and grazing fees, timber sales, commercial or special purpose leases, and the surface rentals and bonus bids received for oil, gas, coal, and mineral leases.”<sup>159</sup>

Grazing and agriculture are the most common uses of state trust lands in the West.<sup>160</sup> Steven Davis notes that “[a]cre per acre, grazing and agriculture dominate as trust land uses in the often-arid Mountain West, yet this contributes relatively negligible amounts to trust funds, especially in proportion to acreage.”<sup>161</sup> He found that timber harvesting, mineral and energy production, and land sales generated more state revenue.<sup>162</sup>

Based on 2021 data, New Mexico boasts the highest revenues from state trust lands, at roughly \$1.25 billion.<sup>163</sup> Approximately 95% of that revenue is attributable to various subsurface resource leases and royalties.<sup>164</sup> In contrast, Arizona—the state with the second highest trust-land revenues, at roughly \$433 million—earns most of its revenue through land sales and commercial leases, with less than 1% coming

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<sup>155</sup> John C. Ruple & Robert B. Keiter, *The Future of Federal-State Land Exchange*, 2014 WALLACE STEGNER CTR. FOR LAND, RES., AND ENV’T PUBL’N 1, 3 (2014).

<sup>156</sup> *See id.*

<sup>157</sup> *See id.* at 14 (stating that particularly if the state land section is an inholding, surrounded by a federally designated wilderness or land prioritized by the federal government for conservation).

<sup>158</sup> *See* SOUDER & FAIRFAX, *supra* note 51, at 60–61.

<sup>159</sup> Fairfax et al., *supra* note 59, at 836.

<sup>160</sup> *See* CULP ET AL., *supra* note 22, at 18.

<sup>161</sup> Davis, *supra* note 40, at 330.

<sup>162</sup> *Id.*; *see also* FRETWELL & REGAN, *supra* note 144, at 7.

<sup>163</sup> N.M. STATE LAND OFF., FY21 ANNUAL REPORT 34 (2021), <https://www.nmstatelands.org/wp-content/uploads/2021/12/New-Mexico-State-Land-Office-FY21-Annual-Report.pdf> [<https://perma.cc/X3QB-FUDG>].

<sup>164</sup> *See id.* at 35.

from subsurface leases.<sup>165</sup> Montana provides an intermediate example, with \$107 million in revenues split roughly evenly between grazing and agricultural leases, subsurface leases and revenues, and sales and commercial development.<sup>166</sup>

State permanent funds are the repository of revenues from the sale and use of state trust lands.<sup>167</sup> Annual interest from these funds is distributed to beneficiaries.<sup>168</sup> States have varying permanent fund assets. For example, New Mexico and Wyoming have large permanent funds as a result of oil, gas, and coal royalties.<sup>169</sup> Arizona also has a large permanent fund resulting from lucrative land sales near urban areas.<sup>170</sup> States with smaller permanent funds may have sold many of their granted lands or may have limited revenue-generating opportunities.<sup>171</sup>

While states historically earned revenues primarily from the outright sale of land or through extractive uses, broader economic changes across the West challenge this model. The contribution of some traditional resource industries to local economies, such as grazing and timber harvests, has declined across much of the American West since the late twentieth century.<sup>172</sup> Beginning with the telecommunications boom in the 1990s and accelerating with the rise of remote work in recent years, local environmental amenities have become an increasingly important driver of economic growth as both firms and workers enjoy more freedom in their choice of where to locate.<sup>173</sup> While traditional uses continue to be the major drivers in many states, environmental amenities associated with recreation, open space, and conservation have become increasingly significant economic forces, particularly in rapidly growing areas of the western United States.<sup>174</sup>

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<sup>165</sup> See ARIZ. STATE LAND DEP'T, FISCAL YEAR 2021 (FY 2021) ANNUAL REPORT 5 (2021), <https://land.az.gov/sites/default/files/media/FY%202021%20Annual%20Report%20with%20letter.pdf> [<https://perma.cc/T8UX-95NY>].

<sup>166</sup> See TR. LANDS MGMT. DIV. MONT. DEP'T NAT. RES. AND CONSERVATION, ANNUAL REPORT FISCAL YEAR 2021 24 (2021), [https://dnrc.mt.gov/\\_docs/Trust-Land/Planning-and-Reports/TLMD\\_HQT\\_REPORTS/20210630\\_TrustLands\\_AnnualReport\\_FY21\\_TLMD.pdf](https://dnrc.mt.gov/_docs/Trust-Land/Planning-and-Reports/TLMD_HQT_REPORTS/20210630_TrustLands_AnnualReport_FY21_TLMD.pdf) [<https://perma.cc/6UMM-ZFNX>].

<sup>167</sup> See Fairfax et al., *supra* note 59, at 837.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 838.

<sup>170</sup> See *id.* at 838–39.

<sup>171</sup> See *id.* at 839–40 (stating that the difference in state's permanent trust funds is “due to two factors: the amount of lands sold for low prices in the early days of statehood; and the amount of mineral royalty income accruing to the permanent funds”).

<sup>172</sup> See Dan S. Rickman & Hongbo Wang, *Whither the American West Economy? Natural Amenities, Mineral Resources and Nonmetropolitan County Growth*, 65 ANNALS REG'L SCI. 673, 693 (2020).

<sup>173</sup> See generally DAVID MCGRANAHAN, USDA, NATURAL AMENITIES DRIVE RURAL POPULATION CHANGE (1999), <https://www.ers.usda.gov/publications/pub-details/?pubid=41048> [<https://perma.cc/6ADH-5369>].

<sup>174</sup> See Catherine Traywick & Hannah Recht, *American West Discovers How to Make Money on the Outdoors: Enjoy It*, BLOOMBERG (Mar. 2, 2019), <https://www.bloomberg.com/graphics/2019-western-outdoor-economy/> [<https://perma.cc/36LB-XN9B>].

As states look to capitalize on the emerging environmental amenities market, the perpetual nature of the trust provides trustees with the authority to emphasize conservation priorities to protect long-term revenue prospects for the benefit of future generations.<sup>175</sup> Colorado has even gone so far as to enshrine stewardship as part of the state's trust mandate into its constitution.<sup>176</sup> Along similar lines, an Arizona appellate court found that leasing land for a particular use could violate the trust's responsibility if that use precluded future uses that could ultimately prove more valuable.<sup>177</sup>

As land use demands have changed in the West, so have states' approaches for capturing that value from trust lands. The most obvious example is recreation. Historically, the primary demand for recreation on trust lands centered on hunting and fishing, but other forms of recreation, from hiking to antler shed hunting, have grown in popularity.<sup>178</sup> States have approached revenue from these recreational activities differently. While Montana has set permit prices to maximize revenue, Colorado has prioritized broad public access to trust land for recreation.<sup>179</sup> Ultimately, recreation on trust land still falls under the broad umbrella of a "use" for a potential buyer who is willing to pay for access to the land and who can be excluded for nonpayment.<sup>180</sup> This makes recreation perhaps more like grazing or timber and less like conservation or preservation, which may advance "non-use" values for a broad and disbursed group of individuals who benefit.

Beyond recreation, states also have some tools to support increasing public demands for conservation and preservation while still generating revenues for their beneficiaries. One interesting approach is to engage in land exchanges. To protect the conservation value of certain lands while still earning revenue, some states have brokered exchanges whereby they convey trade of their lands with high conservation value to the federal government or a land trust in exchange for less environmentally

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<sup>175</sup> See SOUDER & FAIRFAX, *supra* note 51, at 274 (citing Nat'l Parks & Conservation Ass'n v. Bd of State Lands, 869 P.2d 909, 921 (Utah 1993)). In *Nat'l Parks & Conservation Ass'n*, the Utah Supreme Court notes that "in some cases it would be unconscionable not to preserve and protect" unique scenic, paleontological, and archeological values that have little economic value on the open market. 869 P.2d at 921. But the court notes that with appropriate restrictions, the values can be preserved alongside livestock grazing and even mineral development so the lands without diminishing the economic value. *Id.* In circumstances where that is not possible, "it might be necessary to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected and the full economic value of the school trust land still realized." *Id.*

<sup>176</sup> See CULP ET AL., *supra* note 22, at 49.

<sup>177</sup> See SOUDER & FAIRFAX, *supra* note 51, at 280 (citing Havasu Heights Ranch & Dev. Corp. vs. State Land Dep't State Ariz., 764 P.2d 37, 42 (Ariz. Ct. App. 1988)).

<sup>178</sup> See Jurica, *supra* note 78.

<sup>179</sup> See SOUDER & FAIRFAX, *supra* note 51, at 273.

<sup>180</sup> See Nick Bowlin, *Hunters and Anglers Struggle for Public Access to Colorado's State Trust Land*, HIGH COUNTRY NEWS (Aug. 2, 2019), <https://www.hcn.org/articles/recreation-hunters-and-anglers-struggle-for-public-access-to-state-trust-lands> [<https://perma.cc/HVM8-YJQ3>].

sensitive lands that can be leased or sold for development.<sup>181</sup> For example, in 2014, Utah and the Bureau of Land Management brokered a trade of 25,000 acres of state land near the Colorado River in exchange for 35,000 acres elsewhere in the state that could be used for mineral development.<sup>182</sup> In another example, in 2012, Arizona voters approved Proposition 119, which allows similar exchanges to occur with the states' trust lands.<sup>183</sup>

Finally, some states now monetize the conservation value of their trust land more directly in various markets for ecosystem services.<sup>184</sup> Given the potential to use state trust lands for timber extraction or land development, states are positioned to participate in “offset markets,” whereby they are paid not to engage in these activities in specific locations, thereby offsetting development that occurs elsewhere.<sup>185</sup> Various habitat and wetlands offset programs exist in the United States allowing developers to build in environmentally sensitive areas if they pay to restore habitat elsewhere.<sup>186</sup> States may be able to leverage similar programs to generate habitat offsets as a source of revenue from trust lands.<sup>187</sup> Similarly, Washington State recently announced plans to move more than 10,000 acres of trust land to “conservation status,” precluding future timber development and generating over 900,000 carbon offset credits that can then be sold to willing buyers.<sup>188</sup>

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<sup>181</sup> See SUSAN CULP & JOE MARLOW, LINCOLN INST. LAND POL'Y, CONSERVING STATE TRUST LANDS: STRATEGIES FOR THE INTERMOUNTAIN WEST 42 (2015), <https://www.lincolninst.edu/sites/default/files/pubfiles/conserving-state-trust-lands-full.pdf> [<https://perma.cc/G8GC-WJE7>].

<sup>182</sup> See CULP ET AL., *supra* note 22, at 34.

<sup>183</sup> See *id.* at 51.

<sup>184</sup> See, e.g., *Ecosystem Services*, COLO. STATE LAND BD., <https://slb.colorado.gov/lease/ecosystem-services> [<https://perma.cc/DSV9-TNNZ>] (last visited June 30, 2024, 11:32 PM) (encouraging the development of ecosystem services project on state trust land including “[e]nvironmental mitigation markets for water” and “[e]nvironmental mitigation markets for biodiversity (wildlife)”). States have traditionally participated in markets for ecosystem services by leasing state trust land to other state agencies for uses such as state parks or wildlife habitat conservation areas.

<sup>185</sup> See Laurel Demkovich, *Court Ruling Clears Way for Carbon Storage Projects on State Logging Lands*, WASHINGTON STATE STANDARD (Apr. 16, 2024, 3:43 PM), <https://washingtonstatestandard.com/2024/04/16/court-ruling-clears-way-for-carbon-storage-projects-on-state-logging-lands/> [<https://perma.cc/EX82-BVQD>].

<sup>186</sup> See *Habitat Conservation on State Trust Lands*, WASH. STATE DEP'T NAT. RES. (Sept. 1997), <https://www.dnr.wa.gov/programs-and-services/forest-resources/habitat-conservation-state-trust-lands> [<https://perma.cc/6QZF-2J8V>].

<sup>187</sup> See generally KATHRYN FERNHOLZ, ASHLEY MCFARLAND, JENNIFER CORCORAN, RAM DEO, SCOTT HILLARD, LUCAS SPAETE, CHRIS WRIGHT & MEREDITH CORNETT, LEVERAGING STATE TRUST FOREST LAND (2021), <https://dovetailinc.org/upload/tmp/1649275218.pdf> [<https://perma.cc/SA9S-6PPC>].

<sup>188</sup> See *Carbon Project*, WASH. DEP'T NAT. RES., <https://www.dnr.wa.gov/CarbonProject> [<https://perma.cc/54FX-8KXZ>] (last visited June 30, 2024, 11:33 PM).

States' responsibility to raise revenues from their trust lands has led to more varied uses than on similar public lands. Historically, state revenues were dominated by outright land sales, royalties on nonrenewable resources such as oil, and leases of renewable resources such as timber. However, as resource values have evolved and new uses have emerged, states have begun to generate revenues through new activities, including recreation and environmental offset markets. Still, traditional uses dominate state trust lands on a dollar-for-dollar or acre-for-acre basis.

### III. CHALLENGES TO THE EXPANSION OF CONSERVATION USE ON STATE TRUST

Despite the development and implementation of conservation use tools by some states, numerous challenges and questions remain. While the likelihood of an increasing number of conservation projects on these lands seems all but assured in the coming years, state trust managers must be open to these opportunities and be able to square them with their fiduciary duty to beneficiaries, which can be a complex challenge. The following section outlines key legal, political, and practical challenges to expanding markets for conservation on state lands and explores additional considerations and open questions about the structure of such rights.

#### *A. Legal and Policy Hurdles to Expanding Conservation Use on State Trust Lands*

In many western states, legal barriers may intentionally or unintentionally preclude or discourage conservation uses of state trust lands. These barriers include laws and policies that: (1) prioritize immediate revenues over long-term value to beneficiaries; (2) favor selected uses and impose "use it or lose it" requirements or procedural difficulties to change the designated use of a parcel; and (3) impose terms or pricing structures that disfavor conservation.<sup>189</sup> These laws could be challenged as violating the state's fiduciary duty to trust beneficiaries, and such lawsuits have succeeded in several states.<sup>190</sup> However, challenging these laws and longstanding leasing procedures can present legal obstacles, including questions about who may bring a challenge, the burden of proof they must carry, and the standard of review courts apply.

#### *1. Maximizing Immediate Revenue over Sustainable Revenue*

One way that states may disfavor conservation uses of state trust lands is by conflating the obligation to manage the land for the benefit of the trust beneficiary with the maximization of immediate revenue generation.<sup>191</sup> In many cases, this can

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<sup>189</sup> See Leonard et al., *supra* note 21, at 959–60.

<sup>190</sup> See, e.g., *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 921.

<sup>191</sup> See, e.g., Emma Hamilton, *Limestone West Timber Sale Hearing Results in No Ruling*, KBZK (Feb. 20, 2019, 10:40 AM), <https://www.kbzk.com/news/local-news/2019/0>



make sense. If the state is, for instance, comparing five bids for a 10-year grazing lease, all of which will leave the land in the same condition, there is no conflict between taking the highest bid price and the long-term interests of the trust beneficiaries. However, these values may differ when comparing different types of uses, which may leave the land in different conditions after the uses conclude. When choosing between grazing and a proposal to strip mine, for instance, the state must account for how that choice may affect future uses and development of the land—and the revenue that might be generated from them.

A trustee's fiduciary duty requires consideration of both short- and long-term value to the beneficiary.<sup>192</sup> As Fairfax et al., have noted, an "emphasis on maximum economic returns is not an accurate or viable interpretation of either trust principles or of the trust documents."<sup>193</sup> Instead, the perpetual nature of state trust lands requires that in addition to generating immediate revenue, states must preserve trust assets to produce returns for future generations (i.e., intergenerational equity).<sup>194</sup> Put differently by the same authors, "the requirement to produce current income does not supersede the requirement to protect the corpus in perpetuity."<sup>195</sup>

The Oklahoma Supreme Court's decision in *Oklahoma Education Association v. Nigh* provides a helpful example of how a court might practically weigh the importance of protecting the trust corpus against the need to maximize immediate revenues.<sup>196</sup> The case concerned the consistency of below-market grazing leases, and the state's fiduciary duty to manage state trust lands to maximize returns to the trust estate for the beneficiaries.<sup>197</sup> The state sought to defend the below market rates by asserting that grazing better conserved the land for future uses and avoided waste of trust assets.<sup>198</sup> While agreeing in principle "that reasonable precaution should be taken for the protection of the property within the trust," the court emphasized that "this does not mean the question of income becomes an unimportant factor. Lease provisions and conditions can adequately control conservation necessary to protect the value of the lands leased and by reasonable conservation regulations imposed by [the Commissioners of the Land Office]."<sup>199</sup>

Ultimately, the court rejected the state's argument that below-market fees and subsidies to farmers and ranchers encouraged good land stewardship and found the statutory provisions inconsistent with the terms of the original grant and Oklahoma

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2/20/limestone-west-timber-sale-hearing-results-in-no-ruling/ [https://perma.cc/8HP3-N5RC] (noting Montana's decision to judge a proposed conservation lease against a timber sale based only on the immediate income they would provide, rather than accounting for the remaining value of the timber stand after the conservation lease expired). *See also* Daniel Kaffine, *Pricing Conservation Leases*, PERC Policy Brief (forthcoming 2024).

<sup>192</sup> *See* Memorandum from Tobin Follenweider, *supra* note 41, at 3.

<sup>193</sup> Fairfax et al., *supra* note 59, at 908.

<sup>194</sup> *See id.* at 908–09.

<sup>195</sup> SOUDER & FAIRFAX, *supra* note 51, at 279.

<sup>196</sup> *See* Okla. Educ. Ass'n, Inc. v. Nigh, 642 P.2d 230, 238 (Okla. 1982).

<sup>197</sup> *See id.* at 236.

<sup>198</sup> *See id.* at 237.

<sup>199</sup> *Id.* at 237–38.

Constitution.<sup>200</sup> This case emphasizes balancing conservation, stewardship, and revenue generation when managing trust lands. It suggests that both factors must be carefully considered and substantiated to ensure the long-term viability of the trust and its ability to provide benefits to its beneficiaries. However, the court ultimately prioritizes the trust's primary purpose of producing revenue for the beneficiaries, indicating that conservation and stewardship should not come at the expense of perpetual income generation.

Conservation uses may not always affect the long-term value of state trust lands and the revenues that can be generated from them. In that case, a state likely could not sacrifice trust revenue to conserve natural resources, which is unlikely to generate a financial return. The Utah Supreme Court's decision in *National Parks Conservation Alliance v. Board of State Lands* provides a good example.<sup>201</sup> In this case, the court acknowledged that "[a]lthough the primary objective of the school land trust is to maximize the economic value of school trust lands, that does not mean that school lands should be administered to maximize economic return in the short run."<sup>202</sup> Still, it also denied that trust lands can "be used to further other legitimate governmental objectives, even if there is some indirect benefit to the public schools."<sup>203</sup> Where state trust lands contain unique scenic, aesthetic, and recreational values, the court concluded that those values can be conserved, but not through a means that sacrifices the interests of the beneficiaries.<sup>204</sup>

If a conservation use can provide financial returns to the beneficiaries while safeguarding the long-term value, productivity, and health of the land, it may be the best option to align the trust's dual purposes of generating revenue and preserving the trust assets for future beneficiaries. Thus, in comparing conservation use to other proposed uses of trust lands, states must consider both the immediate revenue each would generate and the effect each would have on the long-term value of trust assets. States that are not accustomed to weighing competing land uses in this manner may need to revise existing laws or policies prioritizing only immediate revenues on the explicit or implicit premise that proposed uses will not present these tradeoffs. Better incorporating this trade-off analysis will ensure that the interests of both current and future beneficiaries are considered, maintaining the perpetual nature of the trust and fulfilling the state's responsibilities as a trustee.

## 2. Predetermined Use and "Use it or Lose it" Requirements

Another way states may prevent conservation uses of state trust lands is by making land available only for a particular use. To administer trust lands more efficiently, many states have set up use-based instruments to create rights to trust lands, such as establishing leases for grazing, timber harvesting, energy

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<sup>200</sup> See *id.* at 238.

<sup>201</sup> *Nat'l Parks & Conservation Ass'n* 869 P.2d at 918.

<sup>202</sup> *Id.* at 920–21.

<sup>203</sup> *Id.* at 918.

<sup>204</sup> See *id.* at 920–21.

development, and mining, respectively.<sup>205</sup> The state may then offer only a particular type of lease or a mix of lease options for a parcel based on its judgment about which uses are likely to generate revenue.<sup>206</sup> Historically, this made sense. The characteristics of the land (whether it's forested or includes a productive oil field) can strongly suggest the most profitable traditional use.

States may also include “use it or lose it” rules in these instruments that require the land to be used for the designated purpose. Wyoming, for instance, disqualifies anyone from bidding on a grazing lease if they do not have “actual and necessary use of the land for the production of agricultural commodities.”<sup>207</sup> A conservation group that wishes to bid on a proposed grazing lease (or acquire an existing one) may be precluded from doing so because they do not intend to produce agricultural commodities.<sup>208</sup> While some of these requirements may have been put in place to thwart conservation groups from bidding on state trust lands, many are unintended consequence of longstanding rules established for unrelated reasons.

Policies like these that privilege particular uses over others without regard to the value returned to beneficiaries have also received judicial skepticism. The two primary examples of successful litigation challenging narrow definitions of use and or users comes from the Idaho Supreme Court's decision in *Idaho Watersheds Project v. State Board of Land Commissioners* and the Arizona Supreme Court's decision in *Forest Guardians v. Wells*.<sup>209</sup> In *Idaho Watersheds Project*, an environmental group attempted to bid on a grazing lease for a trust-land parcel, but its request to bid was denied.<sup>210</sup> Idaho law, at the time, limited bidding to “qualified applicants,” which was defined to favor uses that promoted local economic development, including ranching.<sup>211</sup> The Idaho Supreme Court held that this law was unconstitutional because it allowed the interests of the livestock industry to interfere with the state's duty to maximize value for trust beneficiaries.<sup>212</sup> As a result, the court directed the state to put the right to graze the land up for auction again and not to exclude any conservation bidders because they were not qualified.<sup>213</sup>

The Arizona Supreme Court has similarly interpreted the state's trust obligation to prevent favoritism for particular uses. *Forest Guardians v. Wells* challenged Arizona's practice of designating state trust lands as “grazing land” or “commercial land” and using that designation to offer leases to ranchers at a lower cost than it

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<sup>205</sup> See, e.g., MONT. ADMIN. R. 36.25 (2024) (setting out rules for different types of leases).

<sup>206</sup> MONT. ADMIN. R. 36.25.108 (2024) (directing a state agency to classify state trust land based on the uses it can support).

<sup>207</sup> WYO. STAT. ANN. § 36-5-105(j) (2023).

<sup>208</sup> See *id.*; see also 060-18 WYO. CODE R. § 2(f) (2024) (defining a qualified bidder for an oil and gas lease to exclude nonprofit conservation groups).

<sup>209</sup> See generally *Idaho Watersheds Project v. State Bd. Land Comm'rs*, 982 P.2d 367 (Idaho 1999); see generally *Forest Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001) (en banc).

<sup>210</sup> See *Idaho Watersheds Project*, 982 P.2d at 369.

<sup>211</sup> See *id.* at 369–71.

<sup>212</sup> See *id.*

<sup>213</sup> See *id.* at 371.

could be offered to an environmental group interested in conserving the land.<sup>214</sup> In *Forest Guardians*, a grazing lease was offered for a trust parcel, and an environmental group was the high bidder, but the state denied it a grazing lease because it “state[d] an intent from the outset never to graze” the land.<sup>215</sup> Instead, the state informed the environmental group that it could only get the lease if it were converted to a commercial lease, for which a minimum bid requirement exceeded the group’s bid for the grazing lease.<sup>216</sup> While the Arizona Supreme Court acknowledged that the state could use classifications and procedures to simplify the administration of trust land, administrative considerations could not trump the state’s duty to maximize value for beneficiaries.<sup>217</sup> Therefore, the state’s rejection of the environmental group’s bid for the grazing lease was deemed unlawful.<sup>218</sup> Relevant to the use of prioritization, the Arizona Supreme Court found that the Commissioner violated his fiduciary duties as trustee by rejecting the higher bids and that the classification system did not provide a legitimate basis for rejecting the bids.<sup>219</sup> As this example cautions, prioritization of uses intended to exclude certain uses, particularly when those alternative uses could bring in higher revenue, could ultimately be found to be a violation of the trustees’ fiduciary duties.

The *Idaho Watersheds Project* and *Forest Guardians* cases demonstrate that state trust land management policies and practices that prioritize or limit land use to specific purposes without considering the potential for higher revenue generation from alternative uses, may be found to violate the state’s fiduciary duties as a trustee. These cases underscore the importance of allowing a variety of land uses, including conservation, to compete for leases on state trust lands, ensuring that the state maximizes the value of the trust assets for the beneficiaries.

### 3. *Structural and Process Requirements that Disfavor Conservation*

While conservation advocates have had several notable successes pursuing conservation through the existing processes, this has been despite existing traditional lease structures, which are tailored toward specific uses and can be an odd fit with conservation leases. For example, the pricing structure for an oil and gas lease (which requires an upfront lease payment, annual rental fees, and royalties based on production) can be an obstacle for conservation lessees, though not an insurmountable one, as discussed below.<sup>220</sup> On the other hand, a grazing lease, which requires an annual lease fee based on a baseline of allowable animal unit months

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<sup>214</sup> *Forest Guardians*, 34 P.3d at 366–70.

<sup>215</sup> *Id.* at 369.

<sup>216</sup> *See id.* at 369–70.

<sup>217</sup> *See id.* at 372.

<sup>218</sup> *Id.* at 372.

<sup>219</sup> *See id.* at 371.

<sup>220</sup> *See infra* Section III.C.2.; *see also Energy & Minerals*, UTAH TR. LANDS ADMIN., <https://trustlands.utah.gov/work-with-us/energy-minerals/> [<https://perma.cc/B26A-GGGN>] (last visited June 30, 2024, 10:40 PM) (noting the significant role of royalties in the income generated by oil and gas leases).

(AUMs) on the parcel, may be a more suitable fit for conservation use; this is likely why litigation challenging exclusions of conservation use from grazing lease markets often succeeds.<sup>221</sup>

Changing the type of lease after the conclusion of a bidding process can also present challenges. Based on the type of lease, the state may have completed the required financial or environmental analysis on the premise that an area would be grazed, logged, or drilled for oil and gas.<sup>222</sup> As a result, the state may not have the information it needs to compare a conservation use bid against a traditional use bid or may have to redo any required analysis to reflect a conservation use.

A final legal hurdle to the conservation use of state trust lands related to the structure and process of state land leasing is complying with the additional obligations sometimes included in lease agreements. For example, a timber lease may include not only financial obligations but also provisions requiring actions to reduce wildfire risks on the parcel to protect future harvests and road construction requirements to facilitate future development of the parcel.<sup>223</sup> A conservation lessee could compensate the state for these foregone benefits if the performance of these activities is presented as optional under the lease. However, they may instead be given as mandatory provisions.<sup>224</sup>

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<sup>221</sup> See, e.g., *Frequently Asked Questions*, ARIZ. STATE LAND DEP'T, <https://land.az.gov/faqs> [<https://perma.cc/9T49-TYHQ>] (last visited June 30, 2024, 11:40 PM) (discussing the pricing structure for grazing and agricultural leases); see also Keith Ridler, *Environmental Group Outbids Rancher for Idaho Grazing Lease*, AP NEWS (Aug. 27, 2021, 3:47 PM), <https://apnews.com/article/business-environment-and-nature-environment-idaho-6f9f4d65015dd7b9e3e9291bb762a1da> [<https://perma.cc/N285-3N2U>].

<sup>222</sup> See, e.g., MONT. DEP'T NAT. RES., PROPOSED LIMESTONE WEST TIMBER SALE: NOTICE OF PUBLIC MEETING & SECOND SCOPING NOTICE (2016), <https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/mepa-training/limestone-west/LW%20Scoping%20teachercopy.pdf> [<https://perma.cc/MB7S-8FK4>] (noting that a party must request consideration of a conservation license alternative to the proposed timber sale and pay a fee for it to be included in the public comment and environmental analysis process).

<sup>223</sup> See, e.g., Letter from Peter G. Scott, Att'y for RY Timber Inc., Peter G. Scott Law Offices, PLLC, to Mont. Dept. Nat. Res. et al. (Mar. 15, 2019), <https://bloximages.chicago2.vip.townnews.com/bozemandailychronicle.com/content/tncms/assets/v3/editorial/d/03/d03d0c52-5cef-5dbc-b7a5-567d89504774/5c916fffaad4c.pdf> [<https://perma.cc/7FA6-U3YD>] (objecting to the imposition of road construction and other requirements on a proposed timber lease but not the competing conservation license).

<sup>224</sup> See, e.g., 060-0002-8 WYO. CODE R. § 9–10 (1998) (imposing bond and fee requirements premised on the assumption that timber will be removed from leased forested land).

#### 4. *Challenging State Laws*

Of course, all of these legal barriers can (and, in some states, are) being addressed through legislative and regulatory reform.<sup>225</sup> Where such reforms are not forthcoming, litigation may be necessary to establish that states must consider bids from conservation interests. To date, such litigation has been successful in Arizona, Idaho, and Utah, suggesting that it would likely succeed elsewhere too.<sup>226</sup>

Mounting such a challenge, however, would present its own legal obstacles. Whether a state must consider conservation bids to satisfy its fiduciary duty is a question that must be answered state-by-state, based on the particular source of the duty, the terms of the duty, and the state judiciary. Because of the broad language and variations in state enabling acts, this analysis will also depend on state constitutional and statutory requirements.<sup>227</sup> Thus, one court's interpretation of the federal legislation governing that state's grant may have limited usefulness to another court's resolution of the question.<sup>228</sup> Finally, many of these questions will be examined by state courts, which may have differing approaches to resolving conflicts or interpreting duties imposed on the state.

Additionally, the question arises of who can challenge a state's alleged failure to satisfy its fiduciary duty to trust beneficiaries. This, too, will vary based on standing requirements, the causes of action available, and other judicial doctrines. If the duty is imposed by federal law, for instance, the federal government could presumably enforce it, as has been the case in New Mexico.<sup>229</sup> The beneficiaries likely have the strongest compelling claim to the power to enforce the duty, although questions could arise over whether they have to do so as a class.<sup>230</sup> Where state trust

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<sup>225</sup> As one example, in 1999, Montana's legislature granted the State's Department of Natural Resources and Conservation wide discretion to issue "timber conservation licenses of lieu of sale" as an alternative to traditional timber leases. *See* MONT. CODE ANN. § 77-5-208 (1999). With a conservation license, logging opponents could stop a proposed timber harvest by outbidding a traditional timber lease. *See* Michael Wright, *Saving the Gallatin Front: How Locals Stopped a Timber Sale South of Bozeman with a Law the State Just Repealed*, BOZEMAN DAILY CHRON. (May 12, 2019), [https://www.bozemandailychronicle.com/news/environment/saving-the-gallatin-front-how-locals-stopped-a-timber-sale-south-of-bozeman-with-a/article\\_1a6a0838-0294-5559-9693-a9219034a8fc.html](https://www.bozemandailychronicle.com/news/environment/saving-the-gallatin-front-how-locals-stopped-a-timber-sale-south-of-bozeman-with-a/article_1a6a0838-0294-5559-9693-a9219034a8fc.html) [<https://perma.cc/8TGM-YD3L>]. Such licenses, however, were only awarded twice before the law was eventually repealed in 2019, once for a small, one-acre parcel and again for a larger parcel near the town of Bozeman, Montana. *See id.*

<sup>226</sup> *See generally* *Forest Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001) (en banc); *see generally* *Idaho Watersheds Project v. State Bd. Land Comm'rs*, 982 P.2d 367 (Idaho 1999); *see generally* *Nat'l Parks & Conservation Ass'n*, 869 P.2d 909 (Utah 1993).

<sup>227</sup> *See* *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 633–35 (10th Cir. 1998).

<sup>228</sup> *See id.*; *but see* *Fairfax et al.*, *supra* note 59, at 842–50 (noting that while the state enabling documents reveal diversity, the case law interpreting those documents is monochromatic, as a result of lawyers and judges deferring to the few U.S. Supreme Court decisions that have addressed state trust land).

<sup>229</sup> *See, e.g.*, *Ervien v. United States*, 251 U.S. 41 (1919).

<sup>230</sup> *See* *Fairfax et al.*, *supra* note 59, at 850.

lands fund public schools, for instance, there may not be an entity that speaks for all public schools as a class, which raises the issue of whether individual schools could enforce the duty. Conservation bidders could also seek to challenge a state's failure to consider their bids and have in some states.<sup>231</sup> Depending on the causes of action available under state law, such a challenger may first have to prove that its bid was superior to all the other bids before a court will question whether the bid had to be considered.<sup>232</sup> If so, courts may be reluctant to or struggle with weighing the tradeoffs of different bids, like comparing a larger upfront payment for a conservation bid against the uncertainty of a royalty for an oil lease.<sup>233</sup>

Finally, establishing that states must consider bids from conservation interests may, in some states, also establish that the conservation of trust lands can only occur in exchange for equal or greater returns compared to other uses, which may give some conservationists pause. The Utah Supreme Court, for instance, has held that the state cannot sacrifice returns for trust beneficiaries to conserve scenic, aesthetic, or recreational values.<sup>234</sup> Instead, those values can only be protected in ways consistent with the interests of the trust, such as the state buying the land out of the trust or exchanging it for other land or private conservation interests outbidding competing users.<sup>235</sup> Wyoming courts may likewise question whether generally applicable state or local laws can be applied to state trust lands if the result is reduced returns to beneficiaries.<sup>236</sup> Thus, a court decision holding that the state must consider revenue from conservation when administering trust lands is likely to establish the corollary that it can only consider conservation values when they enhance returns.

### *B. Political Barriers*

Even where legal barriers may be relatively low, political opposition can stymie broader conservation use of state trust lands and even trigger a legislative backlash. Such opposition to the conservation use of state trust lands often stems from three principal sources: (1) resource dependent communities; (2) existing resource users; and (3) sometimes even conservationists themselves.

#### *1. Resource Dependent Communities*

Leasing publicly managed natural resources for conservation purposes has sometimes garnered community opposition due to concerns over its potential impact

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<sup>231</sup> See, e.g., *Forest Guardians*, 34 P.3d 364; see, e.g., *Idaho Watersheds Project*, 982 P.2d 367; see, e.g., *Nat'l Parks & Conservation Ass'n*, 869 P.2d 909.

<sup>232</sup> See *Forest Guardians*, 34 P.3d at 372).

<sup>233</sup> See SOUDER & FAIRFAX, *supra* note 51, at 214–15.

<sup>234</sup> See *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 921.

<sup>235</sup> See *id.*

<sup>236</sup> See Koshmrl, *supra* note 7; see Malotky, *supra* note 5.

on communities that depend on certain natural resource use.<sup>237</sup> Montana provides a prime example. In 2019, the nonprofit group Save Our Gallatin Front successfully blocked a timber sale on a mountainside near Bozeman, Montana, by outbidding a logging company at a state trust lease auction.<sup>238</sup> The group applied for, bid on, and won a “timber conservation license in lieu of sale,” a legal instrument specifically designed to allow non-use rights for timber sales on state trust lands.<sup>239</sup> The group acquired a license to defer timber harvesting in the area for 25 years.<sup>240</sup> The group’s success however, prompted political backlash due to concerns over how such conservation licenses might impact rural communities whose economies largely depend on logging.<sup>241</sup> The opposition was severe enough to prompt the legislature to repeal the law allowing such conservation licenses, thereby eliminating that option for future timber auctions on state trust lands.<sup>242</sup> Other examples include leasing state trust grazing parcels for conservation purposes in Idaho and Montana, which have similarly prompted backlash from rural ranching communities.<sup>243</sup>

## 2. Existing Resource Users

Another source of political opposition to the conservation use of state trust lands comes from existing users of those lands. Existing resource users may oppose conservation leasing because it raises their cost of doing business.<sup>244</sup> Simply put,

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<sup>237</sup> See Leonard et al., *supra* note 21, at 960 (noting that “stakeholders from local communities may oppose allowing ENGOs [environmental nongovernmental organizations] to buy out extractive users because of potential economic losses from curtailed development”).

<sup>238</sup> See Wright, *supra* note 225.

<sup>239</sup> Leonard & Regan, *supra* note 13, at 171–72. See MONT. CODE ANN. § 77-5-208 (1999) (repealed 2019).

<sup>240</sup> See Wright, *supra* note 225.

<sup>241</sup> See *id.*

<sup>242</sup> See H.B. 441, 2019 Leg., 66th Sess. (Mont. 2019); see H.B. 485, 1999 Leg., 56th Reg. Sess. (Mont. 1999) (enacting § 77-5-208 on timber conservation licenses); see Wright, *supra* note 225. Before Save Our Gallatin Front, only one timber conservation license had ever been awarded in Montana. See *id.* In 2006, a landowner acquired a conservation license to 1.6 acres of state trust lands near Bigfork, Montana. See *id.*

<sup>243</sup> See, e.g., Leonard & Regan, *supra* note 13, at 158–59 (describing an example from Idaho in which an environmental organization was awarded a state trust grazing lease, which caused controversy among the state’s rural ranching communities and led to legislative efforts to reduce competition on state grazing leases); see also James L. Huffman, *American Prairie Reserve: Protecting Wildlife Habitat on a Grand Scale*, 59 NAT. RES. J. 35, 47–49 (2019) (describing controversy over the nonprofit American Prairie’s efforts to acquire state and federal leases in Montana for conservation purposes).

<sup>244</sup> See Pat Maio, *Oil and Gas Producers Say Outdoors Council Bids up State Lease Sale to Inflate Costs*, COWBOY STATE DAILY (July 5, 2024), <https://cowboystatedaily.com/2024/07/05/environmental-groups-bid-for-wyoming-oil-and-gas-leases-to-drive-up-prices/> [https://perma.cc/BM4L-254H]. As discussed in the following Section, conservation use



allowing more interests at the bidding table will likely raise resource use costs. Excluding conservation buyers from bidding on state trust resources provides an implicit subsidy to traditional users by shielding them from bidding against alternative uses (or “non-uses”). As the example of the timber conservation license in Montana demonstrates, allowing competition for scarce natural resources can affect developers’ bottom lines.<sup>245</sup> Hence, existing users of natural resources, from timber to oil and gas to grazing lands, can become vocal opponents of conservation uses of state trust land.<sup>246</sup>

A second related source of opposition is the broader set of stakeholders that benefit from existing patterns of resource use. Input suppliers (e.g., feed stores, equipment dealers, etc.), output processors (e.g., mills, slaughterhouses, etc.), and laborers may stand to lose out from significant reductions in natural resource use.<sup>247</sup> This concern is very real in rural areas where ranching, timber harvesting, or conventional energy development are major sources of income.<sup>248</sup> In many of these communities, there is concern that if enough existing users “sell out” to conservation, then important economies of scale for inputs and processing may be lost, causing a downward spiral of resource use.<sup>249</sup> Likewise, there is concern that allowing conservation use of these lands will jeopardize the future viability of ranching, as many livestock operations use state and federal lands for livestock

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need not always increase the costs of leases to other users, if the mechanism for conservation is current leaseholders transferring their rights to conservation uses in exchange for payment. *See infra* Section IV.A. In that case, however, the state may receive less for trust beneficiaries.

<sup>245</sup> *See* Regan, *supra* note 13, at 4 (noting that the nonprofit group Save Our Gallatin Front outbid a logging company \$400,000 to \$376,000 to secure a conservation license on Montana state trust lands in 2019).

<sup>246</sup> *See BLM Rule Threatens Multiple Use Management of Public Lands*, NAT’L CATTLEMEN’S BEEF ASS’N (Apr. 18, 2024), <https://www.ncba.org/ncba-news/news-releases/news/details/37658/blm-rule-threatens-multiple-use-management-of-public-lands> [<https://perma.cc/T5Y2-MH7W>]; *see, e.g., American Energy Trade Groups Urge BLM to Reverse Restrictive Public Lands Proposal*, AM. PETROLEUM INST. (July 5, 2024), <https://www.api.org/news-policy-and-issues/news/2023/07/05/american-energy-trade-groups-urge-blm-to-reverse-restrictive-public-lands-proposal> [<https://perma.cc/G78M-KU5P>]; *see, e.g., SCI Comments on BLM’s Proposed Public Lands Rule*, SAFARI CLUB INT’L (June 27, 2023), <https://safariclub.org/sci-comments-on-blms-proposed-public-lands-rule/> [<https://perma.cc/E7UR-PW9E>].

<sup>247</sup> *See* Leonard et al., *supra* note 21, at 960.

<sup>248</sup> *See id.*

<sup>249</sup> *See, e.g., Huffman, supra* note 243, at 36 (describing the controversy surrounding American Prairie, a nonprofit conservation organization that is purchasing private lands in Montana and attempting to use the associated state and federal grazing leases for conservation purposes, primarily bison grazing); *see also* Shawn Regan, *Where the Buffalo Roam: Rewilding the American Serengeti*, 10 BREAKTHROUGH J. 66, 66–82 (2019) (describing local opposition to American Prairie’s market-based conservation strategies).

grazing in addition to their private landholdings.<sup>250</sup> In the context of state trust lands, however, it is important to keep in mind that the leases in question comprise a relatively small part of the resource base in a given area, owing to the sparse checkerboard nature of state land across the West.<sup>251</sup>

### 3. *Conservationists Wary of Market Approaches*

Finally, conservationists may oppose the move to a more market-oriented approach to conservation on public land. Many environmental groups look favorably at the opportunity to purchase their desired conservation outcomes directly.<sup>252</sup> Others, though, bristle at the notion that the public at large should have to pay for additional conservation on public land.<sup>253</sup>

Conservation leasing on state trust lands has generated mixed reactions within the conservation community.<sup>254</sup> While some see it as a pragmatic approach to protect natural resources, others express concerns over the market-based strategy requiring conservationists to pay for protection. Some groups may prefer to pursue legislative agendas and litigation in pursuit of their goals across a broader swath of state land instead of purchasing outcomes on a parcel-by-parcel basis.<sup>255</sup> Others view

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<sup>250</sup> See, e.g., Tessa M. Wittman & Drew E. Bennett, *Cows or Condos: Rancher and Land-Use Outcomes Following Compensated Federal Grazing Permit Waivers*, 93 RANGELAND ECOLOGY MGMT. 62 (2024) (examining the effect of federal grazing permit waivers and buyouts on nearby private land use, finding no evidence for subdivision or land conversion).

<sup>251</sup> See Bryan Leonard & Andrew J. Plantinga, *Stranded: The Effects of Inaccessible Public Land on Local Economies in the American West*, 99 LAND ECON. (2023) (describing the extent of checkerboarded public land ownership across the West, included state trust lands).

<sup>252</sup> See Regan, *supra* note 13.

<sup>253</sup> See, e.g., WESTERN WATERSHEDS PROJECT, ACTION ALERT – SUGGESTED COMMENTS ON BLM’S PROPOSED CONSERVATION RULE, <https://www.westernwatersheds.org/wp-content/uploads/2023/06/Action-Alert-Suggested-Comments-on-BLMs-Proposed-Conservation-Rule.pdf> [<https://perma.cc/WZL3-ZB3F>] (last visited June 30, 2024) (arguing, in the context of a recent proposal to allow conservation leasing on federal Bureau of Land Management lands, that such leases would “effectively outsource the agency’s job of protecting public lands for future generations” and that “[t]he public shouldn’t have to pay the Bureau for the privilege of safeguarding the resources the Bureau itself is supposed to be managing for the common good”).

<sup>254</sup> See, e.g., Letter from Ethan Aumack, Grand Canyon Tr., to Director Stone-Manning, U.S. Dep’t Interior (July 2, 2023), <https://www.regulations.gov/comment/BLM-2023-0001-147957> [<https://perma.cc/H4ZZ-7XJV>] (discussing Grand Canyon Trust’s public comment on the recent BLM public lands rule).

<sup>255</sup> A recent controversy over Oregon’s Elliott State Forest provides an illustrative example. In response to perceived tensions between the state’s obligation to maximize revenues for the Common School Fund and the protection of old-growth forests, Oregon put several parcels of the forest up for sale in the early 2010s. See Zach Urness, *Elliott State*

conservation leasing or various forms of conservation use as an abdication of existing agency land management responsibilities.<sup>256</sup>

### C. Practical Considerations

Each state has the ability to adopt its form of managing and administering state trust lands, including flexibility in determining the structure, scope, pricing, and duration of use of state trust land.<sup>257</sup> Regardless of this flexibility, states are obligated to meet the goals of generating revenue and preserving trust assets.<sup>258</sup> States may use the inherent flexibility of trust land management to conserve state land or opt to meet their trust obligations by maximizing resource exploitation from trust land. When states create a framework to allow for the conservation of state trust lands, they must consider the: (1) structure and scope of leases; (2) lease prices; and (3) duration of leases.

#### 1. Structure and Scope of Leases

Increased conservation use of state trust land raises various logistical questions. Should conservation buyers be able to acquire leases from existing users and convert them to non-use? Should *all* state trust lands be available for leasing by conservationists, or should states entertain the possibility of conservation bids on a case-by-case or noncompetitive basis? These are important questions, as the structure and scope of conservation leases shape the incentives of both traditional resource users and conservationists.

Questions about the structure and scope of leases also have important implications for the economic and political ramifications of conservation use of trust

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*Forest Sale Closes Amid Controversy*, STATESMAN J. (June 12, 2014, 9:40 PM), <https://www.statesmanjournal.com/story/news/2014/06/13/elliott-state-forest-sale-closes-amid-controversy/10408225/> [<https://perma.cc/8UK9-AF4B>] (describing the sale of the Benson Ridge parcel). Rather than acquiring ecologically important parcels and conserving them, however, environmental groups sued the new owners over plans to harvest timber on the lands. *Id.* One tract, the Benson Ridge parcel, which contains habitat for the threatened marbled murrelet, was sold in 2014 to Scott Timber Company for \$787,000. *See id.* In the years that followed, environmental groups spent far more in attorneys' fees on litigation related to the Benson Ridge parcel. *See id.*; see Plaintiffs' Motion for Costs and Attorneys' Fees at 3, *Cascadia Wildlands v. Scott Timber Co.*, 16-CV-01710-AA (D. Or. July 12, 2022), No. 146 (noting that Plaintiffs sought nearly \$1.2 million in attorneys' fees related to litigation over the parcel).

<sup>256</sup> *See, e.g.,* Jennifer Yachnin, *Could 'Non-use' Rights Boost Conservation Lands?*, E&E NEWS (Aug. 27, 2021, 1:32 PM), <https://www.eenews.net/articles/could-non-use-rights-boost-conservation-lands/> [<https://perma.cc/T8NQ-JJFW>] (quoting a representative from the environmental group Center for Western Priorities arguing that adapting public-land leasing rules to allow for conservation is like "put[ting] a Band-Aid on a gunshot wound" and is "not a substitute for proper land management policies that reflect our climate reality").

<sup>257</sup> *See* CULP ET AL., *supra* note 22, at 12.

<sup>258</sup> *See id.* at 24.

lands. For instance, if conservationists are allowed to acquire leases on land that is already leased for other purposes, then incumbent resource users stand to benefit by being able to sell their rights for more than they are currently worth (otherwise, the trade would not occur).<sup>259</sup> On the other hand, existing resource users will face increased competition with conservationists in auctions for *new* leases because they will likely face higher (and certainly not lower) prices than before.<sup>260</sup> States will celebrate leases at a higher price if the increase in state revenue from the leases is at least equal to the costs or lost revenue that would have been realized without the conservation use.

Conservationists' willingness to pay for a given lease will depend on the opportunity cost of their funds, which is in part determined by what other leases might be available. That is, a system where *all* leases are potentially up for bid may lead to a very different pattern of conservation bidding than one where only select parcels are made available.<sup>261</sup> Thus far, conservation leases and "non-use" rights on both state and federal land have been made possible on a limited, ad hoc basis, making it hard to predict how conservation organizations are likely to behave if conservation-oriented leasing becomes more widely available.<sup>262</sup> One approach would be to make conservation-oriented leasing widely available on a provisional basis so that managers can adapt if needed.

## 2. Pricing – Range of Options

Another important question associated with conservation use of state trust lands is how managers should compare bids for extractive use with bids for conservation.<sup>263</sup> Oil and gas resources provide the simplest example of the challenges involved. When a developer wins an oil lease, they make an initial payment to the state for the lease and then pay royalties on all extracted resources. By comparison, no royalties would be associated with a conservation lease where no extraction took place.<sup>264</sup> But, at the end of the conservation lease, the state would still hold valuable oil resources in the ground, with the option to lease them to a developer in the future. The same problem arises for renewable resource uses such as grazing and timber harvest, albeit to differing degrees. Thus, conservationists must be willing to pay a higher lease payment for the lease to account for the lack of royalty payments.<sup>265</sup>

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<sup>259</sup> Joshua K. Abbott, Christopher Costello & Bryan Leonard, *Coase Meets Pigou: When Does Voluntary Provision on Top of Regulation Enhance Welfare?* (unpublished working paper) (on file with authors).

<sup>260</sup> *Id.*

<sup>261</sup> See Leonard et al., *supra* note 21, at 961 (noting practical concerns regarding which lands are made available to conservation-use bidding).

<sup>262</sup> *See id.*

<sup>263</sup> Daniel Kaffine, *Pricing Conservation Leases*, PERC Policy Brief 8–9 (forthcoming Sept. 2024) (on file with authors).

<sup>264</sup> *See id.* at 11–12.

<sup>265</sup> *See id.*

The crucial question is how states should weigh foregone royalty payments against the value of holding resources for future use. Resource economics provides straightforward guidance on the mechanics of the correct discounts or premiums that should be used to compare traditional and conservation uses, at least in theory.<sup>266</sup> In practice, state land managers must estimate the value of foregone royalty payments, expected future production, and various other uncertain parameters. Another important consideration affecting conservationists' ability to finance their bids is whether this premium is applied during the initial auction or given as a rebate at the end of the lease term.<sup>267</sup> It is important to note, however, that many oil and gas leases on state trust lands are speculative and often do not result in production that generates royalties for the state.<sup>268</sup> In Wyoming, for instance, the Office of State Lands and Investments recently reported that just 27% of state trust parcels leased for oil and gas development ever reach production.<sup>269</sup>

### 3. Duration

A related structural question is how long conservation leases should last.<sup>270</sup> Typically, duration is a less pertinent question for oil and gas or timber leases. Where the focus is on extracting the oil or harvesting the timber, duration is inherently tied to the term of extraction.<sup>271</sup> Conservation leases are fundamentally different in that there is little or no extraction, so there is no self-limiting time path of use to determine the duration of the lease. Grazing leases on state trust lands, which rely on the annual renewal of rangeland resources, typically last five to fifteen years.<sup>272</sup> One option would be to use this as a benchmark for the standard length of a conservation lease.

The duration of the lease has important implications for the appropriate pricing adjustments and the incentives of conservationists.<sup>273</sup> As the duration of the lease gets shorter, the discount associated with conservation uses should grow larger. As an extreme example, a one-year lease of a potential oil and gas parcel would leave the state the option to auction the same parcel for extractive development in just one year's time, so nearly the full extractive value of the parcel should be deducted from the bid necessary for a conservationist to win. As the duration of the lease grows,

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<sup>266</sup> See *id.* at 4–5.

<sup>267</sup> See *id.* at 14.

<sup>268</sup> See Wyoming Legislature, *House Minerals, Business & Economic Development Committee* 36:00, YOUTUBE (Feb. 16, 2024), <https://www.youtube.com/watch?v=TnbhEXJ5wrE> [<https://perma.cc/VF4T-G85Y>].

<sup>269</sup> *Id.*

<sup>270</sup> See Kaffine, *supra* note 263, at 7–8; see also Leonard & Regan, *supra* note 13, at 171–72 (describing concerns over the duration of a timber conservation license on state trust lands in Montana).

<sup>271</sup> See Kaffine, *supra* note 263, at 10–12

<sup>272</sup> See CULP ET AL., *supra* note 22, at 18.

<sup>273</sup> See Kaffine, *supra* note 263, at 7–8.

the state increasingly foregoes extractive revenue, so the conservation discount should shrink.<sup>274</sup>

From the conservationist's perspective, a longer lease term will likely provide much greater conservation value. Hence, conservationists should be more willing to pay longer leases.<sup>275</sup> However, groups' success in raising donations or arranging other finance may constrain their *ability* to pay for longer lease terms. The upshot is that the duration of conservation leases could determine the extent of the market for these leases by indirectly pricing out some buyers.<sup>276</sup> States will also need to consider the budgetary implications of granting leases of different lengths, as longer leases may create uncertainties around the salvage value of the resources at the end of the lease term (e.g., a stand of timber may be destroyed by fire, or oil and gas prices may fall significantly).<sup>277</sup>

#### IV. EXISTING OPPORTUNITIES FOR CONSERVATION USE OF STATE TRUST LANDS

The legal and trust requirements that govern state trust land have constrained the ability of state trust land managers to adapt. Yet, those same requirements now present unique opportunities to take advantage of emerging market-based conservation values. All land managers are under growing pressure to accommodate increasing space for more conservation and recreation-oriented management, some forced by the need to comply with federal environmental statutes such as the Endangered Species Act and some due to changing economic demands.<sup>278</sup> This pressure represents both a critical need and a real opportunity to explore additional means of generating trust revenues while aligning with Western communities' economic futures.<sup>279</sup>

Conservation use can be viewed as using land to create, enhance, or protect natural resource attributes.<sup>280</sup> Conservation use can be relatively passive in nature or more active and may require land management for specific conservation purposes such as habitat improvement or wetland restoration.<sup>281</sup> Importantly, conservation uses also preserve the option to utilize lands for more traditional consumptive uses in the future.<sup>282</sup> Variations of conservation use of state trust land present an opportunity to fill a declining revenue gap or generate additional diversified revenue to fulfill the fiduciary duty to state land trust beneficiaries, all while preserving and

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<sup>274</sup> *See id.* at 11.

<sup>275</sup> *See id.* at 7.

<sup>276</sup> *See id.*

<sup>277</sup> *See id.* at 10–12.

<sup>278</sup> *See Davis, supra* note 40, at 331.

<sup>279</sup> *See CULP ET AL., supra* note 22, at 5.

<sup>280</sup> *See id.* at 42 (noting that conservation of state land “can be considered the use of land to prohibit adverse effects that will impair conservation values and/or affirmative rights to manage the land for specific conservation purposes such as wildlife habitats, cleaner water, and recovery of endangered species populations”).

<sup>281</sup> *See id.*

<sup>282</sup> *See Kaffine, supra* note 263, at 3.

enhancing the value of the trust asset. Conservation leases, for example, can be established to generate revenue and conserve ecological resources, wildlife, historic sites, or cultural resources.<sup>283</sup> While some states have created mechanisms and strategies to make conservation use of state trust lands easier, this approach has not yet become standard practice in western states “despite the fact that it is the most straightforward way to preserve state trust lands while meeting the fiduciary obligations of the trust.”<sup>284</sup>

Across the nine western states in our analysis, a number of state land conservation tools are being researched, developed, and implemented to conserve the land corpus and generate revenue for beneficiaries. There are three primary conservation-oriented uses of state-trust lands, including (A) conservation leases and licenses, (B) conservation easements, and (C) conservation-oriented land sales, transfers, and exchanges. Under these three categories, states are developing new and expanded tools, as described below.

#### *A. Conservation Leases and Licenses*

Conservation leases and licenses are the most common type of state trust land conservation use. Conservation leases and licenses are short-term agreements established to conserve ecological resources, wildlife, and habitat or protect cultural or historical resources on state trust lands.<sup>285</sup> Conservation leases and licenses can be awarded through traditional competitive lease bidding processes, noncompetitively, or through other means like nominations.<sup>286</sup> Under the broad category of conservation leases and licenses, systems of conserving state trust land fall into one of three classifications: (1) Conservation Leases; (2) Stewardship Incentives; and (3) Conservation Licenses.

##### *1. Conservation Leases*

Conservation leases are based on property and contract law; a lease is a contract that creates an interest in land, called a leasehold.<sup>287</sup> Leaseholds allow a party that does not own the land (a lessee) to possess and use the land and often excludes others—within the bounds created by the lease—for the term of the agreement.<sup>288</sup> States employ various approaches to facilitate conservation leases. While these leases share a common framework, they differ in terms of intended lessees, conservation objectives, and duration.

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<sup>283</sup> See Stoellinger, *supra* note 21.

<sup>284</sup> CULP & MARLOW, *supra* note 181, at 16.

<sup>285</sup> See Stoellinger, *supra* note 21.

<sup>286</sup> See *id.*

<sup>287</sup> ROGER MCEOWEN, *AGRICULTURAL LAW IN A NUTSHELL* 31–32 (2017) (noting that as a result of this duality, leases are interpreted using principles of both property and contract law.).

<sup>288</sup> See *id.*

State land agencies issue traditional conservation leases, and if there are competing applications, the leases must be won through a competitive bidding process at a public auction.<sup>289</sup> These leases tend to look like a typical lease of state trust land, allowing the lessee to possess and use the land and exclude other noncompatible uses. These leases can be entered for relatively general conservation purposes, such as “protection of the natural assets of state trust lands[.]”<sup>290</sup> Any government agency, individual, nonprofit, or other entity that meets the state’s qualifications can enter a traditional conservation lease. Conservation leases may require certain actions to be taken or certain goals to be achieved. For example, under Arizona’s conservation leasing statute, a lessee may lease state trust land “for the long-term benefit of the land[.]”<sup>291</sup> Conservation leases last for a duration of approximately 10 to 50 years.<sup>292</sup>

Idaho and Arizona are the only two states with formal traditional conservation leasing programs.<sup>293</sup> Idaho established its conservation leasing program in 2007 after the Idaho Supreme Court and the Ninth Circuit Court of Appeals issued a series of opinions finding that the Idaho Land Board could not reject bids on state land grazing lease offers made by conservation groups.<sup>294</sup> In Idaho, the State Board of Land Commissioners determines the lease rate for conservation leases.<sup>295</sup> Today, the Idaho Department of Lands administers a portfolio of 23 conservation leases for “recreation, big game, and wildlife habitat.”<sup>296</sup>

Similarly, Arizona developed its conservation leasing program after the Arizona Supreme Court held that state trust land managers violated their fiduciary duties as trustees by rejecting a conservation group’s higher bid on two state land grazing leases.<sup>297</sup> Arizona’s traditional conservation leasing program is unique in requiring

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<sup>289</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 37-313(B) (2023); IDAHO ADMIN. CODE r. 20.03.14.105 (2023).

<sup>290</sup> ARIZ. REV. STAT. ANN. § 37-311(1) (2024).

<sup>291</sup> *Id.*

<sup>292</sup> *See, e.g., id.* § 37-313(B) (2023) (the lease term may be for less than 10 years, but for no more than fifty years); *see, e.g.*, IDAHO ADMIN. CODE r. 20.03.14.021 (2023); *see, e.g.*, IDAHO CODE § 58-307 (2024) (stating Idaho leases may be issued for a term of no longer twenty years).

<sup>293</sup> *See* CULP & MARLOW, *supra* note 181, at 16.

<sup>294</sup> *See* IDAHO ADMIN. CODE r. §20.03.14.001-115 (2023); *see generally* Idaho Watersheds Project v. State Bd. of Land Comm’rs, 982 P.2d 367 (Idaho 1999); *see generally* Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580 (9th Cir. 2008) (alleging that Idaho state officials violated the Equal Protection Clause by discriminating against Lazy Y in the awarding of grazing leases on state endowment lands due to Lazy Y’s perceived association with conservationists and its status as a newcomer to Idaho grazing markets).

<sup>295</sup> *See* IDAHO ADMIN. CODE r. 20.03.14.040 (2022).

<sup>296</sup> *Grazing, Farming and Conservation Leasing*, IDAHO DEP’T LANDS, <https://www.idl.idaho.gov/leasing/grazing-farming-conservation-program> [<https://perma.cc/GK76-9BKP>] (last visited June 30, 11:53 PM).

<sup>297</sup> *See* ARIZ. REV. STAT. ANN. §§ 37-311, 317 (2024); *see generally* Forest Guardians v. Wells, 34 P.3d 364 (Ariz. 2001) (finding that an environmental group, Forest Guardians,



a state trust land section to be nominated and accepted before it can be leased for conservation purposes.<sup>298</sup> Information is not currently available on the number of conservation leases in Arizona. The lease rate for conservation leased on Arizona state trust land is based on an appraisal of the fair market value of the interest being offered “including mineral, sand and gravel and oil and gas value.”<sup>299</sup>

Some state trust land agencies offer ecosystem service leases to third parties to manage or improve habitat to generate credits for an ecosystem services market.<sup>300</sup> These leases are largely completed by private third parties that meet state qualifications. Lease holders gain exclusive possession of the state land, effectively restricting access to others. Ecosystem services leases, however, differ from other conservation leases in that they require the generation of mitigation credits for a specific purpose. Further, they are not auctioned through a competitive process.<sup>301</sup>

Through ecosystem services leases, state trust lands are managed by lessees with specific habitat goals in mind, and lessees are expected to actively improve the land to create or improve the ecosystem services of the land. Once the ecosystem services are created or improved, the lessee can generate and sell credits to provide improved ecosystem services.<sup>302</sup> Ecosystem services leases are generally for a shorter term, such as five years, but may be longer depending on the ecosystem service that the lease is providing. The lease term may be longer for certain ecosystem services associated with resources like timber.<sup>303</sup>

In 2021, the Colorado State Land Board leased 222 acres of state trust lands to the Table Top Conservation Bank to create a conservation bank to protect Preble’s meadow jumping mouse.<sup>304</sup> Similarly, the Wyoming Office of State Lands allows for leases of state trust land to generate sage grouse mitigation credits.<sup>305</sup> The

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was the highest bidder on three grazing leases on school trust lands but their bids were rejected by the Arizona State Land Commissioner because non-grazing users could only bid on commercial lease, not grazing leases. This led to the finding that the Commissioner violated his fiduciary duties as trustee by rejecting the higher bids and that the classification system did not provide a legitimate basis for rejecting the bids).

<sup>298</sup> See ARIZ. REV. STAT. ANN § 37-312 (2017).

<sup>299</sup> *Id.* § 37-313(B).

<sup>300</sup> See Jim Salzman & J.B. Ruhl, *The Law and Policy Beginnings of Ecosystem Services*, 22 J. LAND USE & ENV’T L. 157, 157–72 (2007).

<sup>301</sup> See 060-29 WYO. CODE R. § 2.

<sup>302</sup> See *id.* Of note, both examples of ecosystem services leases followed the U.S. Fish and Wildlife Services’ process to designate their efforts as conservation banks. See *Conservation Banking*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/service/conservation-banking> [<https://perma.cc/FUW8-KX92>] (last visited June 30, 2024, 11:55 PM).

<sup>303</sup> See *supra* notes 271–75 and accompanying text.

<sup>304</sup> See *Preble’s Meadow Jumping Mouse Mitigation Credits*, TABLE TOP CONSERVATION CO., <https://www.tabletopconservationbank.com> [<https://perma.cc/7LQ9-62LE>] (last visited June 30, 11:56 PM); see also *Conserving Land for Wildlife: Public and Private Partners “Bank” on Northern Colorado’s Fragile Ecosystem*, COLO. DEP’T NAT. RES. (Aug. 24, 2021), <https://dnr.colorado.gov/press-release/conserving-land-for-wildlife-public-and-private-partners-bank-on-northern-colorados> [<https://perma.cc/K68F-NRLR>].

<sup>305</sup> See 060-29 WYO. CODE R. § 2.

Sweetwater River Conservancy is a habitat bank for Greater Sage Grouse Credits in Wyoming.<sup>306</sup> Since 2014, the bank has issued over 1,600 credits, some of which incorporated state trust land leased through Wyoming’s sage grouse mitigation program.<sup>307</sup>

Another form of conservation leasing on state land occurs when a land management agency leases state trust land for habitat conservation. Generally, these leases are issued to state game and fish or state park agencies to conserve critical wildlife habitat, provide access for hunting and fishing, or create a state park.<sup>308</sup> These leases are typically not offered at a public auction, and tend to be for a longer term, depending on the purpose of the state land lease. For example, under Colorado’s Hunting and Fishing Access Program, Colorado Parks and Wildlife leases state trust land to provide hunting and fishing access for a 10-year period, with rights to extend for additional 10-year terms.<sup>309</sup> The state agencies qualify for these types of leases and must use the land to benefit the state agency’s mission while ensuring adequate payment to the state trust. The Idaho State Board of Land Commissioners has created a memorandum of agreement with the Idaho Fish and Game Commission outlining the process that the Fish and Game Department will follow when leasing state trust land for recreational access, including how to calculate the lease rate.<sup>310</sup>

The final type of conservation leasing that can occur on state trust land is a special use lease, which is offered by several of the states included in our analysis.<sup>311</sup> Special use leases are often a catchall leasing category available on state trust land with broad allowances for activities that can take place on the leased land.<sup>312</sup> For example, Wyoming’s special use lease rules allow leasing for “uses other than grazing, agricultural, the extraction of on lease minerals, those uses defined under

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<sup>306</sup> See *Sweetwater River Conservancy Greater Sage-Grouse Habitat Bank*, RIBITS, [https://ribits.ops.usace.army.mil/ords/f?p=107:10::::P10\\_BANK\\_ID:3360](https://ribits.ops.usace.army.mil/ords/f?p=107:10::::P10_BANK_ID:3360) [https://perma.cc/Z5YU-6CVW] (last visited June 30, 2024, 11:57 PM).

<sup>307</sup> *Id.*

<sup>308</sup> See HANNAH DOWNEY, HOLLY FRETWELL & SHAWN REGAN, *ACCESS DIVIDED: STATE AND FEDERAL RECREATION MANAGEMENT IN THE WEST 20* (2016), [https://www.perc.org/wp-content/uploads/2016/04/PLR-Fed-State-Recreation\\_REVISED.pdf](https://www.perc.org/wp-content/uploads/2016/04/PLR-Fed-State-Recreation_REVISED.pdf) [https://perma.cc/8WXS-XZGS].

<sup>309</sup> *Public Access on Trust Land*, COLO. STATE LAND BD., <https://slb.colorado.gov/public-access#:~:text=The%20Hunting%20and%20Fishing%20Access,accessible%20to%20hunters%20and%20anglers> [https://perma.cc/QSK9-NSNQ] (last visited June 30, 2024, 11:58 PM).

<sup>310</sup> See Memorandum from the Idaho Department of Lands on Agreement Regarding Recreational Access on State Endowment Lands (2018), <https://www.idl.idaho.gov/wp-content/uploads/sites/2/2020/06/moa-recreational-access-state-endowment-lands-1.pdf> [https://perma.cc/AR9Y-XTGP].

<sup>311</sup> See, e.g., 060.29.5 WYO. CODE R. (2024); OR. ADMIN. R. 141-135-0100 (2023).

<sup>312</sup> OR. ADMIN. R. 141-125-0100 (2024).

easements or hunting, fishing or general recreation. . . .”<sup>313</sup> Oregon’s special use lease provision allows for a nonexclusive list of 23 activities but ends with “[t]he Director may determine other uses and developments similar to those specified . . . .”<sup>314</sup> This broad language may provide enough flexibility for nonprofits or others to utilize a special use lease to conserve the land or engage in restoration on the leased land. The duration of special use leases can vary, in some cases up to 75 years.<sup>315</sup> Special use leases are not won through the competitive bid process.<sup>316</sup>

## 2. *Stewardship Incentives*

Related to leases, stewardship or improvement programs incentivize existing lessees to engage in habitat improvement or other stewardship-related actions on their leased land. New Mexico, for instance, offers qualified agricultural lessees a discount on their annual grazing rental rate if they engage in certain stewardship activities.<sup>317</sup> Utah offers to reimburse lessees or provide the lessees with materials for range improvement projects on state trust lands.<sup>318</sup> Other states may offer lessees reimbursement for undertaking noxious weed management projects on the state trust land.<sup>319</sup> To qualify for these types of arrangements, there must be an existing valid lease on the state trust land, and the lessee must have enough control over the land to engage in stewardship activities.<sup>320</sup>

## 3. *Conservation Licenses*

Conservation licenses are a variation of conservation leases that permit a nonlandowning party (licensee) to engage in an activity on land owned by another (licensor) that would otherwise be prohibited.<sup>321</sup> Licenses do not allow the licensee to possess the land or exclude others from the land, only the ability to engage in a specific activity on the land. For example, in 1999, the Montana Legislature created a “timber conservation license in lieu of sale” that allowed the Montana State Land Department to accept full, fair market value bids on timber sales to conserve state

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<sup>313</sup> *Special Use Leases*, WYO. OFF. STATE LANDS & INVS., <https://lands.wyo.gov/trust-land-management/surface-leasing/special-use-leases> [<https://perma.cc/W78M-JJ5Z>] (last visited June 30, 2024, 11:59 PM).

<sup>314</sup> OR. ADMIN. R. 141-125-0100 (2024).

<sup>315</sup> See *Special Use Leases*, *supra* note 313.

<sup>316</sup> See *id.*; see also OR. ADMIN. R. 141-125-0100 (2024).

<sup>317</sup> See N.M. CODE R. § 19.2.8.20 (2019); see also WASH. ADMIN. CODE § 332-20-320 (1983) (“Grazing permit fees may be adjusted to compensate permittees for . . . range improvements or performance of range conservation practices. . . .”).

<sup>318</sup> See UTAH ADMIN. CODE r. 850-50-1100 (2022).

<sup>319</sup> *Eradicating Noxious Weeds*, COLO. STATE LAND BD., <https://slb.colorado.gov/agriculture/noxious-weeds> [<https://perma.cc/TQ54-8FBD>] (last visited June 30, 2024, 12:00 AM); 060.0002.4 WYO. CODE R. § 14 (2023).

<sup>320</sup> N.M. CODE R. § 19.2.8.20 (2019).

<sup>321</sup> *License*, BLACK’S LAW DICTIONARY (2nd ed. 1910).

trust land by restricting timber harvest.<sup>322</sup> In 2019, Save Our Gallatin Front, a Bozeman-based community group, successfully bid on a 25-year timber conservation license.<sup>323</sup> However, as discussed in greater detail above, the Montana Legislature repealed the timber conservation license statute just a few months later.<sup>324</sup>

Under Oregon's special use category of state land uses, applicants may seek a special use lease or a special use license, which grants the licensee the ability to use, for less than three years, state land for certain enumerated uses or other uses as determined by the Director of State Lands.<sup>325</sup> Similarly, Arizona grants permits and classifies permits as licenses for special uses of state lands not designated elsewhere in the regulations.<sup>326</sup>

Easements are another set of tools available to conserve state trust lands. Easements are nonpossessory interests in land and enable the easement holder to use or restrict the land in a manner specified in the agreement.<sup>327</sup> Thus, the landowner retains ownership of the land but grants use of the land to another party. In the case of a conservation easement, the landowner agrees not to use the land in a way that would damage the conservation values the easement was designed to protect.<sup>328</sup> Easements tend to be permanent unless otherwise specified in the agreement between the parties.

On state trust lands, easements are often used to grant access across public lands.<sup>329</sup> In access easements on state lands, the agreements are most often permanent and require the grantee to pay the state a one-time fee much higher than a typical lease rate.<sup>330</sup>

Conservation easements, while a commonly used conservation tool on private land, are emerging as a conservation tool on state trust lands.<sup>331</sup> Conservation easements on private land typically protect the land from commercial and residential development as well as subdivision.<sup>332</sup> To date, conservation easements have

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<sup>322</sup> MONT. CODE ANN. § 77-5-208 (2013) (repealed 2019).

<sup>323</sup> See Wright, *supra* note 225.

<sup>324</sup> See *id.*; see *supra* notes 240–42 and accompanying text.

<sup>325</sup> See OR. ADMIN. R. 141-125-0100 (2017); see *id.* R. 141-125-0120.

<sup>326</sup> See ARIZ. ADMIN. CODE § 12-5-1101(7) (1990).

<sup>327</sup> See CULP & MARLOW, *supra* note 181, at 19.

<sup>328</sup> See *id.* (citation omitted).

<sup>329</sup> See, e.g., STATE N.M. COMM'R PUB. LANDS, NEW MEXICO STATE GAME COMMISSION EASEMENT (2021), <https://www.nmstatelands.org/wp-content/uploads/2021/11/SLO-Game-Commission-Easement-2021-2025-FINAL-fully-executed.pdf> [<https://perma.cc/W3GJ-EUBQ>].

<sup>330</sup> See MONT. BD. LAND COMM'RS, ACCESS ROAD EASEMENT POLICY (2006), [https://dnrc.mt.gov/\\_docs/Trust-Land/REMB/Access-Road-Policy.pdf](https://dnrc.mt.gov/_docs/Trust-Land/REMB/Access-Road-Policy.pdf) [<https://perma.cc/E82P-L366>].

<sup>331</sup> See CULP & MARLOW, *supra* note 181, at 19–20.

<sup>332</sup> See James R. Farmer, Vicky Meretsky, Doug Knapp, Charles Chancellor & Burney C. Fischer, *Why Agree to a Conservation Easement? Understanding the Decision of Conservation Easement Granting*, 138 LANDSCAPE & URB. PLAN. 11, 11–12 (2015).

effectively conserved almost 38 million acres (about twice the area of South Carolina) of private land.<sup>333</sup>

Applying conservation easements to state trust lands presents some opportunities and challenges.<sup>334</sup> The revenue generated from the sale of a conservation easement on state trust land may provide a significant windfall to state beneficiaries.<sup>335</sup> A challenge is that permanent land use restrictions will limit future land use, and future managers may interpret the limitation on state trust land as contrary to state land retention policies. Thus, non-perpetual (i.e., 30 years) or renewable conservation easements may better fit state trust lands.<sup>336</sup> An example of one such nonpermanent conservation use of state trust lands was the Owen Sowerwine conservation area in Montana. The Montana and Flathead Audubon Societies and Flathead County entered two back-to-back conservation leases on the parcel to protect its conservation values.<sup>337</sup> In late 2023, the Montana Land Board approved a perpetual conservation easement on the land, which was specially allowed for in statute.<sup>338</sup>

Some states have enacted restrictions on who may hold a conservation easement on state trust lands. In Montana, for example, only the Department of Fish, Wildlife and Parks and certain non-profits can hold conservation easements on state trust lands.<sup>339</sup> Montana has also passed a statute that specifically allows for a conservation easement on the Owen Sowerwine parcel.<sup>340</sup> Utah requires specificity as to what resources are being conserved and under what circumstances the easement could be terminated.<sup>341</sup>

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<sup>333</sup> NAT'L CONSERVATION EASEMENT DATABASE, <https://www.conservationeasement.us> [<https://perma.cc/DVP2-FTU5>] (last visited June 30, 2024, 11:05 PM); see USDA, FORESTS OF SOUTH CAROLINA 2016 2 (2016), <https://www.scfc.gov/wp-content/uploads/2021/07/scfia16.pdf> [<https://perma.cc/S23H-KXDK>] (last visited June 30, 2024, 11:05 PM).

<sup>334</sup> See, e.g., ENVIRONMENTAL QUALITY COUNCIL, TRUST LAND MANAGEMENT: AN ANALYSIS OF CONSERVATION EASEMENTS AND OTHER USES OF STATE TRUST LAND (2008), [https://leg.mt.gov/content/Committees/Interim/2007\\_2008/environmental\\_quality\\_council/staffmemos/2008hj57draft2.pdf](https://leg.mt.gov/content/Committees/Interim/2007_2008/environmental_quality_council/staffmemos/2008hj57draft2.pdf) [<https://perma.cc/E5BE-DJDV>].

<sup>335</sup> See CULP & MARLOW, *supra* note 181, at 19.

<sup>336</sup> See *id.* at 20.

<sup>337</sup> See *Thank You for Helping to Conserve Owen Sowerwine*, FLATHEAD LAND TR., <https://www.flatheadlandtrust.org/conserv-owen-sowerwine/> [<https://perma.cc/VNF3-6QPU>] (last visited July 11, 2024). The lease on this parcel was not allowed for under any specific state conservation leasing program, and a conservation easement was only feasible because the legislature granted authority to the state land board to close an easement on the parcel. See MONT. CODE ANN. § 77-2-101(1)(e)(iii).

<sup>338</sup> See *id.*; see also Micah Drew, *Owen Sowerwine Natural Area Granted Permanent Conservation Easement*, FLATHEAD BEACON (Dec. 18, 2023), <https://flatheadbeacon.com/2023/12/18/owen-sowerwine-natural-area-granted-permanent-conservation-easement/> [<https://perma.cc/X2HW-36AQ>]; see also MONT. CODE ANN. § 77-2-101 (2023).

<sup>339</sup> See Drew, *supra* note 338; see also MONT. CODE ANN. § 77-2-101.

<sup>340</sup> See MONT. CODE ANN. § 77-2-101(1)(e)(iii).

<sup>341</sup> See CULP & MARLOW, *supra* note 181, at 19.

*B. Land Sales, Transfers, and Exchanges*

Conservation-oriented land exchanges or sales are the final category of tools available to states to conserve state trust land. As discussed in the background section of this Article, early state policies encouraged the sale of trust lands to generate revenue and encourage settlement. Over time, state policies have shifted to a focus on retaining state trust lands.<sup>342</sup> This shift in priorities does not mean that no state land will ever be sold, “but rather that the presumption is in favor of retaining rather than disposing of the lands.”<sup>343</sup> Virtually all states provide a mechanism for the sale of trust land, but some restrict the sale to only lands that are challenging to manage or are no longer valuable for revenue generation or require a land banking mechanism to ensure no net loss of state land acreage.<sup>344</sup>

When sales of state trust land do occur, they are typically high-value parcels of land in growing urban areas or inholdings within sensitive federal public lands.<sup>345</sup> Some states have engaged in targeted conservation-focused land sales. For example, after facing public backlash over the sale of environmentally sensitive state trust lands for residential and commercial development, Arizona developed the Arizona Preserve Initiative, allowing entities to petition the state land commissioner to reclassify state trust lands as suitable for conservation purposes.<sup>346</sup> If the land is reclassified, it may be leased or sold for conservation purposes at auction.<sup>347</sup>

Transfers of state trust land, for example, to other state agencies, are another disposal-oriented conservation tool, albeit an infrequently used one, because they permanently limit states’ ability to generate revenue from the trust lands. An example of a transfer program comes from Washington, which in 1989 passed the Trust Land Transfer program that allows the transfer of state land to other organizations but requires that the state trust land be managed indefinitely for ecological values and public benefits.<sup>348</sup> The program’s website claims that many transferred parcels become “parks, open space, nature preserves, or similar designations.”<sup>349</sup>

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<sup>342</sup> See SOUDER & FAIRFAX, *supra* note 51, at 172.

<sup>343</sup> Fairfax et al., *supra* note 59, at 824.

<sup>344</sup> See CULP ET AL., *supra* note 22, at 19; see also DOWNEY ET AL., *supra* note 308, at 22.

<sup>345</sup> See, e.g., DOWNEY ET AL., *supra* note 308, at 24 (describing land sales of trust land in rapidly growing areas like Maricopa County and the Phoenix metro area). See also, e.g., Chris Clements, *Obstacles Remain to Complete the Sale of the Kelly Parcel to Grand Teton National Park*, WYOMING PUBLIC MEDIA (July 12, 2024), <https://www.wyomingpublicmedia.org/open-spaces/2024-07-12/obstacles-remain-to-complete-the-sale-of-the-kelly-parcel-to-grand-teton-national-park> [<https://perma.cc/XR8W-F3QH>].

<sup>346</sup> See *id.* at 24.

<sup>347</sup> See *id.*

<sup>348</sup> See *Trust Land Transfer*, WASH. STATE DEP’T NAT. RES., <https://www.dnr.wa.gov/managed-lands/land-transactions/trust-land-transfer> [<https://perma.cc/X6TT-9C6W>] (last visited June 30, 2024, 11:07 PM).

<sup>349</sup> *Id.*

Speaking generally, states have shown a greater willingness to reposition their holdings—i.e., engage in land exchanges—but typically attempt to maintain a consistent total acreage.<sup>350</sup> Land exchanges allow states to consolidate their holdings, convey lands the state is unable to develop, and provide land-locked communities with future growth opportunities. Consolidating state lands may be particularly desirable as it can “facilitate improved planning and leasing for revenue-generating economic uses of state trust lands[.]”<sup>351</sup> Montana, for example, created a mechanism by which the revenue from sold state trust lands goes into a trust fund, which can then be used to purchase additional land to include in the state trust.<sup>352</sup> According to Ruple and Keiter, land exchanges have emerged as perhaps the “single best opportunity for rationalizing ownership and control over public lands and the resources they contain” as the resulting transformed landscape can “simultaneously facilitate both responsible energy development and conservation of sensitive landscapes.”<sup>353</sup>

A typical requirement for a state trust land exchange is that the exchanged lands must be of equal value based on an approved appraisal.<sup>354</sup> This can become complicated if the lands exchanged contain resources such as oil and gas that need to be accounted for to ensure the exchange is for equal value, as natural resource price markets and technological advances can increase price uncertainty.<sup>355</sup>

## V. CONCLUSION

Collectively, state trust lands represent the second-largest portfolio of land and mineral ownership in the United States, surpassed only by the federal government.<sup>356</sup> While federal public lands are governed by widely recognized laws and policies, state trust lands “exist in a quiet corner of public resource management, only occasionally coming into view”; however, this “obscurity conceals important lands and resources.”<sup>357</sup> With over 46 million surface acres of trust land in the lower 48, concentrated primarily in the nine western states covered in this Article, a tremendous opportunity exists to increase conservation efforts on these lands while also increasing revenues for trust land beneficiaries.<sup>358</sup>

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<sup>350</sup> See SOUDER & FAIRFAX, *supra* note 51, at 172.

<sup>351</sup> Ruple & Keiter, *supra* note 155, at 6.

<sup>352</sup> See DOWNEY ET AL., *supra* note 308, at 22 (describing Montana’s land banking program under which the predominately isolated grazing lands have been sold, while acquired lands have included agricultural, grazing, and timbered lands that also provide recreational opportunities).

<sup>353</sup> Ruple & Keiter, *supra* note 155, at 6.

<sup>354</sup> See *id.* (noting that this is often a state requirement, but also a requirement under FLMPA if the exchange is for federal lands).

<sup>355</sup> See *id.* at 7.

<sup>356</sup> See NAT’L ASS’N STATE TR. LANDS, <https://www.statetrustland.org/> [<https://perma.cc/8UQC-WGGU>] (last visited July 11, 2024, 6:34 PM).

<sup>357</sup> SOUDER & FAIRFAX, *supra* note 51, at 1.

<sup>358</sup> See Jurica, *supra* note 78.

Certainly, state trust lands are different from the more familiar federal multiple-use lands. Still, because of their unique history and trust obligations, state trust lands can be viewed as laboratories, developing new techniques and management approaches to public resources. Despite their trust obligations, or perhaps because of them, state managers appear to be willing to be more flexible than their federal counterparts in approaching their resources.<sup>359</sup> This Article finds that trust land management is far less confined than the conventional wisdom might suggest.<sup>360</sup> Instead, the existence of the trust encourages managers to treat resources as a portfolio of assets that change over time. As new assets such as water, commercial lands, recreation, conservation use, and others become valuable, their value must be factored into trust management. While states continue to manage state trust land for traditional uses (grazing, timber, oil and gas, and mining), some have also been willing to explore and develop alternative uses and revenue-generating opportunities. This willingness to explore new alternative uses of state trust land, including conservation uses, enables state trust land managers to maintain a diversified portfolio that can generate long-term and sustainable benefits for its current and future trust beneficiaries.<sup>361</sup>

While legal, political, and practical hurdles remain, the conservation use of state trust lands is an exciting and emerging market to watch. It seems sure to advance, and with it, our perspective of this “quiet corner of public resource management.”<sup>362</sup>

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<sup>359</sup> See SOUDER & FAIRFAX, *supra* note 51, at 7.

<sup>360</sup> See *id.* at 7–8.

<sup>361</sup> See Memorandum from Tobin Follenweider, *supra* note 41, at 3.

<sup>362</sup> SOUDER & FAIRFAX, *supra* note 51, at 1.