

# Montana's State School Trust Lands

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## Montana's State School Trust Lands

Jessica Wiles\*

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## I. INTRODUCTION

Over the span of nearly a century and a half, the federal government granted control of millions of acres of federal land to newly formed states upon each state entering the Union.<sup>1</sup> The terms of these land grants changed over the course of time, but the underlying purpose of the grants remained relatively uniform: to support public education.<sup>2</sup> These state lands, known as school or state trust lands, are publicly owned and managed but are not typical public lands in the most commonly used sense of the term.<sup>3</sup> Rather, state school trust lands are their own breed of public lands. Knowledge of Montana's unique state school trust land history is essential to understanding current management of these important public lands.

This article presents a synopsis of the history and legal principles of Montana's school trust lands. Part II discusses the origin of the federal land grant program, including the variation in the amount of lands granted and the grant recipients. Part II also discusses how the federal land grants came to be viewed as imposing a trust relationship between the receiver of the grants and the grant's intended beneficiaries. Part III discusses the unique history of Montana's school trust lands, including Montana's Omnibus Enabling Act, Constitution, and statutory scheme relating to trust lands. Part III further discusses the administration of school trust lands in Montana and the current status of these lands, with a brief description of the current market conditions leading to an increase in commercial development of state trust lands. Part IV focuses on case law relating to Montana's school trust lands, including how early courts

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1. In total, Congress gave the states 77,630,000 acres for common schools, and 21,700,000 to the states for universities, hospitals, asylums, and other public institutions. See CTR. ON EDUC. POLICY, PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND GRANT PROGRAM: A BACKGROUND PAPER FROM THE CENTER ON EDUCATION POLICY 15 (2001) [hereinafter CTR. ON EDUC. POLICY BACKGROUND PAPER].

2. In re Powder River Drainage Area, 702 P.2d 948, 952 (Mont. 1985) (“A major policy of the fledgling nation was to foster public education by grants of land to newly admitted states for that purpose. Each of the thirty states carved out of the public domain received such grants, varying in the quantity granted, and terms of the grant, as national policy and political winds dictated.”).

3. JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 285 (1996).

affirmed the trust relationship, and how case law created through taxpayer, citizen group, and environmental group challenges has led to the core legal principles surrounding Montana's school trust lands. Finally, Part IV concludes that the management of school trust lands, as well as the income derived from such lands is, and will remain, immensely important to Montana.

## II. THE ORIGIN OF STATE SCHOOL TRUST LANDS

Using federal land grants to support public education and public schools is not a modern concept.<sup>4</sup> As history reflects, our nation's founders used federal land grants as a way to incorporate the principles of democracy into the far flung regions of the nation.<sup>5</sup> In doing so, this policy equipped individual citizens with resources to exercise the rights and responsibilities of a democratic society.<sup>6</sup> This policy was first revealed in the General Land Ordinance of 1785 and the Northwest Ordinance of 1787.<sup>7</sup> The federal land grants changed over time in terms of both the amount of lands granted and the entities to which the lands were granted.<sup>8</sup> Ultimately, without an express intention within the grants themselves, these grants came to be viewed as bestowing a trust responsibility on the recipient.<sup>9</sup> This Part does not fully detail that history, but rather attempts to summarize the origin of the federal land grants, focusing on the unique nature of Montana's specific land grant story.

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4. GARETH C. MOON, *THE HISTORY OF MONTANA STATE FORESTRY: A COMPROMISE BETWEEN IDEALISM AND ECONOMIC PRACTICALITY* 9 (1991); *see also* PETER W. CULP, DIANE B. CONRADI & CYNTHIA C. TUELL, *TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW AND POLICY ASSESSMENT, A POLICY ASSESSMENT REPORT OF THE LINCOLN INSTITUTE OF LAND POLICY & SONORAN INSTITUTE JOINT VENTURE ON STATE TRUST LANDS* 4–6 (2005).

5. CULP, CONRADI & TUELL, *supra* note 4, at 4.

6. *CTR. ON EDUC. POLICY BACKGROUND PAPER*, *supra* note 1, at 2; *see also* CULP, CONRADI & TUELL, *supra* note 4, at 4–5 (“This theme was adopted with great fervor by the American revolutionaries, who believed that a well-educated citizenry would be essential to protect liberty and ensure that the citizens of the Republic would be prepared to exercise the basic freedoms of religion, press, assembly, due process of law, and trial by jury.”).

7. CULP, CONRADI & TUELL, *supra* note 4, at 2.

8. SOUDER & FAIRFAX, *supra* note 3, at 18–33.

9. *Id.* at 33–36.

A. *Origins of Federal Land Grants for Purposes of Supporting Public Schools*

Two early federal statutes established key federal land disposition policies and began the large scale systematization of land grants for purposes of supporting public educational institutions.<sup>10</sup> The first, the General Land Ordinance of 1785, established the rectangular survey and sale of western land.<sup>11</sup> The survey provided for organizing land into six-by-six mile townships divided into thirty-six sections of one square mile each, or 640 acres.<sup>12</sup> This method of organizing western land was meant to create a system to facilitate the sale of these lands and provide for more clarity in the determination of ownership boundaries.<sup>13</sup> In addition to the creation of the survey system, the General Land Ordinance of 1785 introduced the practice of federal land grants for schools by reserving the section numbered sixteen in every township “for the maintenance of public schools within the said township.”<sup>14</sup>

The second key federal statute, the Northwest Ordinance of 1787, provided a system for governing the territories with the goal of providing territories a path to transition to statehood.<sup>15</sup> In short, a region could be organized by an act of Congress to become a United States Territory.<sup>16</sup> Once a Territory, the Northwest Ordinance of 1787 required that a Territory have a population of 60,000 people to be eligible for statehood and inclusion into the Union.<sup>17</sup> After reaching a population of 60,000, the Territory could then petition Congress for admission into the Union.<sup>18</sup> Congress could then pass an “enabling act” authorizing a

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10. *Id.* at 18–19; *see also* CULP, CONRADI & TUELL, *supra* note 4, at 6.

11. *An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory*, in 4 JOURNALS OF THE AMERICAN CONGRESS 520, 520–21 (1823); *see also* CULP, CONRADI & TUELL, *supra* note 4, at 6.

12. *See* SOUDER & FAIRFAX, *supra* note 3, at 8, 18.

13. CULP, CONRADI & TUELL, *supra* note 4, at 6–7.

14. SOUDER & FAIRFAX, *supra* note 3, at 18.

15. *An Ordinance for the Government of the Territory of the United States North-West of the River Ohio*, ch. 8, 1 Stat. 51 (1787) [hereinafter Northwest Ordinance]; *see also* CULP, CONRADI & TUELL, *supra* note 5, at 7.

16. Northwest Ordinance, 1 Stat. at 51–53.

17. *Id.* This requirement was not always enforced. Nevada was admitted to the Union despite not reaching the required population requirement in 1864 to ensure Lincoln’s Electoral College victory in the national election. *See* SOUDER & FAIRFAX, *supra* note 3, at 20, 22.

18. Northwest Ordinance, 1 Stat. at 51; SOUDER & FAIRFAX, *supra* note 3, at 18.

constitutional convention in the potential new state.<sup>19</sup> If the potential state's constitution passed popular referendum in the Territory, Congress could accept the state's constitution and the new state would be admitted to the Union on an equal footing with all others.<sup>20</sup> Of key importance to this discussion, upon joining the Union, each state's enabling act provided for the grant of federal lands to the state, the terms of which differed and evolved over time.<sup>21</sup>

*B. Variation in Amount of Lands Granted: State-by-State Accession*

During territorial and statehood negotiations, each state made an individual land grant deal with the federal government.<sup>22</sup> Notably, the later a state joined the Union, the larger the grant of federal lands that state received in its enabling act became.<sup>23</sup> The original thirteen colonies

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19. Northwest Ordinance, 1 Stat. at 51; SOUDER & FAIRFAX, *supra* note 3, at 18.

20. SOUDER & FAIRFAX, *supra* note 3, at 18.

21. See CULP, CONRADI & TUELL, *supra* note 4, at 7.

22. SOUDER & FAIRFAX, *supra* note 3, at 8, 18–33. Note that states and territories were also provided other land grants:

The original reservation grants for common schools were also accompanied by increasingly generous 'block' grants for the support of other public institutions. For example, the 1841 Preemption Act granted five hundred thousand acres of land to every public land state for a variety of public purposes; later, the Agricultural College Act of 1862 granted lands to all of the states that were not in active rebellion against the Union to endow agricultural and mechanical colleges (when the war ended, this grant was extended to the southern states as well). Other grant programs transferred lands to states to finance internal improvements, such as railroads.

CULP, CONRADI & TUELL, *supra* note 4, at 4.

23. SOUDER & FAIRFAX, *supra* note 3, at 19–24, 27. There are varying explanations for the differences in the size of the federal lands grants to states over time. *Id.* at 27. One potential explanation is that later states, such as Utah, Nevada, Arizona, and New Mexico, were more arid and thus the land was less valuable, which required the Federal land grant be larger to achieve the purposes of the grant. *Id.* Another explanation is that western states gained more political power over time. *Id.* In addition, land policy shifted over time. "The pattern adopted by most states admitted to the Union before 1850 was to sell trust lands and give the money directly to the schools. After 1850, many states retained ownership of trust lands as a stable source of funding for their education institutions." Tom Schultz & Tommy Butler, *Managing Montana's Trust Lands*, 41 MONT. BUS. Q., Winter 2003, at 1; see also CULP, CONRADI & TUELL, *supra* note 4, at 9.

plus Vermont, Tennessee, and Kentucky, joined the Union between 1785 and 1803 and did not receive any land grants upon becoming states.<sup>24</sup> Between 1803 and 1858 fourteen additional states joined the Union, each receiving section sixteen of every township as a common school grant under the Northwest Ordinance of 1785.<sup>25</sup> Between 1859 and 1890, states began to receive double the amount of the original federal land grant, receiving section thirty-six, in addition to section sixteen, of every township as common school grants upon acceptance to the Union.<sup>26</sup> Beginning in 1896, states began negotiating yet more generous federal land grants.<sup>27</sup> In 1896, the federal government granted Utah sections sixteen, thirty-six, two, and thirty-two of every township.<sup>28</sup> New Mexico and Arizona also received these same four sections of each township.<sup>29</sup>

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24. SOUDER & FAIRFAX, *supra* note 3, at 19. These states, referred to by Souder and Fairfax as phase-one states:

provide a basis of comparison with subsequent states, because no federal land lay within their borders. Phase-one states had to organize their own tax base to support schools and other public functions. In subsequent states, by contrast, the federal government owned large tracts of land, and was called upon to contribute to the development of public institutions.

*Id.*

25. *Id.* at 19–22. These states included Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri, Arkansas, Michigan, Florida, Iowa, Wisconsin, California, and Minnesota. *Id.* Two states, Maine and Texas, which joined the Union during this time period, received no common school grant lands from the federal government. *See id.* at 20–22. Texas included no federal public domain lands because it was a former independent republic and thus received no school land grants. *Id.* at 22.

26. *Id.* at 20–23. The exception was West Virginia, which was admitted in 1863 with no grant of lands from the federal government. *Id.* at 20. States that received the sixteenth and thirty-sixth sections of every township included Oregon, Kansas, Nevada, Nebraska, Colorado, Montana, North Dakota, South Dakota, Washington, Idaho, and Wyoming. *Id.* at 20–21.

27. *Id.* at 20–23.

28. *Id.*

29. *Id.* Alaska and Hawaii, which joined the Union much later were treated quite differently than other states. *Id.* at 23. For instance, Alaska's statehood bill allowed the State twenty-five years to choose 102.5 million acres of unreserved land and fifty years to selection an additional 800,000 acres of national forest land. *Id.* "The value of those selections rights was significantly reduced when state selections were halted and both the federal government and the state's Native Americans moved to the front of the land-grab queue with almost 200 million acres of selection rights, as a result of the Alaskan Native Claims Settlement Act." *Id.* In

There are varying explanations for the differences in the size of the federal lands grants to states over time.<sup>30</sup> One potential explanation is that states admitted to the Union later, such as Utah, Nevada, Arizona, and New Mexico, were more arid and thus the land was less valuable.<sup>31</sup> Because sale or lease for agriculture was the primary use of the early land grants, the western federal land grants needed to be larger to raise funds comparable to the more fertile states.<sup>32</sup> In short, the states in the West required a larger quantity of land to produce the necessary revenue to support schools and other public institutions.<sup>33</sup> Another explanation is that western states gained more political power over time.<sup>34</sup>

The federal land grant to Montana came in the middle of the pack. In 1889, Montana was admitted to the Union as a part of a single Omnibus Enabling Act, along with North Dakota, South Dakota, and Washington.<sup>35</sup> Through this Omnibus Enabling Act, Montana received sections sixteen and thirty-six of every township “for the support of common schools.”<sup>36</sup> Today Montana retains approximately 90% of its original land grant of five million acres.<sup>37</sup>

### *C. The Variety of Federal Land Grant Recipients*

As discussed above, the amount of land granted by Congress varied over time. Similarly, Congress's grant of federal lands also varied over time with regard to whom the lands were granted.<sup>38</sup> Initially, Congress took a township-centered approach, granting land to a township for use by schools in that township.<sup>39</sup> Some later lands were granted to benefit schools in a township, but were directed to be managed by the county.<sup>40</sup> Later still, because some local townships abused their trust responsibilities, Congress granted lands for the benefit of the schools in a

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Hawaii, the statehood act ratified a trust on royal lands but it is not based on the cadastral system of the lower forty-eight. *Id.* at 24.

30. *Id.* at 27.

31. *Id.*

32. *Id.*

33. CULP, CONRADI & TUELL, *supra* note 4, at 9 (“[T]he organized ranching, mineral, and timber industries that would eventually be able to utilize at least some portion of these lands had not yet come to flower.”).

34. *Id.*

35. Omnibus Enabling Act of 1889, ch. 180, 25 Stat. 676.

36. *Id.*

37. CULP, CONRADI & TUELL, *supra* note 4, at 98.

38. *Id.* at 7–8.

39. SOUDER & FAIRFAX, *supra* note 3, at 29–30.

40. *Id.* at 30.

township but vested administration with the state.<sup>41</sup> Lastly, Congress granted the lands for the benefit of the schools in the state and provided for state administration.<sup>42</sup>

Montana fell toward the later end of this progression. Montana's Omnibus Enabling Act granted sections sixteen and thirty-six in every township to the State for the support of the common schools.<sup>43</sup> As a result, Montana was able to begin a school system with a centralized source of funds.<sup>44</sup>

#### *D. How Federal Land Grants Came to Be Viewed as a Trust – The Trend Toward Uniformity*

Given how common it is today to refer to federal land grants to the states as “state school trust lands,” it may surprise some to learn that “trust” in state school trust lands was not a specific requirement in early enabling acts.<sup>45</sup> Rather, the trust notion developed over time and indeed, prior to 1910, the legal trust requirement came from each individual state's commitments in state constitutions, as opposed to individual federal enabling acts.<sup>46</sup>

Prior to 1910, the exact language stating the purpose of each federal land grant varied slightly, but significantly. For example, a typical grant prior to 1860 granted the lands “for the maintenance of the schools.”<sup>47</sup> During the 1860s, the wording changed to “for the support of common schools.”<sup>48</sup> In 1907, the wording changed again when Oklahoma was granted land “for the use and benefit of common schools.”<sup>49</sup> Montana's Omnibus Enabling Act actually used two different phrases within the Act itself, granting lands “for the support of common schools,” but also authorizing in lieu selections of excluded

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41. *Id.*; see also Schultz & Butler, *supra* note 23, at 2.

42. SOUDER & FAIRFAX, *supra* note 3, at 30.

43. Omnibus Enabling Act of 1889, ch. 180, § 10, 25 Stat. 676, 679.

44. SOUDER & FAIRFAX, *supra* note 3, at 30.

45. See *id.* at 33–36.

46. Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 808 (1992); see also SOUDER & FAIRFAX, *supra* note 3, at 33. Note that case law, very early on, established the notion of the land grants as a trust. See *In re Powder River Drainage Area*, 702 P.2d 948 (Mont. 1985) (citing *Trs. of Vincennes Univ. v. Indiana*, 55 U.S. 268 (1852); *Springfield Twp. v. Quick*, 63 U.S. 56 (1895)).

47. Fairfax, Souder & Goldenman, *supra* note 46, at 818.

48. *Id.*

49. Enabling Act of Oklahoma of 1906, Pub. L. No. 234, § 7, 34 Stat. 267, 272; see also Fairfax, Souder & Goldenman, *supra* note 46, at 818.

mineral lands for the “use and benefit of the common schools.”<sup>50</sup> By contrast, no enabling act directly incorporated the use of the word “trust” until the accession of Arizona and New Mexico to the Union in 1912.<sup>51</sup> The Enabling Act of New Mexico and Arizona expressly provides that:

all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the State held in trust . . . and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.<sup>52</sup>

This Enabling Act also specified that the disposition of any lands, money, or thing of value derived directly or indirectly from such lands for any object other than that expressly granted or confirmed “shall be deemed a breach of trust.”<sup>53</sup>

Prior to New Mexico and Arizona’s Enabling Act, states’ individual constitutions imposed a specific trustee relationship on their own terms.<sup>54</sup> For example, despite the lack of an explicitly imposed trust relationship in the Omnibus Enabling Act, Montana’s 1889 Constitution accepted that the federal grant of land would be “held in trust for the people, to be disposed of as hereafter provided for the respective purposes for which they have been or may be granted.”<sup>55</sup> Montana’s 1972 Constitution continued those terms.<sup>56</sup>

Given the variety in the language of the grants and each state’s unique incorporation of such grants into a state constitution, it is not surprising that early case law often did not clearly recognize or cite to trust principles. For example, in the 1920s and 1930s state courts did not cite to either enabling acts or constitutional provisions to bar state agencies from disposing of state school lands for diverse state purposes

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50. Omnibus Enabling Act of 1889, ch. 180, §§ 10, 18, 25 Stat. 676, 679, 681–82.

51. New Mexico and Arizona Enabling Act of 1910, Pub. L. No. 219, §§ 10, 28, 36 Stat. 557, 563, 574.

52. *Id.*

53. *Id.*

54. See SOUDER & FAIRFAX, *supra* note 3, at 33.

55. MONT. CONST. of 1889, art. XVII, § 1.

56. MONT. CONST. art. X, § 11; *see also* Dep’t of State Lands v. Pettibone, 702 P.2d 948, 951 (Mont. 1985).

not specifically benefitting the trust.<sup>57</sup> Similarly, federal courts did not find enabling acts or state constitutions an obstacle to an uncompensated state grant of right-of-way across school lands for irrigation.<sup>58</sup>

In 1966, the United States Supreme Court, in *Lassen v. Arizona Highway Department*,<sup>59</sup> largely clarified the appropriateness of applying trust principles when analyzing how states interpret the purpose of federal land grants. In *Lassen*, the Supreme Court relied on the express trust relationship established in the New Mexico-Arizona Enabling Act to conclude that the State must “compensate the trust in money for the full appraised value of any material sites or right of way which it obtains on or over trust lands.”<sup>60</sup> Soon, courts across the West embraced the Supreme Court’s analysis in *Lassen*, regardless of the exact language of the State’s enabling act and constitution.<sup>61</sup> Thus, despite the relatively unique trust-specific language contained in the New Mexico-Arizona Enabling Act, the analysis in *Lassen* became the standard that defined the trust responsibility.<sup>62</sup> The *Lassen* analysis related to all state school lands without import as to the unique nature of the New Mexico-Arizona Enabling Act and other historical differences between the States.<sup>63</sup> As a result of courts applying *Lassen*, uniformity emerged in the interpretation of state school land grants and the trust relationship, and the responsibility established by such grants.<sup>64</sup> One analysis of such cases determined that “[j]udicial reliance on simplified versions of precedent from other states is characteristic of the school lands cases in general,” and is exacerbated by reliance on the decision of the Supreme Court in

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57. See, e.g., *Grosetta v. Choate*, 75 P.2d 1031 (Ariz. 1938); see also SOUDER & FAIRFAX, *supra* note 3, at 33.

58. *Ide v. United States*, 263 U.S. 497, 502 (1923); see also SOUDER & FAIRFAX, *supra* note 3, at 33–34.

59. *Lassen v. Arizona*, 385 U.S. 458 (1967).

60. *Id.* at 469.

61. E.g., *United States v. 78.61 Acres of Land in Dawes & Sioux Cntys.*, 265 F. Supp. 564, 566 (1967) (noting the Nebraska Enabling Act “did not contain the express restrictions which were incorporated in later, similar acts,” but nevertheless determined that the “grant was undoubtedly in trust for a specific purpose”); *United States v. 111.2 Acres of Land in Ferry Cnty.*, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff’d* 435 F.2d 561 (9th Cir. 1970) (holding the State could not donate school land to the federal government).

62. SOUDER & FAIRFAX, *supra* note 3, at 34–36.

63. *Id.*

64. *Id.* (citing *Cnty. of Skamania v. Washington*, 685 P.2d 576 (Wash. 1984) (A recent case involving state school trust lands that shows an “admixture of citations from diverse jurisdictions without adequate reference to differences in state obligations, and the centrality of the U.S. Supreme Court decisions without apparent awareness that importations from Arizona and New Mexico were occurring.”)).

*Lassen*, interpreting the New Mexico-Arizona Enabling Act as opposed to the specific state law involved.<sup>65</sup> The result is an eroding appreciation of the differences in state accession bargains—one that often leaves the impression that the federal land grants are trusts that are all virtually the same.

### III. MONTANA'S STATE SCHOOL TRUST LANDS – THE IMPORTANCE OF MONTANA'S UNIQUE HISTORY AND TRUST MANDATE

Regardless of the trend in uniformity in interpreting federal land grants to states, it remains important to review and understand the specific history of Montana's Omnibus Enabling Act, Constitution, and statutory and administrative scheme to determine what the trust mandate means for Montana's beneficiaries and land managers.

#### A. Montana's Omnibus Enabling Act

As discussed above, in 1889, Montana, along with North Dakota, South Dakota, and Washington,<sup>66</sup> was admitted to the Union as a part of a single Omnibus Enabling Act. Through this Omnibus Enabling Act, Montana received sections sixteen and thirty-six of every township “for the support of common schools.”<sup>67</sup> In cases where sections sixteen and thirty-six, or parts of these sections, had already been sold or otherwise disposed of, the State was granted other equivalent lands known as “in lieu” lands to be selected by the State in a manner provided by the legislature with approval of the Secretary of Interior.<sup>68</sup> The federal land grant provided that these “in lieu” lands were also granted “for the support of the common schools.”<sup>69</sup> No lands that already had a federal reservation were to be subject to the land grant, including any Indian or military reservations.<sup>70</sup>

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65. *Id.* at 35–36.

66. Omnibus Enabling Act of 1889, ch. 180, 25 Stat. 676, 676 (“An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted to the Union on an equal footing with the original States, and to make donations of public lands to such States.”).

67. *Id.* § 10, 25 Stat. at 679.

68. *Id.* The selection of “in lieu” lands by the State has yet to be finalized over one century later.

69. *Id.*

70. *Id.* (“Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to

The land grant also specifically exempted from selection by the State lands determined by the Department of Interior to be “mineral lands.”<sup>71</sup> Instead, the federal government authorized the State to pick lands “in lieu” of such mineral lands “for the use and the benefit of the common schools.”<sup>72</sup> In 1927, however, the Jones Act retroactively granted states, including Montana, sections that were “mineral in character,” including mineral title to lands already granted, with limited exceptions.<sup>73</sup> The Jones Act grants came with restrictions.<sup>74</sup> Under the Act, Montana is prohibited from selling minerals and is limited to leasing such minerals, “the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools.”<sup>75</sup> Any minerals disposed of contrary to the Jones Act must be forfeited to the United States.<sup>76</sup>

In addition to the grant of federal lands for the support of the common schools, the Omnibus Enabling Act placed certain restrictions on Montana’s disposal of such lands and required that proceeds of such land sales constitute a permanent fund, “the interest of which only shall be expended in the support of said schools.”<sup>77</sup> The limits set out in the Omnibus Enabling Act on the legislature’s ability to dispose of the

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the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provision of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.”). The story of state land selection is much more complex than this provision of the Omnibus Enabling Act implies. For a detailed history of state land selection in Montana, see GEORGE WESLEY BURNETT, JR., MONTANA BECOMES A LANDLORD: A STUDY OF STATE LAND SELECTION (1976) (unpublished Ph.D. dissertation, University of Oklahoma), available at <https://shareok.org/bitstream/handle/11244/4222/7712732.PDF?sequence=1&isAllowed=y>.

71. Omnibus Enabling Act, § 18, 25 Stat. at 681–82; see also CULP, CONRADI & TUELL, *supra* note 4, at 11.

72. Omnibus Enabling Act, § 18, 25 Stat. at 681–82.

73. Jones Act of 1927, Pub. L. No. 570, § 1, 44 Stat. 1026, 1026 (codified at 43 U.S.C. § 870 (2012)) (“Subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.”); see also CULP, CONRADI & TUELL, *supra* note 4, at 12.

74. Jones Act of 1927, § 1, 44 Stat. at 1026.

75. *Id.* § 1, 44 Stat. at 1026–27.

76. *Id.* § 1, 44 Stat. at 1027.

77. Omnibus Enabling Act, § 11, 25 Stat. at 679–80.

school lands changed slightly over time.<sup>78</sup> Initially, all lands granted for educational purposes had to be disposed of at public sale for not less than ten dollars per acre, and could be leased under regulations created by the legislature for not more than five years.<sup>79</sup> In 1932, Congress amended the Omnibus Enabling Act to provide for more specific prices and lease periods for different resources and agricultural products.<sup>80</sup> The amendment also provided that the State may, upon terms it prescribed, grant easements and rights in the lands, and added that:

none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.<sup>81</sup>

Any such disposition constituted “permanent funds for the support and maintenance of the public schools.”<sup>82</sup>

#### *B. Montana's Constitutional and Statutory Trust Mandate*

Montana's trust mandate for school lands originated with Montana's 1889 Constitution.<sup>83</sup> The 1889 Constitution accepted that the federal grant of land would be “held in trust for the people, to be disposed of as hereafter provided for the respective purposes for which they have been or may be granted.”<sup>84</sup> Montana's 1972 Constitution continued those terms.<sup>85</sup> Specifically, Montana's 1972 Constitution, Article X, Section 11, provides, in relevant part:

**Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or

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78. See, e.g., Act of May 7, 1932, Pub. L. No. 124, 47 Stat. 150, *amending* Omnibus Enabling Act, ch. 180, 25 Stat. 676.

79. *Id.*

80. *Id.* § 1, 47 Stat. at 150.

81. *Id.* § 1, 47 Stat. at 151.

82. *Id.*

83. MONT. CONST. of 1889, art. XVII, § 1.

84. *Id.*; see also MOON, *supra* note 4, at 13.

85. MONT. CONST. art. X, § 11; see also *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 951 (Mont. 1985); *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800, 803 (Mont. 1999).

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

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.<sup>86</sup>

Montana's legislature further expanded upon the trust mandate found in Montana's Constitution. For example, the legislature codified restrictions on the State's right to sell or transfer these lands: "All sales of state lands shall be only at public auction held at the county courthouse of the county in which the lands are located."<sup>87</sup> In addition, the State is not allowed to sell valuable mineral lands,<sup>88</sup> or state land bordering on navigable lakes, non-navigable meander lakes, and navigable streams.<sup>89</sup>

The State has other less known restrictions on school trust lands. For instance, the Montana legislature has enacted express restrictions on the management of state forest lands.<sup>90</sup> Specifically:

The board and the [D]epartment [of Natural Resources and Conservation] are prohibited from designating,

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86. MONT. CONST. art. X, § 11 (emphasis original).

87. MONT. CODE ANN. § 77-2-321 (2015); Act of May 7, 1932, Pub. L. No. 124, 47 Stat. 150, *amending* Omnibus Enabling Act, ch. 180, 25 Stat. 676.

88. MONT. CODE ANN. § 77-2-303(1). This restriction on the sale of valuable mineral deposits includes both the surface and mineral estate for lands that are likely to contain coal, oil, oil shale, phosphate, metals, sodium, or "other valuable mineral deposits," but does not prohibit the sale of lands containing sand, gravel, building stone, brick clay, or other similar materials. *Id.*

89. *Id.* § 77-2-303(2)(3). This restriction excludes lands previously leased as cabin sites and allows for the granting of easements and the leasing of such lands. *Id.*

90. *Id.* § 77-5-116.

treating, or disposing of any interest in state forest lands for the preservation or nonuse of these lands prior to obtaining funds for the affected beneficiary equal to the full market value of that designation, treatment, or disposition. Unless the full market value of the property interest or of the revenue foregone is obtained, the board and the department are prohibited from either temporarily or permanently designating, treating, or disposing of any interest in any state forest lands for the following purposes: (1) as a natural area pursuant to Title 76, chapter 12, part 1, or as otherwise provided for by law; (2) as open-space land as defined in 76-6-104; (3) for old growth timber preservation; and (4) as a wildlife management area.<sup>91</sup>

The State legislature has also included restrictions on the exchange of state school trust lands.<sup>92</sup> The land exchange may only occur with specific listed entities.<sup>93</sup> Moreover, the land received must be of “equal or greater value, as determined by the [B]oard [of Land Commissioners] after appraisal by a qualified land appraiser, than the state land and as closely as possible equal in area.”<sup>94</sup> In addition, exchanges that involve state lands bordering navigable lakes and streams or other bodies of water with significant public use value may be exchanged for nongovernment-owned land only if it borders similar navigable lakes, streams, or other bodies of water.<sup>95</sup>

Finally, the State’s Land Banking Program, which authorizes the State to use the proceeds from the sale of state school trust lands to buy other lands, also sets forth specific restrictions for the selection of land banking parcels.<sup>96</sup> Land banking is designed to improve the overall returns to the trust and increase public access to state lands through the sale of state lands that are predominantly isolated in nature, or not legally

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91. *Id.*

92. *Id.* § 77-2-203.

93. *Id.* (“Subject to subsection (2), the board is authorized to exchange state land for land owned by: (a) the state or an agency of the state; (b) a political subdivision of the state, including a county, city, town, public corporation, or district created pursuant to state law; (c) any other public body of the state; or (d) a nongovernmental entity, including but not limited to an individual, association, partnership, or corporation.”).

94. *Id.* § 77-2-203(2).

95. *Id.* § 77-2-203(3); *see also* Skyline Sportsmen’s Ass’n v. Bd. of Land Comm’rs, 951 P.2d 29 (Mont. 1997).

96. MONT. CODE ANN. § 77-2-364.

accessible.<sup>97</sup> The State must realize the full market value of the land sold through the program.<sup>98</sup> In addition, when purchasing land, easements, or improvements for existing trusts, specific appraisal and revenue projection procedures must be used to ensure that the proposed purchase is “likely to produce more net revenue for the affected trust than the revenue that was produced from the land that was sold, among other restrictions.”<sup>99</sup>

*C. Montana’s Trust Administration: The Role of the State Board of Land Commissioners and the Montana Department of Natural Resources and Conservation*

Besides establishing a trust relationship between the State and various institutional beneficiaries, Montana’s Constitution addressed arrangements for administration of the trust.<sup>100</sup> Montana’s Constitution, Article X, Section 4 states:

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97. *Id.*; see also Memorandum from Tom Schultz, Adm’r, Trust Land Mgmt. Div., to EQC Agency Oversight Subcomm., *DNRC Rulemaking 1* (Oct. 8, 2003), available at [http://leg.mt.gov/content/committees/interim/2003\\_2004/environmental\\_quality\\_council/subcommittees/agency\\_oversight/minutes/eqcao10082003\\_ex12.pdf](http://leg.mt.gov/content/committees/interim/2003_2004/environmental_quality_council/subcommittees/agency_oversight/minutes/eqcao10082003_ex12.pdf).

98. MONT. CODE ANN. § 77-2-364(2).

99. *Id.* § 77-2-364(4), (5) (“Prior to purchasing any land, easements, or improvements, the board shall determine that the financial risks and benefits of the purchase are prudent, financially productive investments that are consistent with the board’s fiduciary duty as a reasonably prudent trustee of a perpetual trust. For the purposes of implementing 77-2-361 through 77-2-367, that duty requires the board to: (a) discharge its duties with the care, skill, prudence, and diligence that a prudent person acting in a similar capacity with the same resources and familiar with similar matters should exercise in the conduct of an enterprise of similar character and aims; (b) diversify the land holdings of each trust to minimize the risk of loss and maximize the sustained rate of return; (c) discharge its duties and powers solely in the interest of and for the benefit of the trust managed; (d) discharge its duties subject to the fiduciary standards set forth in 72-38-801; and (e) maintain, as closely as possible, the existing land base of each trust, consistent with the state’s fiduciary duty. (6) Prior to purchasing a parcel of land in excess of 160 acres in any particular county, the board shall consult with the county commissioners of the county in which the parcel is located.”).

100. See Fairfax, Souder & Goldenman, *supra* note 46, at 818. Congressional enabling acts never required establishment of a commission or board to administer the trust. *Id.* Rather, Oregon appears to be the first state to create a land commission consisting of the governor, the secretary of state, and the state treasurer. *Id.* Other states adopted the idea, but with variations. *Id.* Yet other states rejected this idea, providing in constitutions that the legislature was responsible for dealing with the school lands, including Washington and North Dakota, two states

**Board of land commissioners.** The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.<sup>101</sup>

Montana's legislature clarified the role of the Board of Land Commissioners ("Board") in Montana Code Annotated § 77-1-604.<sup>102</sup> The Board exercises general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the Board of Investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration.<sup>103</sup> In its exercise of such authority, the Board is guided by the general principle that state school trust lands and funds "are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act."<sup>104</sup> As such, "the Board shall administer this trust to: (1) secure the largest measure of legitimate and reasonable advantage to the state; and (2) provide for the long-term financial support of education."<sup>105</sup>

The Board is also required to manage state lands under the multiple-use management concept.<sup>106</sup> Multiple-use is:

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under the Omnibus Enabling Act with Montana. *Id.*; see also MOON, *supra* note 4, at 13.

101. MONT. CONST. art. X, § 4; see also MONT. CONST. of 1889, Art. XI, § 4 (emphasis original).

102. The Montana legislature has a general statement of policy with regard to state trust lands that reads: "It is in the best interest and to the great advantage of the state of Montana to seek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue for the support of the common schools, the university system, and other institutions benefiting therefrom, and that in so doing the economy of the local community as well as the state is benefited as a result of the impact of such development." MONT. CODE. ANN. § 77-1-604.

103. *Id.* § 77-1-202(1).

104. *Id.*

105. *Id.*

106. *Id.* § 77-1-203.

defined as management of all the various resources of the state lands so that: (a) they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and (b) harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.<sup>107</sup>

Such multiple-use principles, however, do not negate or supersede the trust mandate of Montana's Omnibus Enabling Act and Constitution.<sup>108</sup>

Under the direction of the Board, the Montana Department of Natural Resources and Conservation ("DNRC") "has charge of the selecting, exchange, classification, appraisal, leasing, management, sale, or other disposition of the state lands."<sup>109</sup> It is also required to perform such "other duties the Board directs, the purpose of the department demands, or the statutes require."<sup>110</sup> DNRC must also collect and receive all monies payable to it through its office as fees, rentals, royalties, interest, penalties, or payments on mortgages or land purchased from the State or derived from any other source.<sup>111</sup> Under direction of the Board, DNRC is further responsible for selecting and locating lands granted to Montana by the United States for any purpose, including the "in lieu" lands.<sup>112</sup>

#### *D. DNRC's Administration of State School Trust Lands*

DNRC is comprised of four distinct divisions: Forestry Division, Water Resources Division, Conservation and Resource Development

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107. *Id.* § 77-1-203(1).

108. See David Woodgerd & Bernard F. McCarthy, *State School Trust Lands and Oil and Gas Royalty Rates*, 3 PUB. LAND L. REV. 119, 125 (1982).

109. MONT. CODE ANN. § 77-1-301(1).

110. *Id.*

111. *Id.* § 77-1-301(2).

112. *Id.* § 77-1-304.

Division, and Trust Land Management Division.<sup>113</sup> The Trust Land Management Division, as its name implies, administers and manages the state trust surface and mineral resources for the benefit of the common schools and other endowed institutions.<sup>114</sup> It is first and foremost an asset management organization.<sup>115</sup> A brief description of each bureau within the Trust Lands Management Division illustrates that although historically managed for natural resource extraction, it has further broadened its land-use activities to include other uses that may generate greater revenue such as commercial, residential, industrial, renewable energy, and conservation leasing.<sup>116</sup>

The Trust Lands Management Division consists of four separate bureaus. First, the Agriculture and Grazing Management Bureau is responsible for the leasing and management of agriculture and rangelands.<sup>117</sup> It manages approximately 9,000 agricultural and grazing leases throughout the State. The Agriculture and Grazing Management Bureau also oversees the recreational use program on state trust lands and ensures compliance with the Montana Antiquities Act.<sup>118</sup> Second, the Forest Management Bureau manages over 780,000 acres of forested state trust land.<sup>119</sup> The Forest Management Bureau's activities include the sale of forest products and the Forest Improvement Program, which uses fees from harvested timber to improve the health, productivity, and value of forested trust lands.<sup>120</sup> Third, the Minerals Management Bureau is responsible for leasing, permitting, and managing approximately 1,876 oil and gas, metalliferous and non-metalliferous minerals, coal, and sand and gravel agreements on over 750,000 acres of the available 6.2 million mineral acres of school trust land and approximately 11,885 acres of other state-owned land throughout Montana.<sup>121</sup> As of 2016, the Minerals Management Bureau manages 1,742 oil and gas leases and 35 coal leases.<sup>122</sup> Finally, the Real Estate Management Bureau manages all land

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113. The Montana Board of Oil and Gas Conservation is administratively attached to DNRC.

114. MONTANA DNRC TRUST LANDS MANAGEMENT DIVISION, ANNUAL REPORT 1 (2016), available at <http://dnrc.mt.gov/divisions/trust/docs/annual-report/fy-2016-trust-lands-annual-report.pdf> [hereinafter DNRC ANNUAL REPORT].

115. Schultz & Butler, *supra* note 23, at 5.

116. *Id.*

117. DNRC ANNUAL REPORT, *supra* note 114, at 7.

118. *Id.* at 8.

119. *Id.* at 9–11.

120. *Id.*

121. *Id.* at 12.

122. *Id.*

ownership transactions on trust land.<sup>123</sup> This includes all permanent dispositions and acquisitions of land, specifically the land banking program, the cabin site sales program, and land exchanges.<sup>124</sup> The Real Estate Management Bureau also oversees the leasing program which involves residential cabin and home-site leasing and the granting of rights-of-way and easements.<sup>125</sup> More recently, this Bureau developed a strong commercial leasing program for development of state trust land, consisting of mostly commercial ground leasing for retail development and renewable energy.<sup>126</sup>

*E. A Snapshot of Montana's State School Trust Lands*

Montana presently retains a vast majority of its original land grant, over five million acres of school trust lands.<sup>127</sup> “The original common school grant in Montana was for 5,188,000 acres, with an additional 668,720 acres granted for other endowed institutions.”<sup>128</sup> Montana continues to hold the majority of its lands in the dispersed pattern in which they were granted—section sixteen and thirty-six of each township.<sup>129</sup> The checkerboard pattern is typical for states that retain school trust lands throughout the West and it brings significant management challenges.<sup>130</sup>

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123. *Id.* at 14.

124. *Id.*

125. *Id.* at 15.

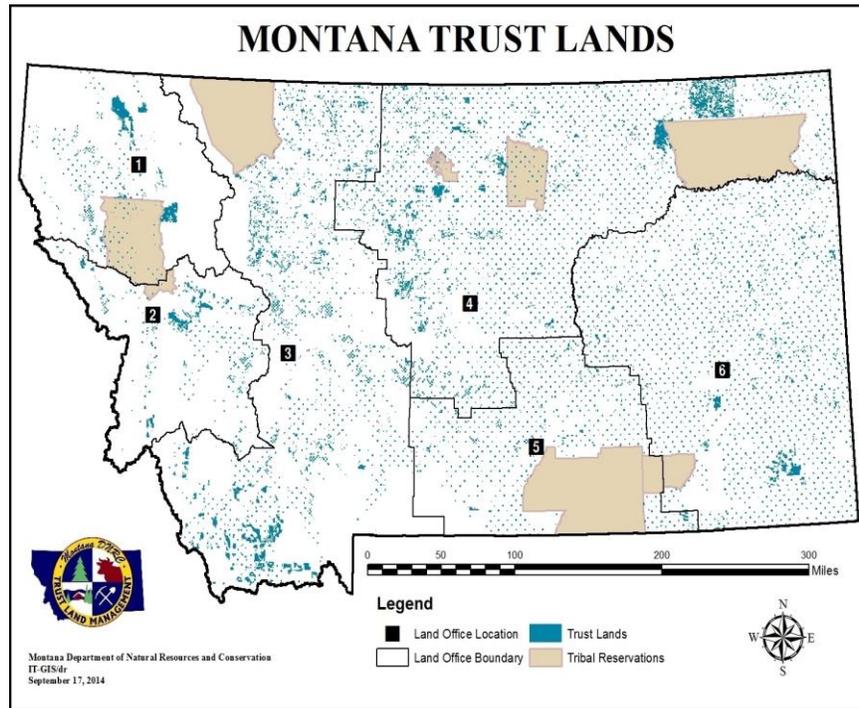
126. *Id.*

127. CULP, CONRADI & TUELL, *supra* note 4, at 98.

128. Schultz & Butler, *supra* note 23, at 4.

129. See DNRC ANNUAL REPORT, *supra* note 114, at 2 (map of Montana Trust Lands showing dispersed pattern of ownership).

130. Fairfax, Souder & Goldenman, *supra* note 46, at 832. “Most obviously, it is difficult to plan for and administer scattered parcels of land.” *Id.* In addition, the “scattering of state-owned parcels means that state granted lands are likely to be surrounded by neighbors—especially the U.S. Forest Service and Bureau of Land Management—who operate under a significantly different management mandate than the state, and who frequently do not share the state’s priorities.”



DNRC manages lands held in trust under the original land grant in the Omnibus Enabling Act for the common schools, but it also manages other lands in trust for other institutions. For example, the Omnibus Enabling Act and subsequent legislation granted acreage for other educational and state institutions.<sup>131</sup> Thus, DNRC manages all of these lands in trust for their intended beneficiaries. The total acreage of school trust lands fluctuates slightly each year due to land sales and acquisitions.<sup>132</sup> Mineral acreage for each trust generally exceeds surface acreage because the mineral estate was retained when lands were sold.<sup>133</sup> At the end of fiscal year 2016, the State held the following surface and mineral acreages:

131. Omnibus Enabling Act of 1889, ch. 180, §§ 12–17, 25 Stat. 676, 680–81 (public buildings at the capital, universities, penitentiary); DNRC ANNUAL REPORT, *supra* note 114, at 2 (map of Montana Trust Lands showing dispersed pattern of ownership).

132. See DNRC ANNUAL REPORT, *supra* note 114, at 5 (map of Montana Trust Lands showing dispersed pattern of ownership).

133. See MONT. CODE ANN. § 77-2-304 (2015).

<u>GRANT</u>	<u>ACREAGE</u>
Common Public Schools	4,616,534 surface acres 5,596,963 mineral acres
University of Montana	17,262 surface acres 33,754 mineral acres
Montana State University Morrill grant	63,474 surface acres 77,929 mineral acres
Montana State University Second Grant	31,686 surface acres 46,598 mineral acres
Montana Tech University of Montana	59,356 surface acres 86,267 mineral acres
State Normal School	63,217 surface acres 80,455 mineral acres
School for the Deaf & Blind	36,461 surface acres 41,171 mineral acres
State Reform School	67,295 surface acres 73,488 mineral acres
Veterans Home	1,417 surface acres 1,276 mineral acres
Public Buildings	184,656 surface acres 172,323 mineral acres
Acquired Lands	32,295 surface acres 0 mineral acres
Sir Trust <sup>134</sup>	2,600 surface acres 0 mineral acres
TOTALS	5,176,252 surface acres 6,210,224 mineral acres <sup>135</sup>

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134. Sir Trust is split equally between the School for the Deaf and Blind, the Montana Development Center, and the Montana State Hospital. See DNRC ANNUAL REPORT, *supra* note 114, at 5 (map of Montana Trust Lands showing dispersed pattern of ownership). This trust was acquired via a private donation and thus did not originate with a Federal land grant.

Montana's Omnibus Enabling Act requires that proceeds from the sale and permanent disposition of any trust lands, or interest therein, constitute permanent funds for the support and maintenance of public schools and various state institutions for which the lands were granted.<sup>136</sup> Montana's Constitution requires that these permanent funds "shall forever remain inviolate, guaranteed by the state against loss or diversion."<sup>137</sup> At the end of fiscal year 2016, the permanent fund balance was approximately \$636.8 million.<sup>138</sup> Total revenue for 2016 was \$22.1 million.<sup>139</sup> The 2016 revenue was down slightly from past years, due to lower commodity market prices for beef, grain, and oil and gas.<sup>140</sup> Activities on state trust lands reduce the tax burden on Montana's taxpayers by paying an average of 10% of the yearly revenue needed to fund K-12 schools in Montana.<sup>141</sup> Unmistakably, DNRC's management of the school trust lands is a large scale operation with significant impacts in Montana.

*F. Current Market Conditions – Commercial Leasing Program*

Currently an increasing demand exists for commercial development of school trust lands located close to or within urban settings.<sup>142</sup> Therefore, DNRC is further developing its commercial leasing program and increasing its number of commercial leases. In 2016, DNRC executed two new leases and signed three new Options to Lease for potential commercial development, generating a total of \$47,500 in new annual revenues.<sup>143</sup> At the end of 2016, there were 134 active commercial leases on state school trust lands and annual revenues continue to grow each year.<sup>144</sup>

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135. *Id.* at app., tbl.8.

136. *See, e.g.*, Omnibus Enabling Act, § 11, 25 Stat. at 679–80.

137. MONT. CONST. art. X, § 3.

138. DNRC ANNUAL REPORT, *supra* note 114, at 17. The Common Schools Permanent Fund balance was \$585.7 million and the other beneficiaries' Permanent Fund Balance was \$51.1 million. *Id.*

139. *Id.* Revenue for the Common School Permanent Fund was \$20.9 million and revenue for other beneficiaries' Permanent Fund was \$1.2 million. *Id.*

140. *Id.* at 7.

141. Schultz & Butler, *supra* note 23, at 5.

142. Commercial leases include all leases that are not agriculture, grazing, or residential in nature. *See* DNRC ANNUAL REPORT, *supra* note 114, at 15.

143. *Id.*

144. *Id.*

#### IV. CASE LAW: MONTANA COURTS ESTABLISH KEY TRUST PRINCIPLES

Early on, Montana's courts interpreted the requirements of Montana's Omnibus Enabling Act as establishing a trust relationship between the State as trustee and the public schools as beneficiaries.<sup>145</sup> Once the basic principle was established, lawsuits initiated by taxpayers, citizen actions groups, and, more recently, environmental groups, have further clarified the meaning of Montana's trust mandate.

##### A. Montana Courts Affirm the Trust Mandate

Montana courts have affirmed and interpreted the trust relationship established in Montana's Constitution. As early as 1896, in *State ex rel. Bickford v. Cook*, the Montana Supreme Court held that the grant of federal land in the Omnibus Enabling Act to Montana constitutes a trust.<sup>146</sup> The Court noted that its holding was in full accord with a decision from the Washington Supreme Court, a state that was granted lands under the same Omnibus Enabling Act as Montana.<sup>147</sup> It is clear, however, that the Court first relied upon its analysis of the granting language in the Omnibus Enabling Act, and the acceptance by the State of this grant as a trust in its Constitution, to reach its conclusion that the grant of land to Montana was a trust.<sup>148</sup>

Other early cases followed suit. In 1913, the Court decided *State ex rel. Gravely v. Stewart*, a case where the Board of Land Commissioners refused to confirm a particular sale of school trust lands to the highest bidder at auction because the Board determined the price was inadequate and less than the real value of the land.<sup>149</sup> The Court upheld the Board's cancellation of the sale stating:

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

146. *Id.* ("The fund created by the statute is a trust fund established by law in pursuance of the act of congress. . . . The state cannot use the fund created by this act for any purpose except as provided for by the act of congress. The state officers have no control over it, except to carry out the trust relation."). Other early cases confirming the existence of the trust relationship included *State ex rel. Dildine v. Collins*, 53 P. 1114 (Mont. 1898) and *State ex rel. Koch v. Barret*, 66 P. 504 (Mont. 1901). See also *State ex rel. Gravely v. Stewart*, 137 P. 854, 855 (Mont. 1913); *Rider v. Cooney*, 23 P.2d 261, 263, 305 (Mont. 1933).

147. *Bickford*, 43 P. 928.

148. *Id.*

149. *Gravely*, 137 P. at 854–55.

The grant of lands for school purposes by the federal government to this state constitutes a trust; and the state board of land commissioners, as the instrumentality created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it.<sup>150</sup>

Not long after the Court decided *Stewart*, the United States Supreme Court decided its first major case recognizing similar trust principles. In *Ervien v. United States*, New Mexico's land commissioner sought to expend 3% of the income derived from New Mexico's school lands to advertise the resources and advantages of living in New Mexico to settlers and investors.<sup>151</sup> State officials rationalized that such an expenditure was a legitimate expense in the administration of the trust estate, which would result in increased demand for the lands and a resulting increase in the proceeds to the beneficiaries.<sup>152</sup> The Supreme Court disagreed with the State, finding that such actions would be a breach of trust.<sup>153</sup> It held that New Mexico's Enabling Act granted lands to New Mexico for an exclusive purpose and the United States had a right to the exact performance of the conditions it put on the land grant.<sup>154</sup>

Thus, Montana's courts recognized the trust relationship between the State and the beneficiaries established by the Omnibus Enabling Act and the United States Supreme Court held similarly when interpreting a similar but later Enabling Act. For Montana, this recognition meant that citizen initiated lawsuits were instigated to further define the application of the trust mandate in Montana.

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150. *Id.* at 855 (internal citations omitted); *see, e.g., Rider*, 23 P.2d 261; *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800, 803 (Mont. 1999).

151. *Ervien v. United States*, 251 U.S. 41, 47 (1919). New Mexico's Enabling Act included specific language setting up a trust relationship between the state and its beneficiaries, unlike the Omnibus Enabling Act for Montana. Enabling Act of New Mexico and Arizona of 1910, Pub. L. No. 219, §§ 10, 28, 36 Stat. 557, 563, 574.

152. *Ervien*, 251 U.S. at 47.

153. *Id.*

154. *Id.* at 47–48.

### B. Early Citizen Challenges Define Key Trust Principles

Montana's citizens' challenges to state laws or the actions of the State Board of Land Commissioners have generated the core case law interpreting and defining Montana's trust mandate.<sup>155</sup> These include cases initiated by taxpayers, citizens' action groups, and environmental groups, among others. Through such actions, Montanans have demonstrated the enforceability of previously defined trust principles and further refined the nature of the trust.

In 1933, a Montana taxpayer filed an action against the officials constituting the State Board of Land Commissioners and the Commissioner of State Lands and Investments to enjoin the leasing of state lands pursuant to a statute that set a minimum and maximum bid for lease of state grazing lands.<sup>156</sup> The taxpayer argued that the statute allowed the Board to lease state lands at a much lower rental rate than it had previously received and that these actions would result in lower revenue for the public schools and an increased burden on state taxpayers.<sup>157</sup> It was in this case, *Rider v. Cooney*, that the Montana Supreme Court first held that a lease is an "interest" in land and, under the Omnibus Enabling Act, the State must obtain full market value for the lease of state lands.<sup>158</sup>

Similarly, in 1938, a taxpayer filed lawsuit seeking an injunction against the State Board of Land Commissioners to prevent the State from entering into a pooling agreement covering state school trust lands in the exploration of natural gas.<sup>159</sup> In ruling against the taxpayer, the Court, in *Toomey v. State Board of Land Commissioners*, reaffirmed the State was a trustee and the trustee must strictly conform to the directions of the

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155. *Rider*, 23 P.2d 261 (taxpayer challenge to State Board of Land Commissioners lease of state grazing lands); *Toomey v. State Bd. of Land Comm'rs*, 81 P.2d 407 (1938) (taxpayer challenge to State Board of Land Commissioners use of natural gas pooling agreements); *State ex rel. Thompson v. Babcock*, 409 P.2d 808, 809 (1966) (bidder of agricultural lease challenge to State Board of Land Commissioner's bid decision); *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800 (Mont. 1999) (citizen's action group challenge school trust land statutes); *Montanans for the Responsible Use of the Sch. Trust v. Darkenwald*, 119 P.3d 27 (Mont. 2005) (citizen's action group challenge of certain other state school trust land statutes); *Friends of the Wild Swan v. Dep't of Natural Res. & Conservation*, 127 P.3d 394 (Mont. 2005) (environmental group challenge to Board's methodology in evaluating timber sale transactions).

156. *Rider*, 23 P.2d at 262.

157. *Id.* at 263.

158. *Id.* at 265–66; *see also* *In re Powder River Drainage Area*, 702 P.2d 948, 952 (Mont. 1985).

159. *Toomey*, 81 P.2d at 409.

trust agreement.<sup>160</sup> Like the Court in *Rider*, the *Toomey* Court held that leasing lands for a term of years was a disposal of an interest or estate in lands and, thus, the Constitution required the State secure the full market value of such an interest.<sup>161</sup> The Court stated the “matter of primary importance is the realization of the best price possible for the benefit of, and to preserve, the permanent fund.”<sup>162</sup> The Court determined the Board had authority to enter into such pooling agreements and these agreements fully protected the State’s rights in securing its full share of the gas underlying its lands.<sup>163</sup>

*State ex Rel. Thompson v. Babcock* is another citizen initiated case establishing key Montana trust principles. In 1966, a bidder on a state agricultural lease sued the Board of Land Commissioners after the Board awarded an agricultural lease of state trust lands to a former lessee of the lands despite the new bidder’s higher crop-share bid.<sup>164</sup> The Court upheld the Board’s discretionary authority to accept lease terms less than the highest bid to effectuate sustained yield concepts and ensure the long-term strength of the permanent fund.<sup>165</sup>

### C. Concerned Citizen Group Challenges: The Montrust Series

In the late 1990s, Montanans for the Responsible Use of the School Trust (“Montrust”), a citizen’s action group, filed a series of three lawsuits that brought attention to trust land management and further clarified key trust principles in Montana.

#### 1. Montrust I – Strict Interpretation of Trust Duties

In *Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Commissioners* (“Montrust I”),<sup>166</sup> the plaintiff Montrust alleged that fourteen separate state statutes relating to school trust lands were unconstitutional because they were in violation of the obligation of the State to obtain full market value for school trust lands.<sup>167</sup> The district court permanently enjoined eleven of the fourteen

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160. *Id.* at 414.

161. *Id.*

162. *Id.* at 416.

163. *Id.* at 414–15.

164. *State ex Rel. Thompson v. Babcock*, 409 P.2d 808, 809 (1966).

165. *Id.* at 812; *see also* *In re Powder River Drainage Area*, 702 P.2d 948, 952 (Mont. 1985).

166. *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm’rs*, 989 P.2d 800 (Mont 1999).

167. *Id.* at 802, 805.

challenged statutes, and the parties appealed to the Montana Supreme Court.<sup>168</sup> In its opening discussion, the Court confirmed that the language in the Omnibus Enabling Act, incorporated into Montana's Constitution, constituted a trust, for which the state was the trustee of what it called "school trust lands."<sup>169</sup> It further confirmed that the Board of Land Commissioners is the instrumentality created to administer the trust.<sup>170</sup> The Court reiterated that Montana's Constitutional provisions on trust land management limit the power of the legislature to dispose of state lands and that one such limitation is the "trust's requirement that full market value be obtained for trust lands."<sup>171</sup> The *Montrust I* Court then analyzed each of the challenged statutes to determine if they met this constitutional requirement.<sup>172</sup> This article will not address each of the statutes analyzed, but several examples follow.

First, the Court considered a statute that authorized individuals and counties to apply to DNRC for historic right-of-way deeds to provide access to private property or to continue county roads.<sup>173</sup> The statute set the required fee for the right-of-way based on the median values for the classifications of land (grazing, timber, crop, other) in 1972.<sup>174</sup> *Montrust* argued that by fixing the fair market values at 1972 levels, the statute was unconstitutional because it violated the trust's requirement to obtain full market value for school trust lands.<sup>175</sup> The Court agreed and held that the statutory language, which gave DNRC no discretion and required it to use the 1972 values, violated the constitutional trust requirement to obtain full market value.<sup>176</sup>

Second, the Court held the State's rental policy of charging 3.5% of appraised value for cabin site leases, which resulted in below market

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168. *Id.*

169. *Id.* at 803.

170. *Id.*

171. *Id.* (citing Act of May 7, 1932, Pub. L. No. 124, § 1, 47 Stat. 150, 151, *amending* Omnibus Enabling Act, ch. 180, 25 Stat. 676 (providing that "none of such lands . . . shall ever be disposed of . . . unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State")).

172. *Id.* at 804–12; MONT. CODE ANN. § 77-1-130 (2015).

173. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 804.

174. *Id.* at 805.

175. *Id.*

176. *Id.*

rate rentals, violated the trust's requirement that full market value be obtained for school trust lands and interests therein.<sup>177</sup>

Third, in similarly exacting fashion, the Court reviewed a statute that authorized free permits for removal of dead, down, or inferior timber for fuel and domestic purposes to state residents.<sup>178</sup> Montrust alleged the statute violated the State's fiduciary duty of undivided loyalty because it failed to distinguish between commercially valuable timber and timber that lacked commercial value.<sup>179</sup> Citing general trust law principles, the Court again agreed with Montrust for two main reasons.<sup>180</sup> First, it held the statute violated the trust's mandate to obtain full market value. Second, the Court held the statute violated the State's duty of undivided loyalty to the trust when it failed to distinguish between commercially valuable timber and timber that lacked commercial value because it authorized the State to issue firewood permits to third parties without charging them for any commercially valuable wood collected.<sup>181</sup>

Fourth, the Court reviewed a statute that allowed a former lessee on agricultural lands up to sixty days to remove moveable improvements from the state trust lands without any cost to the former lessee.<sup>182</sup> The Court determined that the statute violated the constitutional requirement to obtain full market value because it allowed former lessees to remain on trust lands free of charge and authorized DNRC's practice to postpone new leases without compensation to the trust while the former lessee exercised their removal rights.<sup>183</sup> The statute thus denied the trust's beneficiaries of the full benefit of the trust lands and violated the duty of undivided loyalty by benefiting a third party to the detriment of the beneficiaries.<sup>184</sup>

Finally, the Court reviewed a statute that required new agricultural or grazing lessees to show that they paid former lessees the value of their improvements before DNRC would issue leases.<sup>185</sup> Montrust argued this statute violated the fiduciary duty of loyalty by

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177. *Id.* at 806; MONT. CODE ANN. § 77-1-208. This did not apply to the relevant statute on its face, which the Court determined to be constitutional.

178. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 808; MONT. CODE ANN. § 77-5-211.

179. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 808.

180. *Id.*

181. *Id.*

182. *Id.*; MONT. CODE ANN. § 77-6-304.

183. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 809 (citing *Lassen v. Arizona*, 385 U.S. 458, 468 (1967)).

184. *Id.*

185. *Id.*; MONT. CODE ANN. § 77-6-305.

delaying the leasing of state trust lands for the benefit of someone other than the trust's beneficiaries.<sup>186</sup> The State conceded that delay in leasing may occur but argued that such provisions were part of the Board of Land Commissioners' large discretionary power over trust lands, and was necessary to eliminate needless complications in determining the value of improvements.<sup>187</sup> The Court acknowledged the Board's large discretionary power, but stated "this discretion is not unlimited but must conform to the requirements of the trust."<sup>188</sup> The Court determined that allowing state trust lands to stand idle indefinitely while former and new lessees determine the value of improvements was "inconsistent with the trust's mandate that full market value be obtained for school trust lands," and thus unconstitutional.<sup>189</sup>

Upon review of the Court's determination and analysis relating to each statute involved, it is safe to state that the Montana Supreme Court will strictly interpret the State's trust mandate. The next case in the *Montrust* series, *Montanans for the Responsible Use of the School Trust v. Darkenwald* ("*Montrust II*"), further clarified the boundaries of Montana's trust mandate and recognized the State Board of Land Commissioners' large amount of discretion in carrying out the terms of the trust.<sup>190</sup>

## 2. *Montrust II – Clarifying The Board of Land Commissioners' Discretion*

*Montrust II* involved an allegation by *Montrust* that the Board of Land Commissioners breached its trust duties under the Montana Constitution and Montana's Omnibus Enabling Act by commingling the interest earned on certain school trust assets into the State's General Fund without earmarking or accounting for it.<sup>191</sup> *Montrust* also alleged the State's sale of a 30-year future stream of mineral royalties from school trust land in exchange for an immediate cash infusion violated the

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186. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 810.

187. *Id.*

188. *Id.* (citing *Toomey v. State Bd. of Land Comm'rs*, 81 P.2d 407, 414 (1938); *State ex rel. Thompson v. Babcock*, 409 P.2d 808, 809, 811 (1966)).

189. *Id.*

190. *Montanans for the Responsible Use of the Sch. Trust v. Darkenwald*, 119 P.3d 27 (Mont. 2005).

191. *Id.* at 30–33.

State's trust duties.<sup>192</sup> The district court ruled in favor of the State finding no violations of the State's trust duties.<sup>193</sup> The Montana Supreme Court affirmed.<sup>194</sup>

In affirming the district court, the Court began by reaffirming, rather than fully restating, the State's trust duties as described in *Montrust I*.<sup>195</sup> The Court next reviewed Montrust's contention regarding the commingling of funds.<sup>196</sup> It stated that, in accordance with general trust law, the State's duty as a trustee required "it to be able to prove that the information in the accounting is sufficiently accurate and complete to enable the beneficiaries to protect and defend the equitable or beneficial amount."<sup>197</sup> The Court determined that the State had met this burden because it had accounted for the exact amount of interest and bonuses deposited into the General Fund and the amount of the legislative appropriation from the General Fund to public schools, which far exceeded any interest or bonuses derived from the trust corpus.<sup>198</sup> Montrust also failed to allege any particular accounting practice depriving public schools of their distributable income or that the State somehow diverted income away from public schools to non-trust purposes.<sup>199</sup> As a result, the Court determined that Montrust failed to prove any financial harm or breach of trust.<sup>200</sup> The Court further determined that, under such circumstances, the commingling of funds did not constitute a breach of trust *per se* simply by virtue of the trust's existence.<sup>201</sup>

The Court next reviewed a State statute allowing the State to sell a thirty-year future stream of mineral royalties from school trust land in exchange for an immediate cash infusion.<sup>202</sup> Montrust argued that the

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192. *Id.* The general fund is the common fund into which the State deposits all revenues unless the Legislature specifically designates that revenues be deposited into a different account. *Id.* at 31.

193. *Id.* at 33.

194. *Id.* at 41.

195. *Id.* at 33.

196. *Id.* at 33–35.

197. *Id.* at 34.

198. *Id.* at 34–35.

199. *Id.*

200. *Id.*

201. *Id.* at 35.

202. *Id.* at 35–41. The statute authorized DNRC to borrow up to \$75 million from the coal trust severance tax permanent fund for thirty years to buy mineral production royalties owned by the school trust to enhance the short-term distributable revenue from the permanent fund for the benefit of public schools. *Id.* at 31. The State deposits the loan amount into the permanent fund to increase the amount of distributed revenue to beneficiaries and then dedicates the future stream

future stream of mineral royalties should be viewed as a sale of the school trust lands that cannot be disposed of pursuant to Montana's Constitution and Section 11 of Montana's Omnibus Enabling Act.<sup>203</sup> The Montana Supreme Court disagreed, stating that the State did not dispose of any permanent interest in land, "rather, [the State] has exercised its discretion to enter into a loan agreement to exploit mineral production—an agreement for which it received full market value."<sup>204</sup> The Court held that the statute itself did not facially violate the trust because nothing in the plain language abrogated the trust's mandate to obtain full market value for school trust lands.<sup>205</sup> The Court further held that the State's method of determining full market value was proper and did not breach the State's trust duty.<sup>206</sup>

Next, Montrust alleged the State violated Section 11 of the Omnibus Enabling Act when it failed to perform independent appraisals to determine full market value of the future stream of mineral royalties.<sup>207</sup> Here, the Court determined that the method of establishing value was not a breach of trust because the Board had the power to determine the method by which to ascertain full market value.<sup>208</sup> The Court acknowledged the Board's duty to ensure the trust receives full market value from the sale or disposal of any interest or estate in school trust land, but stated that "[o]n this matter we will not substitute our opinion for the Land Board's opinion and we will not control the discretion of the board unless it appears that the action of the board is

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of mineral royalties to servicing the loan over a thirty-year period. *Id.* at 36. The State also distributes any surplus cash flow to the trust beneficiaries. *Id.* Once the state repays the loan, it would again deposit future royalties directly into the permanent fund. *Id.*

203. *Id.* at 36.

204. *Id.* (citing *Hughes v. State Bd. of Land Comm'rs*, 353 P.2d 331, 336 (Mont. 1960) (upholding a statute authorizing the Land Board to lease state lands for underground storage of natural gas); *Rist v. Toole Cnty.*, 159 P.2d 340, 342 (Mont. 1945) (Royalty means a share of the produce or profit paid to the owner of property, which is different from a share or interest in the property itself.); *Toomey v. State Bd. of Land Comm'rs*, 81 P.2d 407, 414 (1938) (Land Board's authority to enter into a pooling agreement with private parties is well within the Board's discretion as it constitutes one of the types of arrangements whereby oil and gas possibilities may be exploited pursuant to § 11 of the Omnibus Enabling Act.)).

205. *Darkenwald*, 119 P.3d at 37.

206. *Id.* at 37–38.

207. *Id.* at 38.

208. *Id.* (citing *Hughes*, 353 P.2d at 338–39 (internal quotations omitted) (upholding the State's determination of full market value using a computation of the present value of the royalty interest of the State based upon the number of cubic feet of recoverable gas remaining in the ground)).

arbitrarily and, in effect, fraudulent.”<sup>209</sup> The Court, however, cautioned the State that an independent appraisal represents the most reliable method of ensuring that the trust receives full market value.<sup>210</sup> The Court also noted that it would not hesitate to overturn a transaction in which the State did not receive full market value.<sup>211</sup>

Montrust further alleged that the distribution of the future stream of mineral royalties improperly favored present beneficiaries to the detriment of future beneficiaries in violation of the State’s trust duties.<sup>212</sup> The Court distinguished *Montrust I*, because the State in *Montrust I* had breached its duty of undivided loyalty by providing trust assets to third-parties for less than full market value.<sup>213</sup> The Court held that the “trustees enjoy far broader discretion in this context than the limited discretion afforded in the breach of duty of undivided loyalty situation described in *Montrust I*.”<sup>214</sup> The Court determined that the Land Board considered its duty to current and future beneficiaries and concluded that the particular distribution helped both.<sup>215</sup> It stated, “Montrust’s disagreement with the Land Board over its policy of shifting some income from long-term to short-term beneficiaries provides an insufficient basis upon which to overturn its decision, particularly where the transaction does not deplete the permanent fund, but only causes it to grow at a slower rate.”<sup>216</sup> In short, the Court determined that the State did not violate its trust duties through its sale of the future stream of mineral royalties.<sup>217</sup>

The next case in the Montrust series, *Montrust III*, alleged violations of the State’s fiduciary duties relating to its cabin site leasing program. The parties reached a settlement, however, and therefore the

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209. *Id.* at 38 (internal quotation omitted).

210. *Id.* at 34

211. *Id.* at 38.

212. *Id.* at 39.

213. *Id.*

214. *Id.* (citing State ex rel. Thompson v. Babcock, 409 P.2d 808 (1966) (accepting “the Land Board’s discretionary authority to accept lease terms less than the highest bid in order to effectuate sustained yield concepts and ensure land-term strength of the trust corpus”). The Court also noted that other jurisdictions have upheld regulations that, in effect, constrained the ability of present beneficiaries from exploiting resources on school trust lands, which in effect favored future beneficiaries. *Id.* (citing Colo. State Bd. of Land Comm’rs v. Colo. Mined Land Reclamation Bd., 809 P.2d 974, 985 (Colo. 1991); Nat’l Parks and Conservation Assoc. v. Bd. of State Lands, 869 P.2d 909, 923 (Utah 1993)).

215. *Id.* at 40–41.

216. *Id.* at 41.

217. *Id.*

case did not result in a court decision. Despite the lack of a final court decision, the case remains relevant to examining the State's trust responsibilities.

### 3. Montrust III – Settlement Based on Established Full Market Value Principles

In 2012, Montrust initiated a third lawsuit against the State, referred to as *Montrust III*.<sup>218</sup> In *Montrust III*, Montrust alleged that a 2011 statute, and its implementing administrative rules, violated the State's fiduciary, trust, and Constitutional duties, because it set certain fee calculation methods and directed DNRC to conduct a bidding process for currently vacant cabin site lots with an initial minimum bid of 2% of the appraised value of the lot. Montrust argued this failed to secure for the trust a full market value rate of return.<sup>219</sup> The parties settled the litigation, agreeing to a permanent injunction of the challenged statute and associated rules.<sup>220</sup> Thus, *Montrust III* did not directly create new case law relating to Montana's trust principles. The settlement demonstrates, however, that the State understands its obligation to obtain full market value for leases.

The settlement agreement required the State to administer cabin site lease rates under its terms and administrative rules created to implement those terms. Specifically, under the terms of the settlement the State agreed to offer all vacant cabin site leases for competitive bid at a minimum rate of 6.5% of the appraised value of the lot, which rate could be reduced to 5% if bids were not received within sixty days.<sup>221</sup> In a neighborhood where vacancy rates are higher than 30%, DNRC is allowed to offer the leases at less than 5%, but not less than 3.5% of the appraised land value or \$800.00 per year, whichever is higher.<sup>222</sup> The State also must also renew all existing leases at a rate of no less than 5% of the appraised land value or \$800.00, whichever is greater.<sup>223</sup> In

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218. See Decision and Final Judgment On Plaintiffs' Motion for Summary Judgment, *Montanans for the Responsible Use of the Sch. Trust v. Montana* (Mont. 1st Jud. Dist. Ct. Nov. 10, 2015) (No. 2012-39); see also *Montrust III Settlement Agreement, Frequently Asked Questions*, DNRC (Nov. 10, 2015), <http://dnrc.mt.gov/divisions/trust/docs/real-estate-management/Cabin%20Site%20Lease%20-%20Information%20Docs/miii-faq-for-mailing-november-9-2015.pdf>.

219. Decision and Final Judgment On Plaintiffs' Motion for Summary Judgment, *supra* note 218, at 5–6.

220. *Id.* at 7.

221. *Id.* at 8.

222. *Id.*

223. *Id.*

addition, every two years the Land Board must review the data from all cabin site leases and complete a formal review by an economist to consider whether to revise the rates.<sup>224</sup> Finally, the Land Board committed “to setting the rental rates for cabin site leases so as [to] capture for the trust beneficiaries the full market value of such leases in order to maximize the cumulative long-term revenue from cabin sites without creating vacancy rates that are detrimental to the best financial interest of the trust beneficiaries, as required by the Montana Constitution and Enabling Act.”<sup>225</sup> In sum, the *Montrust* series of cases brought a new focus to trust land management in Montana. These cases also served to clarify key principles of trust land management.

#### *D. Montana Supreme Court Further Refines Key Trust Principles*

In 2003, Friends of the Wild Swan, an environmental advocacy organization, challenged the Board of Land Commissioners’ methodology in evaluating timber sale transactions, claiming the Board was required under its powers and duties as a trustee to make a harvest-specific accounting of State timber sales.<sup>226</sup> Specifically, Friends of the Wild Swan argued that without the harvest-specific accounting, the Board’s requirement pursuant to Montana Code Annotated § 77-1-202, to “secure the largest measure of legitimate and reasonable advantage to the state” was meaningless.<sup>227</sup> The Board had approved the timber sale at issue in the summer of 2003 without a harvest-level accounting because it specifically evaluated costs and benefits at the programmatic, or year-end, level only.<sup>228</sup>

The Montana Supreme Court held that the harvest-level accounting of proposed timber sales was not required by law.<sup>229</sup> The Court noted the additional information may be advantageous and would undoubtedly help the Board in its evaluation of the timber sales.<sup>230</sup> The question was not whether such accounting would be preferable or desirable, but whether it was required by law.<sup>231</sup> The Court examined the Board’s broad, but not unlimited, discretion over the administration of

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224. *Id.* at 9.

225. *Id.* In addition, attorney’s fees were awarded to both *Montrust* and the Board of Regents of Higher Education. *Id.*

226. *Friends of the Wild Swan v. Dep’t. of Natural Res. & Conservation*, 127 P.3d 394, 396 (Mont. 2005).

227. *Id.*

228. *Id.*

229. *Id.* at 400.

230. *Id.* at 399.

231. *Id.* at 400.

school trust lands.<sup>232</sup> The Court stated, “it is clear that the Board’s obligation as trustee is a complex one, that the obligation is governed by constitutional and statutory provisions which grant authority to the Board over the trust, and that these provisions grant ‘large’ or ‘considerable’ discretion to the Board in the performance of its duties.”<sup>233</sup> In addition, the Court stated that the Board’s status as a state agency also entitled it to respectful consideration of its long and continued course of consistent interpretation, which could only be overcome by “compelling indications.”<sup>234</sup> The Court determined no evidence existed that the Board could not secure the largest measure of benefit without the harvest-level accounting of timber sales.<sup>235</sup> Given the discretion afforded to the Board in the administration of the trust and as a state agency, the Court could not conclude that the harvest-specific accounting requirement was required by Montana Code Annotated § 77-1-202.<sup>236</sup>

*E. Brief Summary of Montana’s Trust Mandate and Key Principles*

After over a century of case law establishing, interpreting, and refining Montana’s constitutional trust mandate, three key principles have emerged. The first is that the State, as a trustee, has a fiduciary duty to the beneficiaries of the trust. The trust must be administered to secure the largest measure of legitimate and reasonable advantage to the State while at the same time providing for the long-term financial support of education.<sup>237</sup> In doing so, the State must receive full market value for the disposition of any estate or interest in school trust lands.<sup>238</sup> Specifically, according to a Montana Attorney General Opinion, the State must “actually compensate its school trust in money” for the full market value of its lands or interest therein.<sup>239</sup>

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232. *Id.* at 397.

233. *Id.*

234. *Id.*

235. *Id.* at 399.

236. *Id.*

237. MONT. CODE. ANN. § 77-1-202 (2015); State ex rel. Gravely v. Stewart, 137 P. 854, 855 (Mont. 1913) (internal citations omitted); *see also* Rider v. Cooney, 23 P.2d 261, 265–66 (Mont. 1933); Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm’rs, 989 P.2d 800, 803 (Mont 1999).

238. Omnibus Enabling Act of 1889, ch. 180, § 11, 25 Stat. 676, 679–80; *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 805–06.

239. *See* Mont. Att’y Gen. Op. 2, 36 Op. Att’y Gen. 287 (1976); *see also* Woodgerd & McCarthy, *supra* note 108, at 125–26 (“In 1976, Montana Attorney General Robert Woodahl, at the request of the Acting Commissioner of State Lands, issued an opinion concerning the Montana Natural Areas Act of 1974. The opinion

The second key principle is that the State, as a trustee, owes a duty of undivided loyalty to the trust beneficiaries.<sup>240</sup> This duty of undivided loyalty “is jealously insisted on by the courts which require a standard with a ‘punctilio of an honor the most sensitive.’”<sup>241</sup> Indeed, “[a] trustee must act with the utmost good faith toward the beneficiary, and may not act in his own interest, or in the interest of a third person.”<sup>242</sup> In addition, the State may not advantage one beneficiary over another, but must deal impartially with them.<sup>243</sup>

And finally, in carrying out its role as trust administrator, the Board is governed by constitutional and statutory provisions that grant it considerable discretion in the performance of its duties.<sup>244</sup> A court will not control this discretion unless it is arbitrary and, in effect, fraudulent.<sup>245</sup> The Board’s discretion is limited by the requirements of the trust including Montana’s constitutional requirement that the State obtain full market value for the disposition of any estate or interest in school trust land.<sup>246</sup> Yet, the Board may have the discretion to accept less than the highest bid for an interest in land to effectuate sustained

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stated: So that the state will not commit a breach of trust under the Omnibus Enabling Act and Montana Constitution, the state must actually compensate its school trust in money for the full appraised value of any school trust lands designated as or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974. Such compensation can only be avoided by securing the consent of Congress.”).

240. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 808–10.

241. *Id.*

242. *Id.* at 808 (citing *Wild W. Motors, Inc. v. Lingle*, 728 P.2d 412, 415–16 (Mont. 1986)).

243. See *Montanans for Responsible Sch. Trust v. State*, No. 97-134, 1998 Mont. Dist. Lexis 730, at \*7 (Apr. 1, 1998) (“[T]he State may not provide favoritism to some beneficiaries if such conduct does not benefit the trust as a whole.”).

244. *Montanans for the Responsible Use of the Sch. Trust v. Darkenwald*, 119 P.3d 27, 36 (Mont. 2005); *Friends of the Wild Swan v. Dep’t. of Natural Res. & Conservation*, 127 P.3d 394, 397 (Mont. 2005); *State ex rel. Thompson v. Babcock*, 409 P.2d 808, 811 (1966) (“The State Board of Land Commissioners has considerable discretionary power . . . . If the ‘largest measure of legitimate and reasonable advantage’ from the use of state lands is to accrue to the state, then the State Land Board must, necessarily, have a large discretionary power,” which is “inherent in the general and discretionary powers conferred by the constitution, and necessary for the proper discharge of its duties.”).

245. *Darkenwald*, 119 P.3d at 38.

246. *Montanans for the Responsible Use of the Sch. Trust*, 989 P.2d at 810; *Babcock*, 409 P.2d at 811; *Toomey v. State Bd. of Land Comm’rs*, 81 P.2d 407, 414 (1938).

yield concepts and ensure the long-term strength of the permanent fund.<sup>247</sup>

#### V. CONCLUSION

Montana's state school trust lands have a unique history and legal framework. Montana's courts interpret Montana's Omnibus Enabling Act, Constitution, and statutory framework to define the trust relationship and principles under which state school trust lands are managed. The management of school trust lands, as well as the income derived from such lands is, and will remain, immensely important to Montana.

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247. See *Babcock*, 409 P.2d at 812; see also *In re Powder River Drainage Area*, 702 P.2d 948, 952 (Mont. 1985).