

RESOLVING THE PUBLIC LAND PARADOX: EXPOSING LANDLOCKED SCHOOL TRUST LANDS AS A BREACH OF TRUST

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INTRODUCTION

The Public Land Paradox: if land is public and the public cannot access it, is it public land? The public land paradox applies to 6.35 million acres of state lands in the Western United States.¹ In Montana, 1.56 million acres are

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1. See THEODORE ROOSEVELT CONSERVATION P'SHIP, INACCESSIBLE STATE LANDS IN THE WEST 2, 5 (2019), https://www.trep.org/wp-content/uploads/2019/11/2019-onX-TRCP-Report_for_web.pdf (defining the Western United States as Washington, Oregon, California, Idaho, Arizona, Utah, Arizona, New Mexico, Colorado, Wyoming, and Montana).

“landlocked”²—land that is “entirely landlocked by private lands, [thus] preventing legal access for outdoor recreation without permission from a neighboring landowner.”³ The vast majority of these lands are school trust land grants—the remainder are state forests, wildlife management areas, and state parks.⁴ The Montana Constitution requires that these lands “be held in trust for the people” (the Trust).⁵ An exploration of the purpose and terms of the Trust reveal that the State of Montana is currently in breach of its duties as trustee of these school trust lands.

Though courts, bureaucrats, and legislators have advanced two different conceptions of the purpose of the Trust, under either purpose the state has an obligation to unlock “landlocked” school trust lands and provide recreational access to those lands. The terms of the Trust explicitly provide the state with the means necessary to consolidate isolated parcels of land into accessible and more valuable larger blocks of school trust lands.⁶ If the state fails to make reasonable efforts to use those means, the state will be in breach of its duties. This article resolves a sizable part of the public land paradox by showing that school trust lands in Montana (as well as in states who joined the Union under the same or earlier enabling acts as Montana) must be made accessible to the public for recreational uses per the terms and purpose of the Trust in Montana.

The resolution of this paradox could not be timelier: Montana has sold less than 10% of the more than 5 million acres of school lands originally granted to the State.⁷ This means that any changes to how the State manages school trust lands will have wide-reaching effects on pristine parts of Montana. And, Montana’s lands are under increasing and immediate threat from increased wildfires,⁸ pressure to develop,⁹ and demand for outdoor

2. *Id.* at 6.

3. *Id.* at 1.

4. *See id.* at 2 (noting that of the 6.5 million acres of landlocked state lands in Western states, 95% are school trust lands).

5. MONT. CONST. art. X, § 11(1).

6. *See infra* Section II.

7. PATRICK H. BEDDOW, SCHOOL TRUST LANDS-MONTANA AND LAND BOARD COMMISSIONERS (Dec. 2020); Amelia Pak-Harvey, *Opportunity Lost: Nevada Began with Millions of Acres of School Trust Land to Help Pay for Public Education. What Happened to them?*, Las Vegas Rev. J. Local Educ. (Dec. 21, 2019), <https://www.reviewjournal.com/local/education/opportunity-lost-nevadas-school-trust-lands-sold-off-over-150-years-1905104/#:~:text=Opportunity%20lost%3A%20Nevada's%20school%20trust,public%20education%20is%20now%20gone>.

8. Kimiko Barrett, *Montana Wildfire Risk is Widespread and Growing*, HEADWATERS ECON., (Oct. 26, 2020), <https://headwaterseconomics.org/natural-hazards/montana-wildfire-risk-widespread>.

9. *See, e.g.*, Todd Wilkinson, *Is High-Flying Bozeman, Montana Losing the Nature of Its Place?*, MOUNTAIN J. (Nov. 24, 2020), <https://mountainjournal.org/will-human-population-growth-destroy-the-american-serengeti> (providing an example of developmental pressures in Montana).

recreation.¹⁰ The State's aversion to selling school trust lands has not prevented Montana from amassing significant savings for schools. The permanent fund, comprised of revenue generated by the school lands, has a current balance of \$700 million.¹¹

This article argues that the purpose of the Trust is two-fold: to maximize revenue (as suggested by the U.S. Supreme Court in a case inapplicable to Montana) or to "secure the largest measure of legitimate and reasonable advantage to the state" (as specified by statute and supported by the Montana Constitution, the intent of the drafters of the Montana Constitution, and the text of the 1889 Enabling Act). The State must unlock "landlocked" state trust lands to realize either purpose. The terms of the Trust explicitly allow for the State to fulfill that mandate. As long as the State neglects to use legal means to unlock these lands, Montana is in breach of its duties as trustee.

Part I of the article explains the origin of landlocked school trust lands. Part II examines how the State of Montana has organized itself to fulfill its duties as trustee of the State's school trust lands. Part III explores two different theories for the purpose of the Trust. Part IV details the terms of the Trust—the tools at the disposal of the State to realize the purpose of the Trust. Part V specifies that under either purpose of the Trust, the State has an obligation to unlock "landlocked" school trust lands.

I. ORIGIN OF LANDLOCKED SCHOOL TRUST LANDS IN MONTANA AND THE WEST

The checkerboard pattern of land distribution, which started in the 18th century, facilitated public lands being eventually enclosed by private lands—landlocked. In passing the General Land Ordinance of 1785, Congress funded a massive surveying effort—the surveyed land was then placed into the grid system. The General Land Ordinance also provided for the sale of western lands and the development of a land grant program intended to eventually support the public school system in western states.¹² The Northwest Ordinance of 1787 set the terms for when western territories could pursue statehood and, upon fulfillment of various procedural and substantive

10. See, e.g., Megan Lawson, *The Outdoor Recreation Economy by State*, HEADWATERS ECON. (Nov. 18, 2021), <https://headwaterseconomics.org/economic-development/trends-performance/outdoor-recreation-economy-by-state/> (reporting that 4.3% of Montana's GDP in 2020 came from outdoor recreation—the highest percentage of any state); see also Liz Rose, *40% of Most Important Colorado Elk Habitat is Affected by Trail Use*, THEODORE ROOSEVELT CONSERVATION P'SHIP. (Sept. 27, 2022), <https://www.trcp.org/2022/09/27/40-important-colorado-elk-habitat-affected-trail-use/> (reporting that in nearby Colorado the presence of recreational trails and the use of them has left nearly 40% of high-priority elk habitat at risk of being abandoned).

11. BEDDOW, *supra* note 7, at 2.

12. *Id.* at 1.

requirements, join the Union.¹³ Congress passing an enabling act marked the final step on a territory's path to statehood and the rights and obligations that came with that recognition.¹⁴

The Enabling Act of 1889 brought Montana, North Dakota, South Dakota, and Washington State into the Union. The Act made state-specific grants of federal lands for the purpose of financially supporting public schools. Specifically, the Act granted the sixteenth and thirty-sixth section of each township in the state.¹⁵ Montana received a grant of more than 5 million acres of school trust lands.¹⁶ No federal lands existed when the first 16 states entered the Union. States that subsequently joined the Union, however, had a comparatively diminished tax base because the federal government owned large portions of land within their respective borders.¹⁷ Revenue from leasing, selling, and otherwise managing school lands was meant to make up for that disadvantage by financially supporting “worthy objects helpful to the well-being of the people of [Montana] as provided in The Enabling Act.”¹⁸

However, lands were not always distributed in an orderly fashion. Around the 1850s, the federal government launched a process of claiming and enforcing legal title to westward lands.¹⁹ This process included making grants of specific sections of the aforementioned grid system to railroad companies and homesteaders.²⁰ The government distributed lands in a hurried pace to populate the frontier as quickly as possible and to establish property rights over western lands.²¹ One manifestation of this rush was the occasional unavailability of the designated township sections—sixteen and thirty-six—for school lands. The Secretary of Interior would approve the granting of alternative lands to make up for the shortage.²²

The general absence of planning left unanswered questions about how the resulting land distribution among private and public owners would affect

13. NW. ORDINANCE, ch. 8, 1 Stat. 51 (1787).

14. *Id.*

15. Enabling Act, ch. 180, § 11, 25 Stat. 676 (1889), amended by Act of May 7, 1932, 47 Stat. 150 (1932), amended by Act of October 16, 1970, 84 Stat. 987 (1970); Montanans for the Responsible Use of the Sch. Tr. v. State *ex rel.* Bd. of Land Comm'rs, 296 Mont. 402, 407 (1999).

16. *State Land Income Must Continue To Aid Schools, Says Mrs. Colburg*, TRIB. CAP. BUREAU (Jan. 28, 1972), <http://www.umt.edu/media/law/library/MontanaConstitution/brown/Const.%20Conv.%20newspaper%20clippings%20ocr.pdf> (reporting that 5.8 million acres had been granted); see also JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 20-21 (Univ. Press of Kan. 1996) (reporting that 5.1 million acres had been granted).

17. SOUDER & FAIRFAX, *supra* note 16, at 19.

18. MONT. CODE ANN. § 77-1-202 (2021).

19. Douglas W. Allen, *Establishing Economic Property Rights by Giving Away an Empire*, 62 J. L. & ECON. 251, 252 (2019).

20. *Id.*

21. *Id.*

22. BEDDOW, *supra* note 7, at 2.

access and development.²³ The federal government assumed that many grants to private landowners would eventually return to public hands, but that assumption failed as private landowners found ways to perpetually hold onto their grants.²⁴ It is relatively easy to see why the government did not intend for school trust lands to become surrounded by private lands. Isolated lands are less valuable, so a grant of isolated lands would not align with the grant's purpose of financial support for schools. Despite the government's hopes and plans, the overall scheme of land distribution "created a complex patchwork of interlocking and overlapping federal, state, and private land ownership patterns" and millions of acres of landlocked public lands in Montana and the rest of the West—most of which was, and is, school trust lands.²⁵

II. THE STATE OF MONTANA AS TRUSTEE OF SCHOOL TRUST LANDS

Though the 1889 Enabling Act made no mention of the respective states serving as trustees over the granted land,²⁶ Article X § 11 of the Montana Constitution established a trust relationship, with the State as trustee and the land as the Trust corpus.²⁷ Only the 1910 Enabling Act, applicable to New Mexico and Arizona, designated the respective state governments as trustees—a trust relationship grounded in federal law, rather than state law.²⁸

Montana statutory provisions establish the parts of the state government responsible for serving as trustee. For instance, the State assigned the Land Board (also referred to as "Board") the task of fulfilling the State's obligations as trustee.²⁹ The Department of Natural Resources and Conservation (DNRC) helps the Land Board fulfill its duties by implementing the decisions made by the Board.³⁰ Both the Land Board and the DNRC receive guidance on the proper interpretation of these statutes

23. Allen, *supra* note 19, at 252–53.

24. Robert S. Henry, *The Railroad Land Grant Legend in American History Texts*, 32 MISS. VALLEY HIST. REV. 171, 171–94 (1945), reprinted in *THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN* 121–44 (Vernon Carstensen ed., 2nd prt. 1968).

25. Charles L. Kaiser & Charles A. Breer, *Legal Issues Presented by Checkerboard, Inholding, and Split Estate Lands*, 40A ROCKY MTN. MIN. L. INST. 9, Introduction (1995); see THEODORE ROOSEVELT CONSERVATION P'SHIP, *supra* note 1, at 2 (noting that 95% of the 6.35 million acres of landlocked Western state lands are school trust lands).

26. Enabling Act, ch. 180, § 11, 25 Stat. 676 (1889), amended by Act of May 7, 1932, 47 Stat. 150 (1932), amended by Act of October 16, 1970, 84 Stat. 987 (1970).

27. MONT. CONST. art. X, § 11(2).

28. Sean E. O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, a Hobson's Choice?*, 8 N.Y.U. ENV'T L.J. 163, 185 (1999).

29. MONT. CODE ANN. § 77-1-202 (2021).

30. Alex Sienkiewicz, *A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land*, 67 MONT. L. REV. 65, 69 (2006); See MONT. CODE ANN. § 77-1-301 (2021) (defining how the DNRC is to implement Board decisions).

from other government actors.³¹ If the Land Board does not properly interpret those statutes, then it may fail to perform its trustee duties.³²

The Montana Supreme Court has analyzed the Trust and contributed to the establishment of its terms and purpose. Beyond the constitutional and statutory obligation imposed on the Land Board as trustee, the court in *Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners* (MONTRUST I) determined that the Board must also comply with the traditional duties of a trustee.³³ The lower court in MONTRUST I explained that the Montana Trust Code contains a full list of those duties which include, but are not limited to: absolute fidelity to the trust; undivided loyalty toward the beneficiary; prudence, diligence, and independent judgment in managing trust assets; duty to make the trust financially productive; and accountability to the beneficiary.³⁴ The Montana Supreme Court determined the Board and DNRC had discretionary power to manage the trust. However, this power was not without its limitations. The Court held that the Land Board and DNRC must comply with the terms and purpose of the trust, in addition to applicable constitutional provisions.³⁵

However, the court has occasionally muddied the waters as to what law—federal, state, or both—should guide the State when it attempts to discern what it must do to fulfill its duties as trustee. The MONTRUST I Court concluded that the “federal government’s grant of [the sixteenth and thirty-sixth sections of each township] to Montana constitutes a trust.”³⁶ The Court reached this conclusion without citation. If the Court had looked at the text of the 1889 Enabling Act, and seen the absence of any “trust” language in that Act, the Court may have clarified that state law (not federal law) assigns the State the responsibility of managing the lands granted by the federal government as a trust.³⁷ This lack of clarity may explain why the State has been confused as to the purpose of the Trust. The 1910 Enabling Act,

31. See, e.g., Memorandum from Todd Everts, Env’t Quality Council on Legal Analysis Regarding State Land Board and DNRC Authority in Relation to HJR 57 to EQC Members 1 (Mar. 6, 2008).

32. See *id.* at 3 (misstating the Montana Constitution as permitting the board to dispose of trust land only at full market value); MONT. CONST. art. X, § 11(2).

33. *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm’rs*, 989 P.2d 800, 805 (Mont. 1999); *Wild West Motors, Inc. v. Lingle*, 728 P.2d 412, 415 (Mont. 1986) (specifying that the Board has an undivided loyalty to the trust).

34. See *Montanans for Resp. Sch. Trust v. State*, 1998 Mont. Dist. LEXIS 730, *5-6 (noting also that the Montana Trust Code “generally applies to all trusts and invokes the common law of trusts”).

35. *State ex rel. Evans v. Stewart*, 161 P. 309, 312 (Mont. 1916); *Toomey v. State Bd. of Land Comm’rs*, 81 P.2d 407, 415 (Mont. 1938); *State ex rel. Thompson v. Babcock*, 147 P.2d 409, 415 (Mont. 1944).

36. *Montanans for the Responsible Use of the Sch. Tr.*, 989 P.2d at 805.

37. Cf. *Enabling Act*, ch. 180, § 11, 25 Stat. 676 (1889), *amended by Act of May 7, 1932*, 47 Stat. 150 (1932), *amended by Act of October 16, 1970*, 84 Stat. 987 (1970).

applicable only to New Mexico and Arizona, sets forth a different purpose than the corresponding text in the Montana Constitution. The Court, however, clearly identified the Montana Constitution and the 1889 Enabling Act as the source of the terms of the trust in Montana.³⁸

The ratification of the 1972 Montana Constitution did not technically alter those terms.³⁹ However, reviewing the Constitutional Convention's transcripts is necessary to understand how the delegates (the Framers of the Constitution) interpreted the trust's terms and purpose. When interpreting constitutional provisions, such as the terms of the school land trust, the Montana Supreme Court has prioritized the intent of the Framers—even when that intent does not entirely match the unambiguous text of the provision.⁴⁰ Though the Court acknowledges the importance of the plain meaning of the text, the Court has held that even in the context of clear and unambiguous language they must consider: the historical and surrounding circumstances under which the Framers drafted the Constitution; the nature of the subject matter under consideration; and the objectives of their actions.⁴¹

The Framers of the 1972 Montana Constitution intended to take significant and concrete steps to protect Montana's environment.⁴² In fact, the Framers set out to provide preventative language and protections relating to the State's pristine environment.⁴³ The Constitutional Convention delegates manifested that intent in several ways. For instance, they created an inalienable right "to a clean and healthful environment."⁴⁴ When debating the purpose and terms of the school trust lands, delegates noted that the State had long ago veered from what the federal government likely intended the state to do with the lands—sell them.⁴⁵ Several delegates viewed this variance in a favorable light because the delay in selling the land meant that the State retained more of the school trust lands.⁴⁶ In the words of Delegate

38. Montanans for the Responsible Use of the Sch. Tr., 989 P.2d at 803.

39. See Everts, *supra* note 31, at 3 (concluding that that 1972 Montana Constitution continued the prior terms of the trust).

40. See *Nelson v. City of Billings*, 412 P.3d 1058, 1064 (Mont. 2018) (explaining that the Framers' intent controls the court's interpretation).

41. *Id.*

42. See, e.g., Mont. Const. Convention Proc. Verbatim Transcript, Vol. V, Mont. Legis. & Legis. Council 1217, 1240 (Mar. 9, 1972) (urging Framers to aggressively approach environmental protections).

43. See *Montana Env't Info. Ctr. v. Env't Quality*, 988 P.2d 1236, 1248–49 (Mont. 1999) (reviewing and summarizing constitutional convention transcripts).

44. MONT. CONST. art. II, § 3.

45. Mont. Const. Convention Editing and Publ'g Comm., Mont. Leg., Montana Constitutional Convention, Verbatim Transcript, March 9, 1972–March 16, 1972, Volume V 1825, 1995-96 (1981), https://courts.mt.gov/external/library/mt_cons_convention/vol3.pdf.

46. See *id.* at 1995 (containing remarks delivered by Delegate Cate in favor of continuing not to sell state lands).

Cate, these trust lands are “the greatest single asset” in the entire state.⁴⁷ Many delegates also recognized that the trust lands would need to continue to be protected to account for an increase in demand for recreational lands as more people moved into Montana.⁴⁸ And, delegates wanted to afford the Land Board the discretion necessary to select the means best suited to the realization of these goals.⁴⁹

Delegates explicitly wanted the Land Board to have the discretion necessary to deal with landlocked parcels of school trust lands.⁵⁰ The delegates reasoned that this discretion was necessary because of the variable value of landlocked lands, which may require the State quickly dispose or exchange the lands in order to accumulate larger-consolidated blocks-of-land.⁵¹ The delegates also lamented that isolated parcels of school trust lands are “absolutely impossible to manage.”⁵² Isolated parcels have diminished value because accessing such land requires a resource-intensive process of seeking the requisite easements and rights-of-way.⁵³

The importance of access to the outdoors explicitly and implicitly influenced how delegates discussed management of school trust lands. Some delegates openly encouraged selling trust lands to local governments intent on turning those lands into parks.⁵⁴ Other delegates advocated for the Board to continue to hang onto the land for as long as possible.⁵⁵ Still, other delegates noted that leasing the land—and thereby subjecting it to some sort of extractive use—may expose the State to undue risks. These risks include: the lessee being unable to pay rent;⁵⁶ the lease terms disproportionately favoring the lessee;⁵⁷ and out-of-state corporations becoming the lessee and having little regard for the value of the land and its importance to the state.⁵⁸

In debates, not directly concerning school lands but related to the outdoors, delegates expressed grave concerns about policies that may hinder access to public lands. One delegate warned of the “wealthy Californians and wealthy Easterners [who had come to Montana] and bought up huge chunks of . . . Montana land along [the] rivers” with the intent of denying Montanans

47. *See id.* (containing remarks delivered by Delegate Blaylock that supports the preservation of state lands).

48. *Id.* at 1996–97.

49. *Id.* at 1996.

50. *Id.*

51. *Id.* at 1996–97.

52. *See id.* at 2001 (detailing an exchange between delegates about the need for flexibility when managing isolated state trust lands).

53. *See id.* (describing the innate drawbacks of isolated versus non-isolated parcels).

54. *Id.* at 1997.

55. *See, e.g., id.* at 1996 (comparing the volatility of money to that of real property over long term).

56. *Id.* at 2001.

57. *Id.* at 1996.

58. *Id.* at 1995.

recreational use of those lands.⁵⁹ Another delegate pointed out that the State's recreational lands contributed substantial economic benefits due to use by "thousands and thousands of people in Montana and visitors" who would be "very much upset" if access to those lands were hindered.⁶⁰ The Constitutional Convention also allocated substantial time to weigh how best to protect recreational use of the State's waterways.⁶¹ These conversations demonstrate that the delegates actively intended to rid the Constitution of any potential barriers to public access to public lands.

This general concern also permeated the delegates' conversation that the Trust might have a broader purpose than generating as much revenue as possible. Many delegates applauded the Land Board for having adhered to that broader purpose. Delegate Wilson, for instance, described the purpose of the Trust as taking actions "beneficial to the educational system in Montana."⁶² Delegate Davis, after considering the Land Board's environmental considerations when managing the trust, described the Board as a "great guardian of this [T]rust."⁶³ Delegate Drum favored giving the Board the discretion to trade isolated land for more recreational land.⁶⁴ The Montana Supreme Court must consider these delegates' views when interpreting whether the Land Board has complied with the terms and purpose of the trust.⁶⁵

III. PURPOSE OF THE TRUST IN MONTANA

The Montana Constitution says that the school trust lands "shall be held in trust for the people . . . for the respective purposes for which [the lands] have been or may be granted, donated or devised."⁶⁶ The 1889 Enabling Act clarified that the federal government granted the lands for "educational purposes" and that funds arising from land transactions should be expended in support of schools.⁶⁷

By statute, support of education and the "attainment of other worthy objects helpful to the well-being of the people of this state as provided in

59. MONT. LEG., MONT. CONST. CONVENTION, VERBATIM TRANSCRIPT, MARCH 1, 1972–MARCH 9, 1972: VOLUME V, at 1304 (1981).

60. *Id.* at 1307.

61. *See, e.g., id.* at 1320–21 (providing an example of one discussion at the Convention concerning how best to preserve the State's recreational waterways).

62. MONT. LEG., MONT. CONST. CONVENTION, VERBATIM TRANSCRIPT, MARCH 9, 1972–MARCH 16, 1972: VOLUME VI, at 1997 (1981).

63. *Id.*

64. *Id.* at 2001.

65. *See Nelson v. City of Billings*, 412 P.3d 1058, 1064 (Mont. 2018) (quoting: "The intent of the Framers controls the Court's interpretation of a constitutional provision.").

66. MONT. CONST. art. X, § 11(1).

67. Enabling Act of 1889, ch. 180, § 11, 25 Stat. 676 (1889).

[t]he [1889] Enabling Act” serves as the guiding administrative principles of the Trust.⁶⁸ Notably, the Montana State Legislature has not specified that revenue maximization must serve as the overriding priority of the Board. Instead, the Legislature has required the Board to “secure the largest measure of legitimate and reasonable advantage to the state” and “provide for the long-term financial support of education.”⁶⁹ This purpose may be realized even where land is used “for less than all of the resources.”⁷⁰

The Montana Supreme Court has sent mixed signals regarding whether the Trust’s purpose involves resource maximization. On the one hand, there is the “Reasonable Advantage” purpose. The Court has held that maximizing income is not paramount; instead income constitutes just *a consideration* that must be evaluated alongside other factors affecting the land, such as environmental factors.⁷¹ This holding aligns with statutory guidance that the purpose of the Trust is to “secure the largest measure of legitimate and reasonable advantage to the state”⁷² The Court’s holding also aligns with the broad purpose set forth by the 1889 Enabling Act to support “school purposes”—an act that the Montana Supreme Court has said must be liberally construed.⁷³ Finally, this interpretation clearly aligns with the intent of the Framers of the 1972 Montana Constitution, who frequently recited their desire to safeguard school trust lands in a way that enabled recreational access and sustained the value of the land over the long term.⁷⁴

On the other hand, there is the “Revenue Maximization” purpose. The Montana Supreme Court has fallen into a trap set by the U.S. Supreme Court: assuming that the Supreme Court’s interpretation of the New Mexico-Arizona Enabling Act bound interpretations of the New Mexico-Arizona Enabling Act and Montana Constitution.⁷⁵ Unfortunately, the Montana Supreme Court is not alone in erroneously interpreting the Montana Enabling Act. Many Western state courts have yoked their interpretation of their school trust to that of the U.S. Supreme Court with respect to the 1910 Enabling Act.⁷⁶ Fortunately, this means that if Montana corrects its

68. MONT. CODE ANN. § 77-1-202(1) (2021).

69. *Id.* § 77-1-202(1)(a-b).

70. *Id.* § 77-1-203(1)(a).

71. Ravalli Cnty. Fish & Game Ass’n. v. Mont. Dep’t of State Lands, 903 P.2d 1362, 1370 (Mont. 1995).

72. § 77-1-202(1).

73. State *ex rel.* Morgan v. State Bd. of Exam’rs, 309 P.2d 336, 338 (1957).

74. See *supra* notes 42–49 and accompanying text.

75. Lassen v. Ariz. *ex rel.* Ariz. Highway Dep’t, 385 U.S. 458, 461 (1967); New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, 36 Stat. 557 (1910).

76. See O’Day, *supra* note 28, at 234 (noting other western state courts have also adopted the Supreme Court opinion to maximize revenue).

interpretation, other states may soon recognize their own incorrect interpretation.

In *Lassen v. Arizona ex rel Ariz. Highway Dep't*, the Supreme Court reviewed whether the State of Arizona could build a highway through State trust land without complying with the public sale requirements set forth in the New Mexico-Arizona Enabling Act of 1910.⁷⁷ Arizona made a practice to simply grant state and county highway departments rights-of-way over state trust lands at no cost.⁷⁸ The State Highway Department sued when the State's Land Commissioner attempted to reverse that practice by requiring the Department to pay the appraised value of the right-of-way in question.⁷⁹

The U.S. Supreme Court accepted the case with the intent to render a ruling applicable to all states that had received such lands from the Federal Government.⁸⁰ The Court made this ruling⁸¹ despite the fact that the enabling act in question only applied to New Mexico and Arizona. Unlike prior enabling acts, the Court included an explicit reference to the formation of a trust over the lands.⁸² The Court upheld the Land Commissioner's decision to force highway departments to compensate the State based on the Court's conception of the trust obligation created by the 1910 New Mexico-Arizona Enabling Act.⁸³ Based on the language and structure of the 1910 Act, the Court concluded that "all these restrictions in combination indicate Congress's concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust."⁸⁴ In other words, the *Lassen* Court "interjected into the law of school land trusts the mandate that school lands be managed to the maximum value possible for the exclusive benefit of the public schools."⁸⁵

With the exception of California and (much later) Colorado, the courts of all western states adopted the *Lassen* holding—interpreting their own enabling acts and constitutions to create trusts over school land with the

77. *Lassen*, 385 U.S. at 461.

78. *See State ex rel. Ariz. Highway Dep't v. Lassen*, 407 P.2d 747, 747 (Ariz. 1965) (detailing that for several decades "the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government.").

79. *Lassen*, 385 U.S. at 459.

80. *See id.* at 461 (explaining that the Court granted certiorari because "of the importance of the issues presented both to the United States and to the States which have received such lands.").

81. *Id.*

82. *See Jessica Wiles, Montana's State School Trust Land*, 38 PUB. LAND & RES. L. REV. 150, 158 (2017) (discussing how Supreme Court's analysis in *Lassen* standardized definition of trust responsibility which was embraced by New Mexico and Arizona despite the already existing definition found in the New Mexico-Arizona Enabling Act).

83. *Lassen v. Ariz. ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 467 (1967).

84. *Id.*

85. O'Day, *supra* note 28, at 191.

exclusive purpose of revenue generation.⁸⁶ The Montana Supreme Court cited *Lassen's* mandate in *In re Powder River Drainage Area* to support the conclusion that the State must obtain “full value” when leasing school land.⁸⁷ Despite acknowledging that the Montana Constitution set specific terms (as detailed further below) to guide the State as trustee over school lands,⁸⁸ the State’s highest court implicitly adopted the sweeping mandate that the U.S. Supreme Court intentionally imposed on the states—regardless of their respective enabling acts.⁸⁹

Other parts of the Montana state government have adopted the Montana Supreme Court’s incorrect interpretation or recited similarly flawed interpretations of the 1889 Enabling Act and the Montana Constitution. The DNRC has stated the purpose of the Trust as: “produc[ing] revenues for the trust beneficiaries”⁹⁰ Other executive officials have repeated that error. A legal staff member of the Environmental Quality Council interpreted the Montana Constitution and Enabling Act as requiring the Land Board to obtain the full market value for any school trust land being transferred, leased, exchanged, or sold.⁹¹ No source of the terms nor purpose of the Trust set such a specific and narrow mandate.

IV. TERMS OF THE TRUST IN MONTANA

A. The Terms of the Trust Explicitly Allow for the Land Board to Sell, Exchange, and Lease School Trust Lands to Further Recreational Access and Conservation

The Montana Constitution identifies two situations in which school trust lands can be disposed: (1) pursuant to the general laws allowing for such disposition and (2) upon the payment or security of the full market value of the land.⁹² The Board can lease,⁹³ sell,⁹⁴ or exchange the land so long as the exchanged land is equal in value and as equal as possible with respect to

86. *Id.* at 191 n.170.

87. *In re Powder River Drainage Area*, 702 P.2d 948, 953 (Mont. 1985).

88. *Id.* at 951.

89. *Id.* at 953.

90. TR. LANDS MGMT. DIV., MONT. DEP’T OF NAT. RES. & CONSERVATION, ANNUAL REPORT FISCAL YEAR 2021 AT MISSION (2021), <http://dnrc.mt.gov/divisions/trust/docs/annual-report/fy-2021-trust-lands-annual-report.pdf>.

91. Everts, *supra* note 31, at 2.

92. MONT. CONST. art. X, § 11(2).

93. Enabling Act, ch. 180, § 11, 25 Stat. 676 (1889), *amended by* Act of May 7, 1932, 47 Stat. 150 (1932), *amended by* Act of October 16, 1970, 84 Stat. 987 (1970).

94. MONT. CONST. art. X, § 11(2).

area.⁹⁵ The sale of any land must be done in public, after sufficient notice, and only above certain prices.⁹⁶ The Board can lease land for up to 99 years, with the exception of leases for extractive purposes.⁹⁷ For example, a lease for conservation uses can last for the full 99 years.⁹⁸ Note that the Board has previously granted such leases.⁹⁹

The Board may grant easements and rights in any of the lands, so long as those interests adhere to any terms set by the State.¹⁰⁰ The State may only grant easements to the Department of Fish, Wildlife, and Parks and to nonprofits for “conservation purposes”—but only in very specific areas.¹⁰¹ Conservation purposes include prohibiting certain uses on a specific property. But the trust land administration statutes do not define what constitutes an easement for conservation purposes.¹⁰² The Board is also unclear on if it has complied with this state restriction on conservation easements because the Board has granted numerous easements with conservation measures on state trust lands.¹⁰³ This practice may evidence that the statute purportedly limiting conservation easements are overridden by the terms and purpose of the trust set forth by the Montana Constitution. Further evidence of the Board’s implied authority to grant easements with conservation measures extends from the fact that the Board is required by state law to grant conservation easements for cabin sites and town lots for sale.¹⁰⁴ Likewise, the Board has the explicit authority to grant an easement for the establishment of natural areas.¹⁰⁵ These natural areas include land with “an important or rare ecological or geological feature or other rare or significant natural feature worthy of preservation for scientific, educational, or ecological purposes.”¹⁰⁶ Finally, the Board may be able to justify most easements done with the public’s interest in mind given that § 77-2-101(1)(f) of the Montana Code Annotated (MCA) allows the Board to grant an easement for “other public uses.”

95. MONT. CONST. art. X, § 11(4); *see* MONT. CODE ANN. §§ 77-2-201, -203 (2021) (limiting when the Board may exchange land).

96. Enabling Act, ch. 180, § 11, 25 Stat. 676 (1889), *amended by* Act of May 7, 1932, 47 Stat. 150 (1932), *amended by* Act of Oct. 16, 1970, 84 Stat. 987 (1970).

97. MONT. CODE ANN. § 77-1-204 (2021).

98. *Id.*

99. Everts, *supra* note 31, at 12.

100. Enabling Act, ch. 180, § 11, 25 Stat. 676 (1889), *amended by* Act of May 7, 1932, 47 Stat. 150 (1932), *amended by* Act of October 16, 1970, 84 Stat. 987 (1970).

101. MONT. CODE ANN. § 77-2-101(e) (2021).

102. Everts, *supra* note 31, at 8–10 (noting that “conservation easement” is defined in the Montana Open-Space Land and Voluntary Conservation Easement Act).

103. *Id.*

104. MONT. CODE ANN. § 77-2-318 (2021).

105. *Id.* §§ 76-12-107, -108.

106. *Id.* § 76-12-104(3)(b).

The Montana State Legislature has also set terms regarding management of the Trust and the public's access to trust lands. The Board must comply with the Legislature's recognition that the people are entitled to generally recreate on state lands, so long as the Trust is compensated for the value of that recreation.¹⁰⁷ Similarly, the Board shall use a "multiple-use management concept" when managing trust lands.¹⁰⁸ This management approach requires the Board to use trust 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.¹⁰⁹

Within these two provisions are a number of specific terms. Specifically, the Board must first identify the needs of the people and the trust beneficiaries. Second, the Board must manage large enough blocks of land to evaluate the extent to which the current combination of uses is meeting the aforementioned needs. Third, the Board needs to adjust the combination of uses after regularly performing evaluations of the needs and conditions of the people. Finally, the Board must ensure that no use or combination of uses will impair the productivity of the land. Additional terms govern: how the Board leases land;¹¹⁰ what rights the Board can sell and to which entities;¹¹¹ and what land the Board can exchange and with which entities.¹¹² Additionally, when attempting to realize the purpose of the trust, the State also requires the Board to weigh "environmental factors and [the protection of] the future income-generating capacity of the land."¹¹³

107. *Id.* § 77-1-202(2).

108. *Id.* § 77-1-203(1).

109. *Id.*

110. *See, e.g., id.* § 77-1-204 (explaining the Board's power to lease certain state trust lands).

111. *See id.* §§ 77-1-301, -304 (defining which rights the Board may sell and to whom those rights may be sold).

112. *See, e.g., id.* §§ 77-2-201, -203, -205, -217 (defining how and with whom the Board may exchange land).

113. TR. LANDS MGMT. DIV., MONT. DEP'T OF NAT. RES. & CONSERVATION, *supra* note 90.

These terms provide the Land Board with several means to effectuate the purpose of the Trust.¹¹⁴ The Board has broad discretion to select among those various means.¹¹⁵ However, the terms also enable the public and beneficiaries to contest Board action.¹¹⁶ The terms lay out specific examinations and duties the Board, as trustee, must conduct when reviewing potential transactions.¹¹⁷ The terms also entitle the public to recreational use of school trust lands—an entitlement the public can seek to enforce.¹¹⁸ Where the public identifies faulty or omitted examinations, the public may have a means to contest a proposed Land Board transaction, especially one that conflicts with the State’s mandate to maintain and improve a “clean and healthful environment.”¹¹⁹ Furthermore, the public can inquire into why the State has not effectively used a program, such as the Land Banking program, which is specifically designed to consolidate land to increase access to and the value of school trust lands.

B. The Land Banking Program Demonstrates How the Land Board has Used the Terms of the Trust to Further Recreational Use and Conservation

The Land Board has previously endorsed efforts to consolidate school trust lands with the intent of increasing access. In 2003, the Land Board unanimously supported HB 223, codified as §§ 77-2-361 et seq., MCA, which created the State Land Banking program (the program).¹²⁰ Under this program, managed by the DNRC,¹²¹ the State must route proceeds from the sale of entirely or almost entirely landlocked parcels of school trust lands to a special land banking account.¹²² Funds in that account then support the purchase of real estate interests (land, easements, or improvements) that allow for public access.¹²³ This purchasing mandate aligns with the goals of the program:

114. See *supra* notes 66-73 and accompanying text (notes related to sale, exchange, lease of lands).

115. See, e.g., MONT. CODE ANN. § 77-1-203(1) (2021) (giving the Land Board discretion to weigh various factors before selecting the appropriate use of land).

116. *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶ 13-14 (1999).

117. *Id.* at ¶ 32.

118. MONT. CODE ANN. § 77-1-202(2) (2021).

119. MONT. CONST. art. IX, § 1.

120. DEP’T NAT. RES. & CONSERVATION, LAND BANKING REPORT: JANUARY 2023 (2023), https://dnrc.mt.gov/TrustLand/land-transactions-easements/LandBanking/January_2023_Land_Banking_Report-.pdf; see also MONT. CODE ANN. § 77-2-363 (2021) (ending program’s sunset provision and increasing maximum area of land permitted to be sold or disposed of in a land bank transaction from 100,000 to 250,000 acres).

121. See MONT. CODE ANN. § 77-1-301 (2021) (summarizing DNRC’s authority to manage the land banking program).

122. See *id.* § 77-2-363 (“Seventy-five percent of the acreage cumulatively sold must be isolated parcels that do not have a legal right of access by the public.”).

123. LAND BANKING REPORT, *supra* note 120.

[First], increasing public access to state trust land through strategic sales and acquisitions; [second,] improving the investment portfolio of the beneficiaries by diversifying land holdings; and [third,] enhancing management and stewardship activities with land consolidation.¹²⁴

These goals, especially the first goal, demonstrate that public access is a part of the historic and current purpose of the Trust. If that were not the case, then the Land Banking program could not survive a review under the State's Constitution because a trustee must not diverge from the Trust's purpose.¹²⁵ However, the Trust also has a purpose of financially supporting education, so revenue generated from the acquired land must generate at least as much revenue as the land sold.¹²⁶

Despite the State's authority to sell landlocked lands and a responsibility to secure the "largest measure of legitimate and reasonable advantage to the state and provide for the long-term financial support of education,"¹²⁷ the State has yet to meaningfully decrease the percentage of school lands inaccessible to the public. Only 23 acquisitions of publicly-accessible land have occurred through the Land Bank program since 2006, resulting in 98,732 acres of publicly-accessible land coming under State management.¹²⁸ Although nearly 100,000 acres of new publicly-accessible lands deserve celebration, it is a drop in an ocean of inaccessible lands—recall that the public cannot access approximately 1.5 million acres of school lands in Montana.¹²⁹

A couple barriers may explain why the State has not used this Land Banking program as frequently as the Trust mandates. First, insufficient recognition among beneficiaries (and the public) that recreational use is a

124. *Id.*

125. The State nor beneficiaries of the trust dispute that the State must demonstrate "absolute fidelity to the trust," among other responsibilities set forth in the Restatements of Trust. *See* *Montanans for Resp. Sch. Trust v. State*, 1998 Mont. Dist. LEXIS 730, *5-6 (citing RESTATEMENT (THIRD) OF TR.: DUTY OF LOYALTY § 78 (AM. L. INST. 2012) (noting also that the Montana Trust Code "applies generally to all trusts and invokes the common law of trusts[.]" The other responsibilities of a trustee include undivided loyalty toward the beneficiary; prudence, diligence, and independent judgment in managing trust assets; duty to make the trust financially productive; and, accountability to the beneficiary); RESTATEMENT (SECOND) OF TR.: DUTY OF LOYALTY § 170 (AM. L. INST. 1959).

126. LAND BANKING REPORT, *supra* note 120.

127. MONT. CODE ANN. § 77-1-202(1) (2021).

128. *See* LAND BANKING REPORT, *supra* note 120 (noting that not all of the land exchanged for this new State land was originally isolated. The DNRC reports that "[i]solated sales make up 76% of all acreage sold since the Land Banking program's inception . . .").

129. THEODORE ROOSEVELT CONSERVATION P'SHIP, *supra* note 1, at 6.

purpose of the Trust that the Land Board must advance.¹³⁰ Second, the inadequate consideration of the public lands' value remains undeveloped. The first barrier is relatively easy to overcome, for example: through information sessions for the Land Board and school districts. Therefore, this article will not spend much time evaluating this issue. The second barrier, however, requires more effort to surmount because the value of undeveloped public lands—i.e., those best suited for public access—has only recently become more apparent.

The Land Board must generate value for Montana's schools through its management of school lands, but one means of value creation is usually left off the table. The State has a mission to “produce revenues for the trust beneficiaries while considering environmental factors and protecting the future income generating capacity of the land.”¹³¹ This latter part of the mission—protecting the future income generating capacity of the land—has become more valuable over time.

Leasing public lands for grazing purposes may diminish the value of the land to a greater extent than currently acknowledged by the Land Board and DNRC. The State currently has 8,921 agricultural and grazing leases out on school lands.¹³² Additionally, Montana oversees 1,126 oil and gas leases, 31 coal leases, and has managed the harvesting of 64.1 million board feet of timber and the planting of 363,739 tree seedlings.¹³³ All of these actions produce short-term revenue to support Montana's schools. For instance, in fiscal year 2021, agricultural leasing on 541,000 acres of school lands brought in \$16.8 million for the trust.¹³⁴ However, the long-term costs of these actions may render such action incongruous with the mission of the Trust.

According to the Intergovernmental Panel on Climate Change (IPCC), “agriculture, forestry and other land use (AFOLU) is a significant net source of [greenhouse gas] emissions.”¹³⁵ In fact, these land uses contributed to nearly a quarter of anthropogenic emissions of carbon dioxide, methane, and nitrous oxide from 2007–2016.¹³⁶ Wood harvesting has a particularly negative impact on the environment given that wood harvesting accounts for

130. See Everts, *supra* note 31, at 6 (quoting MONT. CODE ANN. § 77-1-301(2005) “It is consistent with the powers and duties of the Board that ‘the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation.’”).

131. TR. LANDS MGMT. DIV., MONT. DEP'T OF NAT. RES. & CONSERVATION, *supra* note 90.

132. *Id.* at 3.

133. *Id.*

134. *Id.* at 7.

135. Gensuo Jia & Elena Shevliakova, et al., *Land-Climate Interactions* 133, in CLIMATE CHANGE AND LAND: AN IPCC SPECIAL REPORT ON CLIMATE CHANGE, DESERTIFICATION, LAND DEGRADATION, SUSTAINABLE LAND MANAGEMENT, FOOD SECURITY, AND GREENHOUSE GAS FLUXES IN TERRESTRIAL ECOSYSTEM 131, 133 (2019).

136. *Id.*

about 13% of total net anthropogenic emissions of carbon dioxide (CO₂).¹³⁷ Likewise, grazing negatively impacts the environment, accounting for more than a third of total anthropogenic nitrogen dioxide (N₂O) emissions.¹³⁸ More generally, changes in land conditions can increase the odds, severity, and duration of extreme weather events (such as droughts and excessive rain).¹³⁹

One way to significantly reduce land-use-based emissions is to not use the land for an intensive or extractive purpose. The IPCC reports that “[t]he largest potential for reducing AFOLU emissions [is] through reduced deforestation and forest degradation, . . . a shift towards plant-based diets, . . . and reduced food and agricultural waste.”¹⁴⁰ Steps short of non-use, such as planting bioenergy crops meant to sequester carbon, lack the efficacy and immediacy of simply setting the land aside for recreational use—especially in the case of forest land.¹⁴¹

The status quo approach to leasing school lands for a litany of purposes may be decreasing the value of those lands. The land-use-based emissions contribute to changes in Montana’s climate that have negatively affected public lands and drained the State’s coffers as Montana responds to climate emergencies.¹⁴² Between 1970–2015, the number of large fires on national forest lands in Montana increased to a greater extent than any other western state.¹⁴³ Between 2017–2019, Montana experienced two wildfires and one drought, each of which caused losses in excess of \$1 billion.¹⁴⁴ These types of disasters not only destroy public lands but also require large expenditures by the State.¹⁴⁵ Destroying public lands decreases, if not erases, the chance of those lands producing revenue to benefit the trust.¹⁴⁶ The large

137. *Id.* at 134.

138. *Id.*

139. *Id.* at 135.

140. *Id.* at 136.

141. *Id.*

142. Ctr. Am. Progress, *The Impacts of Climate Change and The Trump Administration’s Anti-Environmental Agenda in Montana* 1 (June 15, 2020), <https://www.americanprogress.org/article/impacts-climate-change-trump-administrations-anti-environmental-agenda-montana/>; see also Corin Cates-Carney, *FEMA Denies Montana Request For Fire Disaster Funding*, MONT. PUB. RADIO: MONT. NEWS (Jan. 10, 2018), <https://www.mtpr.org/montana-news/2018-01-10/fema-denies-montana-request-for-fire-disaster-funding> (noting that in 2017, “Montana spent its entire two-year \$60 million emergency fund for wildfire suppression in one year, and used it up even before last fire season ended.”).

143. Ctr. Am. Progress, *supra* note 142.

144. *Id.*

145. Though not every state has invested in climate change mitigation, states will nonetheless end up paying to address its effects. See, e.g., Press Release, Phil Scott, Governor, Vt., Governor Phil Scott Signs Historic State Budget Into Law (June 9, 2022), <https://governor.vermont.gov/press-release/governor-phil-scott-signs-historic-state-budget-law> (noting Vermont’s plan to spend \$225 million to combat climate change, including investments in weatherization meant to combat the day-to-day effects of climate change).

146. For instance, even a Montanan seeking to purchase land subject to a conservation easement

expenditures require the State to spend limit funds on disaster response and recovery.¹⁴⁷ Notably, the Montana Climate Solutions report urged lawmakers to quantify and reduce industrial, agricultural, and methane emissions.¹⁴⁸ Though, the report did not acknowledge the State's role in perpetuating these emissions through outdated leasing practices.¹⁴⁹

Lands negatively affected by climate change also generate less tax revenue. According to the Montana Wildlife Foundation: "droughts, fires, and floods associated with climate change" jeopardize 35,000 jobs and more than \$1 billion in labor earnings in Montana.¹⁵⁰ The Montana Wildlife Foundation forecasted that an average of 1,700 jobs will be lost per year in Montana due to climate change.¹⁵¹ The resulting loss in revenue will diminish the extent to which Montana can invest in schools and related spending. Moreover, climate change will cause the demand for AFOLU leases to decrease as those land uses become more resource intensive; by 2055, researchers anticipate a 20% drop in rangeland cattle production and a 25% drop in grain production.¹⁵²

Prioritizing school lands for recreational uses is more sustainable and still generates revenue for the Trust. Revenue from non-AFOLU uses comes from a number of reliable sources that have yet to be fully tapped. Trust beneficiaries receive \$10 for every license purchased by a member of the public for recreation on school lands and \$2 from the sale of each conservation license by the Department of Fish, Wildlife, and Parks.¹⁵³ In fiscal year 2021, these recreational licenses contributed \$1,395,294 in gross

(thereby protecting the land from any kind of land use) through a deal with the Land Board would likely pay less for that land if a forest fire had recently run through it. See Kyle M. Stetler et al., *The Effects of Wildfire and Environmental Amenities on Property Values in Northwest Montana, USA*, 69 *ECOLOGICAL ECON.* 2233, 2235, 2241(2010) (studying the effect of wildfires on property value in northwest Montana).

147. See, e.g., Press Release, Phil Scott, Governor, Vt., Governor Phil Scott Signs Historic State Budget Into Law (June 9, 2022), <https://governor.vermont.gov/press-release/governor-phil-scott-signs-historic-state-budget-law> (noting Vermont's plan to spend \$225 million to combat climate change, including investments in weatherization meant to combat the day-to-day effects of climate change).

148. MONTANA CLIMATE SOLUTIONS COUNCIL, MONTANA CLIMATE SOLUTIONS PLAN 46 (Aug. 2020), https://deq.mt.gov/files/DEQAdmin/Climate/2020-09-09_MontanaClimateSolutions_Final.pdf.

149. An argument could be made that the State allowing school lands to be used for purposes known to contribute to climate change is unconstitutional under Article II, Section 3, of the Montana Constitution. That argument is outside the scope this paper but is worthy of exploration.

150. THOMAS MICHAEL POWER & DONOVAN S. POWER, POWER CONSULTING INC., *THE IMPACT OF CLIMATE CHANGE ON MONTANA'S OUTDOOR ECONOMY* 57 (2015), <https://montanawildlife.org/wp-content/uploads/2015/12/Impact-of-Climate-Change-on-the-Montana-Outdoor-Economy-Dec-2015-Final-Report.pdf>.

151. *Id.* at 58 tbl.20.

152. Press Release, Montana Farmers Union, Montana Farmers Union Report: Climate Change Could Cost Montana Agriculture Industry Almost 25,000 Jobs and \$726 Million Over the Next 50 Years (Feb. 24, 2016), <https://montanafarmersunion.com/montana-farmers-union-report-climate-change-could-cost-montana-agriculture-industry-almost-25000-jobs-and-726-million-over-the-next-50-years/>.

153. TR. LANDS MGMT. DIV., MONT. DEP'T OF NAT. RES. & CONSERVATION, *supra* note 90, at 11.

revenue to the Trust.¹⁵⁴ An additional \$196,100 came in through special recreational use licenses for commercial or concentrated use.¹⁵⁵

Unlike AFOLU uses, demand for recreational uses has grown over time. The DNRC created a standalone program within the Trust Management Division to focus on generating revenue through recreation after the agency noted “increased use and demand for trust land for both dispersed and concentrated recreational uses.”¹⁵⁶ And, unlike AFOLU uses, school lands as recreational or public lands do not exacerbate the revenue-sapping effects of climate change. In fact, public lands can help reverse or, at a minimum, reduce those effects by acting as carbon sinks.¹⁵⁷ Notably, protected federal lands in Alaska store approximately 62% of the total carbon stored on U.S. federal lands.¹⁵⁸ Thus, states can play a meaningful role in reducing the costs of climate change by setting school trust lands aside for recreational uses.

Montana courts have acknowledged that changing conditions could alter how the State manages school lands in its role as trustee. In *State ex rel. Koch v. Barret*,¹⁵⁹ the Supreme Court of Montana noted that the enabling act granted the lands in view of “the conditions existing at the time, and other[s] which might arise.”¹⁶⁰ Furthermore, the Court declined to specify the means through which the State should sustain the Trust with respect to uses of the land. So long as the State created a permanent endowment and allocated funds to schools, the Court asserted that “it makes no difference what mode is adopted.”¹⁶¹ However, in dicta, the Court noted the importance of not impairing in any way the value of the land or diverting it to improper uses.¹⁶²

The Land Banking Program enables the Land Board to consolidate, environmentally protect, and increase the value of the school trust lands. Which raises the question: why have more transactions not occurred under the program? Whether this underuse constitutes a breach of the Land Board’s duties as trustee deserves more attention—attention given in the next part of this article.

154. *Id.*

155. *Id.*

156. *Id.*

157. See HOUSE SELECT COMM. ON THE CLIMATE CRISIS, 116TH CONG., SOLVING THE CLIMATE CRISIS 13 (2020) (calling on the government to limit to oil and gas leasing on public lands).

158. *Id.* at 429.

159. *State ex rel. Koch v. Barret*, 66 P. 504 (1901).

160. *Id.* at 507.

161. *Id.*

162. *Id.* at 508.

V. EITHER PURPOSE OF THE TRUST MANDATES THAT THE STATE UNLOCK
SCHOOL TRUST LANDS

The three branches of the Montana state government vary in the extent to which they regard the purpose of the Trust as “revenue maximization” or securing a “reasonable advantage” to the State.¹⁶³ A trustee charged with advancing either purpose has an obligation to unlock “landlocked” parcels of school trust land and grant the public’s entitlement to recreate on those lands.

In comparison, isolated lands are less valuable than consolidated lands.¹⁶⁴ If the State allows school trust lands to remain isolated, then the State will be in breach of its duties as trustee because doing so neither maximizes revenue nor provides an advantage to the State.

Oil, gas, coal, and grazing leases threaten the long-term value of school trust lands. If the State persists in assigning such leases, the State will neither maximize the long-term revenue of the land nor secure an advantage to the State, especially given that those kinds of leases may impose other significant costs on the State.¹⁶⁵ The State should instead recognize that recreational use of such lands not only generates revenue, but also respects the legislative entitlement the people of Montana have to recreate on those lands. Recreational use of school trust lands already generates substantial revenue. Greater revenue is possible if the State opts to: (1) respond to the increase in demand for recreational lands by increasing the license cost to access those lands; (2) respond to that demand by increasing the number of acres of accessible school trust lands by consolidating landlocked parcels; or (3) both.

The Land Board has substantial discretion to realize each purpose and outcome required by those respective purposes—consolidating isolated lands and opening up those lands to the public.¹⁶⁶ The Board may initially choose to pursue those outcomes by effectively using the Land Banking Program. The Board can similarly exercise its discretion by declining any proposed leases for AFOLU uses of school trust lands. Finally, the Board can insist on any school land trust proposals meeting certain conservation thresholds.

However, the Board cannot continue with the status quo. The Board is bound by the duties of a trustee: absolute fidelity to the trust; undivided

163. See *supra* Part III (discussing how the State legislature has specified “reasonable advantage” and not “revenue maximization” as a priority, while the Montana Supreme Court has sent mixed signals).

164. See, e.g., Const. Convention Editing and Publ’g Comm., Mont. Leg., Montana Constitutional Convention, Verbatim Transcript, March 9, 1972–March 16, 1972, Vol. VI, 2001 (1981) (noting how management issues that pertain to isolated lands are absent in the management of consolidated lands).

165. Jia & Shevliakova, et al., *supra* note 135, at 133–35.

166. State *ex rel.* Evans v. Stewart, 161 P. 309, 312 (Mont. 1916); see generally Toomey v. State Board of Land Commissioners, 81 P.2d 407, 415 (Mont. 1938) (explaining that there is an emphasis on consolidating and obtainable by the public); State *ex rel.* Thompson v. Babcock, 409 P.2d 808, 810 (Mont. 1966).

loyalty toward the beneficiary; prudence, diligence, and independent judgment in managing trust assets; duty to make the trust financially productive; and accountability to the beneficiary.¹⁶⁷ The Board's duty to make the Trust financially productive is applicable to all generations of Montanans. As set forth above, the Board's current leasing strategy is threatening that productivity in an empirically verifiable and substantial way.¹⁶⁸ In exercising prudence, diligence, and independent judgment, the Board cannot ignore that empirical evidence. Furthermore, in remaining accountable to the public as beneficiaries, the Board must show how it is evaluating that evidence and using it to reach decisions. A failure of any of these duties provides the public with standing to seek a legal remedy and to ensure that Montana's "greatest asset" is unlocked, accessible, and preserved.¹⁶⁹

CONCLUSION

Montana's obligations as a trustee over school lands imposes a duty to preserve those lands over a long horizon. Whether the purpose of the trust is to maximize revenue (as is the case in New Mexico and Arizona, per the 1910 Enabling Act¹⁷⁰ and *Lassen v. Arizona*)¹⁷¹ or to advance the priorities set forth by the Framers of the 1972 Montana Constitution, permitting any lands to remain isolated and leasing school lands for purposes other than recreational or public use is a violation of the trustee's obligations.

A trustee preserving the natural resources and value of the corpus land would not constitute a breach of the trustee's fiduciary duty. Courts in other jurisdictions have specified that even a trustee charged with maximizing value of land need not pursue an absolute maximization of economic return. For example in *Oklahoma Educ. Ass'n v. Nigh*, the court noted that while a trustee has a duty to seek the maximum return from school lands that duty is subject to the necessary precautions to preserve the trust estate.¹⁷² Given that climate change has directly threatened the lands making up the corpus of school land trusts around the country, precautionary measures (such as

167. See *Montanans for Resp. Use Sch. Tr. v. State ex rel. Bd. Land Comm'rs*, 409 P.2d 800, 806 (Mont. 1999) (describing the Board's duties of prudence, loyalty, fidelity, productivity, and accountability).

168. See *supra* notes 127-149 and accompanying text (discussing how Montana has failed to increase accessibility of school lands, and continues to lease public lands for grazing, oil and gas).

169. See *supra* note 46 (discussing Delegate Cate's views on Montana's school trust lands being "the single greatest asset" in the entire state).

170. New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, 36 Stat. 557 (1910).

171. *Lassen v. Ariz. ex rel. Ariz. Highway Dep't* 385 U.S. 458, 466 (1967).

172. *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 239 (Okla. 1892).

avoiding leases that will lead to emissions) may be more necessary than ever to ensure the long-term viability and value of the trust estate.

In *National Parks & Conservation Ass'n v. Board of State Lands*, the Utah Supreme Court acknowledged the maximization of income of school lands must be evaluated with the long-term in mind.¹⁷³ Accordingly, the Court concluded that: “[t]o the extent that preservation of non-economic values does not constitute a diversion of trust assets or resources, such an activity may be prudently undertaken.”¹⁷⁴ Moreover, even the Court sanctioned the protection of those values where “necessary for maximizing the economic value of the property.”¹⁷⁵ The Utah Court even set forth a duty for the State to exchange trust lands with non-economic value incompatible with the economic exploitation of that value—perhaps due to unique scenic value—with other lands.¹⁷⁶ The *National Parks* rationale would not apply if the State’s courts followed *Lassen* because Utah adopted a statute directing the State to maximize the use of natural resources consistent with multiple-use sustained yield principles.¹⁷⁷

To the extent the federal government has an obligation to use public lands for the public’s benefit—perhaps analogous to the public trust doctrine,¹⁷⁸ statutory mandates, or international agreements—the government needs to reexamine its public lands portfolio. “Fossil fuel extraction on public lands is responsible for nearly a quarter of total U.S. carbon dioxide emissions, making public lands a net-emitter of greenhouse gas pollution.”¹⁷⁹ The federal government is not only allowing such extraction, but subsidizing it—costing taxpayers money in the short- and long-run.¹⁸⁰

The bottom line is that landlocked public lands are indicative of mismanagement by the responsible trustee. Montana’s action to preserve the long-term value of school lands, by emphasizing and prioritizing recreational and public use, should set a precedent for all other states acting as trustees over school lands. A state cannot maximize revenue for long-term school benefits by leasing school lands for AFOLU purposes or allowing the continuation of landlocked public lands. This holds true regardless of whether the states follow the *Lassen* standard or the respective state governments.

173. *National Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 921 (Utah 1993).

174. *Id.* at 916.

175. *Id.*

176. *See id.* at 921 (declaring that the state had a duty to consider exchanging unique lands with non-economic value for other lands).

177. *See id.* at 916 n.4 (citing Administrative Rule 632-2-2).

178. *See, e.g.,* Jesse Reiblich & Dan Reineman, *Rhino Chasers and Rifles: Surfing Under the Public Trust Doctrine*, 34 J. LAND USE & ENV'T L. 36, 49-52 (2018) (examining the applicability of the public trust doctrine to the battle over public access to beaches in the state of California).

179. HOUSE SELECT COMM. ON CLIMATE CRISIS, *supra* note 157, at 14.

180. *Id.* at 491.

Montanans are well-suited to begin a nationwide effort to contest management practices of school trust lands, thanks to the Montana Constitution's protection of the environment and the clear intent of the Framers to ensure access to the outdoors. In particular, Montanans can challenge practices that deprive public access to those lands and hinder the long-term value of the land. Trustees of state trust lands must weigh changing conditions when evaluating how best to use what may be their state's greatest asset. Conditions have wildly changed. Access to and the preservation of lands set aside for recreational use by the public is becoming ever more important to fighting climate change and generating social and financial capital for states. Trustees have an obligation to take more efforts with recreation and non-use in mind. Trustees can start to fulfill that duty by unlocking their landlocked school trust lands via sales and exchanges that consolidate lands and provide recreational use of those lands.