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Utah's School Trust Lands: A Century of Unrealized Expectations

I. INTRODUCTION

Upon admission to the Union, the state of Utah received a substantial amount of land in trust from the federal government for the support of its schools.¹ Unfortunately, Utah's "school trust lands," as they are called, have failed to produce appreciable revenue, and the state's schools have been deprived of much-needed funding as a result. Many factors have contributed to the failure of the trust lands to produce revenue, but none have been as significant as the federal government's refusal to cooperate with Utah's efforts to consolidate its school trust lands into large blocks which the state could effectively manage.

Two departments of the Utah state government have recently initiated or threatened to initiate unprecedented actions in attempts to force the federal government to cooperate with the state in effecting land exchanges, thereby enabling Utah to realize revenue from its trust lands. In July 1989, the Utah Board of State Lands and Forestry (the State Land Board) vented its frustrations with the federal government by proposing the sale of 116,000 acres of Utah school trust lands trapped within national parks and Indian reservations. About three months later, James Moss, in his role as State Superintendent of Public Education, publicly asked Utah's attorney general to sue the federal government for inverse condemnation of some of Utah's trust lands.

This comment discusses some of the reasons for the failure of Utah's school trust lands to provide the state's public schools with appreciable revenues. The comment opens with a description of the history of Utah's school trust lands, the obligations associated with school trust lands in general and the congressional intent behind the grant of school trust lands. The comment next shows how federal inaction on exchange proposals and in-lieu selections has prevented Utah from fulfilling its trustee obligations by preventing the state from recognizing

1. Utah Enabling Act, ch. 138 §§ 6, 10, 28 Stat. 107 (1894). The original land grant totaled nearly 7.5 million acres. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 244 (1970).

Although the state has disposed of some of this land, Utah continues to own over 3.7 million acres of trust lands. In addition, the state retains mineral rights in nearly 1 million acres of trust lands where the surface rights have been sold. See Utah Department of Natural Resources, Division of State Lands and Forestry, State Land Ownership by County and Grant (June 30, 1989) (unpublished report on file with the BYU Journal of Public Law).

revenue from its school trust lands. The comment then examines the State Land Board's Draft General Management Plan (GMP),² which proposed the sale or lease of trust lands trapped within national parks and Indian reservations, and Superintendent Moss's request for the state to sue the federal government. The comment concludes by examining the possibility and likelihood of success of a Utah action charging the federal government with inverse condemnation of Utah's school trust lands.

II. HISTORY OF THE SCHOOL TRUST LANDS

A. *The Land Ordinance of 1785*

Congress laid the foundation for our current public land system when it passed the Land Ordinance of 1785.³ The rectangular survey system adopted by Congress on that date remains in use today, although it was the subject of considerable debate before it was passed.

In 1784, a committee which included Thomas Jefferson proposed a plan of government of the Northwest Territory and for the sale of western lands.⁴ This plan advocated surveying lands using a geographical "mile" of 6,086 feet, thereby allowing the creation of units ten "miles" square, divided into 100 sections of 850 acres or one square "mile" each.⁵ Under the plan, individuals interested in purchasing land were required to purchase land warrants, which they would then surrender to a district surveyor after selecting the particular lands they desired.⁶ The surveyor, after ascertaining that no previous locations had been made on that particular tract, would then issue a patent.⁷

By contrast, the rectangular system of land surveys actually adopted in the Land Ordinance of 1785 provides for the division of territories ceded by individual states to the United States into townships

2. DIVISION OF STATE LANDS AND FORESTRY, UTAH DEPARTMENT OF NATURAL RESOURCES, DRAFT GENERAL MANAGEMENT PLAN: MARKETING OF UTAH TRUST LANDS INHELD WITHIN NATIONAL PARK SERVICE SYSTEM UNITS AND INDIAN RESERVATIONS (1989) [hereinafter GMP] (copy on file with the BYU Journal of Public Law).

3. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 123 (9th ed. 1973).

4. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 61, 63 (1968).

5. *Id.*

6. *Id.* at 61.

7. *Id.* It is interesting to note that Jefferson, a Virginian, advocated the idea of surveying lands before selling them, an idea adopted from New England. *Id.* at 61-62. Virginia's lands, by contrast, had been settled by indiscriminate location of claims with subsequent surveys by metes and bounds, a practice that led to extensive litigation concerning conflicting claims. *Id.* at 61-63. Although no official record of the congressional debate regarding the Land Ordinance of 1785 exists, the conflict between proponents of the Virginia and New England procedures was apparently spirited (William Grayson, a delegate from Virginia, said that debates over the respective merits of the two proposals would fill 40 volumes). *Id.* at 64.

measuring six miles by six miles.⁸ Each township is divided into thirty-six numbered sections, each containing 640 acres or one square mile. In addition to establishing a method for surveying new lands, the Ordinance of 1785 reflects the importance Congress placed on public education by providing that section sixteen of every township should be reserved for the maintenance and support of public schools.⁹

The federal government continued to grant section sixteen of every township to states entering the Union until 1848, when Oregon became a state and was granted both section sixteen and section thirty-six from each township for the support of its schools.¹⁰ This practice continued until 1894, when Utah was admitted as a state and was granted four sections from each township for the support of its schools.¹¹ Arizona and New Mexico each received similar grants of four sections from each township.¹²

B. Creation of Inholdings

Utah's trust lands, as well as those of other states, consist of the same numbered sections in each township. Although the state has sold some trust lands and has participated in small land exchanges with the federal government involving trust lands, most of the state's trust land still consists of one-square-mile parcels of land scattered randomly throughout the state. In the years since Utah obtained statehood in 1896, the federal government has created Indian reservations, national parks, and other National Park System (NPS) units throughout the state. Generally, the lands that the federal government has designated as Indian reservations and NPS units have included existing trust lands. As a result, over 116,000 acres of Utah's school trust lands are trapped within NPS units and Indian reservations¹³ as shown below:

Arches National Park	7,222 Acres
Capital Reef National Park	20,234 Acres
Dinosaur National Monument	3,057 Acres
Glen Canyon National Recreation Area	51,297 Acres
Goshute Indian Reservation	1,120 Acres
Navajo Indian Reservation	33,561 Acres

8. COMMAGER, *supra* note 3, at 123.

9. *Id.*

10. Oregon Enabling Act, ch. 177 § 20, 9 Stat. 323 (1848). See also McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525.

11. Utah Enabling Act, *supra* note 1, at § 6.

12. Arizona-New Mexico Enabling Act, ch. 310, 36 Stat. 561, 572 (1910).

13. GMP, *supra* note 2, at 1, 4.

These trapped lands are referred to as inholdings.

C. *The Conflicting Purposes of National Parks, Reservations, and Trust Lands*

The purposes of national parks, Indian reservations, and school trust lands are congressionally mandated. However, these purposes directly conflict with each other. National parks exist "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."¹⁴ Indian reservations are generally held in trust by the United States government for Indian tribes.¹⁵ As the following discussion of the trust obligation associated with school trust lands shows, the school trust lands are intended to provide a financial base with which to support education in the state of Utah. States are required to obtain the maximum possible economic return from their trust lands, but they simply cannot do this while preserving the same lands for the unimpaired enjoyment of future generations.¹⁶

III. TRUST OBLIGATIONS

A. *The Utah Enabling Act*

An analysis of any state's obligations toward its school trust lands must begin with the instrument granting the lands to the state. Section 6 of the Utah Enabling Act contains Utah's actual land grant, which grants sections 2, 16, 32, and 36 in every township of the state to Utah upon admission of the state into the Union "for the support of common schools."¹⁷ Section 10 of the act sets forth Utah's trust obligations regarding the lands:

[T]he proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed

14. 16 U.S.C. § 1 (1988).

15. For background on Indian property law, see F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* Ch. 9 (1982).

16. Although some persuasive arguments have been made for managing school trust lands through a multiple-use sustained yield policy instead of the current policy of maximum economic return, these arguments have yet to find favor with the courts. See, e.g., McCormack, *supra* note 10.

17. Utah Enabling Act, *supra* note 1, § 6.

for school purposes only.¹⁸

Utah accepted its land grants in the Utah Constitution, which provides:

All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise . . . are hereby accepted, and declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.¹⁹

The Utah Constitution also provides that the state guarantees all public school funds against loss or diversion.²⁰

In *Andrus v. Utah*,²¹ the United States Supreme Court characterized the school land grant as a “solemn agreement” between Utah and the federal government.²² As the Court explained, “The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.”²³

B. Case Law Defining the Trust Obligation

There is a substantial body of case law dealing with the principles governing management of state school trust lands. As the following discussion shows, the overwhelming majority of this case law holds that states, as trustees of school trust lands, are required to obtain the maximum possible economic return from their trust lands for their public schools, which are the trust beneficiaries.

Judicial comment on the various states’ trust obligations regarding school trust lands dates back at least to 1852, when the United States Supreme Court declared that funds derived from school trust lands could only be used to benefit the common schools.²⁴ In 1919, the Supreme Court discussed the trust obligation at length in *Ervien v. United States*.²⁵ In *Ervien*, the New Mexico Commissioner of Public Lands sought to spend up to three percent of the income generated by New Mexico’s trust lands to advertise the resources of the state. The

18. *Id.* at § 10.

19. UTAH CONST. art. XX, § 1.

20. *Id.* at art. X, § 7.

21. 446 U.S. 500 (1980).

22. *Id.* at 507.

23. *Id.*

24. Board of Trustees for the Vincennes Univ. v. Indiana, 55 U.S. 268, 274 (1852).

25. 251 U.S. 41 (1919).

Arizona-New Mexico Enabling Act provides that lands granted by the act

[s]hall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided . . . disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.²⁶

The Supreme Court held that the New Mexico Commissioner of Public Lands had no authority to use trust money to promote the virtues of his state, even though such advertising might well increase the value of the remaining trust lands and therefore benefit the trust beneficiaries. As the Court explained, "There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose."²⁷ The Court went on to explicitly state that the United States, as grantor of the trust lands, had the power to impose restrictions on the use of the lands and to exact performance of the conditions it attached to the land grant.²⁸

One of the most frequently cited cases dealing with school trust lands is *Lassen v. Arizona ex rel. Arizona Highway Department*.²⁹ *Lassen* originated as a controversy between the Arizona State Highway Department and the Arizona State Land Commissioner. The Highway Department attempted to obtain rights of way to build a highway over school trust lands. The Highway Department argued that because highways constructed across school trust lands would enhance the value of remaining trust lands in amounts equal to or greater than the value of the lands taken, it should not be required to compensate the Land Commissioner for the lands it took. The Arizona Supreme Court agreed and ordered the Land Commissioner to grant the Highway Department rights of way across school trust lands without compensation.

The Supreme Court reversed the Arizona ruling, requiring the Highway Department to pay to the Land Commissioner the land's appraised value. The Court held, "The Enabling Act unequivocally demands . . . that the trust receive the full value of any lands transferred

26. *Id.* at 45 (quoting Arizona-New Mexico Enabling Act § 10).

27. *Id.* at 47.

28. *Id.* at 48.

29. 385 U.S. 458 (1967).

from it."³⁰ In reaching this decision, the Court reviewed the legislative history of the Arizona-New Mexico Enabling Act:

The restrictions placed upon land grants to the States became steadily more rigid and specific in the 50 years prior to [the Enabling] Act, as Congress sought to require prudent management and thereby to preserve the usefulness of the grants for their intended purposes. The Senate Committee on the Territories, with the assistance of the Department of Justice, adopted for the New Mexico-Arizona Act the most satisfactory of the restrictions contained in the earlier grants. Its premise was that the grants cannot 'be too carefully safeguarded for the purpose for which they are appropriated.' [One senator] described the restrictions as 'quite the most important item' in the Enabling Act, and emphasized that his committee believed that 'we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes.'³¹

Because the Court intended its decision to apply to school trust land problems generally, *Lassen* has been repeatedly cited by both state and federal courts attempting to determine the extent of trust obligations associated with school trust lands.³²

In *Oklahoma Education Association, Inc. v. Nigh*,³³ the Oklahoma Supreme Court declared that state statutes which provided for the use of school trust land assets and funds to subsidize farming and ranching operations in the state were unconstitutional. In so holding, the court stated that Oklahoma's acceptance of its trust lands created an "irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated."³⁴ In discussing the trust obligation, the court stated:

The State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from the use and disposition of the trust property No Act of the Legislature can validly alter, modify or diminish the State's duty as Trustee of the school land trust to administer it in a manner most beneficial to the trust estate and in a manner which obtains the maximum benefit in return from the use of trust property or loan of

30. *Id.* at 466 (quoting Arizona-New Mexico Enabling Act § 10).

31. *Id.* at 467-68 (footnotes omitted).

32. The Court stated that it heard the case "because of the importance of the issues presented both to the United States and to the States which have received [school trust] lands." *Id.* at 461. *Lassen* generated considerable interest among states holding trust lands; nine states submitted *amicus curiae* briefs to the Court. *Id.* at 461 n.5.

33. 642 P.2d 230 (Okla. 1982).

34. *Id.* at 235.

trust funds.³⁵

In *State ex rel. Ebke v. Board of Education Lands and Funds*,³⁶ the Nebraska Supreme Court analyzed statutes which provided that lessees of school trust lands could renew their leases at rates below fair market value. The court found the statutes unconstitutional. Although some parties involved in the case contended that providing maximum return to the trust was only one of several factors that the court should consider, the court expressly disagreed, pointing out that "the primary purpose of the trust is the production of income for the support and maintenance of the common schools of the state."³⁷

In *Kanaly v. State*,³⁸ the South Dakota Supreme Court analyzed a statute which closed the University of South Dakota at Springfield, changed the university into a minimum-security prison and transferred control of the prison/university from the Board of Regents to the Board of Charities and Corrections without consideration. The court ruled that in light of the South Dakota Enabling Act, which created a "special, permanent and perpetual trust" for the educational institutions of the state, the trust lands upon which the university was situated could not be transferred to other state agencies for anything less than full value.³⁹ After describing the nature of the trust, the court stated, "The beneficiaries of this trust, compact, and contract created and established by the Enabling Act and the South Dakota Constitution are the various educational institutions of this state. The beneficiaries *do not* include the general public, other governmental institutions, nor the general welfare of this state."⁴⁰

The Arizona Supreme Court recently reaffirmed its intent to adhere to the policy of obtaining maximum economic benefit from its school trust lands in *Deer Valley Unified School District No. 97 v. Superior Court ex rel. County of Maricopa*.⁴¹ In *Deer Valley*, a school district sought to obtain a fifteen-acre parcel of school trust land upon which the district wished to construct a new school. The school district attempted to condemn the site (which would have required the district to pay the appraised value of the land) and offered in the alternative to bid on the land at a public auction. The Arizona State Land Department refused to cooperate with any of the district's attempts to obtain

35. *Id.* at 235-36.

36. 154 Neb. 244, 47 N.W.2d 520 (1951).

37. *Id.* at 247, 47 N.W.2d at 523.

38. 368 N.W.2d 819 (S.D. 1985).

39. *Id.* at 823-24.

40. *Id.* (emphasis added) (citations omitted).

41. 157 Ariz. 537, 760 P.2d 537 (1988).

the property, preferring to hold the property for future leases in an attempt to maximize the property's contribution to the school trust. A trial court dismissed the school district's action seeking to condemn the property, and the Arizona Supreme Court affirmed. The court found that the Arizona Constitution forbade condemnation as a means of disposal of school trust lands and required that disposal take place at a public auction.⁴² Thus, *Deer Valley* holds that a state land board has authority to retain trust lands in hopes for future earnings, even if by retaining the lands the land board deprives school districts of land needed for new schools.

The above summary of cases represents only a small fraction of the cases discussing the trust obligation attached to school trust lands.⁴³ However, the cases cited above clearly define the trust obligation, and there is no indication that courts will depart from their interpretation of the trust obligation in the future. The Supreme Court recently reaffirmed its long-standing "concern for the integrity of the conditions imposed by the [enabling acts]," stating that such concern "has long been evident."⁴⁴

In addition to the case law summarized above, the Utah Attorney General's office has analyzed Utah's obligations regarding its school trust lands. In one instance, the Utah State Land Board approved the sale of school trust lands to two counties. The Land Board sold the lands for their appraised value, but then discounted the sale price by fifty percent because the state retained a reversionary interest in the lands. In an informal opinion, the Attorney General's office opined that a sale for anything less than fair market value of the lands was unconstitutional:

[T]he land grant trust demands fair market value for any disposition of any interest in state trust lands, whether by the legislature or the Board [T]he Board policy of discounting sales of determinable

42. *Id.* at 541, 760 P.2d at 541.

43. For further case law regarding school trust obligations, see *United States v. 111.2 Acres of Land*, 298 F. Supp. 1042 (E.D. Wash. 1968), *aff'd.*, 435 F.2d 561 (9th Cir. 1970) (Washington statute donating school trust land to the United States held unconstitutional because the Washington Enabling Act requires that school trust lands not be disposed of unless the full fair market value of the estate or interest disposed of is paid to the state); *County of Skamania v. State*, 102 Wash. 2d 127, 685 P.2d 576 (1984) (Washington statute allowing holders of timber leases on school trust lands to base their lease terms on the timber market held unconstitutional because it would benefit timber industry at the expense of trust beneficiaries); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981) (holding that Alaska could not include 5,040 acres of university trust lands in a state park because restricting land uses would not allow the trustees to maximize the economic return from the land for the benefit of the university).

44. *Asarco, Inc. v. Kadish*, 109 S. Ct. 2037, 2053 (1989) (quoting *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302 (1976)).

fees by 50% to account for the state's retained reversionary interest is an improper exercise of the Board's authority and inconsistent with their trust duties.⁴⁵

The above discussion shows that states have a congressionally-mandated duty to obtain the maximum economic return from school trust lands, that any use of trust lands which does not directly benefit the beneficiaries of the trust is a violation of a state's duties under the trust, and that states may not dispose of any interest in school trust lands for anything less than the full fair market value of that interest.⁴⁶

C. *Intent Behind the Land Grant*

In *Lassen v. Arizona*,⁴⁷ the Supreme Court explained that the intent of the land grant was to provide states with a fund with which to support their schools:

*The grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act. It was not supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes. Congress could scarcely have expected, for example, that many of the 8,000,000 acres of its grant 'for the support of the common schools,' all chosen without regard to topography or school needs, would be employed as building sites. It intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools.*⁴⁸

Other sources agree that Congress probably assumed that the states would either sell their school trust lands outright or that the states would use the proceeds of the sale of trust lands to acquire other lands in contiguous units which would be more likely to produce revenue.⁴⁹ This conclusion is consistent with the language of the Utah Enabling

45. Informal Op. Utah Att'y Gen. No. 85-62 (Oct. 7, 1985).

46. See *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985) (holding that an appurtenant water right on school trust land constitutes an interest in land, and therefore cannot be surrendered by the state for anything less than its fair market value).

47. 385 U.S. 458 (1967).

48. *Id.* at 463 (emphasis added). Although this excerpt mentions Arizona specifically, the Court intended its *Lassen* decision to apply to all states holding school trust lands. It is therefore appropriate to apply this passage to Utah as well. See *supra* note 32 and accompanying text.

49. See, e.g., McCormack, *supra* note 10, at 535, 536; UTAH DEPARTMENT OF NATURAL RESOURCES AND ENERGY, PROJECT BOLD: PROPOSAL FOR UTAH LAND CONSOLIDATION AND EXCHANGE 3 (1985) [hereinafter PROJECT BOLD PROPOSAL].

Act itself, which stipulates that "the *proceeds* of lands . . . granted for educational purposes . . . shall constitute a permanent school fund."⁵⁰

IV. FEDERAL INACTION

Unfortunately, the trust fund established by the Utah Enabling Act has never been a source of great revenue to its beneficiaries.⁵¹ The chief factor which prevents Utah from realizing appreciable income from its trust lands is the fact that most of the state's trust lands remain in the same pattern of scattered one-square-mile sections in which the state received them.

For some time, the state has attempted to effect land exchanges, both on small and large scales, in order to consolidate its landholdings and thereby enable the state to manage its trust lands effectively. However, these exchange proposals have been consistently delayed and/or rejected by the federal government, both through simple inaction and through a cumbersome exchange process which makes even the simplest exchanges extremely difficult and time-consuming.

It is easy to understand the reluctance of various federal agencies to make land exchanges with the state a high priority. Most of Utah's square-mile sections of school lands are surrounded by land which the Bureau of Land Management (BLM) controls. The trust lands, therefore, are generally controlled by the BLM as well; if the federal government actually engaged in a large-scale land exchange with the state of Utah, the BLM would lose effective control of about four million acres. Most of the trust lands that are not surrounded by BLM lands are trapped within national parks; the NPS effectively controls these lands.⁵²

Utah's experience in obtaining its "in-lieu" selections provides a good example of federal unwillingness to cooperate with the state on matters involving land exchanges. The Utah Enabling Act provides that

50. Utah Enabling Act, *supra* note 1, at § 10 (emphasis added).

51. Utah has sold, given away, or otherwise disposed of between three and four million acres of trust lands. However, as of June 30, 1989, there was only about \$37,000,000.00 in the school trust fund. See Utah Division of State Lands and Forestry, Annual Fiscal Report (June 30, 1989) (unaudited and unpublished) (copy on file with the BYU Journal of Public Law); Utah Division of State Lands and Forestry, Statement of Fund Balance (June 30, 1989) (unpublished and on file with the BYU Journal of Public Law). The interest derived from this fund provides little support for Utah's public schools. Education expenses now constitute nearly 50% of Utah's state budget. *E.g.*, *Deseret News*, Aug. 6, 1989, at B2, col. 1. The income from the school trust lands currently provides only about one percent of that amount. See Testimony Prepared for Former Utah Governor Scott M. Matheson Before the House Subcommittee on Public Lands Concerning H.R. 4005, the Utah-Federal Exchange Act of 1988, at 4 (May 20, 1988) (unpublished and on file with the BYU Journal of Public Law) [hereinafter Matheson Testimony].

52. See *supra* note 13 and accompanying text.

if any of the sections granted to the state in the Enabling Act had already been disposed of by Congress, the state would be entitled to "other lands equivalent thereto."⁵³ These lands have since become known as "in-lieu" lands, because they are selected by the state in lieu of trust lands to which the state was entitled. Utah was not surveyed until long after its admission to the Union, and therefore did not file the first of its indemnity selection lists with the BLM until 1965.⁵⁴ However, the state did not complete its in-lieu selections until after 1985.⁵⁵

Furthermore, in 1974, the Secretary of the Interior imposed a new standard on in-lieu selections *after* the state had submitted its selections. Traditionally, land exchanges had been conducted on an acre-for-acre basis; the standard imposed in 1974 called for exchanges to be prohibited if they involved "grossly disparate values."⁵⁶ Utah challenged the new standard in court, and the Supreme Court, in a 5-4 decision, upheld the new standard.⁵⁷

Frustration with the scattered pattern of state school trust lands gave rise in early 1981 to Utah's Project BOLD, a proposal for land exchange which would have consolidated Utah's school trust lands into forty-seven large blocks through congressional, rather than administrative, action.⁵⁸ The Project BOLD proposal cites federal inaction on exchange proposals as one of the factors preventing the state from exercising its trust responsibilities:

The checkerboard pattern of State school lands often leads to conflict between the State and federal governments over use of specific lands and often precludes the State from exercising its school trust responsibilities. Attempts to address these problems through small exchanges of State parcels with the federal government have been frustrating and largely unsuccessful. *Some exchange proposals have been pending more than 20 years.*⁵⁹

53. Utah Enabling Act, *supra* note 1, at § 6.

54. *Andrus v. Utah*, 446 U.S. 500, 503-04 (1980).

55. Matheson & Becker, *Improving Public Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, 33 ROCKY MTN. MIN. L. INST. § 4.03[1] (1988).

56. *Id.* at § 4.03[1]; *see also Andrus v. Utah*, 446 U.S. 500, 503-06.

57. *Andrus v. Utah*, 446 U.S. 500 (1980). In his dissent, Justice Powell noted that the Court's opinion "ignores the clear meaning of statutes spanning about two centuries in which Congress specifically adopted an equal acreage principle as the standard for making compensation" for in-lieu selections. *Id.* at 521 (Powell, J., dissenting).

58. *See generally* UTAH DEPARTMENT OF NATURAL RESOURCES AND ENERGY, PROJECT BOLD: ALTERNATIVES FOR UTAH LAND CONSOLIDATION AND EXCHANGE (1982); PROJECT BOLD PROPOSAL, *supra* note 49; and Matheson & Becker, *supra* note 55.

59. PROJECT BOLD PROPOSAL, *supra* note 49, at 4 (emphasis added).

Former Utah Governor Scott Matheson recently co-authored an article describing Utah's experiences with land exchanges during his tenure as governor. In his description of the difficulties of the administrative exchange process, Governor Matheson points out that "[i]n 1984 Utah had more than 22 exchange applications pending with the Bureau of Land Management covering over 200,000 acres of land dating back to June, 1967. . . . [T]he complexities of the exchange process rendered all but the simplest and smallest exchanges impossible to complete."⁶⁰

V. THE PROPOSAL TO SELL UTAH'S INHOLDINGS

The inability of the state to consolidate its trust lands, thereby allowing the state to effectively manage those lands, has led to increasing frustration on the part of state officials. These frustrations reached the boiling point on April 11, 1989, when the Utah State Land Board adopted a resolution which called for the marketing and disposal of most of the state's inholdings unless the federal government agreed to an exchange involving Lake Powell lands within a few months. This resolution was clarified and expanded in a July 21, 1989, draft general management plan (GMP) prepared and published by the State Land Board.⁶¹ Public reaction to this proposal was immediate and overwhelmingly negative, and the proposal has since been informally rescinded.⁶²

One of the motivating forces behind the GMP was a Memorandum of Understanding (MOU) signed by Governor Norman Bangerter of Utah and U.S. Secretary of the Interior Don Hodel in early 1987.⁶³ Shortly after Bangerter was elected Governor of Utah in 1984, Hodel, in his first news conference as Secretary of the Interior, affirmed his strong support for Project BOLD.⁶⁴ Governor Bangerter, however, did

60. Matheson & Becker, *supra* note 55, at § 4.03[2]. The authors of this article point to the appraisal process as one of the factors making exchanges so difficult. Under federal law, mineral lands to be exchanged through the administrative process must be appraised. The appraisals must be based on core drillings, the costs of which may exceed the value of the lands involved unless the minerals found are extremely valuable. *Id.*

61. GMP, *supra* note 2.

62. The State Land Board has issued no formal statement rescinding this proposal, but the October 1, 1989, deadline passed some time ago and the Land Board has taken no further action regarding the GMP.

In November 1989, the author spoke with Scott Flandro, projects coordinator of the State Land Board. Mr. Flandro stated that the proposal to market the inholdings had been indefinitely postponed.

63. See Memorandum of Understanding Between the Department of the Interior and the State of Utah, May 19, 1987 (on file with the BYU Journal of Public Law) [hereinafter MOU].

64. Deseret News, Feb. 21, 1985, at B1, col. 1.

not pursue land exchange and consolidation on a statewide basis.⁶⁵ On May 19, 1987, Governor Bangerter and Secretary Hodel signed the MOU which provided, among other things, that (1) removal of Utah lands from federal reservations was in the best interests of both the state and the federal agencies responsible for managing federal lands; (2) both the state and the federal governments would cooperate in attempting to exchange the state inholdings for lands in or on the extremities of the Glen Canyon National Recreation Area; and (3) the Department of the Interior would attempt to complete the exchange within eighteen months.⁶⁶

The idea of a Lake Powell exchange was not new. During Governor Matheson's administration, the state inquired about the feasibility of a land exchange which would give the state lands near Lake Powell, but such proposals were consistently rejected by the Division of Parks and Recreation.⁶⁷ Hodel's statement of support for an exchange allowing Utah to obtain substantial landholdings near Lake Powell certainly was one factor leading to the State Land Board's decision to demand the Lake Powell Exchange in the GMP.

A. *Analysis of GMP*

The first section of the GMP provides background information on the school land grants and describes the difficulties the state has had in attempting to encourage the federal government to cooperate with Utah in effecting land exchanges. The GMP opens with a statement of support for the Bangerter/Hodel MOU. It then provides a brief history of the federal school grants and Utah's grant in particular, concluding that "the [Utah] Enabling Act and the Utah Constitution form a compact between the United States and Utah for the benefit of the state's public school system," and that Utah's trust lands "must be managed prudently to maximize direct economic contribution to the trust institutions, over time."⁶⁸ The plan then documents how changes in federal policy have combined with other factors to prevent the state from realizing the benefits from its trust lands that Congress originally envisioned,⁶⁹ and asserts that because of the continued state ownership pat-

65. Matheson & Becker, *supra* note 55, at § 4-41.

66. MOU, *supra* note 62.

67. Matheson Testimony, *supra* note 51, at 30-31.

68. GMP, *supra* note 2, at 7.

69. *Id.* at 8. As a young nation, the United States maintained a policy of disposal of public lands. Over time, this policy was changed and revised until the passage of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (FLPMA), which officially adopts a formal policy of land retention. This has affected the trust because the federal government agreed, in Utah's Enabling Act, to pay into the trust five percent of the sales of all federal

tern of square-mile sections surrounded by seas of federal land, the federal government essentially controls most of Utah's school trust lands.

Next, the GMP explains how Congress reserved federal lands for national parks, national monuments, defense areas, and so on, *after* Congress had already granted sections of these lands to the state, thereby creating the inholdings. The first section of the GMP concludes with a complaint against the federal government for preventing the state from realizing revenue from its inholdings by making exchange processes so complicated as to make all but the simplest exchanges impossible.

After voicing its support for the Lake Powell exchange, the GMP proposes that 116,000 acres of inholdings within national parks, national monuments, national recreation areas, and Indian reservations be sold or leased unless federal legislation providing for the Lake Powell exchange is "imminent" by October 1, 1989.⁷⁰

Parts two and three of the GMP provide for the marketing of mineral and surface estates respectively. These sections give general descriptions of the available lands and describe the potential for mineral development or surface uses of the lands.

B. *Problems With the GMP*

The GMP was probably either an effort to compel better cooperation from the federal government, or else merely an effort to raise public awareness of the problems Utah faces in trying to force the federal government to cooperate with the state to eliminate the state's inholdings.⁷¹ This strategy, however, backfired; the proposal raised the ire of many prominent citizens who blasted the land board for proposing the sale of Utah's national parks.⁷²

lands. Utah Enabling Act, *supra* note 1, at § 10.

70. GMP, *supra* note 2, at 10-11.

71. In support of the argument that the GMP was merely an attempt to raise public awareness of the problems Utah continues to experience in trying to get rid of its inholdings, it must have been obvious to the State Land Board that federal legislation could not possibly be "imminent" by October 1, 1989, as the GMP called for, even with the full cooperation of the federal government. That date was scarcely more than two months away from the time the GMP was released.

72. *See, e.g.*, Deseret News, Aug. 22, 1989, at B1, col. 6 (report of public hearing in which one man supported the GMP, one woman was ambivalent, and nearly 40 citizens "adamantly opposed" the plan, including former Governor Scott Matheson and "teachers, lawyers, hikers, and blue collar workers"); Salt Lake Tribune, Aug. 22, 1989, at B1, col. 1 (report of same meeting); Salt Lake Tribune, Aug. 23, 1989, at A8, col. 1 (editorial finding it "abundantly clear" that the GMP was "the latest in a series of maneuvers to compel better cooperation from the federal government" and proposing that the state collect rent from the federal government for uncompen-

If the goal of the State Land Board in releasing the GMP was to increase public awareness of the problems involved in trying to realize revenue from the school trust lands, then the Board achieved its goal. However, the Board did this at the expense of its own credibility; public reaction to the proposal was overwhelmingly negative, and the Board itself was the target of intense criticism.⁷³ One of the reasons for this is that the tone of the GMP made it appear as if the Land Board actually *wanted* to develop the inholdings within the national parks. Had the Land Board given the federal government sufficient time to respond to its demand for substantial progress on the Lake Powell exchange—for instance, twelve to eighteen months instead of two—the Board might have appeared to be more serious and more credible.

Another unfortunate consequence of the Land Board's proposal may have been to promote even greater reluctance on the part of federal agencies to exchange land. For example, much of the land around Lake Powell is a national recreation area, similar in purpose to a national park. If the state plans to raise money through unrestricted commercial development of the lands it hopes to acquire around Lake Powell, this could ruin the atmosphere that the NPS desires to create through its national recreation areas. Although some of the above writing is necessarily speculation, it is clear that the GMP did have at least one positive effect—as a result of its publication, the general public in Utah is much more aware of the school trust lands and the state's problems in managing those lands than the public was only a few months ago.

VI. A SUIT FOR INVERSE CONDEMNATION?

A. *The Argument for Inverse Condemnation*

The forementioned letter from Superintendent Moss to Attorney General Van Dam⁷⁴ concludes with the following request:

If it be true that the land grants under the Enabling Act created trusts binding both the State and Federal governments in a solemn compact for the purposes stated in the grants, then the Federal government has been guilty almost since the inception of the Trusts of a gross violation of its duties under the compact, resulting in the infliction of a continuing and disproportionate burden of taxation upon all of the taxpayers of Utah, and a deprivation of critically needed revenues for Utah's schools, colleges, and institutions.

sated use of school trust lands).

73. Deseret News, *supra* note 72. The report of the hearing describes "ringing cries for the jobs of Land Board members" and "denunciations of Gov. Norm Bangerter for appointing the Land Board members."

74. See *supra* section I.

I therefore ask that you proceed without delay, as legal counsel for the Utah Public School System, to undertake a suit against the United States for inverse condemnation, breach of fiduciary duty, or such other causes as you may determine, after evaluation of the facts of the case, to be appropriate.⁷⁵

This section analyzes Superintendent Moss' request.

Initially, it should be noted that two important facts relating to federal condemnation of state inholdings within national parks are well-settled. First, federal policy is to eventually acquire all privately owned inholdings within national parks, although NPS policy on this point has vacillated from time to time. Second, the NPS possesses the power to condemn private inholdings within national parks on behalf of the federal government.

Over twenty-five years ago, Congress passed the Land and Water Conservation Fund Act of 1965,⁷⁶ which provides for the planning, acquisition, and development of outdoor recreation areas. Since its passage, the act has been the main source of funds with which the federal government has acquired its national parks and other recreation lands.⁷⁷

Congress has often asserted that it intends to acquire all private inholdings within the national parks.⁷⁸ Federal courts have recognized Congress' apparent intent to acquire these lands.⁷⁹ The NPS, by con-

75. Letter from James R. Moss, Utah State Superintendent of Public Instruction, to Paul Van Dam, Utah State Attorney General (October 25, 1989) (letter on file with the BYU Journal of Public Law).

76. Pub. L. No. 88-578, 78 Stat. 897 (codified as amended at 16 U.S.C. § 460d, 460l-4 to 460l-11, 23 U.S.C. § 120 (1988)).

77. See S. REP. NO. 162, 95th Cong., 1st Sess. 2 (1977); H. REP. NO. 156, 95th Cong., 1st Sess. 2 (1977). The Act provides, in part, that "[m]oney appropriated from the fund for Federal purposes shall . . . be allotted by the President . . . [f]or the acquisition of land, waters, or interests in land or waters . . . [w]ithin the exterior boundaries of the National Park System." 16 U.S.C.A. § 460l-9 (West Supp. 1989).

78. See S. REP. NO. 162, *supra* note 77. The Report discusses H.R. 5306, the purpose of which was to provide funding "to acquire the backlog of lands previously authorized for inclusion in the national park system." *Id.* at 2. Lands previously authorized included all areas within national parks. See 16 U.S.C. § 460l-9. The report includes the following statement: "The committee clearly recognizes that the intent of Congress is to eventually acquire all inholdings located in the national park system." S. REP. NO. 162, *supra*, note 77, at 6.

See also H. REP. NO. 156, *supra* note 77 (recognizing need to acquire inholdings and proposing amendments to H.R. 5306 which would state Congress' express intent to acquire all inholdings within three years of enactment of amendment); 123 CONG. REC. 16,690 (Congress has, for some time, intended to acquire all private inholdings within national parks) (remarks of Rep. Sebelius).

In 1987, Congress extended the funding of the Act through 2015. This indicates a continuing desire on the part of Congress to eventually acquire all private lands within the national parks. See 16 U.S.C.A. § 460l-5(c)(2) and 1987 Amendment (West Supp. 1989).

79. See Committee of 100 on the Federal City v. Hodel, 611 F. Supp. 547, 559, 560 (D.D.C.

trast, has at different times maintained policies of either prompt or eventual acquisition of private inholdings within national parks. Currently, the NPS does not have a strict policy of acquisition *per se*; rather, park superintendents are required to complete Land Protection Plans (LPPs) specifying which park lands need to be taken out of private ownership and whether any park lands may be protected by means other than federal acquisition in fee.⁸⁰ Regardless of the NPS's current policy, however, Congress clearly seems to favor eventual federal acquisition in fee ownership of all inholdings within the national parks. This policy reflects the ethical consideration that since the federal government effectively controls all uses on national park lands, it should acquire clear title to all park lands, and by so doing compensate prior owners of the lands.

Congress has given government officials, including the NPS, liberal power to condemn property through the Condemnation Act.⁸¹ The United States Supreme Court has found this condemnation authority to be extremely broad.⁸²

Unfortunately, the fact that Congress apparently wants the NPS to eventually acquire all privately-owned lands within national parks, combined with the fact that Congress has given the NPS authority to condemn private lands within national parks, has not motivated the NPS to actually condemn Utah's inholdings. This can probably be attributed to the fact that although the Land and Water Conservation Fund Act of 1965 is currently funded for at least \$900,000,000 per

1985) ("Congress has repeatedly reaffirmed its intention that the amendments to the land and Water Conservation Fund Act of 1965 be used to further the goal of acquiring all private inholdings within national parks."); *United States v. 0.37 Acres of Land*, 414 F. Supp. 470, 472 (D. Mont. 1976) ("It seems quite clear that Congress has long favored the acquisition of private lands within the boundaries of the national parks. This is reflected not only by the continued appropriations for acquisition of such inholdings, but likewise by legislative history of the laws relating to them.") (citations omitted).

80. For a discussion of the various policies pursued by the NPS, see generally Comment, *Parks, People, and Private Property: The National Park Service and Eminent Domain*, 16 ENVTL. L. 935, 939-40 (Summer 1986).

81. The Condemnation Act provides, in relevant part:

In every case in which . . . [any] officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so

40 U.S.C. § 257 (1982).

82. In *United States v. Carmack*, 329 U.S. 230, 236 (1946), the Supreme Court held that it "must be slow to read into [the Condemnation Act] unexpressed limitations restricting the authority of the very officials named in [the Act] as the ones upon whom Congress chose to rely."

For further discussion of the NPS's authority to condemn land, see Comment, *supra* note 80, at 936-38.

year through the year 2015,⁸³ money from the fund may only be spent if appropriated by Congress.⁸⁴ In this time of rising federal budget deficits and increasing federal commitments, it should come as little surprise that appropriations have diminished steadily in recent years.⁸⁵

Even if the federal government had an unlimited supply of money, however, the NPS would have little incentive to go through the bureaucratic headaches necessary to condemn private inholdings within national parks, since it effectively controls all private land within national parks already. The current federal budget deficit, combined with this natural reluctance on the part of the NPS to condemn private inholdings, renders the likelihood of condemnation of Utah's inholdings extremely remote at any time in the foreseeable future. Therefore, if Utah desires to enjoy the benefits of condemnation of its inholdings,⁸⁶ it will have to bring a suit of inverse condemnation against the NPS.

B. Inverse Condemnation Procedure and Requirements

The law of inverse condemnation is governed by the Tucker Act.⁸⁷ Stated generally, inverse condemnation is a remedy sought when a government agency has taken private property (either personal or real) for a public use without compensating the owner.⁸⁸ In such a case, a property owner may sue the government agency involved for just compensation.⁸⁹ Federal courts have held that inverse condemnation may occur where government regulation is "practically so burdensome and pervasive that the landowner is denied all use of his land,"⁹⁰ and where government acts impede and interfere with an owner's use of property in such a manner as to constitute a taking of the fee interest therein.⁹¹

83. 16 U.S.C.A. § 460l-5(c)(1) (West Supp. 1989).

84. 16 U.S.C. § 460l-6 (1988).

85. *E.g.*, Comment, *supra* note 80, at 941 n.35.

86. The author does not imply that condemnation of the inholdings is the best solution to the problems created by the inholdings. Obviously, one advantage of condemnation is that the federal government would be forced to pay Utah fair market value for over 116,000 acres of land, resulting in a large infusion of capital into the principal of the School Trust Fund.

As this comment shows, Utah has for some time attempted to exchange its inholdings for comparable lands outside its national parks without success. A land exchange would probably provide the state with greater protection against inflation than an outright sale of the inholdings and other trust lands. However, land exchanges involving inholdings within national parks would be more difficult to effect than traditional land exchanges, primarily because FLPMA requires the federal government to exchange lands on a value-for-value basis, and it is difficult to ascertain the values of national park lands.

87. 28 U.S.C. §§ 1346(a)(2), 1491 (1982).

88. 7 FEDERAL PROCEDURE, LAWYER'S EDITION § 14:155 (1982).

89. *Id.* at 14:156.

90. *Armijo v. United States*, 663 F.2d 90, 93 (Ct. Cl. 1981).

91. *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970).

The action may be brought in either a U.S. District Court or the U.S. Claims Court, but must be brought in the U.S. Claims Court if the amount claimed is over \$10,000.⁹² For an inverse condemnation suit to lie, the taking must be authorized by Congress.⁹³ Any civil action brought against the United States must be brought within six years from the time the right of action first accrues or it will be barred.⁹⁴

If Utah were to initiate an inverse condemnation proceeding concerning its inholdings, most of these elements would be easily satisfied. Obviously, a taking authorized by Congress has occurred. Over 116,000 acres of real property, which were granted to the state by the federal government for the express purpose of providing support for public education, were subsequently trapped within national parks through Congressional action. The congressionally mandated purpose of the parks, which is to preserve and protect the parks and leave them unimpaired for the enjoyment of future generations, directly conflicts with the congressionally mandated purpose of the school trust lands, which is to provide revenue for the schools. Because the state's inholdings are small parcels of land trapped within large national parks, the inholdings are managed as national park lands. It may well be said that the government regulation of the inholdings is "practically so burdensome and pervasive that the landowner is denied all use of his land."⁹⁵

There is, however, one major difficulty with Utah's bringing an action charging the federal government with inverse condemnation, and that is the six-year statute of limitations.⁹⁶ If a court were to hold that the inholdings were "taken" by the NPS on the date that the respective national parks were created, then the six-year statute of limitations obviously would have long since run. On the other hand, if a court were to hold that the takings occurred on the date that the final Land Protection Plans for the respective national parks became effective, then the takings may have occurred within the last six years.

To summarize, the NPS has the authority to condemn private inholdings within Utah's national parks. Although Congress favors federal acquisition of inholdings within the national parks, the funds provided for by the Land and Water Conservation Fund Act of 1965 are not being appropriated by Congress in the amounts envisioned by the Act itself. This fact, combined with natural reluctance on the part of the NPS to undertake action to condemn lands that it already effec-

92. 7 FEDERAL PROCEDURE, *supra* note 88, at 14:156.

93. *Id.*

94. 28 U.S.C. § 2501 (1982).

95. *See Armijo*, 663 F.2d at 93.

96. *See supra* note 94 and accompanying text.

tively controls, makes it unlikely that the NPS will condemn Utah's inholdings at any time in the near future. The state may elect to initiate an action charging the NPS with inverse condemnation of the inholdings, but the success of such an action may depend upon when the actual taking took place. The statute of limitations imposed by the Tucker Act may have already run.

VII. CONCLUSION

The school trust lands granted to Utah by the federal government were intended to serve as a source of revenue for Utah's public schools. For a variety of reasons, however, the trust lands have never provided these schools with significant revenues. The state has a fiduciary duty to manage the trust lands in a manner that will provide Utah's schools with the benefits that Congress intended they should receive.

Although sale of the trust lands is one option, it is not an appealing one. Utah's trust lands, if sold in their current scattered state, would probably not command a worthwhile price. Unloading millions of acres of trust lands on the marketplace would drive the price of the trust lands down even further. It is therefore highly unlikely that the state will ever realize a substantial economic benefit from its trust lands unless the state is somehow able to convince the federal government to work with the state in conducting a massive land exchange, allowing the state to consolidate its holdings and manage them effectively. The burden with this does not lie solely with the federal government. The state of Utah needs to develop a viable proposal for a comprehensive land exchange. The Bangerter administration has concerned itself with solving the inholdings problem while neglecting the overall problems with the trust lands.

In the meantime, the state should not rule out possible legal action against the federal government. Obviously, the state has not been treated fairly with regard to its trust lands. A suit alleging inverse condemnation of at least the inholdings would at least encourage the federal government to deal fairly with the state. If the state does nothing, however, it will continue to realize virtually no benefit from its trust lands.

Matthew J. Harmer