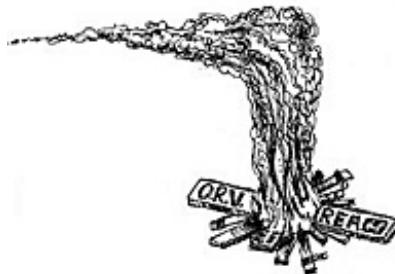




Issue No. 73

July 24, 2017

# Around the Campfire with Uncle Dave Foreman



## Comparing Apples and...Parsnips?

*State Trust Lands are often misunderstood in terms of both their character and their management.*  
**THEY ARE NOT PUBLIC LANDS**, but are instead the subject of a public trust created to support the education of New Mexico's children. (Emphasis in original.)  
--New Mexico State Land Office Website, Aubrey Dunn, Commissioner

In all the hurly-burly chatter about handing over the federal Public Lands to state ownership and management, there is the assumption that the lands would more or less stay the same but under better, more local, and more open management by the states than by the faraway feds. Nothing could be further from the truth. State Trust Lands exist for a wholly other purpose and legal mandate than do the Public Lands (National Forests, National Park units, National Wildlife Refuges, and Bureau of Land Management lands). State Trust Lands were created to help fund schools and other public institutions, not to provide recreation grounds or wildlife habitat. As New Mexico State Land Commissioner Aubrey Dunn has truthfully said, *the state lands are not public lands*. Were our nation to transfer Federal Public Lands to the states, we would lose general access to them and they would not generally be

managed for wildlife conservation.

Nonetheless, partly out of ignorance of the utterly different mandates for State Trust Lands and Federal Public Lands, nearly every Republican member of the House of Representatives, the Republican Party national platform, and nearly all of the GOP candidates for the presidential nomination in 2016 have called for giving our National Forests, Wildlife Refuges, Parks, and other Public Lands to the states. The whipsnapper for the Republican drive in the House for land transfer, Rep. Rob Bishop of Utah, has even introduced legislation calling for American taxpayers to pony up \$50 million to begin the process of handing over *their lands* to the states.

This shove against federal ownership of land and the whole idea of *Public Lands* began with the first withdrawals of Forest Reserves in the 1890s. Though backed by Western boomers, loggers, miners, and oil men, the leaders from the get-go have been the sheepmen and cowmen, first running their herds for free on the unallocated Public Lands and then for way-below-market-value grazing fees on National Forests and BLM lands. During the last 125 years, the anti-Public Lands rabble has mostly simmered on the back burner but has boiled over now and then, most of all in the 1940s and early 1950s and again in the late 1960s with the so-called Sagebrush Rebellion.[\[1\]](#) The biggest of all boils, though, is now.

Key for the fight of Public Lands lovers and users to keep the Public Lands in the public's hands (the whole public of the fifty states!) is to understand the bedrock difference between state and federal lands. You will learn around this Campfire just how unlike State Trust Lands are from the National Forests and other federal Public Lands we know so well. In a follow-up Campfire, I'll chop-up the highfalutin assertions about how much better the National Forests and all would be under State Land Trust management.

## **HISTORY OF STATE TRUST LANDS**

Let's go to the beginning to better understand how sundered are the State Trust Lands and the Federal Public Lands. In order to handle settlement of the West and set up the steps by which newly settled territories could be admitted to the Union as new states with the same rights and status as existing states, Congress (still operating under the Articles of Confederation—the Constitution had not yet been written and approved) passed the General Land Ordinance of 1785 and the Northwest Ordinance of 1787. Before the War of Independence, some British colonies had gained land grants from the Crown that stretched from the Atlantic to the Mississippi. Virginia not only stretched to the Mississippi, but also north of the Ohio River. States without such sprawling grants, such as Maryland, were fearful that the big, big states such as Virginia would be overwhelming in power, both economic and population, and would thereby overlord the new nation, making a mockery of equal states. Maryland and other little states would not enter into a confederation unless the states with big grants gave up their trans-Appalachian lands to the new national government, which could then sell such lands to settlers and others to pay off the staggering war debt. Virginia agreed as did the other states with western lands, and the new United States under the Articles of Confederation now held a "public domain" of nearly 240 million acres. These lands from the Appalachians to the Mississippi and north of Spanish Florida to the Great Lakes were the beginning of the federal Public Lands and were the great wealth of the new nation.

After the War of Independence, there was a swell of citizens and immigrants itching to cross the Appalachians into the Indian-held lands to the West and make their farms and new settlements. Some, like Daniel Boone and his followers (including some of my Foreman kin) had already started settlements in Kentucky (part of Virginia) before the War of Independence. The General Land Ordinance of 1785 and the Northwest Ordinance of 1787 were meant to manage this settlement in a

rational way. First, the General Land Ordinance said that surveying the land had to precede settlement. The survey would be on a township/section grid, with regularly numbered sections of a square mile (640 acres) filling a township six miles on a side or thirty-six sections (square miles). In the middle of the township, section 16 would go “for the maintenance of public schools within the said township.”<sup>[2]</sup> The Northwest Ordinance laid out the steps for how new states could be admitted to the Union on an equal footing with the original thirteen states. Veterans of the Continental Army could receive grants of surveyed land for their service, the acreage in keeping with their rank (100 acres for a private up to 500 acres for a colonel). Otherwise land was sold to settlers—and to wealthy land speculators.<sup>[3]</sup> It was not until 1862 that a Homestead Act was passed, providing free land to those who settled and farmed it. Before then, federal land was sold.

Underlying the General Land and Northwest Ordinances, I find three concepts from the Enlightenment mind of Thomas Jefferson on how the new nation was to grow:

First, the United States would be a nation of yeoman farmers tilling their own land. Cities would not be in the saddle.

Second, these hardy swains would be well educated, as education was essential for good citizenship. Thus, we would have an educated agrarian republic.

Third, the layout of settlement would be on a planned, Enlightenment grid, with the township of 36 square miles the first level of community and government.



**The grant of school sections to new states went through four stages.** The first was the Ohio stage. Although the General Land Ordinance and Northwest Ordinance came into being in 1785 and 1787 respectively it was not until 1803 that the first state in the Northwest Territory—Ohio—was admitted to the Union.<sup>[4]</sup> Ohio and the states that followed were given Section 16 for support of public schools. At first, however, Section 16 went to the township for its public schools. It soon became clear that the Enlightenment grid was not how settlement and community were playing out on the land because the grid was blind to

geography such as rivers and terrain. So, as later states were admitted to the United States, Section 16 was given first to the county, then to the state.

became more generous due to the rising political power of the West. Stage 3 began with the admission of Utah in 1896 with *four* sections—16, 36, 2, and 32—granted for support of schools. Arizona and New Mexico, admitted as states in 1912, also got four sections. The fourth stage came with the statehood of Alaska in 1960 where the school land trust was thrown out the window. Alaska would simply be handed a breathtaking one-third of all federal land in the state.

Early on, however, the rational grant of Section 16 ran into problems—it was not always available. A settler or land speculator may have already taken it. So, *in lieu* selection was born. If the planned school trust section was not available, the state could select another section in lieu of 16. Forward through time and the march West, *in lieu* selections became more important. Army forts, Indian reservations, railroad grants, and other sales and giveaways might have already taken the school sections. Then with Utah, Arizona, and New Mexico there were also Forest Reserves, National Monuments, and other withdrawals. So, *in lieu* selections became more important.

As the United States marched West led by the Goddess of Manifest Destiny, land grants evolved. The early states to receive Section 16 generally sold off such sections to pay for public schools. Congress, therefore, began to be stricter in statehood acts regarding the school land grants, and new states began to establish in their constitutions more of a *trust* concept to the lands given from the federal government for the support of schools.

Moreover, beyond granting more sections in each township, additional grants of land were given new states for the support of universities, prisons, special schools, to encourage railroads, and for other good things. The acreage handed out in the West was much greater than what the Eastern states had gotten.

### **CHARACTERISTICS OF SCHOOL TRUST LANDS**

Early Western states (California 1850 and Nevada 1864) followed the lead of Eastern states and sold off most of their school sections (California 90%, Nevada 99.999%).[\[5\]](#) So, today, when we talk of states with school trust lands, we are mostly talking about nine states west of the Great Plains—Oregon, Washington, Idaho, Montana, Wyoming, Colorado, Utah, Arizona, and New Mexico. It was not until the last two states in 1912—Arizona and New Mexico—that Congress explicitly established the granted lands as a trust. However, through court decisions and state constitutions, granted lands in the other states have taken on a trust obligation.

### **So, what is a trust as applied to granted lands for support of the schools?**

Cobbled together through British and American common law, US legislation, and court decisions (including the US Supreme Court), the concept and reality of a legal trust is quite clear.

Three parties are needed to establish a legal trust: 1) the *settlor* is the legal person who creates the trust; 2) the *trustee* holds the trust property; and 3) the *beneficiary* benefits from the trust property.[\[6\]](#)

For our purposes, the trust property is the land grant to the state from the federal government. The federal government is the settlor who gave the state certain federal lands. The trustee is the state land office, (which varies among the states), which manages the land and makes money off its management. And the beneficiary is the state school system and other public entities (universities, prisons, and so forth) as established in the federal grants of land.

Moreover, three elements are needed for a trust: “an *expression of intent*” enforceable in court; an obvious “*beneficiary*;” and a “*property interest*...held for the benefit of the beneficiary.”[\[7\]](#)

Then, “[f]ive general principles guide public trust management: clarity, undivided loyalty, accountability, enforceability, and perpetuity” write Jon Souder and Sally Fairfax. Clarity of the goal is, “The trustee must exercise prudence, skill, and diligence in making the trust productive for the specified beneficiary.” “[U]ndivided loyalty states that the trustee is strictly forbidden from diverting trust

resources to others.” Accountability means keeping good, accurate records. Enforceability “allows the beneficiary, or others...to sue to enforce the terms of the trust.” For State Trust Lands, perpetuity since the 1840s is in the *Permanent Fund* held for the beneficiary (public schools).[\[8\]](#)

Sundry management set-ups oversee the School Trust Lands in the states, ranging from New Mexico with an elected land commissioner and no board to those with differently constituted commissions with commissioners or managers appointed by the commissions or the governor. New Mexico’s state land commissioner has the greatest power and least oversight.[\[9\]](#)

State land offices (trustees) must manage state trust lands for income to go to the beneficiary. In general, 90 percent of trust revenues go to the public schools (K-12) in Western states. The rest goes to universities, etc.[\[10\]](#) Most of the revenue over the years has gone into a Permanent Fund, where the money goes into stocks, bonds, and other investments. The wealth of some state Permanent Funds is amazingly big.

State Land Offices cannot give away resources or access on state trust lands. For example, Arizona was simply giving road rights-of-way to the state and county highway departments. A court ruling ended that and said such rights-of-way even to the state government had to be paid for.[\[11\]](#) Likewise, the New Mexico State Land Commissioner recently ruled that there was no public access to state trust lands, and if hunters and anglers wanted access, then the New Mexico Game & Fish Commission had to pay more than the paltry \$200,000 a year it had been paying. Land Commissioner Aubrey Dunn first asked for \$3 million a year for such access, but bargained down to \$1 million. The Game Department and hunters and anglers were unhappy, but Dunn was merely following his trust obligation. He explained that State Trust Land is not public land. Quite correct. After Dunn’s action, the Utah Schools and Institutional Trust Lands Administration (SITLA) wanted to jack up the payment from the Utah Division of Wildlife from \$800,000 to double or quadruple that yearly for hunter access. If not, SITLA said it could simply close its lands and lease them to outfitters.[\[12\]](#) In other words, if you wanted to hunt in some of the big game heavens of Utah such as the Book Cliffs, you would need to pay an outfitter who held the lease.

The state land office brings in money on surface resource leases and resource sales (grazing, farming, timber, etc.), subsurface revenues and royalties (coal, minerals, oil & gas, etc.), and through land sales and commercial leases (rights-of-way, golf courses, shopping centers, etc.). Because of how state trust lands may be checkerboarded (section 16, etc. in a matrix of federal land) or in stand-alone blocks, how they may be located in a state (in remote areas or next to growing urban centers), and what resources may be present on state trust lands (coal, timber, minerals, oil & gas, forage, and the like), the annual revenue and the size of the Permanent Fund varies widely among the sundry State Trust Lands states.

In 2013, for example, New Mexico far and away brought in the most revenue (\$577 million), overwhelmingly from oil and gas royalties and revenues, while Oregon brought in the least (less than \$7 million), almost half from timber sales. Also in 2013, New Mexico dwarfed the other states in its Permanent Fund balance (over \$13 billion), with Arizona next (a bit over \$4 billion), and Montana last (only \$546 million).[\[13\]](#)

In our next chat around the ol’ Campfire, we’ll toss all the happy (and phony) assumptions about giving our public lands to the states into the campfire, as well as look at how states have sold School Trust Lands to energy corporations, timber corporations, big ranchers, and other corporations.

To delve deeper into the tangled briar patch of the history and policy of State Trust Lands and federal Public Lands, google “State Trust Lands” and click on *The State Trust Lands* and *State Trust Lands in the West* in the laundry list that pops up. I’ve drawn heavily on those two papers for my research. And buy and read my book *The Great Conservation Divide* for a rather thorough history of how federal

Public Lands evolved (available from rewilding.org).



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*Ne'er do I glance  
Through rose-hued glass  
At the world of Men*

*But for when  
I upend  
My martini glass  
For the last of the gin*

Happy Trails (keep in mind that I can only say that if the Federal Public Lands remain Federal Public Lands)[\[1\]](#)  
Uncle Dave  
In my backyard, watching birds and awaiting neck surgery

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[\[1\]](#) Note: This is the first of several Campfires regarding the current all-out attack on the Federal Public Lands. In addition to explaining the differences between State Trust Lands and Federal Public Lands, topics will include the history and policy of the Antiquities Act of 1906, and the history and policy of the National Monuments coming from that act. By more fully understanding the background and use of these key, but often misunderstood, parts of the Federal Public Lands story, conservationists can better fight the Jacobins storming the long, bipartisan consensus on Federal Public Lands.

**TABLE I**  
**STATE LAND GRANTS FROM FEDERAL GOVERNMENT IN ACRES**[\[14\]](#)

STATE	ALL LAND GRANTS	SOLD	STATE LAND 2013	% OF ORIGINAL GRANT
Arizona	10.5 million	1.3 million	9.2 million	88%
Colorado	4.8 million	2 million	2.8 million	58%
Idaho	3.7 million	1.3 million	2.4 million	65%
New Mexico	13 million	4 million	9 million	69%
Montana	5.9 million	800,000	5.1 million	86%
Oregon	3.4 million	2.6 million	776,000	23%
Utah	7.5 million	4.1 million	3.4 million	45%
Washington	3 million	800,000	2.2 million	73%
Wyoming	4.2 million	700,000	3.5 million	83%

**TABLE 2**  
**INCOME FROM STATE TRUST LANDS**[\[15\]](#)

		PERMANENT FUND	MAIN REVENUE

STATE	TOTAL REVENUE 2013	2013	SOURCE
Arizona	\$318.5 million	\$4.15 billion	Land sales, commercial leases
Colorado	\$125 million	\$664 million	Oil & gas
Idaho	\$75 million	\$1.2 billion	Timber
Montana	\$122 million	\$546 million	Oil & gas
New Mexico	\$577.5 million	\$13.38 billion	Oil & gas
Oregon	\$6.9 million	\$1.26 billion	Timber
Utah	\$106.4 million	\$1.62 billion	Oil & gas
Washington	\$141.8 million	\$916.2 million	Timber
Wyoming	\$223 million	\$2.8 billion	Oil & gas, coal

[1] Better called the Western Rural Welfare Rebellion.

[2] General Land Ordinance of 1785 quoted in *State Trust Lands in the West* (Lincoln Institute of Land Policy, Cambridge, MA, 2015), 8.

[3] See Dave Foreman, *The Great Conservation Divide* 2<sup>nd</sup> Edition (forthcoming) (The Rewilding Institute, Albuquerque, 2017), for more detail on the creation and early disposal of the public domain.

[4] The Northwest Territory was north of the Ohio, east of the Mississippi, and south of the Great Lakes.

[5] From a school grant of 2.7 million acres, Nevada has a mere 3,000 acres unsold.

[6] Jon Souder and Sally Fairfax, *The State Trust Lands* ([www.ti.org/statetrusts](http://www.ti.org/statetrusts)), 2; excerpted from Jon Souder and Sally Fairfax, *State Trust Lands: History, Management, and Sustainable Use* (University of Kansas Press, Lawrence, 1995).

[7] Souder and Fairfax, *State Trust Lands*, 2.

[8] Souder and Fairfax, *State Trust Lands*, 2-3.

[9] Souder and Fairfax, *State Trust Lands*, 5.

[10] *State Trust Lands in the West* (Lincoln Institute of Land Policy, Cambridge, MA, 2015), 21.

[11] *State Trust Lands in the West*, 14; Souder and Fairfax, *State Trust Lands*, 4.

[12] Brian Maffly, "Utah school-trust lands agency wants millions more for hunting access," *The Salt Lake Tribune*, May 20, 2017.

[13] One might ask why New Mexico then has such a budget problem and has cut funding to the bone for public schools and universities.

[14] Based on information from *State Trust Lands in the West*.

[15] Based on information from *State Trust Lands in the West*.



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