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Reshaping Washington's Public Lands Trust Doctrine

Audrey Bell

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Introduction

In this paper, I will discuss how Washington state's trust duties related to federally-granted public lands management have and have not been reconciled with article XVI, section 1 of the Washington constitution. First, I will provide a foundation for the management of federally-granted public lands and the storied history of Congress's intent in providing land grants to the states. Next, I will examine the provisions of the Enabling Act of 1889 ("Enabling Act") and the Washington constitution that govern the management of those granted lands. Third, I will chart the historical treatment of Washington state trust duties related to the federally-granted public lands. Finally, I will argue that neither Congress nor Washington state constitutional framers intended to restrict federally-granted public lands management to provide revenue for common schools at the expense of clear state constitutional goals. The paper will give specific consideration of the Washington Supreme Court's recent opinion in *Conservation Northwest v. Hilary Franz*.[1]

Summary

Congress granted federal public lands to Washington, Montana, and North and South Dakota under one Enabling Act. Accordingly, states' trust duty to manage federal public land grants for specific beneficiaries has been questioned in many courts across state lines. For example, in its recent opinion in *Conservation NW v. Franz*, the Washington State Supreme Court considered two essential questions of Washington state law related to the management of federal public land grants.

[1] *Conservation NW v. Comm'r of Pub. Lands*, 199 Wn. 2d 813, 514 P.3d 174 (2022).

The first question—whether Congress created a private trust duty for the states established by the Enabling Act—has been significant in the state law of land management. The Enabling Act granted federal public lands to each state and provided for the creation and maintenance of a public school system. The Enabling Act mandated that states accept only full market value for the sale or disposal of the lands and designated any revenue generated to specific beneficiaries.[2] Congress granted legislators the authority and discretion necessary to establish the statutory framework to enforce those terms.

Courts' interpretations of the Enabling Act have varied based on different perspectives of the intent of Congress in creating the Enabling Act, as well as varying interpretations of Washington's related constitutional provisions. Based on a 1984 State Supreme Court opinion, Washington state has, until recently, managed federal public grant lands through its Department of Natural Resources ("DNR") as if the Enabling Act assigned the state a private trust duty to the common school fund; accordingly, since then DNR prioritized generating revenue for the common school fund by logging federal public grant lands.[3]

In the Washington State Supreme Court's 2022 *Conservation Northwest* opinion, one of the Court's holdings—that the Enabling Act created a common law trust duty that is recognized in article XVI, section 1—narrowed its 1984 holding and reopened the question of Washington state's trust duties related to federal public grant lands. Indeed, the Court's *Conservation Northwest* decision may be interpreted to suggest that the State holds a hybrid public-private trust duty to its beneficiaries generally, as opposed to a narrow private trust duty to the beneficiaries

[2] Washington Enabling Act, ch. 180, 25 Stat. 676, (1889).
[3] *Skamania Cnty. v. State*, 102 Wn. 2d 127, 685 P.2d 576 (1984).

enumerated in the Enabling Act. Much of this paper will discuss the numerous interpretations of the overlapping trust duties imposed by the Enabling Act and state constitution.

The second question considered in *Conservation Northwest*—whether current state management practices violate the state's obligations under article XVI, section 1—addresses an apparent conflict between the Enabling Act and the Washington State constitution. Washington State's Enabling Act expressly required that federal public lands be held, appropriated, and disposed of exclusively for the benefit of the beneficiaries therein. Article XVI, section 1 of the Washington constitution, however, provides that public lands granted to the state be held in trust for "all the people" of the state. It continues, requiring in part that those lands not be disposed of unless the full market value is received in exchange for the property.

Although the terms of the Enabling Act support limitations on the recipients of revenue generated from federal public lands, nothing in the Enabling Act nor the Washington constitution requires that management of those lands *only* benefit those recipients. In fact, the constitution explicitly directs management for "all the people." Finally, when Congress approved the Washington constitution, it implicitly approved of state framers' intent to manage public lands to benefit a more broad class of beneficiaries.

The issues presented in *Conservation Northwest* require considering the history and plain language of the Enabling Act and state constitution. A close historical analysis of the relationship between the Enabling Act and article XVI, section 1 can help relieve the prolonged legal ambiguity surrounding what duty Washington owes its beneficiaries in the management of federally-granted public lands.

Background

I. The Federal Public Domain

The first fundamental issue in public land management in the United States goes back to the Revolutionary War.[4] That issue concerned whether "unoccupied" land should be the domain of the federal government or the property of individual states.[5] In the original thirteen states, lands were either under private or state ownership; there was no federal public domain[6]. In the late 1700s, the majority of the original thirteen states received claims to western lands from Great Britain when they were colonies; those claims to western lands covered a large portion of the continent.[7] The remaining states, however, received no such grants.[8] "Have not" states believed that all states which fought for independence should begin on equal footing, which required the even division of western lands; naturally, states with western claims were reluctant to surrender them.[9]

The Continental Congress adopted a resolution in September of 1780 urging states to surrender a portion of their western claims to ensure the stability of the union.[10] In October of 1780, Congress went one step further, expressly stating that such lands, if surrendered, would serve the "common benefit of the United States" and ultimately form distinct states.[11] States surrendered almost 233 million acres of "unoccupied" land to the federal government.[12]

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[4] Christine A. Klein, Federico Cheever, Bret C. Birdsong, Alexandra B. Klass, & Eric Biber, NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES, 40 (4th ed. 2018).
[5] Paul W. Gates, HISTORY OF PUBLIC LAND DEVELOPMENT (3d 1968).
[6] Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?* NR & E, 39 (1997).
[7] Klein et al., note 4, *supra*, at 40.
[8] Klein et al., note 4 *supra*, at 40.
[9] Peter A. Appel, *The Power of Congress Without Limitation: The Property Clause and Federal Regulation of Private Property*, 86 Minn. L. Rev. 1 (2001).
[10] Appel at 22.
[11] Gates, note 5 *supra*, at 51.
[12] Klein et al., note 4 *supra*, at 41.

After the states surrendered their original western claims, the federal government retained much of all the unappropriated lands and granted some to territories and new states.[13] Private and state-owned lands provided a strong source of revenue for states, but federal lands did not; Congress worried that states with reliable revenue sources—which could fund, for example, the creation and maintenance of public schools—would gain an advantage over states without reliable revenue from land.[14]

To make good on its reassurance that surrendered western lands would benefit the common United States, Congress initiated a program of land grants for schools in the General Land Ordinance of 1785 that reserved one section of every township for the support of public schools.[15] And since the Northwest Ordinance of 1787, Congress granted lands to new states upon their admittance to the Union.[16] Beginning in 1803 the federal government specifically designated sections of each federally surveyed township for the support of public schools.[17]

In 1846, Congress expanded its common school land grants from one to two sections per township to account for the inadequate funding one section of each township provided.[18] Accordingly, when the Washington Territory was created in 1853, Washington received two sections per township to support "common schools."[19]

[13] Hager at 39.
[14] Hager at 39.
[15] Sally K. Fairfax, et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 805 (1992).
[16] Hager at 40.
[17] Hager at 40; Fairfax, et al. at 805.
[18] Daniel J. Chasan, *A Trust for All the People: Rethinking the Management of Washington State Forests*, 24 Seattle U. L. Rev. 1, 2 (2000).
[19] Organic Act ch. 90, section 20, 10 Stat. 172 (1853).

Some legal scholars view Washington's Enabling Act as simply "carr[ying] out the basic design" of Washington Territory's 1853 act.[20] Regarding Congress's federal public land grants, this seems plausible; when Washington entered the union in 1889, the sixteenth and thirty-sixth sections of every township were granted to the state and designated for the support of common schools.[21] Still, although Congress dedicated two sections of each township to fund common schools, those lands "…never paid all the costs of public education."[22]

II. The Enabling Act of 1889

The Enabling Act of 1889 detailed the conditions for Washington, Montana, and the Dakotas to achieve statehood. In section 10 of the Enabling Act, Congress granted Washington state almost 2.5 million acres to support the common schools and directed the state legislature to manage and dispose of land, with some limits on its discretion.[23] Section 10 states:

> That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States…are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*…the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes

[20] Chasan at 2. Indeed, "…the drafters' suspicion of both corporations and government led to the explicit protection of certain individual rights that are nowhere explicitly recognized in the US Constitution." Importantly, this popular view made it "…extremely unlikely that the Washington framers…intended…the Federal Constitution and courts should have any significant role in interpreting or setting limits on the interpretation of Washington's constitution."
[21] Chasan at 2; Fairfax et al., at 805.
[22] Chasan at 3 (citing Thomas W. Bibb, HISTORY OF EARLY COMMON SCHOOL EDUCATION IN WASHINGTON (1929)).
[23] John B. Arum, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 Wash. L. Rev. 151, 2 (1990).

> shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Section 10 does not limit the holding or appropriation of lands granted, nor does it state that the federally-granted lands were *only* for school support.[24]

In section 17 of the Enabling Act, though, Congress restricted the use of granted lands to an exclusive purpose.[25] Congress directed Washington state to use almost 300,000 acres of that land exclusively to establish public buildings at the capitol, an agricultural college, and state charitable, educational, penal, and reformatory institutions:

> To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.[26]

Congress authorized the Washington state legislature to implement rules governing the management of grant lands, including permitting the state to grant easements or rights in the lands; Congress further authorized the state legislature to make rules governing any revenue generated

[24] Arum at 165.
[25] *Id.*
[26] Washington Enabling Act, ch. 180, § 17, 25 stat. 676, 681 (1889).

from federal grant lands, provided any revenue generated from them was held in trust for common school beneficiaries enumerated in the Act.[27]

The Oxford English Dictionary defines a legal trust as "[t]he confidence reposed in a person in whom legal ownership of property is vested to hold or use for the benefit of another."[28] The notion of *trusts* repeatedly surfaces when discussing public lands, though the first explicit trust in Enabling Acts did not emerge until 1910.[29] However, unlike most legal trusts, the trust obligations imposed on public land managers are often unclear.[30]

When considering the impact of trust duties on public land management, it is important to keep in mind the following questions: (1) who created the terms of the original trust obligation, (2) who are the beneficiaries of the trust, and (3) who may interpret or modify the terms of the trust in the event of changed conditions? This paper will primarily focus on how the interpretation and modification of the trust terms have influenced the management of federally-granted lands and the designation of revenue generated from them.

Congress's intent in granting lands to states within their respective enabling acts was to provide for education within the states and reduce fraudulent misuse and misappropriation of federal public lands.[31] As mentioned before, however, Congress's first explicit creation of the "trust concept," appeared more than ten years after Washington's Enabling Act, in Congress's New Mexico-Arizona Enabling Act of 1910.[32] There, Congress stated explicitly that those granted school lands were to be "held in trust…and that…proceeds of any…said lands shall be subject to

[27] Hagar at 40; Washington Enabling Act, ch. 180, §11, 25 Stat. 676 (1889).
[28] Klein et al., note 4 *supra*, at 39.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

the same trusts as the lands producing…."[33] Like New Mexico and Arizona, Congress conditioned Washington's statehood on adopting a constitution incorporating the heart of the Enabling Act provisions, but at least in Washington's case, those provisions lacked specific language requiring holding the granted lands in trust.[34]

Indeed, when the US Supreme Court interpreted Arizona's Enabling Act, it held that Arizona's use of school lands to provide for its highway system was improper because Arizona's management of school lands occurs under a federally imposed trust, and the terms of that trust limited Arizona's use.[35] Since then, the trust concept in the New Mexico-Arizona Enabling Act has been the standard for judging similar land use decisions.[36] However, this standard is insufficient when it comes to judging land use decisions in Washington because Congress did not explicitly establish a trust duty governing land management in Washington's Enabling Act.[37] Indeed, by approving Washington's constitution, Congress impliedly approved the management of grant lands for the benefit of "all the people."

Until the express trust language in the New Mexico-Arizona Enabling Act of 1910, the federal government issued federal public land grants more broadly.[38] Different issuing practices resulted in multiple interpretations of states' public land grant management duties, and the question of states' management duties has plagued the courts since the grants were issued.[39]

Whether the Enabling Act confers a real, enforceable trust duty upon states with the same fiduciary duties as private trust relationships has long been a question in Western states that

[33] *Id.*
[34] *Id.*
[35] *Id.* at 41.
[36] *Id.*
[37] *Id.* at 40.
[38] *Id.* at 41.
[39] *Id.*

received federal land grants. According to one scholar, Washington courts and governments have assumed the following about forest land management: (1) lands are held for benefit of "common schools" and other public institutions held by the state as trust, (2) the trust is exactly analogous to a private trust, (3) the state's "common school lands" must be managed under common law principles that govern private trusts, (4) the state owes "undivided loyalty" to beneficiaries, (5) "undivided loyalty" requires management for maximum revenue, and (6) revenue production cannot be sacrificed to preserve environmental or aesthetic values.[40]

The long debate on the trust relationship created by the Enabling Act captured the Court's attention in *Skamania v. State*.[41] Indeed, in *Skamania*, the Washington Supreme Court held that the terms of Washington's Enabling Act should be construed liberally to support a private trust duty.[42] In *Skamania*, the Court found that federal land grants are in fact "…real, enforceable trusts that impose…the same fiduciary duties applicable to private trustees."[43]

In 1982, because of a major recession and plummeting lumber prices in Washington, DNR's logging contracts could not be operated profitably.[44] The state legislature passed the Forest Products Industry Recovery Act ("Recovery Act"), which modified contracts for the sale of timber from state trust lands.[45] By 1982, companies defaulted on 15 contracts and filed suits challenging the enforceability of others.[46] The Recovery Act permitted default, easier extension, and

[40] Chasan at 1.
[41] *Skamania Cnty. v. State,* 102 Wash. 2d 127, 685 P.2d 576 (1984).
[42] *Id.*
[43] *Id.* at 132.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 130.

termination of the contracts.[47] The question before the Court was whether the Recovery Act violated the state's fiduciary duties to its trust beneficiaries.[48]

Although statutes are presumed to be constitutional, a statutory challenger must prove the statute unconstitutional "beyond a reasonable doubt."[49] Normal deference to legislation was limited when dealing in trust lands, however, when passed according to police power, the Court stated the only meaningful limitation on the legislature is that a statute must "reasonably tend to correct some evil" or promote "some interest" of the state, and not be unconstitutional.[50]

The Court found that direct benefits to lumber companies at expense of beneficiaries did not address any evil or promote interests of the state; the terms of the Recovery Act were a breach of the states' trustee duty.[51] Therefore, the Court held that the Recovery Act violated State's fiduciary duties to the trust beneficiaries enumerated under article XVI, section 1.[52] The Court also held that the trust created by the Enabling Act was "real" and enforceable, and private trust principles applied to the management of state lands as trust assets.[53] As noted above, after *Skamania*, the trust duty imposed by the Enabling Act was considered a private, fiduciary trust duty.

Although there is no explicit trust language in Washington's Enabling Act, the Court stated that evidence of Congress's intention to impose enforceable trust duties weighs in favor of finding

[47] *Id.*
[48] *Id.* at 128.
[49] *Id.* at 132 (citing *in re marriage of Johnson*, 96 Wn. 2d 255, 258 (1981)).
[50] *Skamania* at 132 (citing *Shea v. Olson* 185 Wash. 143, 153 (1936)).
[51] *Skamania*, 102 Wash. 2d 127
[52] *Id.*
[53] *Id.*

that a trust duty exists.[54] Historically, it is true that many federal land grants created a real, enforceable trust imposing upon the state the same fiduciary duties in private trust relationships.[55]

However, that is not true for every grant because the terms of each grant are not the same; indeed, many legal scholars believe the Court in *Skamania* incorrectly relied on cases related to fundamentally different land grants and state constitutional provisions.[56] When the Court applied private trust principles in *Skamania*, it pitted the Enabling Act and state constitution against each other; the framers provided that the state hold granted lands in trust on behalf of "all the people," not specific beneficiaries.[57]

III. Constitutional Formation

The opinion of early Washingtonians was substantially affected by the populist movement, which at the time of the constitution's drafting in 1889 had evolved and become popular nationwide.[58] Washingtonians viewed corporations and societal elites with distrust, and those views informed a state constitution that "…impose[s] numerous restrictions on the legislature…and provide[s] strong protections of individual liberties."[59]

Congress conditioned Washington's statehood on adopting a constitution that complied with its Enabling Act provisions; Washington's statehood supports concluding that the original constitution did reflect those terms.[60] For example, article XVI of the state constitution honors section 10 of the Enabling Act, stating in part, "…none of the lands granted to the state for

[54] *Id.*
[55] *Id.* at 132, (citing *Lassen v. AZ ex rel. AZ. Hwy. Dep't*., 385 US 458 (1967)).
[56] Peter Goldman, *Managing Washington State Forests for 'All the People': A Long-Simmering and Environmentally Significant State Constitutional Issue*, King County Bar Association Bar Bulletin, 2 (2019).
[57] Arum, at 161.
[58] Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION, 4 (2d ed. 2013).
[59] Utter & Spitzer, note 58 *supra*.
[60] Washington Enabling Act, § 8.

education purposes shall be sold otherwise than at public auction to the highest bidder."[61] Article XVI, section 1 states:

> All the public lands granted to the state are held in trust *for all the people* and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.[62]

This provision creates a trust duty for "all the people" of Washington, however, this is the first instance that trust duties are introduced to Washington state's public land management; the Enabling Act had no such language.[63] The constitution also requires revenue from land or timber sales to be kept in the common school fund, and that the common school fund must be "exclusively applied to the support of the common schools."[64] These provisions support managing the lands and the common school fund according to the Enabling Act but honor the goal of state constitutional framers to provide services to Washington citizens.

Early Washingtonians' independence, self-sufficiency, and common desire to limit corporate control and to "…harness the power of the state to promote opportunity for the 'common man'" is reflected in the Washington constitution.[65] The Washington State Constitutional

[61] *Id.*; WA CONST Art. 16, § 2.
[62] WA CONST Art. 16, § 1. Emphasis added.
[63] *Id.*
[64] WA CONST Art. 10.
[65] Utter & Spitzer, note 58 *supra,* at 8-9.

Convention Committee approved of the common school movement's doctrine that every child must be provided an equal opportunity to succeed by being provided with a positive educational experience.[66] Considering Washingtonians' wariness around corporate development and potential misuse of government resources, they also had a special interest in managing federal public lands for the population at large.[67]

The constitutional framers represent sections 10 and 17 of the Enabling Act in article XVI of the constitution; article XVI supports understanding the framers' desire to prevent corruption as an intentional expansion of the federal public land grant beneficiaries to more than those enumerated in the Enabling Act.

Indeed, this provision imposes a trust duty to sell, not give away, public lands.[68] This concept of a trust "…reflects the nineteenth-century conception…" which protected public assets from "…reckless and sometimes fraudulent disposition of valuable public lands to private interests."[69] However, this provision does not reflect the Washington Supreme Court's modern interpretation of the state's trust duty, which until recently prioritized a private, fiduciary duty.[70]

In fact, the Constitutional Convention Committee strongly rejected alternate phrasing which would have required achieving the "highest perpetual income" in managing federal public grant lands; instead opting for the language above, requiring management for the benefit of "all the people" of Washington state.[71]

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[66] Utter & Spitzer, note 58 *supra,* at 9.
[67] Utter & Spitzer, note 58 *supra,* at 9.
[68] Arum at 161.
[69] Arum p. 161-62.
[70] *Skamania*, 102 Wn. 2d 127.
[71] Beverly Paulik Rosenow, ed., THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 793-94 (1962).

Lastly, to further protect federal public grant lands from misappropriation, the constitutional framers ensured that the lands would be sold for fair market value, at public auction, to the highest bidder, and in limited amount.[72] In 1889, Congress admitted Washington State into the union.

IV. Interpretation of the Enabling Act throughout History

The Enabling Act authorized the admission of Washington, North Dakota, South Dakota, and Montana to the United States; all four states have grappled with the nature of the states' trust duties in the years since achieving statehood. For example, the Enabling Act describes how states may dispose of federal public grant lands and the funds derived from them, but it does not directly express the conditions or consequences of use by the state of the trust lands for purposes not designated in the grant.

Still, legal scholars argue that the Enabling Act and the constitution did not appear to expressly create a trust governing public land management and did not clearly state an intent to create one; that together they should only be enough to create a "…dedication of land for a particular public purpose."[73] In *Papasan v. Allain*, the US Supreme Court stated that without express trust language, land appeared to be "outright gifts" to be held by states in fee absolute.[74] If federal law transferred an absolute fee interest, lands are owned outright by the state and the state may treat them as any other state lands.[75] If federal law created a trust with a state as trustee, however, the state is bound to comply with the terms of the trust.[76]

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[72] Goldman at 2.
[73] Arum at 164.
[74] *Papasan v. Allain*, 478 U.S. 265, 269-79 (1986).
[75] *Id.*
[76] *Id.*

Of the issues which may arise from the Enabling Act's silence, two are most pressing, particularly because the Court's *Conservation Northwest* opinion does not resolve them. The first question is what *kind* of trust Washington holds; that is, whether the state is required to prioritize generating revenue from trust lands. The second question is what the state and its agencies may and may not do to manage the lands in compliance with Washington's trust duties to beneficiaries. To understand what kind of trust exists concerning federal public land grants, courts should consider the historical interpretation of similar Enabling Act provisions in connection with the constitutional provisions approved by Congress.

The Enabling Act and Subsequent Court Decisions Related to Washington's Trust Duty

Outside of Washington, other states have managed federal public grant lands in various ways based on courts' interpretations of their relative Enabling Acts. Indeed, Congress's land grants have raised many questions for state and federal courts.

For example, in *State v. Whitney*, 66 Wn. 473 (1912), the state brought an action to quiet title over a section of township granted to the state in the Enabling Act.[77] There, individual citizens alleged that in 1902, the title of the thirty-sixth section of a township rested in the federal government at the time they homesteaded on the property.[78] The Washington Supreme Court held all lands granted under the Enabling Act for educational purposes, surveyed and un-surveyed lands alike, were immediately granted to the state because the Court could not conceive "…how Congress could have employed stronger language to indicate its purpose and intention to devest the United States of all title in these lands, and grant them to the several states for school purposes."[79]

[77] *State v. Whitney*, 66 Wn. 473, 475 (1912).
[78] *Id.*
[79] *Id.* at 477.

The Court went on to state that the situation surrounding un-surveyed lands in Washington was similar to that in Idaho, saying, "…if its title vested only to the lands surveyed at the time of its admission…then the bounty of the Federal government…reserv[ed] to the state only such lands…insufficient…to tempt…public entry."[80] The Court concluded that title to all public lands granted to Washington immediately vested in the state.[81]

In *Thompson v. Savidge*, 110 Wn. 486, (1920), the issue of title being vested in the state again came before the Court after the Washington state commissioner of public lands entered into an agreement with the Secretary of Agriculture which essentially allowed the commissioner to exchange federal public land for surrendering Washington's claim to some federal public grant lands.[82] The attorney general argued that the Enabling Act vested title of granted lands in the state and that the title cannot be impaired by any subsequent act of the federal government.[83]

Importantly, the Court stated that title of all sections sixteen and thirty-six did not vest in the state upon its admission to the Union.[84] It was only surveyed land which vested in the state upon admission.[85] Further, the state legislature authorized the commissioner's disposition of the federal public grant lands.[86] Therefore, the Court held the state's relinquishment of its claim to the lands for other lands did not violate article XVI of the Washington constitution.[87]

The Court's opinions in *State v. Whitney* and *Thompson v. Savidge* are early examples of how Washington's Enabling Act has been strictly adhered to in some circumstances and

[80] *Id.* at 482
[81] *Id.* at 481-82.
[82] *Thompson v. Savidge*, 110 Wn. 486, (1920).
[83] *Id.* at 487.
[84] *Id.* at 506.
[85] *Id.*
[86] *Id.* at 486.
[87] *Id.*

interpreted differently based on variable understandings of Congress's intent in granting public lands to the states. For example, if surveyed, but not un-surveyed lands, immediately vested in the state, Congress could not have intended to fund public education; even two fully-vested townships could not provide sufficient funding. It is unlikely that Congress simultaneously granted lands to benefit public schools and rescinded specific grants based on their surveyed status. The Court has grappled (and still does) with what exactly Congress intended in providing Washington land grants.

The Enabling Act continues to be interpreted in many different ways. For example, in *State v. Superior Court*, where there was a question about which capacity the state holds grant lands in, the Supreme Court stated: "As is well known, the state holds title to property in two entirely distinct capacities, the one a proprietary capacity…and the other a governmental capacity…in trust for the public use."[88] This interpretation of trust duties implies that all lands held in a governmental capacity are held in trust for public use. This interpretation aligns more clearly with the intent of the framers.

In *State ex rel. Bookstore v. Potts* 141 Wash. 110, 117 (1926), the Court held that Enabling Act provisions should be given "a liberal…not a narrow and restricted" construction.[89] This opinion, unlike that in *Whitney* and *Savidge*, suggests that management of federal public lands held in trust by the States should adhere to a liberal construction of the requirement that management must benefit the common schools, but the Court has not been clear about how that should affect DNR's management of the lands, and what the precise duty of the state may be.

[88] *State v. Superior Court*, 91 Wn. 454, 458, 157 P. 1097 (1916).
[89] *State ex rel. Bookstore v. Potts* 141 Wash. 110, 117 (1926).

In *State ex rel. State Capitol Comm'n v. Clausen* 134 Wash. 196, 201 (1925), the Court held that "[t]he Enabling Act…made donations of the public land owned by the Federal government to the state for various purposes…" and the state receiving the donation became the absolute owner of the title, to hold in trust for the purposes enumerated in the Enabling Act.[90] The Court has at least remained consistent in that opinion.

Later still, though admitting there was much debate remaining about when state property is deemed governmental rather than proprietary, the Washington State Supreme Court found, "…[federal public grant] lands…are school trust lands…indisputably held in the state's governmental capacity."[91]

In *PUD No. 1 of Okanogan Cty. v. State*, however, a case related to the condemnation of state lands for new electrical transmission lines, the Court stated that "Congress did not expect states to hold school lands inviolate or for the sole use of the schools," which appears to contradict the private trust rationale of *Skamania*.[92] Instead, the Court found that the state held federal grant lands in its sovereign, "…governmental capacity, that is, in trust for the public use."[93] The Court reasoned that "…condemnation of State lands was compatible with Skamania in that the PUD proposed to compensate for this condemnation."[94]

In *PUD No. 1 of Okanogan Cty.,* the Court also distinguished between the sale and management of land, expressly rejecting DNR's extension of *Skamania* to land management

[90] *State ex rel. State Capitol Comm'n v. Clausen* 134 Wash. 196, 201 (1925).
[91] *Public Utility Dist. No. 1 of Okanogan County v. State* 182 Wn.2d 519, 537 (2015).
[92] *PUD No. 1 of Okanogan Cty. v. State*, 182 Wn. 2d 519, 547-48, 342 P. 3d 308 (2015).
[93] *Id.* at 536.
[94] *Id.* at 545-46.

decisions.[95] *PUD No. 1 of Okanogan Cty. v. State* supports a broad reading of the state's duty to hold federal public grant lands in trust for all the people.

Constitutional Interpretation & Article XVI, Section 1

Modern WA Constitutional interpretation began in 1983 when Chief Justice William Williams requested a presentation on the origins and methodology of presenting state constitutional law arguments.[96] Indeed, many legal experts felt Washington courts needed to "develop a body of independent jurisprudence that will assist the court and the bar of our state in understanding how that constitution will be applied."[97]

Article XVI, section 1 of the Washington constitution states, "…the public lands granted to the state are held in trust for all the people."[98] By including this provision, the framers' allayed a widely held concern: that lands might be corruptly given away and that "special interests…might capture or corrupt public institutions."[99]

In *Public Utility District No. 1 of Okanogan County v. State*, the Washington State Court found that the state's trust duties were not compromised by the public utility district condemning school trust lands because the legislature expressly conferred the district that authority.[100]

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[95] *Id.* at 549; accord *State ex rel. Garber v. Savidge*, 132 Wn. 631, 634, 233 P. 946 (1925); *Case v. Bowles*, 327 U.S. 92, 100 (1946).
[96] Utter & Spitzer, note 58 *supra,* at 12.
[97] Utter & Spitzer, note 58 *supra,* at 13. (*Gunwall* (1986) signified a "reaffirmation of independent reliance" on Washington constitutional provisions, with six nonexclusive, neutral criteria to use in determining whether to base legal decisions on state or federal constitutional provisions. Of course, the *Gunwall* analysis is not intended to "merely substitute" state courts' notion of justice for that of legislators or the United States Supreme Court. Relevant to the discussion of trust land management is the premise that any trust land management statutes passed by the legislature would be presumed constitutional.)
[98] WA CONST Art. 16, §1.
[99] League of Educ. Voters v. State, 176 Wn.2d 808, 823, 295 P.3d 743 (2013).
[100] *Public Utility District No. 1 of Okanogan County v. State* 182 Wn.2d 519 (2015).

There, the Okanogan County Public Utility District ("PUD") No. 1 filed a condemnation petition against property owners to obtain easements to build a new electrical transmission line.[101] Some school trust lands nearby were required for the project; DNR argued that the PUD did not have the authority to condemn school trust lands and that DNR, as manager of those school trust lands, had ultimate decision-making authority as to the school lands' use.[102]

The Court found, however, that a PUD can condemn the lands for an electrical transmission line, and that condemnation did not violate any trust duty.[103] States may delegate the power of eminent domain to municipal corporations as far as statutorily authorized, and in the PUD's case, the legislature gave it express statutory authority to condemn school lands held in trust by the state.[104] As noted above, Congress "…did not expect the states to hold school lands inviolate or for the sole use of schools" and specifically amended Washington's Enabling Act in 1932 to allow for the condemnation in this case.[105]

The Court held that because neither Washington's Enabling Act nor the constitution prohibited condemnation of school lands, the legislature's grant of authority to PUDs to condemn school lands was not a breach of the state's fiduciary duties as trustee of school lands.[106] Importantly, this case differentiated land sale and land management, which suggests that even if a trust duty originated from the Enabling Act, the constitution divided the strict trust duty and applied it only to the sale of lands.

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 549.
[106] *Id.* at 544.

And yet, a trust requires an explicit declaration of trust or circumstances which show beyond doubt that a trust was intended to be created.[107] No such language was used in Washington's Enabling Act, and the circumstances of the constitution's formation do not support any intent to create a trust related to the management of public lands. It is not the case that Washington does not engage in any land trusts. For example, the state legislature dictated that remaining forest grant lands were deeded to counties under RCW 76.22.040; unlike Congress's terms in the Enabling Act, counties explicitly agreed the state would hold remaining forest grant lands in trust for the counties and that proceeds generated from the lands would go to those counties after deducting administrative expenses.[108] There, the legislature gave the discretion to land managers by stating: "…[i]n the event that the department sells logs using the contract harvesting process…the moneys derived…are the net proceeds from the contract harvesting sale."[109] This language suggests that land managers have a choice in harvesting logs from the lands; there is no clear duty to prioritize financial revenue. To the extent that the state holds a trust duty concerning any lands, it is the lands granted by counties, not the lands granted to it by Congress.

The *Conservation Northwest* Decision

The *Conservation Northwest* opinion creates new problems in public trust management more than it clarifies the interaction of the state's trust duty with its constitutional provisions. Although both parties in the suit tout the Court's decision as a success, the opinion does not resolve the state's trust duty, especially not as the state's trust duty relates to article XVI, section 1. Instead, the Court effectively narrowed previous decisions by disposing of the state's strictly fiduciary duty

[107] Restatement (Third) of Trusts (2003).
[108] RCW 76.22.040.
[109] *Id.*

to beneficiaries[110]. The Court does not explain, however, how the state should manage its federal public lands, and for which beneficiaries, though the Court does reinforce the legislature's authority to implement management policies.

In *Conservation Northwest v. Commissioner of Public Lands* (2022), Conservation Northwest argued that the Washington constitution requires holding school land for "all," but only allows disposing of that land for the institutions enumerated in the Enabling Act.[111] The Court held that the Enabling Act created a trust duty from the state to the beneficiaries enumerated therein, and article XVI, section 1 recognizes that trust mandate.[112] The Court further explained that the trial court did not err in dismissing the lawsuit challenging DNR's land management strategies because those strategies did not violate its trust obligations.[113] The DNR may elect to generate revenue from timber harvest sales under the discretion granted in the day-to-day management of federally granted lands granted by the Enabling Act.[114]

Importantly, the Court also did not address how to reconcile the duty of the state in holding versus disposing of the lands, though a plain language reading of article XVI sections 1 and 2 ostensibly supports a broad duty to manage the lands for "all the people" and deposit any revenue generated from the lands into the common school fund. This decision may limit the application of article XVI, section 1, but does not definitively dispose of the state's duty to manage the lands for the benefit of "all the people."

The Court's decision that the state's relationship to federal public land grants should not emulate a private trust between parties is a positive development in Washington law because

[110] *Conservation NW*, 199 Wn. 2d 813.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*

holding otherwise contravenes the intent of both Congress and Washington state constitutional founders and directly conflicts with the directive of article XVI, section 1 to manage all state lands for the benefit of "all the people."[115]

The opinion preserves a gray area of the law, however: article XVI, section 1 may still create a constitutional mandate to manage federal public grant lands for the "benefit of all the people," though the exact relevance of the provision is unclear. For example, it is possible that logging limits the use of federal public trust lands to benefit all the people, particularly later generations of Washingtonians. For now, DNR's choice to continue to generate revenue from logging public school lands reduces the likelihood that "all the people" will benefit from them.

Conclusion

Congress granted states joining the union federal public lands to ensure that each new state would receive adequate support for public education. However, Congress did not expressly create a trust in all circumstances; in Washington's Enabling Act, there is only clear that revenue generated from granted lands must benefit common schools. The Enabling Act had previously been interpreted to narrowly proscribe Washington's trust duties to enumerated public school beneficiaries. The Enabling Act should properly be interpreted as distinguishing between public lands and the common school fund. In that case, states would be free to exercise discretion in the management of lands but be restricted in using funds generated from them.

Multiple misinterpretations of United States Supreme Court rulings and opinions from states with different Enabling Acts have led to the incorrect belief that grant lands must be treated as private trusts. If the lands and permanent fund can be considered separately, however, land

[115] WA CONST Art. 16, §1.

managers may be free to manage federally-granted public lands in a manner keeping with article XVI, section 1.

By adopting article XVI, section 1, the authors of the Washington constitution expanded the duties of the state in managing federal grant lands; after the adoption of the constitution, the beneficiaries enumerated in the Enabling Act became just one portion of "all the people" intended to benefit from lands held by the state. Article XVI, section 1 of the Washington constitution supports a broad duty to manage federally-granted public lands for the benefit of all Washington citizens.

In its *Conservation Northwest* decision, the Washington Supreme Court leaves many unresolved questions. The uncertainty about Washington's duties in managing federal grant lands should be promptly resolved by the state legislature according to a historical interpretation of the intent of Congress and the state's constitutional framers with specific consideration to article XVI, section 1. Importantly, this paper does not discuss state and federal environmental laws, although the *Conservation Northwest* decision implies that environmental laws make up one of the overlapping legal duties in managing federally-granted lands.

Moving forward, the state legislature must use its extensive discretion and authority to determine how federally-granted lands are managed and used. There are myriad ways for Washington state to generate revenue from federally-granted lands if it chooses to do so. Hopefully, Washington may optimize land use for purposes such as conservation or recreation so that it may finally make good on its commitment to managing its public lands for "all the people."