

A HISTORY OF FEDERAL LAND GRANTS TO SUPPORT PUBLIC SCHOOLS

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Perhaps the most neglected funding topic in all of education is school trust lands—lands granted at statehood by the federal government for the support of common schools. Though most educators have heard of land grant universities and to many the old English practice of granting lands to support schools is vaguely familiar, today most education leaders are left speechless when informed that the practice is alive and well in the United States to the tune of 45 million acres and \$32 billion held in endowment funds for the support of public schools.

This paper is written to provide the reader with an historical foundation on which to place any newly found knowledge of school trust lands, of the current status of the land management in their state, and even of the potential that might be accomplished with these lands and the revenue from the funds for the benefit of our public schools and school children, if long-term planning were employed.

SCHOOL LANDS – A CONCEPT OF THE FOUNDING FATHERS

Intricately embedded throughout the history of our country is the concept of granting lands for the support of education. Early founding documents of the nation, as well as the founding compact for each state known as the statehood act or the enabling act, dealt extensively with these land grants for education. The concepts of free education and compulsory taxation to support schools are accepted principles today, but were not universally embraced during the early history of the United States. It is, however, surprising how these concepts were integrally woven into the founding documents of the nation, even though they may not have been uniformly applied in all states.

English settlers brought the concept of creating permanent funds for the support of education to the colonies. The monasteries of the Middle Ages were endowed with perpetual funds to provide education, and wealthy individuals continued the practice after Henry VIII closed the monasteries. The permanent funds were not all money, for some included land granted for the support of the school. Many early institutions of higher learning in America were initially funded with grants of land by the king or governor, resulting in the title “land grant university.”

In 1777, the Georgia constitution required schools to be supported by the state, however almost half of the counties did not accept the state support due to the stigma of pauperism associated with the state dollars. At the time of statehood, West Virginia, Maine, Wisconsin and Kansas had free schools. Other states such as Massachusetts, New York, Connecticut, Pennsylvania, Arkansas, Ohio, and Indiana charged parents and guardians for the school attendance of the children.

Many of the original colonies claimed land from the Atlantic Ocean to the Pacific Ocean. A great deal of heated debate and discussion both during and after the Revolutionary War revolved around how the western lands in the ocean-to-ocean states were to be handled. State militiamen had been promised lands for their service during the war. This controversy over the western lands delayed the ratification of the Articles of Confederation. Colonel Broadhead was even stationed in the

western country to prevent settlement until the controversy could be resolved. Finally on October 10, 1780, Congress passed a resolution¹ pledging:

- the western territory ceded to states should be disposed of for the common benefit of all states,
- this territory should be formed into states to be admitted into the Union on equal footing with the original states,
- the expenses incurred by the states in subduing British posts should be repaid, and
- most importantly to this discussion, Congress should regulate the manner and condition of the sale of lands.

Despite the passage of this resolution, many states still held onto millions of acres of western land to compensate their Revolutionary soldiers. Slowly over the period from 1781 to 1786 states relinquished those claims.

It took another five years before Congress determined how to regulate and survey the western lands. On May 20, 1785, Congress adopted an ordinance that provided for the survey and sale of these lands. The territory was to be divided into townships, each six miles square. Each township was to be subdivided into 36 one-mile square lots, which are called sections today. Lots 8, 11, 26, and 29 were reserved to the United States for future sale and Lot 16 was reserved “of each township, for the maintenance of public schools within the said township.”²

The Northwest Ordinance or General Land Ordinance of 1787 provides that “schools and the means of education shall forever be encouraged...” but it makes no provision for the reservation of Section 16 for schools. The Northwest Ordinance provided for the governance of a territory and laid out the steps and benchmarks for statehood. It is the contracts for the sale of this western land that set aside Lot 16 plus two townships for a university. The Northwest Ordinance did not reserve land for schools. Rather, it was the Ordinance of 1785 and the contract for the sale of western territory that are the two instruments establishing the reservation of lands for the support of education.

LANDS GRANTED OR PROVIDED

Among those knowledgeable about school trust lands, there is the tendency to believe that school trust lands are solely a western issue. That is not the case. In 1788, Massachusetts provided for the reservation of school lands to encourage settlement in its eastern territory. Tennessee was admitted to the union in 1796 and was the first state admitted into the union in which there were federal lands at the time of admission. Tennessee was granted a portion of those federal lands for the support of schools, but because of extensive settlement did not receive Section 16. The education land grant to Tennessee lagged statehood by ten years, but finally occurred in 1806. Ohio and Alabama were the first states to be expressly granted Section 16 for the support of education in 1803. Every state, except Maine and Texas, admitted from 1803 through 1848 received Section 16 for education.

Oklahoma received an extra \$5 million³ as part of the permanent school fund when the territory of Oklahoma became a state because Indian lands had been set aside by treaty and were not available

¹ Journals of Congress, VI, page 213.

² Laws of United States of America, 1789-1815, Vol. I, Chapter 32, pages 563-569.

³ As of 1905 the \$5 million had not been dispersed to Oklahoma. The federal government was paying interest only.

for the grant to education. Texas, which entered the union as an independent republic, had no federal lands within its borders so there were no federal lands to grant to the schools. On July 26, 1839, Texas had provided for the reservation of 13,284 acres⁴ within each county for education. Then in 1840, Texas increased the reservation to 17,712 acres.⁵ By 1906 Texas had the largest permanent fund and has maintained her dominance to this day by strict adherence to trust principles and commitment to the preservation of the permanent fund shown by the absence of raids on the fund.

In 1846 the Commissioner of the General Land Office in Washington D.C. requested that two sections, Section 16 and Section 36, be granted to schools for their support instead of just one section. The following year the Secretary of the Treasury made a similar request of Congress. Representative John Rockwell of Connecticut tried to give Wisconsin two sections in 1848 in their admissions act, but his amendment was defeated. By August of that year, two sections were set aside for schools in enabling legislation in Oregon and Minnesota. California was subsequently admitted September 9, 1850, with two sections per township set aside for schools. States receiving 2 sections include: California, Colorado, Idaho, Kansas, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Washington, and Wyoming. Nevada was originally granted Sections 16 and 36 that equaled close to four million acres (3,985,422 acres). In lieu of this original grant, Nevada accepted 2 million acres with the right to select those acres from any of the unappropriated federal lands within its borders. Most of these Nevada school trust lands have been sold and only a few thousand acres of school trust lands remain today. Most of their property tax is derived from these former school lands. Beginning in 1894, Utah was granted four sections (Sections 2, 16, 32, and 36) because of the arid worthless nature of the lands. Arizona and New Mexico were later also granted four sections.

These lands, regardless of the sections granted, gave the schools ownership in all parts of the state. Those states receiving Section 16 received 1/36th or 3% of the state to support education. Those states receiving Sections 16 and 36 were granted 1/18th or 6%. Utah, Arizona, and New Mexico received Sections 2, 16, 32, and 36 which represented 1/9th or 11% of the state granted for the support of education.

The school lands were either leased or sold to generate revenue. The surface of school trust lands was leased for grazing or agriculture during the early settlement of most states. Later lands have been leased for every economic activity that occurs on private lands—convenience stores, habitat protection, commercial developments, malls, industrial parks, residential home sites, to name a few. Timber and forest products are renewable resources and can be sold over and over again if harvested in a sustainable manner. Minerals, in those states fortunate to have them, have contributed substantially to the support of schools. Royalties are paid on any minerals produced. Many states also reserve the right to receive an actual percent of the substance being produced, called “in kind royalty production.”

CREATION OF THE PERMANENT SCHOOL FUND

Connecticut was the first state to establish a School Fund, doing so in 1795. The idea of establishing a perpetual permanent fund began to catch on, and Connecticut was followed by New York in 1805 and Massachusetts in 1834. When referring to this fund, states use various names such as Common School Fund, Permanent School Fund and State School Fund.

⁴ Three Spanish leagues.

⁵ Four Spanish leagues.

A permanent fund was to provide a growing funding source for schools—passed from generation to generation as an endowment or birthright for the education of the children. Dr. Fletcher Harper Swift, who in 1906 began the most exhaustive research into the permanent school funds ever undertaken, concluded, “The general permanent common school fund, then, did not supplant these other sources, but served to increase the revenue derived for the more important of them by the incentive and unity which it gave to the free school movement.”⁶

Many mid-western and western states were required as a condition of statehood in their enabling act to establish a permanent fund. In those states where a permanent fund was required by the enabling act, the state constitution then set out the parameters required of the state for the protection of the school fund. Many of these funds are guaranteed by the state constitution against loss or diversion. Thus the enabling act, in conjunction with the state constitution, created a bilateral compact between the United States and the state that could not be changed without the consent of both parties.

FEDERAL FINANCIAL CONTRIBUTIONS TO THE PERMANENT SCHOOL FUNDS

The federal government granted or loaned funds to states that in turn routed those funds to their permanent school fund. States also chose to deposit certain revenue streams or funds in their school fund—much as tobacco settlement funds have been deposited in the permanent school fund in some states today.

California regarded Sections 16 and 36 as belonging to the townships⁷ and instead created their permanent school fund from the proceeds of the sale of 500,000 acres of internal improvement lands granted in 1841 by Congress to Alabama, Arkansas, Illinois, Indiana, Louisiana, Michigan, Mississippi, and Missouri and extended to all states admitted subsequently to the passage of the 1841 act. This Internal Improvement Act (IIA) of 1841 empowered states to use the proceeds of the lands for “Roads, railways, bridges, canals and improvements of water courses and drainage of swamps...”⁸ The IIA funds were given on the condition that states would grant free transportation for the mail, federal troops and war supplies over these improved passageways. Ultimately well over ten million acres were granted. California, Iowa, Wisconsin, Oregon, Kansas and Nevada by constitution combined their internal improvement lands with the school lands to establish permanent common school funds managed by the state. Unfortunately, Kansas failed to enact laws to carry out the constitutional provisions for their lands, and their proceeds were never added to the state permanent school fund.⁹

Beginning with the Revolutionary War and continuing for several decades, the nation was saddled with insurmountable debt. The national costs of the Revolutionary War plus the states’ debts for the war assumed by the general government exceeded \$120 million. The Louisiana Purchase of 1803 with certain other French claims came to an additional \$15 million. The War of 1812 added another \$100 million. However, the unprecedented economic prosperity from 1827 to 1837 wiped out all the debt and left the nation with a \$40 million surplus in the Treasury. Congress approved a bill June 23, 1836, to loan any surplus on January 1, 1837, in excess of \$5 million to the states on

⁶ Swift, Fletcher Harper, *A History of Public Permanent Common School Funds in the United States, 1795-1905*, Henry Holt and Company, 1911, p. 24.

⁷ Report California State Superintendent of Public Instruction, 1864-65, page 249.

⁸ U.S. Statutes at Large, Vol. V, Chapter 16, approved September 4, 1841.

⁹ Kansas School Law, 1905, p. 5.

the basis of the number of representatives they had in Congress. It must be emphasized that this was a loan that could be called with 30 days notice.

These loans have never been called for and have been regarded by the states as a gift. The majority of states set aside all or part of the loan for the support of schools.¹⁰

STATE FINANCIAL AND LAND CONTRIBUTIONS TO THE PERMANENT SCHOOL FUNDS

Many of the original thirteen colonies wanted similar support for their schools, so in 1821, Maryland passed a resolution that all states should have an equal right to participate in the school grants. Connecticut, New Hampshire, Vermont and Virginia agreed; however, these states were not successful in getting the resolution through Congress. Thus, those states not getting Section 16 for schools included the original thirteen colonies, plus Kentucky, Maine, Texas, Vermont, and West Virginia.

Those states not receiving federal grants of lands established their own school funds or school lands. Like western states, revenue streams from licenses, lotteries, taxes, forfeitures, fines, escheats, and grants were employed to build the school fund. Ten states¹¹ used the revenue from land sales as a portion of their permanent fund. North Carolina added money derived from the sale of swamp or vacant lands. In 1828, Maine reserved 13 townships and added 12 more townships a few decades later.

States also contributed state sources of land and revenue to the permanent school funds. As mentioned earlier, Connecticut was the first state to establish a permanent fund for the support of schools. The proceeds from the sale of 3.3 million acres in Ohio (part of western Connecticut at the time) were used to establish the Connecticut fund. New York provided a permanent fund from the proceeds of the sale of 500,000 acres. Georgia reserved two lots in each survey district for the support of schools. In New Jersey the proceeds for all submerged lands went to their permanent fund. The proceeds from swamplands in North Carolina as well as vacant lands provided the revenue for their permanent fund, known as the Literary Fund. Maine, upon separating from Massachusetts, ultimately reserved 726,625 acres. Pennsylvania set aside 60,000 acres for a permanent fund, but the \$1.5 million that had been realized from the lands by 1834 never made it to the Common School Fund. After dedicating the proceeds of over 42 million acres to their permanent school fund, the Texas constitution of 1845 dedicated an additional one-tenth of the state taxes to the fund for education also. Although Colorado's constitution of 1876 provided five sources for building their permanent fund including escheats, grants, gifts, devises to the state for education, and the land grant, only the federal land grant has been deposited in the Colorado fund to date.

Many states deposited license monies in the fund—everything from marriage licenses, which may be understandable, to tavern licenses. Confiscations, taxes on banks, Supreme Court fees, gambling, proceeds from swamp lands, and money derived from exemption from military service are but a few of the sources used by states to increase permanent funds for schools. Some states

¹⁰ The exact amount deposited in the permanent school fund from the U. S. Surplus Revenue of 1837 is available in the paper entitled, "Permanent State School Funds," in this notebook.

¹¹ Connecticut, Georgia, Maine, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, and Texas.

also deposited state funds into the permanent school funds. Montana set aside ten sources, including proceeds from the sale of timber and other property from school lands.¹²

LANDS AND FUNDS PROTECTED AS A TRUST

The lands granted at statehood by the federal government were granted in trust for the support of common schools. The state accepted the responsibilities of trustee, requiring it to act in the best interest of the beneficiary—the schools and other institutions. These lands were not simply a gift, but were part of a sacred agreement between each new state and the federal government. Each state gave up the right to tax federal lands in exchange for being granted lands to support schools and other needed institutions within its boundaries.

It was in recognition thereof, i.e., in order to ‘equalize’ the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the ‘public land’ states. The nature of the congressional land grant program was ‘bilateral’ in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.¹³

The grants of land by Congress at statehood along with the state constitution adopted by the people of the state created an “irrevocable compact.”¹⁴ The Washington Supreme Court summarized the issue of school trust lands well when it said, “Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.”¹⁵

So what are the duties imposed on private trustees? Simply put, the state, as trustee, owes the following to schools in administering their grants¹⁶:

- Duty of undivided loyalty to the schools
- Duty to avoid conflicts of interest
- Duty to make the trust property productive
- Duty to be prudent
- Duty to account to the schools by providing information and keeping and rendering all accounts

¹² Enabling Act, Secs. 10, 11, 13 Montana Civil Codes, 1895, Vol. I, p. cxxxiii.

¹³ State of Utah v. Kleppe United States Court of Appeals, tenth Circuit No. 76-1839, 586 F.2d 756 (1978), pg. 758.

¹⁴ Oklahoma Education Association, Inc. v. Nigh, 642 P.2d 230, 235 (Okla. 1982)

¹⁵ County of Skamania v. State of Washington, Washington Supreme court, No. 49799-1, pg. 6.

¹⁶ A thorough listing of standard trust principles and the duties of a trustee is available in Cases and Text on the Law of Trusts, by Bogert, Oaks, Hansen, and Hill, The Foundation Press, Inc., (1991).

These duties collectively are often referred to as fiduciary duties because they are the duties imposed by the law and the courts on a trustee, or fiduciary.

It is important for the trustee and the school beneficiary to understand how rigidly courts enforce the trust duties—how seriously they take a breach of trust. The Supreme Court of the United States in the Cardozo case eloquently spoke:

Many forms of conduct, permissible in a workaday world for those active at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions [Citation.] Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

The United States Supreme Court in the Lassen case¹⁷ recognized Congress' concern in placing restrictions on the states in the use of the school trust lands that the lands provide as much support as possible to the schools and other beneficiaries and exclusively to the named beneficiaries of the grant.

To understand the order of legal strength, enabling acts always preempt state constitutions, which always preempt state law.¹⁸ This means if there is a conflict between the state enabling act and the state constitution or laws, the enabling act always prevails because the state constitution is required to be consistent with the enabling act, and state statutes must be consistent with the constitution.

Those same trust principles that apply to the lands also apply to the revenue made from the land.¹⁹ The permanent common school fund by whatever name it is called in a state has the same legal protection as the lands granted in trust for the support of schools. The trust corpus includes the lands, the proceeds, and the permanent fund. In order to receive these legal protections requiring the state to act with undivided loyalty in the best interest of the schools, the State Board of Education or another education entity must be aware of the breach and take legal action. Only then does the power of the law intercede on behalf of the schools as beneficiaries.

PERMANENT FUNDS 1906 AND THE PRESENT A LESSON TO BE LEARNED BEFORE IT'S TOO LATE

Dr. Fletcher Harper Swift conducted an exhaustive study of the permanent school funds at the turn of the century for his dissertation from Columbia. Even at that time there had been considerable erosion in many funds. Today the permanent funds in eastern states no longer exist. His study led him to conclude that the losses of permanent funds were attributable to:

- sacrifice of the school fund to local interests, as occurred in California

¹⁷ Lassen v. Arizona, United States Supreme Court, No. 84,87 S.Ct. 584 (1967) pg. 589.

¹⁸ Department of State Lands v. Walter Pettibone, supreme Court of Montana No. 83-281, 702 P.2d 948 (Mont. 1985), pg. 953.

¹⁹ Alamo Land & Cattle Co., Inc. v. Arizona, Certiorari to the United States Court of Appeals For the Ninth Court No. 74-125 (1976), pg. 298 reads, "The proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

- carelessness and incompetence in management
- lack of responsibility to any higher authority
- proceeds being lost or applied to things other than the fund
- inadequate legislative protective provisions

Dr. Swift also concluded that an additional defect in building the permanent fund derived from the management structure of the lands. “The result is that by far the majority of states have entrusted the care of millions of acres of school lands, and the investment of the proceeds to the sales of the same to officers or to a board composed of several officers, all overburdened with other duties.” This management challenge is still evident today in many states that entrust the management of the lands to boards of elected officials whose primary job is unrelated to the management of the lands.

As far back as 1870, the Missouri Public School report indicated, “There is a criminal responsibility resting somewhere for the gradual wasting away of the public school fund.”²⁰ Dr. Swift believed that it was unworthy of an intelligent commonwealth to expect some busy and sought-after person such as a State Treasurer or State Superintendent or Governor to manage a large fund well.

The constitutions of many of the land grant states provided for the protection of the permanent fund against loss or diversion. In those states having such a provision in their constitution, repayment of loss is constitutionally guaranteed.

“In many states the permanent funds and the proceeds which should have been added to them have been cared for so carelessly diverted, squandered, wasted, and embezzled so shamefully, that what ought to be a magnificent endowment, whose income would to-day be yielding an appreciable relief from taxation, has dwindled to an almost negligible sum, or exists as a permanent state debt on which interest is paid out of the taxes levied upon the present generation,”²¹ said Dr. Swift in 1911. Currently a change to a state’s enabling act to remove the trust restrictions is filed in the United States Congress. Wilderness groups do not want trust lands inside potential wilderness areas yet are unwilling to support exchanges for other federal lands. Open space advocates without the financial resources to purchase school trust lands advocate loudly for the lands to be preserved for their enjoyment with no understanding of the underlying trust principles being violated. Developers resist paying full market value for “state” lands. There are a myriad of others who may also want to see the trust protection diminished. Western states may today be at a crossroads. History has shown what will happen to these valuable trusts without the watchful eye of trustees and beneficiaries.

There are currently 45 million acres of school trust lands and \$32 billion in the permanent funds remaining in the western states. The eastern and mid-western states have sold their school lands and “diverted, squandered, wasted, and embezzled”²² the resulting funds. It is a matter of trust, and the awesome responsibility to guard and protect these trusts for the benefit of future generations is now squarely on the shoulders of western trustees and education leaders.

²⁰ Missouri Public School Report, 1870, p. vi.

²¹ Swift, p. 11.

²² Swift, p. 11.