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Administration of Grazing Leases of State Lands in New Mexico: A Breach of Trust

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NOTES AND COMMENTS

ADMINISTRATION OF GRAZING LEASES OF STATE LANDS IN NEW MEXICO: A BREACH OF TRUST

INTRODUCTION: THREE TRUST BREACHES

This note will show that in its administration of grazing leases of federally-granted trust lands in New Mexico, the State, as trustee, has been and is in continuing breach of its fiduciary duties under § 10 of the New Mexico-Arizona Enabling Act of 1910 (hereafter called the "Enabling Act").[1]

Section 10 of the Enabling Act expressly places all federally-granted lands and the revenues derived from these lands in trust for the benefit of certain kinds of institutions, such as the public schools and universities. Section 10 also expressly requires, *inter alia,* that all leaseholds and products from the trust lands be appraised at their true value and that no disposal thereof be made for less than their true value. Should the trust lands or the products therefrom be leased or otherwise disposed of in a manner inconsistent with the Act, such lease or other disposal is null and void, notwithstanding any state law to the contrary.

The State of New Mexico has breached its fiduciary duties in three ways: by failing to appraise the grazing lands, by failing to charge

1. 36 Stat. 557, 564, 565, § 10 (1910):

> That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.
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> Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provision of this Act, shall be deemed a breach of trust. . . .
>
> All lands, leaseholds, timber, and other *products of land before being offered shall be appraised at their true value,* and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, . . .
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> Every sale, *lease,* conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding. . . . (Emphasis added.)

sufficient rents for the grazing leases, and by failing to take reasonable steps to safeguard the capacities of the lands to grow grasses and forbs.

The first breach of trust follows from sound principles of statutory construction and from ordinary trust principles which apply to public land trusts such as this. The Enabling Act requires the state to appraise the lands, but no meaningful appraisal has occurred.

Because no appraisal of the trust lands has been made, the State does not know whether it is leasing the trust lands for their true value. Available evidence indicates that the State is receiving less money than it should be receiving; the lessees of the grazing lands have probably been benefitting from bargain rentals at the expense of the federally-designated beneficiaries. It is a breach of trust according to ordinary trust principles for the State to fail to administer the trust for the greatest benefit of the beneficiaries.[2]

The State has breached its duties as trustee in a third manner by failing to take reasonable steps necessary to safeguard the capacities of the lands to grow grasses and forbs. It is well established in trust law that a trustee has a duty to conserve the corpus of the trust and make the trust property productive.[3] This principle would seem to require the State to manage its grazing lands responsibly. Yet, no reasonable range management program exists. No reliable determination of the lands' capacities to sustain a given level of grazing without environmental harm has been made. The evidence indicates that the State has probably breached its duty to conserve the productivity of the trust lands.

Although most of the discussion to follow will be a description of the three breaches of trust, the thrust of this note impliedly will be toward reform. Reform is needed both in the statutory scheme for the administration and leasing of the grazing lands and in the policies of the State Commissioner of Public Lands, the agency head responsible for carrying out the trust's mandate.

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2. Restatement of Trusts § 169 (Proposed Final Draft, 1935): Duty to Exercise Reasonable Care and Skill. "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has."

3. Restatement of Trusts § 171 (1935): Duty to Preserve the Trust Property. "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." Restatement of Trusts § 176: Duty to Make the Trust Property Productive. "The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."

THE TRUST DESCRIBED

Over thirteen million acres of federally-donated land are held in trust by the State of New Mexico under the provisions of the Enabling Act. The surface rights to about four million of those acres have been sold, leaving to the State the surface rights to over nine million acres. The State still owns the mineral rights to most of the thirteen million acres.[4]

The revenues from disposal of the trust lands and of the lands' derivative products such as oil and gas are placed in trust for the benefit of the institutions mentioned in § 10 of the Enabling Act. The *Annual Report* of the Commissioner of Public Lands for fiscal year 1973-74 lists the beneficiaries and the amount of money received by each.[5] In fiscal year 1973-74, income derived directly from the trust lands totalled $47.77 million.[6] 1.53 million of that came from grazing leases.[7] The total amount of money in the trust fund stood at $542.98 million as of July 1, 1974, but no breakdown is available as to what portion of that total is attributable to rentals from grazing leases. The trust has been receiving such rental income since 1900.[8]

Except for the Spanish Land Grants, which were recognized by the Treaty of Guadalupe Hidalgo[9] after the Mexican War, all of the land of territorial New Mexico was public domain. By the Organic Act of 1850[10] and by the Ferguson Act of 1895,[11] Congress granted Sections 16 and 36 of each township to the Territory of New Mexico to be held in trust for common school purposes. Thereafter, under the Enabling Act of 1910, Congress confirmed the earlier grants and granted two additional sections in each township to the new State for the common schools and additional quantities of land for other purposes.[12]

Section 2 of the Enabling Act, which outlined mandatory provisions of the new State constitution, compelled the State to consent in its constitution to the terms and conditions upon which the land grants and confirmations were made. As counsel for the State Land Office has written, "This Enabling Act is the basic law of the Land

4. [1973-1974] N.M. Comm'r of Public Lands Ann. Rep. 8.
5. Annual Report, *supra* note 4, at 34.
6. Annual Report, *supra* note 4, at 35.
7. Annual Report, *supra* note 4, at 35.
8. Annual Report, *supra* note 4, at 34.
9. 9 Stat. 922 (1848).
10. 9 Stat. 446 (1850).
11. 30 Stat. 484, 489 (1898).
12. *Supra*, note 1.

Office and has often been referred to by the courts as the trust instrument."[13] Section 2 further provided that any change in this compact between the sovereigns could be effected only through the mutual consent of both parties and specified that the manner by which the State must express its consent was through constitutional amendment.[14] New Mexico agreed to the requirements of § 2 of the Enabling Act in Article XXI, § § 9 and 10 and Article XIX, § 4 of its Constitution.[15]

Any unilateral attempt by the State to change the provisions of the trust as set forth in the Enabling Act is void, regardless of well-intended motives or salutary result. Such was the thrust of a recent U.S. district court case.[16] The court there stated, "The statutory restrictions placed on the New Mexico trust lands were the strictest controls that had theretofore been imposed upon the disposition of any such lands granted in a statehood bill."[17]

Congressional intent was clear regarding the State's obligations as trustee. As the chairman of the Senate Subcommittee on Territories, Senator Beveridge of Indiana, said in floor debate:

> The fourth difference (between the House and Senate bills), Mr. President, relates to the disposal of the land which both bills appropriate for school purposes and other purposes. The House bill throws no safeguard whatever about the disposition of that land. *I regard this as quite the most important item in the Senate bill.*

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13. Jordan, *Some Legal Aspects of Leasing and Selling State Land,* 1962 State B. N.M. J. 25.
14. 36 Stat. 557, § 2 (1910).
15. N.M. Const. art. XXI, § 9:
    This state and its people consent to all and singular the provisions of the said Act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided.
    N.M. Const. art. XXI, § 10:
    This ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress.
    N.M. Const. art. XIX, § 4:
    When the United States shall consent thereto, the Legislature, by a majority vote of the members in each house, may submit to the people the question of amending any provision of Article XXI of this Constitution on compact with the United States to the extent allowed by the Act of Congress permitting the same, and if a majority of the qualified electors who vote upon any such amendment shall vote in favor thereof the said article shall be thereby amended accordingly.
16. United States v. N.M., Civil No. 9484 (D. N.M., filed Mar. 4, 1974).
17. *Id.* at 11.

> The Senate committee bill throws very carefully considered safeguards about its disposition. We took the position that the United States owned this land, and in creating these States we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for these purposes.
>
> So the Senate bill provides that there shall be no mortgages on the land; *that it shall be sold and leased only after appraisement and advertisement;* that the proceed shall be kept in separate funds and many other practical precautions which as a matter of mere business wisdom I think everybody agrees to. The Senate bill makes those lands and the proceeds thereof a trust fund.
>
> Of course that is not without precedent. *We have thrown conditions around land grants in several States heretofore, notably in the case of Oklahoma, but not so thorough and complete as this.* The reason why it was thought necessary to do this, outside of the general reasons which would support it as a matter of good business prudence, was the unfortunate experience that occurred in the Territory of New Mexico a few years ago, where the land grant of timber of 1898 was, as the Department of Justice thought after careful investigation, grossly and fraudulently violated.
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> The result was that a great deal of that valuable timber was sold at an absurd sum, and the Government, after careful investigation, began suits which are now pending against corporations and parties, and the Territory itself has been made a party.
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> I might say this further thing, Mr. President, that is to my mind important, that every person who appeared before the Senate committee, as is shown by the Senate hearings, regardless of his politics, without a single exception, approved, and in many cases very emphatically approved, of the restriction which was thrown around the lands in those Territories by the Senate bill. (Emphasis added.)[18]

The Senate version of the Act, which Senator Beveridge supported, ultimately prevailed.[19]

According to the terms of the Enabling Act, the State Commissioner of Public Lands is the legally-designated agent having control, jurisdiction, care and custody of the lands for the State.[20]

Thus, the lands are universally recognized as being held in trust by the State for certain beneficiaries designated in the Enabling Act.[21] Problems of administration of the lands are appropriately analyzed in

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18. 45 Cong. Rec. 8227 (1910) (remarks of Senator Beveridge).
19. United States v. N.M., Civil No. 9484 (D. N.M. filed Mar. 4, 1974), at 6.
20. Jordan, *supra* note 13, at 26. *See also,* N.M. Const. art. XIII § 2.
21. Annual Report, *supra* note 7, at 6.

terms of traditional trust doctrine.[22] Traditional trust doctrine holds a trustee to a strict duty to protect, conserve and safeguard the assets of the trust for the benefit of all the *cestuis que* trust, and the trustee is liable for a loss thereof resulting from his failure to exercise reasonable care, prudence and diligence.[23] The following cases demonstrate judicial handling of problems related to the trust.

U.S. v. Ervien[24] involved the validity of a New Mexico law which provided that three per cent of the income from the trust funds be used to advertise the land to investors.[25] The State justified this apparently improper diversion from the trust fund by arguing that the increased investment caused by the advertising could not help but increase the value of the trust lands by more than the three per cent expenditures. The 8th Circuit Court flatly rejected the State's justification, stating:

> . . . it could not reasonably be contended that the trust funds could properly be expended in advertising the agricultural resources of the state *or to promote the general welfare.* . . . (Emphasis added.)
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> . . . Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands . . .
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> . . . The proposed campaign of publicity is for the general advancement of the state. It has no immediate or direct bearing upon the trust lands or purposes except as they are within and pertain to the state at large. . . . The advantage accruing (to the trust land) is too indirectly consequential to authorize the use of the trust funds.[26]

State ex rel Shephard v. Mechem[27] dealt with the validity of ch.

22. United States v. Swope, 16 F.2d 215, 217 (6th Cir. 1926):
> The trust was imposed upon New Mexico by the Act of Congress, but the same rule of construction applies to both public and private grants. "The best construction of a statute is to construe it as near to the rule and reason of the common law as may be. . . . Where a statute directs anything to be done generally, and does not appoint any special manner, it is to be done according to the course of the common law." 2 Suth. Stat. Const. (2d Ed.) § § 454, 455: . . .

23. Restatement of Trusts § 197 (Proposed Final Draft, 1935): Liability in Case of Breach of Trust. "If the trustee commits a breach of trust, he is chargeable with (a) any loss or depreciation in value of the trust property resulting from the breach of trust; or (b) any profit made by him through the breach of trust; or (c) any profit which would have accrued to the trust estate if there had been no breach of trust." Restatement of Trusts § 204: Balancing Losses Against Gains. "A trustee who is liable for a loss occasioned by one breach of trust cannot reduce the amount of his liability by deducting the amount of a gain which has accrued through another and distinct breach of trust; but if the two breaches of trust are not distinct, the trustee is accountable only for the net gain or chargeable only with the net loss resulting therefrom."

24. 246 F. 277 (8th Cir. 1917), *aff'd,* 251 U.S. 41 (1919).

25. Law of March 8, 1915, ch. 60, [1915] N.M. Laws 2d Leg.

26. 246 F. at 279, 280.

27. 56 N.M. 762, 250 P.2d 897 (1952).

181, Laws of 1951, and The Appropriation Act, ch. 227, Laws of 1951. In combination, these Acts transferred $19,300, or five per cent of the amount appropriated for the operating expenses of the land commissioner, to the general fund to help defray the general expenses of government. All of this money was derived from the trust lands. The New Mexico Supreme Court ruled that the laws illegally diverted trust funds to non-trust uses and thus were violations of the trust set up in the Enabling Act.

> If the Congress had intended that any part of the proceeds from the lands so granted could be used for general governmental purposes, it would not have used such restrictive language in the acts granting the lands, and required the state to agree to such conditions by constitutional provisions irrevocable without congressional consent. . . .
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> We know . . . members of the legislature were fearful sufficient money would not be available to meet the appropriations made in 1951, but this fact does not afford legal justification for paying out these trust funds for general governmental purposes. A few of the appropriations payable from the general fund might be said to afford some incidental protection to the grant lands, but far too many have no relation whatever to such purpose. . . .[28]

The court also found no merit to the State's defense that the money taken from the trust funds had been spent and could not be restored.

State ex rel State Highway Commission v. Walker[29] involved the question of whether the land commissioner was required to charge the State for rights of way or easements for state highways across trust lands. Citing *U.S. v. Ervien,* the New Mexico Supreme Court answered that he was. The Court explicitly noted the inapplicability of the general law that an agency of the State is not to be charged for the use of State property unless specific provision is made therefor.

In *Walker,* the court apparently ignored the state's claim that the instant case differed significantly from *U.S. v. Ervien* because the trust lands would directly benefit in the form of increased land values stemming from the construction of the highways.

In *Lasen v. Arizona ex. rel. Arizona Highway Dept.,*[30] the United States Supreme Court ruled that Arizona had to compensate its trust fund for the full appraised value of any material sites or rights of way on trust lands without any diminution for the amount of any enhancement in value of the remaining trust lands. Elsewhere in its opinion, the Court cited *State v. Walker* with apparent approval.

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28. 56 N.M. at 770, 771.
29. 61 N.M. 374, 301 P.2d 317 (1956).
30. 385 U.S. 458 (1966).

FIRST BREACH: FAILURE TO APPRAISE

> All lands, leaseholds, timber, and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . .[31]

The first trust violation results from these facts: the lands donated in the Enabling Act were granted in trust; the grant mandated that the trustees appraise the lands prior to any sale or lease of the lands or their products; such an appraisal could only be made by an extensive economic study to find true value accompanied by continuing on-site inspections to ascertain current carrying capacities; no such appraisal was ever made, although much of the land has been leased. Congressional concern for safeguarding the use and disposition of the trust lands was described in *Lassen v. Arizona Highway Dept.*:

> All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories. Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898. The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently hoped to prevent such depredations here by requiring public notice and sale. The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands.[32]

Ervien, and the cases related to it, clearly shows that the courts will not allow even the smallest impropriety with respect to the use of trust funds, whether the impropriety occurs on the income side of the ledger or on the disbursement side. All money due the trust funds must be paid; all expenses must be closely related to the maintenance and administration of the trust. Mere incidental benefit to the beneficiaries from expenditures of trust money and disposition of trust land will not justify an otherwise improper use of trust monies, no matter how great the indirect benefit may be; the benefit must be direct. That other public interests may also benefit is acceptable *only* if the trust truly remains the prime beneficiary. A fortiori this rule is true for private interests such as grazing leases.

Reference to the remarks by Senator Beveridge, quoted above, confirm congressional intention about an appraisal.

31. 36 Stat. 557, 564, § 10 (1910).
32. 385 U.S. 458, 463, 464 (1966).

> So the Senate bill provides that . . . [the land] shall be sold and leased only after appraisement and advertisement. . . . We have thrown conditions around land grants in several States heretofore . . . but not so thorough and complete as this. . . .[33]

Congress recognized the importance of ascertaining the true value of the land.

Appraised value can refer to fair market value, but appraisal of trust leasehold values of state-owned grazing lands requires more than an evaluation made by looking at a market price. There are several reasons for this.

Chief among the reasons why a look at a market price of trust grazing leases would be insufficient is that any such price would be meaningless.[34] As was observed by the attorney for the State Land Commission, Oscar Jordan, no such market exists.[35] Mr. Jordan's observation is factual, not editorial; and it is inevitable. A thorough analysis of why no market exists would go far beyond the scope of this note. In lieu of such an analysis, and in order to begin to show why the State's present response to the congressionally mandated appraisal is a failure, a few brief illustrations follow of why there is no viable market for leaseholds and of the kinds of problems accompanying an attempt to establish true value.

By State statute all grazing leases must be let for bid at intervals of not greater than five years.[36] This is not to say that the State must

33. 45 Cong. Rec. 8227, *supra* note 18.

34. Such a look is hypothetical; as this note will show, New Mexico's approach to evaluating the trust lands has little relation to market price or any other rational economic concept.

35. Interview with Oscar Jordan, State Land Office Attorney, Oct. 4, 1974. *See also,* L. Sloan & A. Zurcher, *The Dictionary of Economics* (1970) which defines a market as the area within which buyers and sellers are in communication with one another and within which exchange takes place.

Note in this regard that the Enabling Act specifically states that no advertising of impending lease renewals is required; the state does not so advertise.

36. N.M. Stat. Ann. § 7-8-51 (Repl. 1974):

> Every grazing lessee who desires a new lease on the same lands for a term not exceeding five (5) years shall make and file with the commissioner his application for such new lease on or before August first next preceding the expiration of his existing lease; and any and all other applicants for a like lease on such land shall make and file with the commissioner their applications on or before September first next preceding the expiration date of such existing lease. If more than one such application to lease be filed as herein provided, one of which shall be that of the holder of the existing lease, the commissioner shall lease such land to the bona fide applicant offering the highest annual rental therefor, if to anyone; except that the commissioner, before so doing, if another bona fide applicant shall offer a higher rental than that offered by the holder of the existing lease, shall give written notice to the holder of the existing lease, immediately after September first next preceding the expiration of such lease, of the name and address of the applicant offering the highest

lease or release its grazing land; as was made clear in *Magnolia Petroleum Co. v. Price,*[37] no such obligation exists. The lessee has the right to match the highest bid should other bids be made on the re-lease or sale of the leasehold lands.[38] In practice, very little bidding occurs.[39] The preference right of renewal and the possible costs of appraisal may discourage competitive bidding.

A statutory prohibition against excessive improvemens may also discourage investment.[40] The lessee can be required to pay for the appraisal of improvements.[41] The conditional nature of the right to renewal would seem to create uncertainty about the status of the leases and have an unsettling effect on demand for leases and a negative impact on range conditions, causing it to be more difficult to appraise the value of the leases.

Second, state-owned grazing lands often lie intermingled with

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annual rental and the amount of such offer, and if the holder of the existing lease, on or before September thirtieth next ensuing, shall meet such offer and has, in good faith, complied with all the requirements of his existing lease, the lease shall be awarded to him, if to anyone.

37. 86 Okla. 105, 206 P. 1033, 1039 (1922), *aff'd*, 267 U.S. 415 (1925):
... The state now has complete control of such (trust) lands to lease or not to lease if it so chooses; ... Should it sell any of them or lease any of them, such sale or lease must not violate the conditions of the grant. ... The state is bound by the terms of the Constitution and by the terms of the grant to protect him in his preference right to re-lease if the land is re-leased, and the preference right to purchase, at the time of sale, if the land is sold. This is as far as the state is obligated to the lessee without violating the conditions of the grant itself, the uppermost purpose in the grant being to protect the school, educational and public building funds, for which purposes the land was granted to and accepted by the state.
38. N.M. Stat. Ann. § 7-8-51 (Repl. 1974).
39. Interview with Jordan, *supra* note 35.
40. N.M. Stat. Ann. § 7-8-53 (Repl. 1974):
Except by the express written consent of the commissioner, improvements upon lease state lands held under one (1) lease shall be limited as follows: upon those leased for grazing purposes, fences only, at a cost not exceeding one hundred and fifty dollars ($150) per mile, and necessary corrals, at a cost not exceeding two hundred dollars ($200); ...
N.M. Stat. Ann. § 7-8-56 (Repl. 1974):
All permanent improvements in excess of the amount specified in section 5199 (7-8-53), shall be and remain a part of the real estate so offered for sale, except as provided in this and the preceding sections.
N.M. Stat. Ann. § 7-8-19.1 (Repl. 1974):
Whenever any state lands are sold or leased to a person other than the holder of an existing surface lease and upon which lands there are improvements belonging to such lessee or to another person, the purchaser or subsequent lessee, as the case may be, shall pay to the commissioner of public lands for the benefit of the owner of the improvements the value thereof as determined by an appraisal made by the commissioner of public lands. ...
41. N.M. Stat. Ann. § 7-8-19.3 (Repl. 1974): Reasonable costs and expenses of appraising improvements on state lands and other costs of sale shall be paid by the purchaser or subsequent lessee.

privately-owned lands. Thus, once the carrying capacities on the State lands are determined, the fact that the State land is not fenced from the private land and that the State cannot presently control carrying capacities on private lands combine to create difficult problems in enforcing carrying capacities on the State lands. The federal government has no such enforcement problems because the Bureau of Land Management has, in effect, the power to dictate carrying capacities on all land, private and public, located within the grazing units with which federal land is involved.[42] New Mexico should explore the possibility of gaining a similar power where State and private land is intermingled. Perhaps lessees should have to consent to such State power as a condition to leasing. In any case, the close relationship between State and private land make appraisal of State land more difficult.

Third, often, for historical and financial reasons, the private landowners hold the preferential leasing rights to State lands adjacent to their own lands.[43] So, today a delicately-balanced and unquantified relationship exists between the value of State and privately-owned lands. Possibly the value of privately-owned lands is inversely related to the prices of State grazing leases.[44]

If the rentals of the grazing leases are below true value, as only a valid appraisal can conclusively determine, then the rentals must be increased; but such an increase could conceivably depress prices of private lands. It was this possibility that worried Oscar Jordan in 1962. Such a concern seems quite reasonable and should play a role in the appraisal process. The State might note the federal government's solution to the same problem: a gradual price increase to bring the price of permits up to true value.[45]

Other factors, such as the psychology of the rancher and the cultural and economic idiosyncrasies of a given area, contribute further to the economic complexity. A full explanation of all the relevant factors would require a detailed economic study, which is the whole

42. 43 C.F.R. § 4115.2-1(h) (1974); 43 C.F.R. § 4125.1-1(l) (1974).

43. And these owners hold the "preferential" rights to renew permits from the federal government.

44. Interview with Oscar Jordan, *supra* note 35.

45. *See, e.g.*, Albuquerque Journal, March 25, 1975, at 1, cols. 5 and 6. The article was headlined "Land Use Planning Opposed by Cattleman." Ruben Pankey, member and apparent spokesman for the New Mexico Cattle Growers Assn., was quoted as saying on the occasion of an informal public hearing at the Albuquerque Public Library called by Senator Pete Domenici for input into the proposed Land Resource Planning Assistance Act that "We're against land use planning. I can't find anything in it but that it would be a detraction to our quality of title and ownership of land" and that land use planning in reality is tampering with someone's use of the land, "and whether it's a rancher or someone's lot in the city, the land is sacred to him."

point. A valid appraisal of the leasehold value of the trust lands will require the skills not only of the professional economist, but also of the agronomist, among others.

The need for a multi-disciplinary approach follows from the dual nature of a meaningful appraisal of grazing land. First, a study must be made to determine an economically meaningful rental rate per cow-year.[46] That study must be complemented by a determination of the carrying capacities of the trust lands. Since the carrying capacities for the trust lands are a function of many factors such as general weather conditions, altitude and soil type, they will vary throughout the State.

Thus, a valid appraisal of the trust lands will require complementary economic and agricultural studies conducted by economists, agronomists and related specialists. Yet, New Mexico's response to the congressionally-mandated requirement of an appraisal consists of obsolete statutes[47] telling each lessee to appraise the land he hopes to lease; providing penalties of varying kinds and degrees should any applicant either mistakenly or "knowingly and willfully swear falsely . . . in any appraisement thereof;" and scheduling annual rental rates as a function of carrying capacity.[48] Apparently, the applicant is to ascertain the carrying capacity. Then the State will assign the annual rental rate for that carrying capacity.[49]

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46. A cow-year is shorthand for the amount of forage necessary to enable a steer for one year to experience sustained weight gain. A cow-year is twelve times as great as an animal-unit month, the term used by the federal government, defined *infra*.

47. N.M. Stat. Ann. § 7-8-1 is now obsolete as regards grazing leases. N.M. Stat. Ann. § 7-2-30 is in fact used to determine lease rates according to varying carrying capacities; but § 7-8-1 is not interpreted by the State Land Office as directing potential lessees to determine carrying capacities. § 7-8-1 is used only in the context of sales and business leases. Thus the aspiring lessee has no obligation to determine either the carrying capacities or the rental rates per carrying capacities. N.M. Stat. Ann. § 7-8-1 (Repl. 1974): Applications to lease or purchase state lands shall be made under oath, and applicants to lease shall, at their own expense, procure appraisements thereof to be made under oath by some disinterested and creditable person or persons familiar therewith. . . . N.M. Stat. Ann. § 7-8-7 (Repl. 1974): Any person or persons applying to lease or purchase state lands, or acting as appraiser or appraisers thereof, who shall knowingly and willfully swear falsely as to any material matter contained in any application to lease or purchase any such lands or in any appraisement thereof, shall be deemed guilty of perjury, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

48. Briefly, carrying capacity denotes the number of animal units that can successfully graze a given area without causing deterioration of grass and forb cover.

49. A thorough explanation of the evolution of the present rental schedule lies shrouded in the history of political machination and compromise; suffice it to say that the rental is not based on any appraisal of the land's true grazing value.

Part of the reform of the grazing lease system should be a clarification of N.M. Const. art. XIII § 2–*i.e.*, a clarification of whether the State Land Commissioner or the legislature is to control the lease appraisals.

The State has shirked its responsibility to determine either carrying capacity or true value of the trust lands; in so doing, New Mexico has breached its fiduciary duty to administer the trust properly by appraising the land before selling or leasing it.[50]

A naturally occurring question is whether the state can afford such an appraisal. However, the matter can better be understood by asking whether the State can afford not to conduct such an appraisal. The trust's beneficiaries are probably losing income each year because the rental rates are too low.[51] But considerations of affordability are not relevant. Rather it is the provision of the trust rendering "null and void" "every . . . lease . . . of . . . any of the lands hereby granted or confirmed . . . not made in substantial conformity with the provisions of this act," that makes any balancing of costs academic. If the settlor chooses to enforce the trust provision requiring appraisal, the State will be faced with an offer it cannot refuse.[52]

SECOND BREACH: INADEQUATE RENT

An appraisal of the trust lands should disclose whether the present arbitrary rental schedule has coincidentally been sufficiently high.[53]

50. Insofar as appraisal refers to determination of carrying capacities, this statement must be qualified by adding that already the state is using Bureau of Land Management and Soil Conservation Service data to some extent. However, a glance at a map delimiting locations across the state of federally controlled and state controlled grazing lands demonstrates that in many places the state land is isolated and thus no applicable data exists.

51. Probative indicators that the rental rates are too low are discussed *infra*. Judicial language strongly suggests that the courts are aware that maintenance costs may be great and that such costs are to be borne uncompromisingly by the trust funds. See the discussion of the state's failure to safeguard the trust corpus, *infra*.

52. Thanks to *The Godfather*, Mario Puzo, novelist, and Francis Ford Coppola, film director, for inspiring the phrase. The phrase means "Do it our way or die." In *The Godfather* it was used by Mafiosi in extortions.

53. Correlative to the second violation is the possible unconstitutionality of the state charging less than true value for its funds. The provision of the New Mexico Constitution that may be violated by rentals for grazing leases set at less than true value is given below along with its commonly used titles.

N.M. Const. Article iX Section 14
Aid to private enterprise

> Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, . . . Provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

The following four cases suggest that N.M. Const. art. IX § 14 is being violated.

In *State ex rel. Mechem v. Hannah*, 63 N.M. 110, 314 P.2d 714 (1957), pursuant to Ch. 22, Laws of 1957, New Mexico had contracted with the U.S. Department of Agriculture to contribute twenty-five per cent of the funding for an emergency drought feed program. A ceiling of $75,000 in state funds had been agreed to. The program was occasioned by a severe six-year drought; President Eisenhower had declared New Mexico a drought area.

A statement made in 1962 by the attorney for the State Land Office, the State agency responsible for proper administration of grazing leases, suggests that the land is not leased for its true value:

> Under Section 10 of the Enabling Act, leasing these lands for less than comparable private lands would lease for amounts to leasing for less than true value and thereby constitute a violation of the trust in that the lands are being used for a purpose foreign to the trust—that is, to subsidize for instance a city, county, or perhaps the livestock and farming industries rather than to operate the lands for the benefit of the institutions designated. Realizing this, the office is making an attempt to raise the rentals to true value. However, as a practical matter, unless this is done gradually, it could possibly seriously injure the agricultural industry in New Mexico.[54]

Insofar as State grazing lands resemble nearby federal grazing lands in value and carrying capacity, State rentals should probably corre-

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In spite of those facts, and a stipulation by the parties, "That the livestock industry is a basic and essential industry to the economy of the State of New Mexico," the Court ruled that the act appropriating state money to the program violated the constitutional prohibition against the state aiding free enterprise.

> The act in question attempts to give public money to private individuals in violation of Article IX, Section 14, of our Constitution. They are not indigents or paupers, and the money is not to be given to them to prevent their becoming such, although there is testimony that many would have had to liquidate their herds, and that because of the drought many small ranchers and farmers left Roosevelt County. (p. 120).

See also, State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942) which held unconstitutional Ch. 110, Laws of 1941, which granted a pension to a former government employer after he had left the service of the state because the law violated Section 14 of Article IX; and *Harrington v. Atteberry*, 21 N.M. 50, 153 P. 1041 (1915), which held unconstitutional ch. 51 of Laws of 1913, which permitted annual appropriations of $500 to counties to pay premiums on agricultural, horitcultural, artistic and livestock fair exhibits.

The issue in *State v. Axtell*, 74 N.M. 339, 393 P.2d 451 (1964), was whether a gratuity paid by the state but subsequently determined to have been granted unconstitutionally might be recovered from the recipient. The court answered yes and approved *State ex rel. Mechem v. Hanna, infra.*

If the rentals for the grazing leases are too low, then the state is effectively aiding free enterprise. Whether the courts would see this effective aid to free enterprise as being unconstitutional would depend upon how obvious an impropriety must be before it is considered a violation and whether indirect aid would be held to come within the prohibition.

54. Jordan, *supra* note 13, at 30. A U.S. Department of Interior News Release of November 15, 1968, reflects an analogous concern about raising federal grazing permit fees:

> ... both agencies (Interior, headed by Stewart L. Udall and Agriculture, headed by Orville L. Freeman) will use graduated increases over a period of time to reach the fair market value of the forage. This will give the livestock operators an opportunity to adjust their operations to meet the increased fees without undue impact.

A brief portion of this note further explains Mr. Jordan's concern. Note that the process that Mr. Jordan wanted to occur gradually cannot take place absent a meaningful appraisal of true value and carrying capacities.

late to the fees charged to permittees of the federal lands.[55] In 1966, the U.S. Department of Agriculture conducted a study of western grazing lands called the "Western Livestock Grazing Study." As a result of that study, the Bureau of Land Management and Forest Service learned that the annual permit fee should have been about $1.23 per animal unit month. The fee in 1966 was actually $.33. Beginning in 1969, the Bureau of Land Management and the Forest Service began raising the fee nine cents per year so that by 1973 the fee would be $1.23 per animal unit month.[56] Additionally, the base fee would be adjusted annually by an index computed from the average private forage rental notes paid the preceding year by ranchers in the western states. Thus current market conditions and inflation would be included, probably causing the fee to be far above $1.23 per animal unit month.[57] In 1974, the fee stood at $1.06, and this despite two years when the planned annual increase did not take place, thus showing that at least $.54 remained to be added to the base fee, plus whatever additions might be called for in the index figure. Actually, the fee may well exceed $2.00 per animal unit month by 1978.

N.M. Stat. Ann. 7-3-30 includes the minimum rental schedule for State grazing lands. In 1976, a five-year plan instituted by the Land Commissioner to double the rates will have ended.[58] Yet the State rental will still be far below a reasonable projection of the federal fee. For example, assuming a carrying capacity of seven head per section, if the federal fee cost $2.00 per animal unit month, the annual fee for the section would be $138.00. The State rental rate would be $64.00 for the same number of cattle on the same amount

55. Given the deterioration of federal lands, it would not be untoward to suggest that the State not depend entirely on BLM data. The federal range lands are deteriorating. As a Bureau of Land Management News Release of March 1, 1975, stated, "the overall condition of over 150 million acres under BLM control in ten western states is worsening at such a rate that a 25 per cent reduction in productivity is anticipated in the next quarter century unless 'new methods of management on the ground' are found and 'current limitations on funding and management' are removed."

See also, Natural Resources Defense Council, Inc. v. Morton, Civil No. 1983-73. (D.D.C., filed Dec. 30, 1974) citing at 19 the first annual report of the Council on Environmental Quality which concluded "that overgrazing had dramatically affected the public lands."

But note the federal government's approach to the problem, as expressed in 40 Fed. Reg. 2813 (1975). Subdivision (iv) of 43 C.F.R. § 4115.2-1(k) is changed to establish the range improvement portion of the total grazing fee at a minimum of 50 per cent . . ."

56. Letter from Secretary of Interior Stewart Udall to Senator Henry Jackson, Chairman of United States Senate Committee on Interior and Insular Affairs and to Representative Wayne Aspinall, Chairman of United States House Committee on Interior and Insular Affairs; November 13, 1968.

57. Permit fees differ slightly between lands administered by the Bureau of Land Management and the U.S. Forest Service; the cost differentials are not significant here.

58. Interview with Jordan, *supra* note 35.

of land for the same length of time.[59] State rental fees are very low according to federal standards.

In comparing state rentals with federal permit fees, it should be noted that the federal permit system is more feudal than capitalistic,[60] and the $2.00 per animal unit month figure,[61] chosen arbitrarily for illustration, may still not be nearly sufficient as an adequate rental price. Occasionally, federal grazing land is leased through open, competitive bidding, and then the prices are much higher than under the commensurate property requirement fee system. An example is the 1974 bidding for 36,700 animal unit months on 233,000 acres of federal pasture on the McGregor Missile Range north of El Paso, Texas. The average price for the grazing leases was $4.39 per animal unit month. Although this price must be qualified by the caveat that more than forage was up for bid, the permit fee of $4.39 per animal unit month was $.93 per animal unit month jump from the average 1973 fee.[62] This one example of open bidding indicates the magnitude of the disparity that might exist between the present rent for New Mexico grazing leases and the market value of those leases.

Subleasing State grazing land is not uncommon. This also seems to suggest that the State is not charging sufficient rent, since its lessee can often re-lease the same land at a profit.[63]

Also, Colorado's rental rates are approximately twice those of New Mexico,[64] indicating that New Mexico's rental rates are too low.

Finally, it should be noted that other factors may exist complicating the issue of whether lease rates reflect true value. These factors include alternative uses of the land such as for recreation and com-

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59. Federal: ($2.00 per AUM) x (7 AU) x (12 months); State: 7 head = $.10 per acre per year. ($.10 per acre per year) x 640 acres per section.

60. The federal grazing permits require as a condition precedent to bidding that the bidder possess base properties consisting of water rights or adjacent land. 43 C.F.R. § 4111.2-1. The subject is beyond the scope of this note; suffice it to say that permits change hands quite infrequently.

61. " 'Animal-unit month' means the amount of natural or cultivated feed necessary for the sustenance of one cow or its equivalent (one cow equals one horse or five sheep or five goats) for one month." 43 C.F.R. § 4110.0-3(a)(m).

62. McGregor Range Forage Brings Record $4.39, Bureau of Land Management News Release (Oct. 24, 1974). A portion of the release bears particular attention:

> Comment by bidders before and during the bidding was to the effect that a boost in price for the McGregor Range forage was the lesser of several "evils." Prices for other feeds have increased. The McGregor Range offerings constituted a "bargain" in a high cost feed market.

63. Repeated subleasing suggests insufficient rental rates. Apparently the State agrees. The Land Commissioner is attempting to collect a 20 per cent subleasing fee.

64. Interview with Jordan, *supra* note 35.

peting wildlife.[65] Too, services performed by lessees such as practice of conservation and prohibition of trespassing vandals must be considered, though at least one case suggests that such services cannot be consideration for the leasehold.[66]

In general, then, the disparity between the price of New Mexico grazing leases and that of grazing leases from the federal government and surrounding stages strongly indicates that New Mexico leases are not being rented for their true value.

THIRD BREACH: APATHY TOWARD RANGE DETERIORATION

The third trust violation, like the second, flows basically from the failure to appraise the true value and carrying capacities of the trust lands. In fact, the second and third breaches are to some extent interrelated, differing primarily in the type of harm caused by the nonappraisal. Discussion of the second violation focused on income lost by the beneficiaries. In my treatment of the third violation, I will discuss the damage to the land itself caused by neglectful management.

If the State does not know with any degree of certainty the carrying capacities of the trust lands; or if no viable program exists to enforce known carrying capacities; or if, as is asserted here, the State is both uninformed about carrying capacities and lacking in effective enforcement measures; then the probability of further range deterioration is increased. The greater that probability is, the more obvious is the breach.

The condition of the grazing land has deteriorated greatly in the Twentieth Century.[67] However, the authorities disagree about the causes of the deterioration. One range scientist lists five causes: climatic change; livestock grazing; rodent activity; suppression of grassland fires; and competition.[68] The authorities generally agree that this list is inclusive, but different scientists assign varying degrees

65. Interview with Jordan, *supra* note 35. Note, however, that the present state statutory scheme does not internalize the welfare of wildlife here.

66. Lassen v. Arizona ex rel. Arizona Highway Dept., 395 U.S. 458 (1966).

67. Buffington & Herbel, *Vegetational Changes on a Semidesert Grassland Range,* 35 Ecological Monographs, 139, 161 (1965).

See also, New Mexico Executive Order No. 74-22 issued December 3, 1974, by former Governor Bruce King, which reads in part:

> WHEREAS the quality of much of our range lands has been deteriorating partly because of poor management practices; and
>
> WHEREAS the productivity of lands which have been neglected, abused or mismanaged can be increased through a concerted well-organized statewide remedial effort . . .

68. Humphrey, *The Desert Grassland,* 24 The Botanical Review (No. 4, April, 1958).

of importance to the five causes; furthermore, the interrelationships between the five are often viewed differently. A recent Bureau of Land Management study[69] is unequivocal in its placing of fault for deteriorated range land. That study faults overgrazing.

That the authorities disagree about the causes of deteriorating range lands is beside the point. Appraisal and enforcement—deployment of a meaningful range management program—will contribute to better range lands even though some of the deterioration may very well be beyond human remedy. Certainly the State cannot be expected to prevent droughts. But as administrator of the trust lands, the State clearly should institute measures to eliminate man-made causes of deterioration. As was true in the case of appraisal, a complete study of the various range ecology measures appropriate for the sound range management is a necessity if the State is to fulfill its duty as trustee to conserve the corpus of the trust. Authority exists supporting the proposition that the State can expend as much of the trust's income as is reasonably necessary to conserve the corpus.[70]

> It requires no argument to demonstrate that the state would have the power to protect the grants of lands and to charge the expense of such protection to the trust fund . . .
>
> . . . It appears that some of the land is suitable for agriculture, other for mining, and other for timber. . . . It is obvious that large expenditures must be made in the examination, protection, control, sale and leasing of this land, and in the control of the proceeds of the land and of the several funds in which it must be kept. It must be presumed that Congress was aware of the heavy burden of expense that would be required in the management of those grants. . . .[71]

The State Land Commissioner's inability to state even approximate figures about man-months per year devoted by the State Land Office staff to range management is noteworthy.[72] The State Land

69. *Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada* (April 1974) documents the serious damage being wrought on the environment in another state. The report, compiled by a team of BLM resource managers, states flatly that wildlife habitat is being destroyed. "Uncontrolled, unregulated or unplanned livestock use is occurring in approximately 85 per cent of the State and damage to wildlife habitat can be expressly labeled only as extreme destruction." *Id.* at 13. Overgrazing by livestock has caused invasion of sagebrush and rabbitbrush on meadows and has decreased the amount of meadow habitat available for wildlife survival by at least 50 per cent. The reduced meadow area has caused a decline in both game and non-game population. *Id.* at 26. In addition, there are 883 miles of streams with deteriorating and declining wildlife habitat, thus making it apparent, according to the report, that grazing systems do not protect and enhance wildlife values. *Id.* at 14, 29.

70. *See* Note 3, *supra.*

71. United States v. Swope, *supra* note 22, at 219.

72. Interview with P. Lucero, by telephone, February 19, 1975.

Office employs one range management specialist to inventory the resources of 9,159,648 acres of State Trust Land;[73] even at that, this specialist is not able to devote his full time to the inventory.

The State probably errs in its method of determining how to fund the various departments of the Land Office. Revenue from grazing rentals in fiscal year 1973-74 was $1.53 million, or 3.2% of the total of $47.77 million derived directly from the trust lands. The Land Office received $2.62 million for operating expenses; $.60 million was available for operating expenses as a cash balance from fiscal year 1972-73. On June 30, 1974, after all disbursements of $1.13 million for all operating expenses, a cash balance of $1.47 million remained. Of the $1.13 million disbursed for operating expenses, the State Land Commissioner does not know how much was spent on land maintenance.[74] Certainly, the figure is very low, absolutely and, in view of the language used by the court in *U.S v. Swope,* relatively.

Thus, the Land Office fails to expend available funds for administering the trust lands; and of those expenditures it does make, a pittance probably goes toward maintaining grazing conditions. While such a policy creates the illusion of revenues going to the beneficiaries, such increased revenues may well be short-lived if the failure to spend adequate amounts for maintenance indirectly causes range deterioration.

Because of small revenues from grazing leases, proportionately small expenditures for management of those grazing lands appear justified. Such an appearance is deceptive. A system of assigning priorities of maintenance according to the amount of revenue generated—whether intentional or not—is not wise if the long-run effect is a deterioration of the land. If more money is needed for effective land management, more should be spent. If more cannot or will not be spent, then the State should curtail its leasing business and leave the lands alone.[75] Certainly such a curtailment is a drastic solution, probably even more so for the lessees than for the trust's

73. Annual Report, *supra* note 4, at 2.

74. Interview with Lucero, *supra* note 72.

75. Whether the state leases or re-leases its lands is discretionary. *See, Knapp v. State ex rel. Commissioners of Land Office,* 196 Okla. 513, 166 P.2d 86, 89 (1946) for the proposition that "While . . . it was stated that the preference right (to re-lease) was an option, and therefore an equitable estate in the land, it is apparent that such right is not in fact an option enforceable at the will of the lessee, and is not in the true sense an equitable interest or estate in the land." *See also, Ellison v. Ellison,* 48 N.M. 80, 146 P.2d 173 (1944), construing the Enabling Act and N.M. Const. art. 21 § § 9, 10 to prohibit the state from granting an absolute right of renewal of leases. *Knapp, supra,* also stands for the proposition that where value of renewed school lands was increased on a reappraisal and a preferential lessee was offered just opportunity to re-lease but at an increased rental, the lessee was not deprived of his first opportunity to re-lease.

beneficiaries. Almost certainly such a step need not be taken. Rather, the State need only see its mandate clearly and act decisively.[76]

Before leaving this discussion, note should be made of one more important aspect of a meaningful appraisal. An appraisal can be made in terms of present carrying capacities or future, i.e., potential carrying capacities. For example, various factors may be operating on a given area so that little grass is presently growing there. Removal of some of those factors, or perhaps positive steps toward rehabilitation, or a combination of these measures, might ultimately result in increased forage yields. An appraisal based on the present poor condition of the land, ignoring the land's potentially greater production, might justify a laissez-faire approach to land management; the value of the grazing land would probably remain static. A dynamic approach to appraisal, one looking beyond the status quo to the potential of the lands, might benefit all parties involved.[77]

Such a dynamic approach seems best, although a static one of protecting the present carrying capacities of the land would probably satisfy the requirements of the trust.[78] Certainly the static approach[79] to appraisal, coupled with a good management program, would be an improvement over the present non-system, which is in clear violation of the trust.

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76. As the court noted in *State ex rel. Shephard v. Mechem,* 56 N.M. 762, 250 P.2d 897 (1952), the majority and better rule about the availability of mandamus for testing the constitutionality of a statute is that the writ is discretionary but available. The Enabling Act specifically provides for the U.S. Attorney General to enforce its provisions and specifically states that "Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act." 36 Stat. 557, 565 (1910).

77. Not the least of whom is posterity. The court in *State ex rel. Yeo v. Ulibarri,* 34 N.M. 184, 279 P. 509 (1929), recognized this, emphasizing at pp. 191-92 the importance of maintaining the trust lands with an eye toward permanent value. At p. 192 the court said, regarding use of the trust lands:

> Congress, the donor, did not assume to dictate a policy (for use). It left that to the trustee in order that it might have the elasticity necessary to meet *changes of conditions and advances in scientific knowledge.* . . . (Emphasis added.)

78. An interview with the State Land Office Agronomist, Dwayne Gladwell, revealed that a method of appraisal that uses soil samples in combination with climatic, elevational and other variables might supply such a dynamic method of appraisal.

79. My thanks to Mark Evans, University of New Mexico Department of Economics graduate student, for the static-dynamic terminology. The static-dynamic conceptualization implicitly criticizes the neoclassical economists' evaluation of an economic system's efficiency in terms of ability to exploit a given stock of resources with a particular level of technology without regard to that system's tendency to induce or inhibit technological growth and advances as the better test of a system's propensity to induce technological improvement.

CONCLUSION

The State has probably breached its fiduciary duties as trustee of the federally-granted trust lands in three ways. Failure to appraise the lands constitutes the first breach. Failure to charge a consideration reflecting true value, and failure to manage the grazing lands properly constitute the second and third breaches.

Because the breach of trust could result in the federal government nullifying all leases, the State has no safe choice but to comply with the trust's mandate. Such compliance also coincides with the State's best long-run interests. When compliance does come about, a valid appraisal must include an economic study of the lands' true rental value and on-site inspection of the lands to find carrying capacity. Determinations of true rental value and carrying capacities must become on-going matters and must be coupled with a sound program of land management. Only then will the trust beneficiaries and the trust corpus be protected in the manner contemplated by Congress and traditional trust doctrine. Although a dynamic approach to the appraisal is best, a static methodology will probably satisfy the terms of the trust and is better than the laissez faire attitude of the past and present.

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