'Connecting the management of land and assets to education funding'

ACHIEVING "MEANINGFUL CONSULTATION"

Background: <u>The Uniqueness of State Trust Lands</u>

The Western States Land Commissioners Association (WSLCA) consists of 21 Western States who together represent the second largest land owner in the United States (second only to the Federal Government), owning and managing more than 515 million acres of surface lands, subsurface mineral estate, and navigable lakes, rivers and territorial sea.

As a condition of statehood, the federal-state bargain provided states with a variety of land, mineral and water resources to support trade, commerce, public education and other essential state functions. States were required to accept the federal mandates in their State Constitutions. State Enabling Acts and State Constitutions often label all lands as public trust land thus, leading to confusion regarding purpose, use and benefit of certain types of land.

The land and resources specifically designated to support public education is sometimes termed common school land or section 16 and section 36 land. Hereafter, this writing will refer to these land grants as *School Trust Lands* - land held in perpetual trust for the sole right and benefit of funding public education (K-12, higher education, reformatory and care facilities, etc.).

School Trust Lands are not new, but they are unique. As the United States expanded west of the Mississippi River, each new state (and their respective school land trusts) was given mandates by the federal government as a condition of statehood. States were required to accept the federal mandates in their State Constitutions as a condition to admission into the union. They extend back in our nation's history for more than 150 years. They are not intended for general consumption or free enjoyment. Routinely, the Courts have affirmed that the States have a "sacred trust" to manage the lands and maximize income to help fund public education. Furthermore, the United States Supreme Court has called the designations a solemn obligation of the United States to uphold the "sacred trust" and fulfill the purposes of the Land grants.

In keeping with mission and mandates of the respective *School Trust Lands*, the states have taken reasonable steps to actively manage these assets to maximize funding to support public education. Grasslands are leased for grazing livestock. Land is leased for crop production. Mineral acreage is leased, and royalty received, for mineral extraction and mining. Forests are managed on a sustained yield timber harvest basis. Land is leased for recreation and hunting. Properties with commercial and economic development potential are developed.

School Trust Lands have contributed enormously to the development of the western United States. They contribute billions of dollars annually to public education funding from income earned by active land and asset management.

At an accelerating pace the same Federal Government that gave the obligation to the States to manage the land and maximize earnings, through the action of the United States Congress and the President of the United States, has imposed volumes of regulatory actions implemented without either the inclusion of the elected leadership of the people or "meaningful consultation" with *School Trust Land* officials which frustrate the intention of the federal-state commitments decreed at statehood.

The result is many instances wherein our national government has acted to frustrate and quite often totally impede the ability of the States to match their "sacred trust responsibilities" to maximize earnings from the land for the benefit of education. Trust principles and mandatory duties and outcomes are frequently delayed, deterred and disregarded by Federal action or inaction.

Other impediments to *School Trust Land* management in the American west is the interspersed Federal and State land ownership patterns in the states. In recent years, several cases involving federal designation of national monuments or wilderness areas have completely-surrounded and isolated *School Trust Lands*, limiting future land uses with little or no thought to the impact on *School Trust Lands*. This represents a "de facto" condemnation of the rights of these states to use these lands for their intended purpose, causing major losses in the market value of the lands.

The mandates of Statehood and the Constitutional mandates should outweigh the subsequent conflicting determinations of federal agencies, especially when made without the benefit of meaningful input from the states trustees. Competing equities have emerged that call for improved awareness, involvement and change in process.

Defining "Meaningful Consultation"

The traditional approach to rulemaking has not recognized the uniqueness and special purposes given to *School Trust Lands*. Moving forward, The WSLCA requests a place at the table and "meaningful consultation" when federal regulation and rulemaking impact *School Trust Lands*. The nature of land grant allocation, section 16 and 36 of each township (or more in some states), presents an intermingled federal-state ownership pattern across the West. It is therefore difficult to imagine a scenario when *School Trust Lands* would not be impacted by a federal land management action.

<u>THE QUESTION IS</u>: how do we constructively handle competing equities among states and the federal government when pursuing regulation and rulemaking that impacts *School Trust Lands*?

The National Environmental Policy Act And State Of "Consultative" Requirements

As an example, the National Environmental Policy Act (NEPA) provides limited opportunity for *School Trust Land* managers to have meaningful input into proposed Federal Actions. We are often left standing on the outside of the process clinging to our solemn promise from the United States.

While State Governors are often provided "cooperating agency" status during a NEPA process, this status is not always granted specifically to *School Trust Land* managers. Governors and their departments have a broad array of competing interests to represent in NEPA processes. Furthermore, not all Governors are trustees on behalf of *School Trust Lands*. Some states have elected Land Commissioners, others have a Land Board configuration with several trustees responsible for administration and management of these sacred trusts.

Specific inclusion of *School Trust Land* managers as cooperating agencies should be automatic where there is any potential impact to trust assets due to the proposed Federal action. Just as Federal agencies must consider direct and cumulative impacts to wildlife, water, air, and habitat; impacts to *School Trust Lands* and assets should undergo the same scrutiny and analysis as part of the NEPA process. A change in law is not necessary. The obligation exists in our Enabling Acts and in our State Constitutions. *School Trust Land* managers should be provided meaningful input in these processes.

It is unfortunate that current "consultation" as required with Tribes and other non-federal governments appears as merely "a box to be checked" to validate predetermined federal conclusions. Consultation must include meaningful participation, decision making, and strategically timed *School Trust Land* management input.

What Should Be Incorporated Into Meaningful Federal/State Trust Management Consultation?

Insofar as *School Trust Lands* are concerned….

1. Require NEPA analysis of direct and cumulative impacts on *School Trust Lands* and assets. *School Trust Land* managers should be included to facilitate their Constitutional mandates, and measure economic impacts to trust assets from the proposed Federal action. The Council on Environmental Quality could implement a policy or a Rule change requiring all Federal agencies to specifically consider *School Trust Land* and assets in all NEPA processes.

   The NEPA process should require Federal Agencies to meet with the *School Trust Land* managers early in the process of scoping proposed federal actions or policy directives. Early involvement is critical while flexibility still exists in proposed actions.

2. The Federal agencies should invite and provide affected trust land authorities "Cooperating Agency Status" automatically—leaving the decision, whether-or-not to

participate, up to trustees. If *School Trust Land* managers wish to participate in the proposed NEPA process—then that cooperating agency status must have substance. *School Trust Land* managers should be involved in all stages of rule-making including participation in scoping, preparation of draft EIS, selection of preferred alternatives , review of comments, consideration of alternatives that would mitigate impacts to state trust assets and preparation of final documents.

3. Establish a State-Federal task force to develop real impact formulas and models to determine or "score" the economic impacts on *School Trust Land* and assets to determine which projects or policy changes can proceed without costs being paid or mitigation required prior to the Federal action proceeding.

4. The following considerations should be evaluated as part of the review process where *School Trust Lands* are involved:

   - Identify and consider impacts on the states' *School Trust Land* budgets.
   - Quantify economic impact on the *School Trust Land* ability to meet Constitutional mandates to produce income from *School Trust Land* to support Public Education.
   - Assessment of potential job loss and economic costs to the States due to impacts on *School Trust Land* and assets.
   - Identify and consider impacts on legal mandates to *School Trust Land* and assets.

5. Additional topics for discussion with *School Trust Land* managers during the regulatory process:

   - When a species and its habitat becomes the overriding national interest, identification of alternative routes and/or methodologies to permit *School Trust Land* managers to pursue their mission (the constitutional mandate) need to be considered.
   - *School Trust Land* managers and the federal government should develop streamlined procedures for land exchange if a federal project renders surrounded and land-locked *School Trust Land* for a non-compatible use, together with a reasonable time frame for completion (less than 5 years).
   - In the case of conflicts with Federal conservation actions, passage of the Advancing Conservation and Education Act (ACE) legislation to assure timely land tenure adjustments would be beneficial in accommodating Enabling Act mandates and State Constitutional directives.
   - In extreme cases when Federal initiatives render *School Trust Lands* worthless for management and development, a process should be developed requiring the Federal government or a project proponent to provide resources (funding or

exchange land suitable to the trustee) to offset the adverse impact to the *School Trust Land.* Reasonable time frames for resolution must be defined prior to Federal designation and action.

Summary

The statehood bargain created a binding legal contract between the states and the federal government. Constitutional mandates should outweigh subsequent conflicting determinations of federal agencies. As such, thoughtful and meaningful consultation with *School Trust Land* managers is necessary to account for and mitigate actions that will adversely impact the rights of trust beneficiaries. These rights are unique and separate from an overarching public consideration. The Courts, state courts and the U.S. Supreme Court, have affirmed these sacred trusts and their perpetual obligation to generate and maximize income to help fund public education. As an organization, the WSLCA can serve as a conduit for this essential voice.