Fiduciary Duty to Protect and Preserve “ A Sacred Trust”

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The approximately 46 million acres of state endowment lands spread across 24 states are "the most frequently ignored and least understood categories of land ownership in the American West."

Culp, Trust Lands in the American West: A Legal Overview and Policy Assessment (2005).

Presentation Outline

* Historical Development of the State Endowment Trust Concept
* Trust Enforcement Challenges
* Idaho's Experience
* Lessons Learned

What is a trust?

"[A] property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)."

Black's Law Dictionary, Eighth Edition (2004).

Fiduciary Duty

A duty of utmost good faith, trust, confidence, and candor owed by a trustee to a beneficiary.

* Duty of Undivided Loyalty
* Duty of Good Faith
* Duty to Act with Due Care, Diligence and Skill in Managing Trust
* Duty of Prudence
* Duty to Preserve the Trust

Origin of Endowment Trust Concept

* Evolved over time as states sought ways to realize the value of their land grants.
* The term “trust” did not appear in state constitutional requirements until admission of Washington, Idaho, South Dakota, and Montana.
* Arizona and New Mexico are the only states with trust included in their enabling acts.

County of Skamania v. Washington, 102 Wash.2nd 127 (1984).

* “There have been intimations that school land trusts are merely honorary, that there is a ‘sacred obligation imposed on (the state’s) public faith,’ but no legal obligation. These intimations have been dispelled by Lassen v. Arizona. This trust is real, not illusory.”
* “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.”
* “Where the statute deals with state trust lands, however, the permissible goals of the legislation are more limited. The federal land grant trusts were created to specifically to benefit certain named beneficiaries.”

Why is it so difficult to enforce the trust?

* Lack of institutional advocate
* Limited accountability
* Rent-seeking
    * The activity of individuals who spend resources in the pursuit of monopoly rights granted by government; the process of spending resources in an effort to obtain an economic transfer.
    * Rent-seeking expenditures attempt to use the power of the state to transfer wealth from one group to another. (Butler, Economic Analysis for Lawyers, 2d Ed (2006)).

Priest Lake Cottage Sites

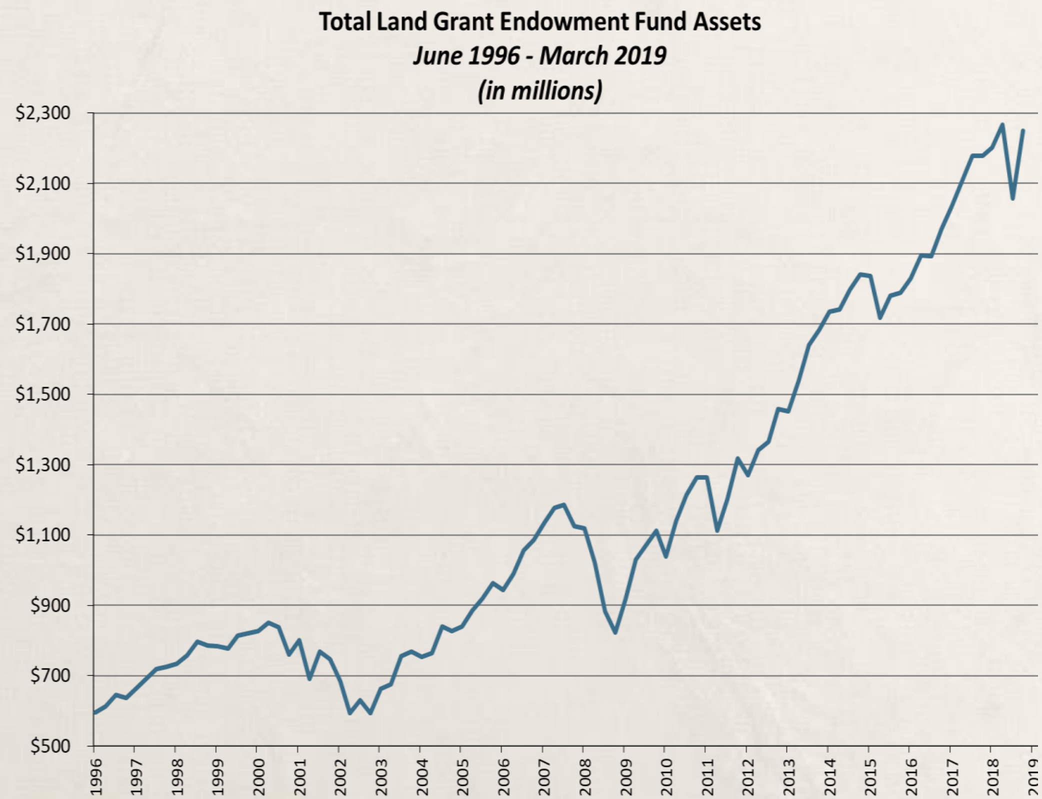
Source: Idaho Department of Lands

Wasden v. Board of Land Commissioners, 153 Idaho 190 (2012).

* "The State's endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions. The Board, which manages those endowment lands, is the epitomic public trustee."
* "Where, as here, a legislative enactment appears to clash with the constitutional duties of a State board, it seems axiomatic that the Attorney General must step forward to uphold the Constitution."
* "It is passing strange that no school officials or endowment beneficiaries have stepped forward in this litigation, but that is of no import."

Idaho's Endowment Reform

- Initiated in 1995 by Governor Batt
- Adopted Whole Trust Concept
- Adopted Prudent Investor Rule
  - Prudent Investor Rule – "[A] trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule . . .." Idaho Code § 68-501.
  - "A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution." Idaho Code § 68-502 (1).
- Modernized Investment Rules for Permanent Fund


Total Land Grant Endowment Fund Assets
June 1996 - March 2019
(in millions)
$2,300
$2,100
$1,900
$1,700
$1,500
$1,300
$1,100
$900
$700
$500
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019

Idaho's Endowment Reform

* Investment Policy
* Spending Rule (balances interests of current and future beneficiaries)
* Asset Management Plans
* Performance Standards
* Monitoring Plan

Lessons Learned

* Formalized decision-making process leads to better and more defensible decisions
* No good deed goes unpunished
* Need to develop institutional memory
* Need for coordinated state efforts

Plan to Succeed