

SITLA and Legislative Oversight—Wise Long-term Direction under Evolving Charitable Trust Duty, or Shortsighted Micromanagement?

*Jan McCosh-Hilder**

I. INTRODUCTION

Imagine that your third-grader has to share a math text book because there are not enough to go around. Imagine your pristine state-owned undeveloped hillside view, for which you paid a premium, has become cluttered with backhoes and bulldozers. One or both scenarios may provoke outrage. Either circumstance frames this question: to what extent should the lands granted in trust for the benefit of the State's school children be developed and consumed to support a public school system that ranks lowest in the nation for school funding per child?¹ This is the dilemma facing Utah's legislature as School and Institutional Trust Lands Administration ("SITLA"), Utah's entity for managing school trust lands, engages in its fiduciary duties to its beneficiaries, the state's school children.

SITLA's mandate to "generate maximum profits" while exercising prudent trust administration is a balancing act, not uncommon to state trust lands administrators. Unfortunately, SITLA cannot simply look to other states for a definitive rule on school trust land management, since land grants and trusts vary among those states with school trusts, and case law and policies have developed differently. For example, Texas is rich in oil and gas reserves but has the least land holdings of any state school trust, though it returns the highest revenue per acre.² Of its original 2.7 million acre grant, Nevada retains approximately 3,000 acres,³ which represents a tiny fraction of the originally granted lands. Colorado has retained fifty-eight percent of its original land grant, but has altered the terms of its trust to use its lands in conservation.⁴ By amending its state's constitution

* Jan McCosh-Hilder; J.D. candidate 2009, S.J. Quinney College of Law at the University of Utah. The author has a B.S. degree in Business Finance. She worked in corporate management and financial administration for over ten years and served on the Board of Trustees of Wightwood Independent School (located adjacent to protected wetlands) in Branford CT, prior to entering law school.

¹ LEI ZHOU, STEVEN HONEGGER & NICK GAVILOA, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2004-05 (FISCAL YEAR 2005), 8 (U.S. Department of Education, Washington, DC: National Center for Education Statistics 2007), *available at* <http://nces.ed.gov/pubs2007/2007356.pdf>.

² PETER W. CULP, DIANE B. CONRADI & CYNTHIA C. TUELL, TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW AND POLICY ASSESSMENT, 56 (Lincoln Institute of Land Policy/Sonoran Institute 2005), *available at* <http://www.trustland.org/publications/trustlands.cfm>.

³ *Id.* at 54.

⁴ *Id.* at 49 (quoting COLO. CONST. (Amendment 16), §10(1)(b)(1)).

and creating a “Stewardship Trust,” Colorado has effectively minimized a portion of its lands for further development.⁵ Opting to include “protecting beauty, natural values, open space, wildlife habitat for this and future generations”⁶ as part of the trustee’s stewardship, Colorado’s Board identifies its mission “to manage the assets in its care... to produce a reasonable and consistent income... while providing responsible environmental stewardship to ensure the conservation of natural resources.”⁷

Utah’s legislature has not articulated or directed a firm policy on school trust land use, giving SITLA broad discretion in managing the lands.⁸ Rather than refining a land-use policy or addressing concerns with SITLA’s board composition, Utah’s Legislature is focusing on whether SITLA should be a public or quasi-public entity and upon the narrow issue of “appropriate” employee compensation for SITLA administration under a public or private business model, frustrating business operations and dissuading development.

SITLA had a record year in 2006, returning more than \$162 million in revenues and increasing trust assets by \$166 million.⁹ SITLA attributes the record year in part to several maturing development projects, success of land auctions, and improved management of resources.¹⁰ Development projects returned over \$36 million in 2006¹¹ and continue to comprise a significant portion of revenues. Development generated over \$25 million in 2007.¹² The record return in 2006 was approximately twelve times the development returns in 2000, when SITLA made changes to its business model and became a hands-on-player in real estate development.¹³ SITLA’s entrepreneurial development efforts have stirred up controversy in local communities inciting community members, local public officials, and rival developers.¹⁴ SITLA is keenly aware its development efforts are controversial.¹⁵ In 2007, SITLA’s director claimed SITLA is “very much

⁵ See *id.* at 50.

⁶ COLO. CONST. (Amendment 16) §10(1)(b)(1).

⁷ LINCOLN INSTITUTE OF LAND POLICY, STATE TRUST LANDS: FIDUCIARY DUTY IN THE CHANGING WEST, available at <http://www.trustland.org/state/state-co.cfm> (follow “Trust Land Management in Colorado” hyperlink).

⁸ School and Institutional Trust Lands Management Act, 1994 Utah Laws 294 (codified as amended at Utah Code Ann. § 53C-1-201(5) (1953)).

⁹ SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION FISCAL YEAR 2006 12TH ANNUAL REPORT (July 1 2005 to June 30, 2006), 9.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 19.

¹² SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION FISCAL YEAR 2007 13TH ANNUAL REPORT (July 1 2006 to June 30, 2007), 9.

¹³ SITLA, *supra* note 9 at 19.

¹⁴ Joe Baird, *Trust-lands Agency Creates Controversy in Utah’s Dixie*, SALT LAKE TRIB., March 19, 2007.

¹⁵ *Id.*

pushing the envelope with development,” [with a goal] to avoid “busting it.”¹⁶ The legislature has approved an interim committee to study SITLA issues, including “the preservation of lands for public purposes, SITLA compensation and other issues.”¹⁷ After a legislative audit, the report to the Utah legislature recommended reducing or eliminating incentive pay because management of the fund “lacks the factors that are conducive to having a significant bonus program.”¹⁸ The report suggests public salaries are in line with the requirements of SITLA’s management’s duties.¹⁹

This note suggests that Utah’s legislature should forbear from micromanaging compensation, one of the key components of professional business operation and maximization of profitability. Utah’s legislature should leave the Board to make its decisions consistent with the discretion it specifically grants. If the legislature’s desire is to dissuade land development, it should either (1) amend Section 53C-1-102 of Utah Code to clearly recognize conservation as a duty; (2) amend Section 53C-1-202 of Utah Code, directing an enhanced conservation representation on the Board of Trustees; or (3) study state-wide land conservation needs and designate, by constitutional amendment, a change to the purpose of the trust, recognizing stewardship and conservation as an important intergenerational duty of loyalty to its future beneficiaries to protect trust property. This note does suggest fiduciary duty of charitable trusts is evolving to include preservation, consistent with public policy. It does not reach the question of whether the trustee of state school lands has a fiduciary duty to remedy the low funding per child in the state’s public school system.

II. BACKGROUND

A. Congressional Land Grants

Beginning in 1803, as the country expanded west and states joined the union, Congress began granting lands for the benefit of public education. The grants were made primarily because the western states contained significant parcels of federal lands and Congress feared states would lack the revenues from a tax base to fund a state public education system. The grants to each new state varied in the language of the federal grant and the enabling language of the states who received the grant. There are “four central aspects of the grant program: (1) how much land was granted; (2) to whom; (3) for what purpose; and (4) how the lands were

¹⁶ *Id.*

¹⁷ SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, MINUTES OF THE MEETING OF THE SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, 4 (Mar. 8, 2007).

¹⁸ OFFICE OF THE UTAH LEGISLATIVE AUDITOR GENERAL, REPORT TO THE UTAH LEGISLATURE NUMBER 2007-08: A FOLLOW-UP AUDIT OF THE SCHOOL AND INSTITUTIONAL TRUST LAND ADMINISTRATION (SITLA), 43 (July 2007).

¹⁹ *Id.* at 42.

to be administered.²⁰ With the exception of the New Mexico and Arizona land grants, little direction is given by Congress in this fourth aspect, administration of the trust lands.²¹ As a result, administration of the granted lands has evolved differently among the states, as each has been left to devise its own system of governance within the confines of its individual grant and enabling language.²² The authority to dispose of trust lands has been an on-going issue in trust land administration. By the mid-1830s a lease-only policy gave way to sales, followed in time by gradual restrictions on sales.²³ Early in their statehoods, several of the states sold much of their original grant lands. By the time New Mexico and Arizona received land grants, a trend toward retention re-emerged. In the mid-1970s some states recognized retention as their official policy.²⁴ Utah's law and policy is consistent with disposal, rather than retention.

B. Utah's Land Grant

When Utah became a state in 1896, Congress granted Utah nearly six million acres of land for the support of public schools, granting "sections numbered two, sixteen, thirty-two, and thirty-six in every township. . . for the support of common schools."²⁵ Utah's Constitution directed that the lands "shall be held *in trust* for the people, to be *disposed of* as may be provided by law, for the respective purposes for which they have been. . . granted."²⁶ Approximately half of Utah's land grant was sold into private ownership, with most of the sales happening within the first thirty-five years of statehood.²⁷ Utah's original grant accounted for approximately thirty percent of what constitutes privately held land in the state today, with seventy percent of Utah's land belonging to the federal government.²⁸

Utah's checkerboard pattern of land holdings, sometimes referred to as the "Blue Rash,"²⁹ presents challenges to management because much of the land falls within federally owned property. In addition to the lack of contiguous borders amongst the one-mile square parcels, the federal ground surrounding much of the school lands is managed under public-land use directives, which tend to be

²⁰ Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 *Envtl. L.* 797, 808 (1991).

²¹ Culp, *supra* note 2, at 14.

²² See Fairfax, *supra* note 20, at 820.

²³ *Id.* at 822-23.

²⁴ *Id.* at 823-24.

²⁵ Act Cong. July 16, 1894, ch. 138, 28 Stat. 107 §6.

²⁶ UTAH CONST. art. XX §1 (1894), (emphasis added; subsequently amended in 1998, clarifying the school trust).

²⁷ SITLA, *supra* note 9 at 39.

²⁸ *Id.*

²⁹ Bruce M. Pendery, *Utah's School Trust Lands: Constitutionalized Single-Purpose Land Management*, 16 *J. ENERGY NAT. RESOURCES & ENVTL. L. NO. 2*, 319, 321 (1996) (attributed to the state lands color scheme used in standard map-making coupled with the spotty distribution) (internal quotation marks omitted).

oriented to preservation and sustainable use.³⁰ This land-use policy is inherently in conflict with the school trust mandate of maximizing the profitability of the land.

Utah has successfully completed two land exchanges with the federal government. To facilitate these exchanges, Congress enacted Public Law 103-93 in 1993.³¹ Six years later, the federal government and the state of Utah completed the largest land transaction in the United States since the Louisiana Purchase and ended a sixty-year conflict over trust lands.³² The exchange allowed Utah to exchange some of its lands held in national parks, Indian reservations, national forests and other federal lands for consolidated parcels of ground that have a greater financial potential for development.³³ A second exchange was completed in 2001, when parcels in proposed federal wilderness areas were traded for blocks of BLM lands.³⁴

C. Utah Establishes a Quasi-Public Land Board

As land exchanges became a policy utilized in Utah's trust management and the lands increased in their availability for development, the potential for abuse in management of the trust assets increased. State lands were governed by The Division of the State Lands and Forestry and there was a perception that they were subject to indirection and corruption.³⁵ Rumors of the state granting "sweetheart deals" abounded.³⁶ The author of a Salt Lake City newspaper article claims that prior to the state's legislature stepping in to reorganize the administration, "bad deals were being made at the cost of education. . . [and] some estimates say \$300 million was lost through what is euphemistically called poor management practices."³⁷ In the 1980s, Utah's legislature shifted funds from the trust to support the higher education system, resulting in a significant reduction to the

³⁰ See Fairfax, *supra* note 20, at 834.

³¹ Gary C. Bryner, *What Does the Grand Staircase-Escalante Mean for Land Protection in the West? Resource Development and Ecological Protection*, 21 J. LAND, RESOURCES, & ENVTL. L., 567, 572-73 (2001).

³² *Id.* at 573-74.

³³ *Id.* at 574.

³⁴ See ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS 214 (2003).

³⁵ See Jerry D. Spangler and Donna M. Kemp, *Investigators Find Problems in 8 Utah Land Deals, Appraisals too High, They Say; Landowners, State Officials Disagree*, DESERT NEWS, May 14, 2000 at A1, available at <http://www.westlx.org/investigators.pdf> (referencing the efforts required to restore the public confidence due to prior sales conducted below market).

³⁶ See SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, MINUTES OF THE MEETING OF THE SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, 17 (Mar. 8, 2007). See also Katharine Biele, *How Dave Terry Fought His Way Out of the Cushy SITLA Director's Chair*, SALT LAKE CITY WEEKLY, June 14, 2001 (referencing lingering suspicions from the days when the state lands division was cutting sweetheart deals with the Division of Wildlife Resources).

³⁷ See Biele, *supra* note 36.

trust's permanent fund. Even though the permanent fund balance was almost depleted, the Supreme Court upheld the legislature's actions applying the Jones Act of 1927 to another issue in the case.³⁸ Utah's Constitution was amended in 1988 to stem this practice. With a permanent fund balance of \$94.5 million in 1994,³⁹ "[t]he School and Institutional Trust Lands Administration was created and told to reverse what some call a century of mismanagement."⁴⁰

Aware Utah's trust lands produced less per acre than trust lands in surrounding states, the legislature formed an advisory group of citizens to increase the funding for the Utah educational system through increasing the returns on school trust lands.⁴¹ The advisory group proposed changes to the trust's management to ensure reasonable independence from the state's bureaucratic structure.⁴² As a result of the group's efforts, Utah's legislature enacted the School and Institutional Lands Management Act (the "Act") in 1994, which changed the governance of trust lands from the Division of State Lands and Forestry to a quasi-public entity, the State and Institutional Trust Lands Administration ("SITLA"),⁴³ with a mandate to "manage the lands. . . in the most prudent manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries."⁴⁴ The trust is comprised of two portfolios, the real estate portfolio and the financial portfolio. The real estate portfolio is managed by SITLA.⁴⁵ The financial portfolio contains the money generated by the lands and is managed by the State Treasurer.⁴⁶

Management details are included in a fifty-seven page act, codified in *1994 Utah Laws 294*. The Act includes significant detail on how funds generated by the trust are to be managed and distributed but leaves significant discretion to the Board and the Director on how the lands should be managed for the exclusive benefit of its trust beneficiaries.

Consistent with fiduciary duty under modern trust doctrine of prudent administration, SITLA has begun to structure its portfolio of assets to maximize return while limiting risk—all while balancing its duties under a perpetual trust. After professional consultation, SITLA increased its involvement in development of state lands.⁴⁷ The Legislature changed the law to facilitate development and

³⁸ See *Jensen v. Dinehart*, 645 P.2d 32 (Utah 1980).

³⁹ SITLA, *supra* note 9, at 9.

⁴⁰ Jennifer Toomer-Cook, *Audit Focuses on Trust Lands*, DESERET MORNING NEWS, Jan. 20, 2006, at B02.

⁴¹ SCHOOL AND INSTITUTIONAL TRUST LANDS ADVISORY BOARD, REPORT TO THE LEGISLATURE, available at <http://www.le.utah.gov> (follow link for legislative history of HB 250).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ UTAH CODE ANN. §53C-1-101(2)(B) (2007).

⁴⁵ SITLA, *supra* note 9, at 39.

⁴⁶ *Id.*

⁴⁷ *Id.* at 19.

SITLA's Board adopted policies for development.⁴⁸ SITLA is currently considering careful changes to maximize return of surface and mineral resources as well as oil and gas by increasing its direct involvement as a market participant in those activities.⁴⁹

Changes to the business model have been financially rewarding. Development efforts returned \$3 million in 2000 and \$36 million in fiscal year 2006.⁵⁰ Total trust assets grew from \$641 million to \$807 million in 2006.⁵¹ SITLA's 2006 annual report stated a goal to reach \$1 billion in total trust assets by 2010, with an ultimate goal of making the "school lands trust a major source of public school funding."⁵² The financial goal of \$1 billion in trust assets was met in 2007.⁵³

In 2006, the legislature became concerned that the salaries paid to SITLA's administration were too high and ordered a legislative audit. The auditor concluded, among other things, that the employees of SITLA should be paid at a level consistent with public entities and should "have either a very small bonus program or none at all because [SITLA] lacks the factors that are conducive to having a significant bonus program."⁵⁴ Neither the legislative auditor nor the legislators appear to have yet looked beyond the compensation issue to the more critical questions regarding the needs of schools and to what extent the trust lands may be converted to non-land assets that benefit the schools, and what competing tensions must be addressed as the legislature balances school needs against the demands of Utah's overall environment, land development, natural beauty, and general conservation of open space.⁵⁵ Though approximately one-quarter of SITLA's 2007 annual report is dedicated to "conservation" and "stewardship," the Director's message states "[i]t is the duty of the Trust Lands Administration to manage Utah's trust lands in the financial interests of the trust beneficiaries. There are only two ways to do that: [1] Put the lands into production [2] Sell the lands."⁵⁶

⁴⁸ SITLA, *supra* note 17, at 19. *See also* School and Institutional Trust Lands Administration Policy Statement No. 2006-03 available at <http://www.landsftp.state.ut.us/pub/boardminutes/2007%2004%20April%20Board%20Mins.pdf>.

⁴⁹ *See* SITLA, *supra* note 9, at 10-16.

⁵⁰ SITLA, *supra* note 9, at 19.

⁵¹ *Id.* at 4.

⁵² SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION FISCAL YEAR 2006 12TH ANNUAL REPORT (July 1 2005 to June 30, 2006), 40.

⁵³ SITLA, *supra* note 12, at 10.

⁵⁴ OFFICE OF THE UTAH LEGISLATIVE AUDITOR GENERAL, Legislative Audit, *supra* note 15, at 43.

⁵⁵ E-mail from Emily Brown, Esq. Office of Legislative Research and General Counsel, to author (Sept. 18, 2007 11:15 MST) (on file with author). Though a financial audit was conducted, the Natural Resources, Agriculture, Environment Interim Committee, and Education Interim Committees do not plan to study SITLA issues this year.

⁵⁶ SITLA, *supra* note 12, at 4 (emphasis added).

III. SCHOOL LAND ADMINISTRATION'S FIDUCIARY DUTY UNDER UTAH LAW

A. *Utah's Enabling Act and Constitutional Provisions*

With the exception of California, almost all of the Western states rely on the trust doctrine for management of their state trust lands.⁵⁷ However, trust asset management approaches amongst the states vary widely, since Congress gave little or no direction in the language of the land grants. Some scholars claim that the diversity in trust land management programs that has developed due to the differences in state enabling acts and state constitutions, "makes it difficult, and perhaps irresponsible, to generalize about the management of state trust lands in the West."⁵⁸ However, one important theme among the states is the trust responsibility.⁵⁹

Utah's Enabling Act mandates that "the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools."⁶⁰ Utah accepted these lands and agreed to hold them in trust for the purpose for which they were given in its Constitution.⁶¹ Utah's Constitution provides that the lands "shall be held in trust. . . for the respective purposes for which they have been. . . granted."⁶² Three cases discussed below are particularly important in understanding Utah's trustee doctrine with respect to the school lands.

B. *Evolving Trustee Duty Under Utah's Case Law*

In *Duchesne County v. State Tax Commission*, the Utah Supreme Court determined that the state's constitutional language together with the enabling language established an express charitable trust.⁶³ Justice Larson stated that the school land trust embraced "all the elements of an express trust, with the state [as] the trustee, holding title only for the purpose of executing the trust. . . . The trust estate is definite, the trustee is certain, and the purpose of the trust and the use of the fund is definite, certain and particularly characterized."⁶⁴ As such, under the trustee doctrine, the proceeds from a foreclosure were not taxable because the loan

⁵⁷ See Sean O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?* 8 NYU ENVTL. L. J. 176 (1994).

⁵⁸ Culp, *supra* note 2, at 15.

⁵⁹ *Id.*

⁶⁰ Act Cong. July 16, 1894, ch. 138, 28 Stat. 107 §10.

⁶¹ UTAH CONST. art. XX §1 (1894).

⁶² *Id.*

⁶³ *Duchesne County v. State Tax Commn.*, 140 P.2d 335, 338 (Utah 1943).

⁶⁴ *Duchesne*, 140 P.2d 335, 338 (Utah 1943).

was an asset of the permanent fund held in trust for the beneficiaries and limited in amounts and purposes for which it could be expended.⁶⁵

In *National Parks and Conservation Ass'n v. Board of State Lands* the Utah Supreme court established that the trustee doctrine logically extended to land held by the trust.⁶⁶ In *National Parks*, the court relies on its prior holding in *Duchesne* and Article X, section 5 of the Utah Constitution, which provides:

[T]he proceeds from the sale of school lands shall be placed in the State School Fund, which is to “be safely invested and held by the state in perpetuity,” and that “[t]he interest of the State School Fund only shall be expended for the support of the public elementary and secondary schools.” Further, “[t]he State School Fund shall be guaranteed by the state against loss or diversion.”

The court concluded “[i]t must follow that the state holds the school lands and the proceeds flowing from them as a trustee of an express trust, limited in the amount that can be expended, and the purposes and uses thereof.”⁶⁷ In further defining the state’s trust duties, the court held the fiduciary duties imposed on the state by virtue of the school trust are “the duties of a trustee and not simply the duties of a good business manager.”⁶⁸

In *District 22 United Mine Workers of America v. Utah*, the United States Court of Appeals for the Tenth Circuit addressed the issue of whether lands granted to the State for a particular purpose through the Enabling Act created a trust with respect to those lands. The Tenth Circuit determined that the Enabling Act alone did not create a trust, but that the Enabling Act granted discretion to the State in managing the lands. The court expressly determined “a trust was created by the Utah Constitution... with regard to the Lands in question.”⁶⁹ When miners in Utah brought suit against the State, claiming that the State violated its fiduciary duty when it had not provided a miner’s hospital, the court stated, “we find a trust here under the Utah Constitution, rather than under the Utah Enabling Act and 1929 Act.”⁷⁰ The Constitutional provision applies to State School lands.

*National Parks*⁷¹ points out the relationship of the state and the managing entity of the trust lands. Consistent with the discretion granted under the Enabling Act, “[t]he Legislature has delegated the management of the school trust lands to the Board and Division of State Lands and Forestry. In administering the school trust lands, the state, through the [managing entity], acts as a trustee.”⁷²

⁶⁵ *Id.*

⁶⁶ *National Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909 (Utah 1993).

⁶⁷ *Id.* at 917.

⁶⁸ *Id.* at 918 (quoting *Gladden Farms Inc. v. State*, 633 P.2d 325, 329 (Ariz. 1981)).

⁶⁹ 229 F.3d 982 at 992 (U.S. App. 2000).

⁷⁰ *Id.* at 987.

⁷¹ *National Parks*, 869 P.2d 909 (Utah 1993).

⁷² *Id.* at 917.

The court continued, "All trustees owe fiduciary duties to the beneficiaries of the trust. The duty of loyalty requires a trustee to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust."⁷³ Accordingly, regardless of whether the trust obligations derive from the Enabling Act, or from the Utah Constitution, it is settled that the State's relationship to the lands implicates the fiduciary duties of a trustee to the trust's beneficiaries.

C. Application of Utah's Trust Theory to School Lands Administration

In *National Parks*, the Utah Supreme Court relied on *Ervien v. United States* and *Lassen v. Arizona*.⁷⁴ In doing so, it applied the law established by New Mexico and Arizona's Enabling language, not necessarily Utah's. Though the end result would likely have been the same, at least one critic has pointed out that the Utah Supreme Court should have used modern charitable trust doctrine to decide *National Parks*, rather than a "conventional wisdom" approach established by *Ervien and Lassen*.⁷⁵ Although the Utah Supreme Court relied on the traditional school trust doctrine of income maximization to justify the result, the court recognized that income maximization could harm future beneficiaries of the school land trust.

Although the primary objective of the school land trust is to maximize the economic value of school trust lands, that does not mean that school lands should be administered to maximize economic return in the short run. The beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run.⁷⁶

In her concurring opinion in *National Parks*, Justice Durham points out that undivided loyalty in managing trust lands would lead to absurd results if taken to its logical extreme. "It would require the state to allow any use of any tract of trust land, free from all regulation, as long as the trust received enough money."⁷⁷ In illustration, she offers an applicant who proposes to build a toxic waste disposal facility on trust land at the head of a major water source; and claims it would be ludicrous to force the state to make the sale and allow the project, simply because

⁷³ *National Parks*, 869 P.2d at 918 (quoting WILLIAM F. FRATCHER, SCOTT ON TRUSTS §170 (4th ed. 1987)).

⁷⁴ *Id.*

⁷⁵ See Tacy Bowlin, *Rethinking the ABCS of Utah's School Trust Lands*, UTAH L. REV. 923 (1994). See also Sally K. Fairfax, et. al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 797 (1992). The basic notion of conventional wisdom can be summarized as "any derived benefit from the school trust lands must be used in support of schools and may not be used to support or subsidize other public purposes."

⁷⁶ *National Parks*, 869 P.2d at 920-21.

⁷⁷ *Id.* at 923.

the approval would prove the greatest monetary return to the school trust fund.⁷⁸ The hypothetical is especially poignant when considering a 2003 legislative initiative pushed by a St. George legislator, less than ten years after the *National Parks* decision, dubbed Plan B.⁷⁹ Plan B was an initiative for SITLA to pursue a competitive bid for the location of a high-level nuclear waste facility (planned for the Skull Valley Goshute Reservation) on state trust land to earn money for Utah schools.⁸⁰ “The Goshute facility, estimated at \$3.1 billion, would be big enough to hold 44,000 tons of lethally radioactive spent power-plant fuel.”⁸¹ Claiming “[t]he revenue we might get from this would make it more palatable to a lot of people,” the St. George Legislator gained behind-the-scenes support from Republican legislators.⁸²

As one scholar points out, the Utah Supreme Court could have determined in *National Parks* that the Division had an affirmative duty to “consider aesthetic, scenic, and recreational values in land management decisions” under traditional trust law, and then reached the merits of “whether the Division properly considered such values in deciding to make the . . . exchange.”⁸³ Specifically, consistent with its holding in *Duchesne County v. State Tax Commission*, the Utah Supreme Court could have applied charitable trustee duties, applying principles to maximize the land into perpetuity.⁸⁴ However, these options all preceded the legislature’s 1994 enactment.

D. Trustee Duty Codified by Utah Legislature

1. Statutory Establishment of a Charitable Trust

Utah’s legislature enacted the School and Institutional Trust Lands Management Act (the “Act”) in the 1994 general session to ensure compliance with its fiduciary duties. The legislature’s mandate acknowledges the duties of a perpetual trust established by Utah’s Constitution.

⁷⁸ *Id.* at 923-24.

⁷⁹ Judy Fahys & Dan Harrie, ‘Plan B’ Aims to Outbid Goshutes’ N-Waste Site; Legislators See Little Hope to Stop Toxic Materials, Want to ‘Deal with Reality,’ *Lawmakers Push Alternative to Goshutes’ Site*, SALT LAKE TRIB., Feb. 6, 2003, at A1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* State trust lands continue to be a target of nuclear projects. A 2006 Report to the Legislature recommends that a nuclear study be coordinated and funded by Energy Advisor and SITLA, since SITLA lands would “likely be the location of any [nuclear power] project.” Public Utilities and Technology and Natural Resources, Agriculture and Environment Interim Committee, 2006 Energy Advisor Report to the Utah Legislature: Energy Policy and Development in Utah 18 (Oct. 18, 2006).

⁸³ Bowlin, *supra* note 75, at 945.

⁸⁴ 140 P.2d 335 (Utah 1943).

The purpose of this title is to establish an administration and board to manage lands that Congress granted to the state for the support of common schools under the Utah Enabling Act.

This grant was expressly accepted in the Utah Constitution, which imposes upon the state a perpetual trust obligation to which standard trust principles are applied.⁸⁵

2. *Specific Trustee Duties*

The statutory language is more restrictive of the trustee's duties as defined by Utah case law but gives administration liberal discretion. The Utah Code addresses SITLA's duties as a trustee and reads in pertinent part:

(2)(a) The trust principles . . . impose fiduciary duties upon the state, including a duty of undivided loyalty to, and a strict requirement to administer the trust corpus for the exclusive benefit of, the trust beneficiaries.

(b) As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.

(c) The trustee must be concerned with both income for the current beneficiaries and the preservation of trust assets for future beneficiaries, which requires a balancing of short and long-term interests so that long-term benefits are not lost in an effort to maximize short-term gains.

(d) The beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of this state.

(3) This title shall be liberally construed to enable the board of trustees, the director, and the administration to faithfully fulfill the state's obligations to the trust beneficiaries.⁸⁶

3. *Statutory Composition of SITLA's Board of Trustees and Board Duties*

The Act is specific in defining membership of SITLA's Board of Trustees and assigns broad responsibilities for policymaking to the Board.⁸⁷ Under the Act, the Governor and the State Board of Education appoint a nominating

⁸⁵ UTAH CODE ANN. §§53C-1-102 (1)(a)-(b) (2007) (as enacted by 1994 Utah Laws 294).

⁸⁶ *Id.* §102.

⁸⁷ *Id.*

committee comprised of members from different geographical areas of the state representing interests in natural resources, industries, public lands, and education.⁸⁸ The Senate must consent to the Governor's selected seven-member nonpartisan board, which must include at least six members nominated by the committee. Each member is to possess outstanding professional qualifications "pertinent to the purposes and activities of the trust" and the Board membership must represent renewable and nonrenewable resource management/development and real estate.⁸⁹ The Board is expressly charged with a role in policy development. "The Board of Trustees shall provide policies for the management of the administration and for the management of trust lands and assets."⁹⁰

The Act is specific that policies of the Board "shall. . . seek to optimize trust land revenues and increase the value of trust land holdings consistent with the balancing of short and long-term interests, so that long-term benefits are not lost in an effort to maximize short-term gains."⁹¹ "Broad discretion" is specifically granted to the Board for developing policies for the long-term benefit of the trust.⁹²

The Act specifies that the Board, with the consent of the Governor, is responsible for selecting the Director and the over-sight of the Director's performance, including compensation and removal.⁹³

4. *Statutory Duties of the Director*

The Director is given the "broad authority" to "[e]stablish procedures and rules" for the day-to-day management of the administration, "consistent with general policies prescribed by the Board."⁹⁴ The mandate, shared by the Board, that procedures and rules "shall seek to optimize trust land revenues consistent with the balancing of short and long-term interests, so that long-term benefits are not lost in an effort to maximize short-term gains" is clearly specified.⁹⁵

IV. THE CONTROVERSY

Under charitable trust doctrine, is the State violating its fiduciary duties to its trust beneficiaries, the State's school children, when SITLA permanently disposes of land by engaging in real estate development?

⁸⁸ *Id.* §203.

⁸⁹ *Id.* §202.

⁹⁰ *Id.* §201(5).

⁹¹ *Id.* §204.

⁹² *Id.*

⁹³ *Id.* §301.

⁹⁴ *Id.* §302(1)(a)(ii).

⁹⁵ *Id.* at 302(2).

A. Fiduciary Duties of the Trustee and the Perpetual Trust Obligation

Utah generally adopts the The Restatement (Second) of Trusts, and has adopted provisions relating to trustee duty.⁹⁶ Under common law, trustees are charged with a series of fiduciary duties to the beneficiary of the trust.⁹⁷ These duties include a duty to manage the trust in accordance with the instructions of the settlor; a duty of good faith, which requires the trustee to put the best interests of the trust ahead of his own; a duty of prudence, which requires the trustee to manage the trust property with the same degree of skill that a prudent person would exercise in his or her own affairs; and a duty to preserve and protect the trust assets, or trust corpus, to satisfy both present and future claims against the trust.⁹⁸ In administering charitable trusts, trustees' duties are similar to those of private trusts.⁹⁹

One would be hard-pressed to argue the SITLA is violating its duties to its trust beneficiaries, Utah's school children, when SITLA permanently disposes of land by engaging in real estate development because its actions are consistent with Utah's statutory law codified in the Act and with fiduciary duties under the Restatement.¹⁰⁰ However, it is less clear whether the development of state lands is consistent with the fiduciary duty of a charitable trust under evolving public policy. An argument for a breach of duty is that the disposal of state land through real estate development violates the fiduciary's duty of "protecting trust assets" to preserve the land for future beneficiaries' enjoyment of undeveloped open-space. As discussed below, (A) Real estate development is consistent with the legislative mandate to maximize the profitability of the trust (B) the settlor's instructions do not preclude real estate development, (C) the establishment of a quasi-public management entity gives reasonable independence from the bureaucratic structure of the state, (D) SITLA's actions are within the prudent investor realm, and (E) the exchange of land assets for other income bearing assets is not in violation of preserving and protecting the corpus of the trust under modern trust doctrine. Whether the fiduciary duty of "preserving and protecting" should be redefined in our present-day world, where greenhouse gasses and carbon footprints are of utmost concern, is a significant issue and is addressed below in Section V of this note.

⁹⁶ See *Pelt v. State of Utah*, 104 F. 3d 1534 (1996) (adopting §2), see also *Plateau Min. v. Utah Div. of State Lands*, 802 P.2d 720 (1990) (adopting §170).

⁹⁷ RESTATEMENT (SECOND) OF TRUSTS §§ 2, 3.

⁹⁸ *Id.* at §170.

⁹⁹ See RESTATEMENT (SECOND) OF TRUSTS §379 (duties of trustees of charitable trusts ordinarily are not enforceable by individual beneficiaries but are enforceable by suit brought by the Attorney General).

¹⁰⁰ RESTATEMENT (SECOND) OF TRUSTS §§ 2, 3, 170.

B. Real Estate Development is Consistent with Maximizing Profitability

Utah's legislature is clear that the trust lands are to be held in a perpetual trust and managed under trust law. The statutory language specifically identifies the "compact between the federal and state governments. . . imposes upon the state a perpetual trust obligation to which standard trust principles are applied."¹⁰¹ The trust obligation is made more restrictive in Utah Code Annotated §53C-1-102(2), which provides in part:

(B) As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.

...

(D) The beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of this state.

If sub-sections (B) and (D) are construed narrowly, revenues must be generated in the most "profitable manner possible" without considering the "general welfare of this state." Under this mandate, SITLA is not only justified in real estate development but precluded from considering the broader impact of its actions, adopting a pro-development approach, along with avoidance of any actions inconsistent with maximization of the asset fund is likely consistent with the present trustee duty. Further, if maximization of fund assets for the sole benefit of public schools is the purpose of the grants and the will of the legislature, then market level private salaries and bonuses are intuitively necessary to achieve such a result. Not to offer compensation sufficient to compete with talent in the private market would be a seeming breach of fiduciary duty.

C. The Settlor's Instructions Do Not Preclude Real Estate Development

The instructions of the settlor are typically those of Congress in the original land grants. However, as the Tenth Circuit held in *United Mine Workers*, it is Utah's Constitution that establishes the trust, so the enabling language and the Constitution must be read together to understand the intent of the settlor. Utah's enabling language reads, "the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools."¹⁰² The Constitutional language accepting the Congressional grant and establishing the trust, Article XX §1 reads, "[the lands] shall be held in trust. . . to

¹⁰¹ UTAH CODE ANN. §53C-1-102(1)(b).

¹⁰² UTAH ENABLING ACT §10 (1894).

be disposed of as may be provided by law, for the respective purposes for which they have been granted. . .¹⁰³

The Act provides that the proceeds of land sales are placed into the permanent fund.¹⁰⁴ Together with the statutory language enabling disposal of the lands, SITLA is not in violation of the intent of the settlor when it sells land for real estate development at fair market value.

D. SITLA Meets the Duty of Good Faith

The duty of good faith requires the trustee to put the best interests of the trust ahead of his own. SITLA was created in part to provide management that was reasonably independent from the state's bureaucratic structure at a time when rumors of sweetheart deals were prevalent. Statutory law requires that land sales follow a specific procedure to ensure sales are conducted at fair market value.¹⁰⁵ Though the current administration is not immune from legislative pressures, the structure established by the Act gives reasonable independence from the State's competing interests, whether those interests are for the public good or for an individual, as illustrated by example.

In 2006, the State put pressure on SITLA to sell Tabby Mountain for \$40 million, if half of the funds could be raised through appropriation. The Governor's plan was to acquire the property for preservation and public recreational use.¹⁰⁶ Since Tabby Mountain was not on the market at the time of the State's offer, the property had not gone through the competitive bid process and the Board concluded that "Tabby Mountain is not on the market."¹⁰⁷ When asked in a Board meeting if the Department of Natural Resources ("DNR") would be willing to participate in a competitive process, DNR's Director stated "they are at the Board's mercy and will have to play by the rules."¹⁰⁸ Ms. Bird, representing the beneficiary, thanked the Board for their high level of integrity, claiming the "beneficiaries are very grateful for their standing up for the schoolchildren of Utah. That is why this agency was recreated."¹⁰⁹

E. SITLA's Real Estate Development is Compliant with the Duty of Prudence

The Act's explicit language to manage the assets for maximum profitability, together with instructions to the Board and Director to balance short-term gains

¹⁰³ UTAH CONST. art. XX §1 (1894) (emphasis added).

¹⁰⁴ UTAH CODE ANN. 53C-3-102 *et seq.*

¹⁰⁵ *Id.*

¹⁰⁶ UTAH STATE PARKS AND RECREATION, MINUTES OF BOARD MEETING, 2-3 (Dec. 21, 2006), available at <http://stateparks.utah.gov/docs/122106minutes.pdf>.

¹⁰⁷ See SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, MINUTES OF THE MEETING OF THE SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, 8 (Jan. 25, 2007).

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.*

with preservation of the assets in the long-term in a perpetual trust, supports the views that the trust should move to a more modern administration of its assets under the prudent man rule articulated in § 227 of the Restatement 3d of Trusts.¹¹⁰

The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.¹¹¹ This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation, but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.¹¹² In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so. In addition, the trustee must:

- (1) conform to fundamental fiduciary duties of loyalty and impartiality;
- (2) act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and
- (3) incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship.¹¹³

In the absence of a contrary statutory provision, a trustee may generally invest in such properties and in such manner as expressly or impliedly authorized by the terms of the trust.¹¹⁴ It is clear from the State's Constitution, "disposal" of trust lands is not precluded by the trust. SITLA's changes to its business model by hiring top talent and becoming a hands-on-player in real estate development are consistent with making the assets productive while exercising caution. SITLA had a record year in 2006, returning more than \$162 million in revenues and increasing trust assets by \$166 million.¹¹⁵ Those gains were achieved by the Board's efforts in carefully selecting skill in the area of real estate development and paying bonus compensation consistent with market rates for that talent.

The Act specifies, "the board shall establish the compensation of the Director to include a salary within [a specified range]."¹¹⁶ Though compensation in the form of bonuses is not specifically addressed in the Act, the Prudent Man Rule supports the Board in incurring reasonable costs that are appropriate to the investment responsibilities of the trusteeship. When harmonizing the legislature's mandate to manage the assets in the "most prudent and profitable manner," it would violate

¹¹⁰ Utah has adopted sections of RESTATEMENT (THIRD) OF TRUSTS. Compare RESTATEMENT (THIRD) OF TRUSTS §227 (1992), and Utah Code Ann. §§7-5-10, 33-2-1-4 (2007).

¹¹¹ RESTATEMENT (THIRD) OF TRUSTS §227 (1992).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ SITLA, *supra* note 9, at 4.

¹¹⁶ UTAH CODE ANN. 53C-1-301(4)(a) (2007) (emphasis added).

the duty of prudence to offer less than market compensation to a real estate developer, exposing the trust to the unnecessary risk inherent in reliance on inexperienced talent with a likely wasting or diversion of precious trust assets.

F. The Exchange of Land Assets for Cash or Other Income Bearing Assets is Within the Duty to Preserve the Trust Corpus into Perpetuity

Under the Prudent Man Doctrine, real estate development as a part of an “overall investment strategy” does not violate the duty to preserve the corpus of the trust as long as the investing increases the overall value of the trust corpus.¹¹⁷ The overall investment strategy SITLA announced in 2006, to increase the trust’s portfolio value to over \$1 billion by 2010,¹¹⁸ combined with careful selection of skillful employees, is consistent with the Prudent Man Doctrine. The significant financial gains, which actually exceeded the 2006 goal, and most significantly as SITLA has engaged in real estate development, evidence that over-all, trust assets are not being wasted.

Further, the Utah Supreme Court’s holding in *National Parks* could be construed to support an argument for disposal of less-profitable lands into higher-returning assets in consideration of future beneficiaries. Holding “[t]he beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run.”¹¹⁹ The Court emphasizes the law’s focus on long-term income maximization, not long-term land conservation.

If maximizing the profitability of the trust is the goal of the legislature, selling trust lands in favor of more profitable enterprises is supportable. Texas’ school trust provides a model of efficient land use. As mentioned previously, Texas returns significant revenues on a relatively minimal amount of land.¹²⁰ Texas relies on its rich resources of oil and gas, making extremely efficient use of land held in trust for the benefit of its public school system.¹²¹ Like Texas, Utah has oil and gas resources in addition to many other natural resources. As Utah’s population increases and developable lands become increasingly scarce, the value of developable lands increase. A careful plan to sell high-valued developable lands to invest in further development of state-rich natural resources, for example, would be consistent with the Prudent Man Doctrine of trustee duty.

Those in favor of real estate development constituting a breach of the State’s fiduciary duty to preserve the corpus of the trust could argue consistent with Justice Durham’s concurring opinion in *National Parks*, “in some situations it is permissible for the state to give priority to factors besides economic gain to the school trust.”

¹¹⁷ RESTATEMENT (THIRD) OF TRUSTS §80 (Draft No. 4).

¹¹⁸ SITLA, *supra* note 9, at 4.

¹¹⁹ *National Parks*, 869 P.2d at 920-21.

¹²⁰ CULP, *supra* note 2, at 56.

¹²¹ *Id.*

Utah's legislature specifically identifies in the purpose section of the Act, that the "compact between the federal and state governments. . . imposes upon the state a perpetual trust obligation. . . ." ¹²² As land resources become increasingly scarce, the question remains to what extent land should be preserved to benefit future beneficiaries under a perpetual trust. Scholars have pointed out that modern trust doctrine and perpetual trust management does not necessarily bear out an interpretation that the trustee has a "*requirement* to pursue the highest monetary returns possible for trust beneficiaries, regardless of other considerations." ¹²³ "Rather, a more flexible theory of "portfolio management" that incorporates concepts of balanced risk and return and management for long-term sustainability has emerged." ¹²⁴

The Restatement (Third) of Trusts provides that a trust is beneficial in designing beneficial interest over time, but that societal and individual advantages are to be balanced against other social values and the effects of "deadhand control on the subsequent conduct or personal freedoms of others. . . ." ¹²⁵

The Act provides:

As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, *and not for any purpose inconsistent with the best interests of the trust beneficiaries.* ¹²⁶

It could be argued real estate development is inconsistent with the best interest of the trust beneficiaries because it is inconsistent with long-term sustainability and intergenerational equity, affecting the personal freedom of future generations. As the scarcity of undeveloped land increases, that undeveloped land could theoretically have a higher value to future beneficiaries than the anticipated future income generated by disposing of that land today.

However, the Act clearly articulates that the "state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible." ¹²⁷ This legislative mandate, together with the holding in *National Parks* concluding that undivided loyalty requires that the state as a trustee has a duty to maximize the *income* "for the exclusive benefit of the beneficiaries," ¹²⁸ poses a substantial counter to those who argue that SITLA's involvement in real estate development violates the state's fiduciary duty to preserve the trust corpus.

¹²² UTAH CODE ANN. §53C-1-102(1)(b) (2007).

¹²³ CULP, *supra* note 2, at 48 (quoting Fairfax, Souder, & Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 799 (1992)) (emphasis added).

¹²⁴ *Id.* at 48.

¹²⁵ RESTATEMENT (THIRD) OF TRUSTS §29 cmt. c, illus. i (2003).

¹²⁶ UTAH CODE ANN. §53C-1-102 (2)(b) (2006), (emphasis added).

¹²⁷ *Id.* at §102 (2)(a).

¹²⁸ *National Parks*, 869 P.2d 909.

V. IS IT TIME TO REDEFINE FIDUCIARY DUTY WITHIN THE CONTEXT OF STATE CHARITABLE TRUST MANAGEMENT?

Even if the requirement to achieve maximum financial return is a proper element of the modern trust mandate, the charitable trust designation of state trusts sets them apart from private trusts.¹²⁹ Charitable trusts, unlike the majority of private trusts, are intended to endure essentially in perpetuity. By necessity, this requires trust managers to look beyond revenue maximization, and obligates trust managers to embrace notions of intergenerational equity by investing portfolios in sustainable management strategies that will maintain a healthy trust corpus for future generations.¹³⁰ “[S]ome trust managers and trustees may be proceeding under a set of assumed management restrictions that are actually far narrower than those that are commonly applied in the private sector.”¹³¹ Equitable charitable trust principles can and should be applied to state land trusts.

Standing to bring a suit is an area for further consideration. It is possible a municipality could obtain the court’s approval in a *cy pres* proceeding. In today’s society in which protection of the environment has become a moral issue, raising pollution even to the level of sin,¹³² conservation an important consideration for the entire human race, including trust administrators.

VI. CONCLUSION

Under the current statutory construction of SITLA, and the present common-law definition of fiduciary duty, it is likely that SITLA’s real estate development does not violate the duty to protect and preserve the trust corpus, and the legislature should forebear from micromanaging the day-to-day business activities of SITLA as it is discharging its present obligations. A more worthy objective is the development of a sustainable land-use policy. The legislature could advance this goal by either (1) amending Section 53C-1-202 of Utah Code Annotated, the statute directing the composition of the Board of Trustees, or (2) completing a study of state-wide land conservation needs and designating by Constitutional amendment, a portion of school trust lands protected from development for the benefit of future generations of the State’s school children.

Utah’s constitutionally/statutorily created trust is of great significance, since unlike many states, it gives Utah’s legislature the ability to unilaterally alter the terms of the trust.¹³³ Whether the reason is to preserve future income possibilities or natural values, open space and wildlife habitat for this and future generations,

¹²⁹ See CULP, *supra* note 2, at 21.

¹³⁰ *Id.* at 48.

¹³¹ *Id.*

¹³² Philip Pullella, *Vatican lists "new sins," including pollution*, REUTERS (Mar.10, 2008), available at http://www.green.yahoo.com/news/nm/20080310/hl_nm/pope_sins_dc.html; Pope Benedict has made several strong appeals for the protection of the environment.

¹³³ See CULP, *supra* note 2, at 36.

the state could validly conserve a portion of the land, designating a portion undevelopable.

The State's fiduciary duties to its beneficiaries, Utah's school children, derive directly from Utah's Constitution. In accordance with its fiduciary duties as a trustee of a perpetual trust, the Legislature has enacted the School and Institutional Trust Land Management Act, giving management authority to a quasi-public entity, SITLA. Though this paper suggests it is time to redefine fiduciary duty, as long as SITLA's Board is in compliance with the Act and current common law fiduciary duty, it is technically in compliance with the best interest of the beneficiaries. Business decisions such as compensation to management fall within the discretion of the Board of SITLA and legislature's meddling in such decisions is destructive of the prudent administration of the trust. Because a conflict of interest is inherent, the duty of good faith would be difficult or impossible to achieve if the Legislature became directly involved in business decisions.