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A Trust for Whom?: Managing Colorado's 3 Million
Acres of State Land: A Critique of the
Constitutional Amendment (February 5)

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A Trust for Whom?: Managing Colorado's 3 Million Acres of State Land

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JOHN M. EVANS, REEVES BROWN & MARK A. E. BURGET, A TRUST FOR WHOM?: MANAGING COLORADO'S 3 MILLION ACRES OF STATE LAND (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1996).

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HOT TOPICS IN NATURAL RESOURCES

SPRING 1996 PROGRAMS

MONDAY, FEBRUARY 5

A TRUST FOR WHOM? MANAGING COLORADO'S 3 MILLION ACRES OF STATE LAND

Historically, state trust lands have been managed for public schools revenue. Now there is pressure to protect some state lands as open space. Should trust lands be managed for broader public values? Is this consistent with existing legal mandates? Speakers: State Land Board Commissioner **Maxine Stewart**; **John Evans**, Colorado Board of Education; **Reeves Brown**, Colorado Cattlemen's Association; The Nature Conservancy's Colorado State Director **Mark Burget**. Special focus on the recently implemented Multiple Use Program and also on how The Nature Conservancy is working with the State Land Board to preserve resources. Center Director **Elizabeth Rieke** will moderate.

TUESDAY, MARCH 12

AIR QUALITY AND TRANSPORTATION ON COLORADO'S FRONT RANGE: TAKING RESPONSIBILITY FOR DIFFICULT CHOICES

With communities along Colorado's Front Range continuing to grow at a rapid rate, government, private businesses and citizens are faced with difficult choices concerning air quality and transportation. Can we control the "brown cloud" and increasing congestion on our roads and freeways? What decisions and sacrifices must be made, and who will take responsibility for them? **Wade Buchanan**, Chairman of the Regional Air Quality Council (RAQC), will moderate a panel addressing these issues including **David Pampu**, Deputy Executive Director of the Denver Regional Council of Governments (DRCOG); **Christine Shaver**, Environmental Defense Fund attorney; and **Ken Hotard**, Senior Vice-President of the Boulder Area Board of Realtors.

TUESDAY, APRIL 23

THE PROBLEM OF FEDERAL-PRIVATE SPLIT MINERAL ESTATES: WHO HAS CONTROL?

Many federally owned lands overlie privately owned oil and gas and mineral rights. Increasingly, the competition between agency multiple use directives and private interests in resource development has resulted in legal battles between the federal government, which seeks to regulate use of the federally owned surface estate for resource extraction, and the private owners of mineral estates. **Andrew Mergen**, the Center's 1996 El Paso Natural Gas Law Fellow, will look at problems and potential solutions associated with these split mineral estates.

12:00 noon

Holland & Hart

555 17th St., 32nd Floor, Denver

Box lunches provided

One Hour of Continuing Legal Education (applied for)

Prepayment required. Seminar cost: \$15 if received 3 working days before program; \$18 thereafter. Cost includes lunch. Additional charge of \$5 for CLE credit, if desired. Limited scholarships.

Register by phone or FAX with credit card or send check payable to the University of Colorado to Natural Resources Law Center, Campus Box 401, Boulder, CO 80309-0401. Phone 492-1288; FAX 492-1297. Kathy Taylor, Coordinator.

A TRUST FOR WHOM?
MANAGING COLORADO'S 3 MILLION ACRES OF STATE LAND:
A CRITIQUE OF THE CONSTITUTIONAL AMENDMENT

Prepared by

John Evans, Ph.D., J.D.

Member-At-Large Colorado State Board of Education
President of The Western Institute of Agricultural Land Use

February 1996

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A CRITIQUE OF THE CONSTITUTIONAL AMENDMENT

I. Introduction.

Recently, a report to the Colorado Department of Natural Resources and the State Board of Land Commissioners was completed by the Natural Resources Law Center of the University of Colorado. The report trigger the development of a proposed Amendment to Sections 9 and 10, Article IX of the Colorado Constitution. The following is an examination of some of the problems and suggestions.

A. A Constitutional Perspective.

We all want quality education in Colorado. A source of funding for public schools dating back to Colorado's admission into statehood was "state lands." Back in 1861, a congressional Act establishing the Colorado Territory, reserved certain lands to be granted by the federal government to the support of common schools. When Colorado was admitted into statehood, the Congressional Enabling Act of 1876 granted these lands to the state, in turn for the grant was a condition of statehood. Colorado was required to "disclaim all right and title to the unappropriated public lands within its boarders." With this Act 4.6 million acres came under state control. Three hundred seventy five million acres consisting of 16 and 36 sections in every township is for school lands. The exception to this was where parcels had been already granted or disposed of by Congress. Other lands also came under Colorado's control. For example, about 500,000 acres came under the Internal Improvement Act of 1841, 46,080 acres for a state university, 32,00 acres for a state penitentiary, and 46,000 for a salt spring land; and finally, 90,000 acres for an agricultural and mechanical college under the 1862 Morrill Act.

From the start, the educational purpose of the "state lands" was obvious. The lands and the state land board were incorporated in article IX of the Colorado Constitution. This article deals with the establishment of education as a state purpose and among other things creates the State Board of Education. See Art. 9, Section 1.

Colorado kept most of the granted lands rather than selling them to settlers as originally anticipated. With statehood, Colorado's Constitution established a "land board" composed of four officials. Colorado Const. Art. IX, Section 9. There were the Governor, the Superintended of Public Instruction, the Secretary of State and the Attorney General. Article 10 of the Colorado Constitution had provided that the "state board...provide for the location, protection, sale or other disposition of all the lands...in such manner as will secure the maximum possible amount thereof. Colorado Const. art. IX, Section 10. It also directs the legislature to "provide by law that the several grants of land made by Congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of [the beneficiaries]...and shall provide for the sale of said land from time to time."Id.

In 1909, the Colorado Constitution was amended to create the current structure of three commissioners. There is a president, a register, and an engineer appointed by the Governor and confirmed by the Senate.

In 1919, several important changes were made. First a permanent fund was established to receive and hold funds from sale of school trust lands. See 1919 Colo. Sess. Laws 650, Section 27. Under the 1919 Constitution, the public school lands shall "forever remain inviolate and intact; the interest thereon, only, shall be expended in the maintenance of the schools districts of the state." The Constitution makes the state treasurer the custodian of the fund, which "shall be securely and profitably invested as may be by land directed."

B. Legislative Regulatory Authority

Constitutional authority does not preclude the Colorado legislature from regulating the activities of the State Land Board. See Evans v. Simpson, 547 P. 2d 931 (1976). The powers of the board can be limited by statute. The lands can be held in trust, In re Canal Certificates, 34 P. 274 (1893), leased in such a manner as will secure the maximum possible amount, In re Leasing of state Lands, 32 P. 986 (1893) and sold so as to secure the maximum possible amount therefor. People v. G.H. Hard Land Co., 117 P. 141 (1911).

In all of these State Land Board actions, the legislature still has responsibility to regulate. The Colorado Supreme Court has held that the "Constitutional responsibility of the State Land Board to secure the maximum possible amount for public lands was not intended as a license to disregard reasonable legislative regulations which might reduce the amount of revenues otherwise obtainable..." Colorado State Board of Land Comm'rs v. Colorado Mined reclamation Bd., 809 P. 2d 974 (1991).

C. Critique of the Revised Draft of the Constitutional Amendment as of January 5, 1996.

Subject: Board Structure.

1. This section of the proposed concerns State Land Board Structure. It proposes to include representation by persons with substantial experience in agriculture, public or primary secondary education, extractive industries, local government, natural resource conservation and land planning or management.

Critique:

The members of the new structure are not representative of the trust beneficiaries. How can such board be held accountable by the beneficiaries? What is the justification for such a board? Why do we want to put the special interests in charge of managing the school land? Why only one representative of elementary and secondary education? Why does this plan ignore the State Board of Education whose State Constitutional charge is to supervise all of Colorado's public schools? These questions suggest the amendment does not improve the status quo. In fact, it may be more harmful. We all remember it was the sale of water rights under the Lowry Bombing Range by the land board that triggered this review. In that sale, water rights were sold for considerably less than their market value. This led to a law suit initiated at the request of the

State Board of Education to recover the lands. It is hard to see how this new board improves the situation. If anything, the inclusion of the users of state lands or special interests insures more such "deals" not less.

Recommendations:

Maintain the current land board structure and allow more legislative oversight on the sale of any assets. In any case, the Land Board should be removed from the Department of Natural Resources and made a separate agency. Or, as an alternative, since the State Board of Education has constitutional responsibility for supervision of Colorado schools and is the party most likely to enforce any breach of trust responsibility, place the Land Board within the State Department of Education.

Subject. The Mission of the Land Board.

The constitutional amendment proports to make the mission of the Land Board more clearer. It eliminates the requirement to "secure the maximum possible amount" of revenue from the state school lands. More importantly, it withholds from development, sale or exchange of lands for public use for open space and "natural values."

Critique:

This is a collision of visions. On the one hand, there is the Jeffersonian vision of financing public school education through the "school lands." This vision teams-up with the so called "stakeholders" of the lands who make their living from the "school lands." Our founding fathers believed that the land, if given care, would bring profit indefinitely for the benefit of Colorado's children. Some professional city planners, developers, and environmentalists represent the other vision. These are educated urban professionals who see the school land not for production, but for aesthetics.

The proposal is to call for a "morally neutral" vision. It is to produce some profit and some aesthetics. The new mission creates conflict. It sets up the Board to make "value judgments" about land use based upon ethical issues of the day. It destroys the old political consensus that the school lands were for the benefit of Colorado's children. If land use is the issue, why cannot our values be rationally decided within the existing constitution? If preservation is the goal, then why not purchase the land at market value or exchange the land? Are the public schools so financially sound so as to serve a new ideal -- open space? Is the highest good to be derived from the school lands profit for children or open space?

Recommendation:

My recommendation is to keep the original mission of the State Land Board. The focus should not be the mission, but rather accountability by the people who implement the mission.

Subject: The Permanent Fund As Security for School District Bonds

This section of the amendment uses the permanent fund as security for school district bonds.

Critique:

The proposal is somewhat novel. Yet, the Department of Natural Resources has not been discussed it with the State Board of Education and its experts on school finance. Thus, it is difficult to flush out all the legal issues to be reviewed and resolved.

There are Constitutional caps on the amount of school district indebtedness. How does these caps operate in the context of this amendment? How do you allocate the money among the districts by need or assessed value? Even more importantly, does the State of Colorado want to stand "Full Faith and Credit" for local school districts? Do we want to put the State in debt? Do the school districts really need this additional security? These are important questions that need to be answered before approving this part of the amendment.

Recommendation:

There needs to be a rethinking about how to use the permanent fund. But this proposal raises more problems than it solves.

II. Conclusion:

The issue is accountability to the ultimate beneficiaries -- Colorado's public school children. There is a need to provide for more accountability. I am not sure turning the land over to representatives of the users achieves accountability. Although the Lowry Bombing Range water rights sale suggests better oversight is needed, changing the members of the land board is not the answer. My recommendation is that the Land Board be made an independent agency or at the very least place in the State Department of Education.

Changing the mission of the Land Board away from benefiting the common schools toward open space is a political decision. It is based on a belief that one values open space over public school education. I would hope that Coloradans chose education.

Finally, the proposal for the state to guarantee local school district bonds needs study. However, the permanent fund needs to be studied as to the best way to use the funds for the benefit of Colorado's public school children.

BIO FOR:

JOHN M. EVANS

John Evans received a Ph.D. in education specializing in life long learning working under the father of life long learning, Malcolm Knowles with the CCSSO at Georgia State University. He also has earned a Juris Doctor Degree from Valparaiso University. He is no stranger to the classroom, beginning with the Denver Public Schools to teaching in the Graduate Programs of Mississippi State University, Indiana State University, San Jose State University and San Joaquin College of Law. Even as a senior dean Illinois Eastern Community College - Olney, he taught one course per semester for four years. Use to challenging leadership assignments, he organized a Regional Educational Services Agency for Continuing Education at Mississippi State University in 1977, a University to Public School Partners Program in 1985, a graduate program in Life - Long Learning in 1986 at Indiana State University, higher education graduate intern program at San Jose State University in 1987, a Law Review and new national law journal at San Joaquin College of Law in 1990 and a Center for Parents at Denver University in 1995. In 1990, working with the Colorado Bar Association on land use problems, he founded the annual conference the Western Agricultural Roundup. He worked with regional agricultural and environmental leaders to establish the Western Institute for Agricultural Land Use, which he is now the President. He served on Governor Romer's growth forums in Colorado. Also in 1994, wishing to serve in a leadership role in education, he was nominated and elected to the Colorado State Board of Education. He has written and been published extensively on both education and environmental law and policy.

P. 02

A Cattlemen's Perspective of State Land Management

presented by Reeves Brown, Colorado Cattlemen's Association
before the CU Natural Resources Law Center
February 5, 1996

- 1) Role of state lands to grazing lessees
 - a. Nature of state lands
 - Most state land parcels are unfenced and are indistinguishable from a grazing lessee's deeded lands. Because of the land's common management pattern, the grazing lessee treats the land, deeded and leased, in the same manner.
 - b. Relationship of state lands to grazing lessees
 - Most state lands are either "land-locked" or surrounded on three sides by the grazing lessee's deeded lands. In addition, most of these state land grazing leases have been managed as an integral part of the lessee's ranching operation for many years. More than simply a convenient location for a lease, these state lands parcels constitute a vital and irreplaceable component of the rancher's overall ranch management strategy.

- 2) Grazing lessees' perspective on...
 - a. Stewardship -
 - Because of the common management pattern and long-term management history, most grazing lessees demonstrate the same level of commitment to good stewardship of their leased state lands as they would to their deeded private land.
 - b. Multiple Use -
 - A "multiple use" policy is neither inherently "good" nor "bad". Rather, it is either appropriate or inappropriate for the goals sought. Therefore, a more relevant question than "Is multiple use good" would be to ask "What are we trying to accomplish with our state land management?"
 - If our goal is recreational opportunity, then multiple use is appropriate. It is important to recognize that multiple use of ANY kind WILL have an adverse impact on the resource -- this holds true whether we're talking about an intensive outdoor paintball arena or a less intrusive bird-watching experience; the increase in human presence or activity WILL disturb both the range and wildlife resource to some degree. There is simply no such thing as totally "non-consumptive" impacts.

-- CONTINUED --

- Because multiple use will disturb the range resource, grazing lessees are generally unsupportive of this. However, if society deems that the goal of state land management IS to pursue increased human activity, then grazing lessees only ask that the opportunity to provide this experience be equitable among all parties. It would seem logical that, given the same opportunity for multiple use, it makes more sense from an efficiency standpoint to have the manager for the surface lease be the same manager for any additional overlaying leases.
 - However, if the goal of state land management is to achieve optimum range and wildlife conditions, then the strongest argument can be made for retention of an on-site grazing lessee with a vested interest in ensuring good resource stewardship.
- c. Open Space -
- "Open space" is not just a management goal for a rancher -- it's his lifeblood.
 - Again, a more appropriate question may be "Should we allow managed livestock grazing on this open space?" If our goal is good stewardship, the science is very clear that proper management is much better than no management. Case in point: Yellowstone Park... or any national park for that matter. A recent survey of state land range condition conducted by CSU in 1991 concluded that "the average range condition of all range sites was good (>50%) or excellent (>75%) except for the dry exposure range site which was influence by the condition on one lease."

3) Conclusion

- a. We must be careful about pursuing increased revenues from state land management and consider fully the resulting impact which such pursuits will have on the long-term range condition. Case in point: Mud Springs lease in South Park. In this case, a short-term effort to capture a higher grazing lease return resulted in long-term damage to the resource, public concern about introduced livestock diseases, and an outstanding account receivable the Land Board.
- b. While the role of state lands is NOT to support local economic development, we would be remiss as a society if we did not at least consider this potential adverse impact. State lands managed as an integral part of an overall ranching operation typically support a stable and long-term economic benefit to the entire community which depends on the ripple effect of this economic activity.

-- CONTINUED --

- c. It is worthwhile to investigate ways to provide for incentives for on-site range stewards/lessees in order to reward desired behavior and accelerate movement toward our long-term stewardship goals.
- d. It is important to recognize the benefit gained from historic grazing leases on state lands BEYOND the potential for revenue generation:
 - open space -- A by-product of a grazing lease
 - healthy rangeland resource -- The typical grazing lessee demonstrates the same level of commitment to proper range stewardship on state land leases as he does on his own deeded land.
 - wildlife benefits -- It is no surprise that the two things that wildlife populations depend on for a healthy habitat, namely healthy rangelands and abundant available water sources, are the same two things which the grazing lessee depends on to accomplish his ranch management goals. More than just complementary, the rancher's stewardship goals and the wildlife population's habitat needs are symbiotic.

REEVES BROWN
Biography

Reeves Brown is a third generation cattle producer from Sand Springs, Montana. Although he still owns cattle on the ranch with his father, he has resided in the Denver area since 1987. After working for the National Cattlemen's Association for two years, he assumed the position of Executive Vice President of the Colorado Cattlemen's Association (CCA) in 1989. CCA is a non-profit trade association for the Colorado beef industry and serves as the spokesman for the state's 10,000+ beef producers.

In his capacity with CCA, Reeves is responsible for managing the affairs of the association's 2700 active members and 42 county associations. He has been active in Colorado resource management issues working to cultivate communication between private land owners and other land management interests. He is a Past President of the Colorado Riparian Association.

Reeves graduated from Montana State University with a degree in Agriculture Business and a minor in Economics. He has worked in the association management field since 1985. Reeves and his wife, Penny, live in Lakewood, Colorado.

Post-It Fax Note	7871	Date	2/1	# of pages	1
To	Kathy Taylor	From	Jan		
Co./Dept.		Co.	Colo Cattlemen's		
Phone #		Phone #	431-6422		
Fax #	492-1397	Fax #			



Biographical Summary for Mark A.E. Burget:

Mark A. E. Burget
Director, The Nature Conservancy of Colorado
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303-444-2950 (phone)
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Education: B.A. Dartmouth College, Hanover, New Hampshire, 1983.
 J.D. University of Virginia, Charlottesville, Virginia, 1991.
 M.B.A. University of Virginia, Charlottesville, Virginia, 1991.

Mark joined the Colorado staff of The Nature Conservancy in 1992 to build community-based conservation programs along the ecologically-significant tributaries of the Upper Colorado River Basin. In 1993, he was appointed The Nature Conservancy's Colorado State Director.

The mission of The Nature Conservancy is to protect the plants, animals and natural communities that represent the diversity of life on earth by protecting the land and water they need to survive. In Colorado, the Conservancy operates out of its main office in Boulder and five community-based conservation program offices in Fort Collins, Colorado Springs, Alamosa, Telluride, and Steamboat Springs.



**Natural Resources Law Center -- Hot Topics Luncheon Series
Mark Burget, Director, The Nature Conservancy of Colorado
February 5, 1996**

Remarks Outline

- I. Introduction to The Nature Conservancy of Colorado: The mission of The Nature Conservancy is to protect the plants, animals, and natural communities representing the diversity of life on earth by protecting the land and water they need to survive.
 - A. The Nature Conservancy's work is based on 3 guiding characteristics:
 - 1. Non-confrontational, voluntary solutions.
 - 2. Guided by science at the Colorado Natural Heritage Program.
 - 3. Multi-local organization, with community-based conservation programs led by local advisory boards representative of local human communities.
 - B. Disclaimer -- While The Nature Conservancy has worked cooperatively with the State Land Board, the Conservancy does not claim legal expertise in the policy arena.
- II. The Colorado State Land Board owns ecologically-significant properties throughout the state of Colorado and these lands likely harbor more biological diversity than is currently known.
 - A. The State Land Board owns properties within significant natural area conservation sites identified by The Nature Conservancy and the Colorado Natural Heritage Program.
 - B. There is much we do not know about State Land Board Lands -- There is a need for more comprehensive biological inventory, building on good work already done by the Colorado Natural Areas Program.
- III. The State Land Board's mandate might be interpreted to justify the destruction of biological diversity and other important public values, but should be interpreted to justify the long-term preservation of the natural resource values that State Trust Lands harbor.
 - A. A clarification of the State Land Board's mandate would better guide the Board's decisions with respect to the choice between maximizing short term economic value and protecting natural assets for the long term.
- IV. Within the current legal framework, The Nature Conservancy has been able to work cooperatively and productively with the State Land Board to secure long-term, but not permanent, protection of significant Trust Lands.
 - A. At its Aiken Canyon Preserve, near Colorado Springs, the Conservancy has entered into a 99-year lease to protect a significant Front Range Foothills ecosystem.

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- B. At its OV Mesa Preserve in southern Colorado, the Conservancy has entered into a 99-year lease to protect a significant 1360-acre eastern plains grassland community.
 - C. The Conservancy's transactions at OV Mesa and at Aiken Canyon were expensive transactions -- costing approximately the same as a fee acquisition at fair market value.
- V. Within its current mandate, the State Land Board could make it easier for public or private conservation organizations to safeguard significant natural values by making shorter-term conservation leases available to parties other than agricultural producers.
- A. Conservation leases can serve the dual purposes of protecting significant natural values (species, natural communities, and natural processes) and avoiding endangered species train wrecks on private property.
- VI. Additionally, State Land Board leases could be offered only to lessees who demonstrate stewardship standards based on principles of conservation biology.
- A. For instance, agricultural leases on Trust Lands harboring significant riparian areas might require lessees to fence out riparian areas during certain times of the year.
- VII. In making any decision regarding the disposition or use of State Trust Lands, the Land Board should consider the protection of significant natural values and should guard against the most serious threats to those values.
- A. Natural values worthy of consideration might include plants, animals (including insects), and natural communities that are either rare or declining, that are excellent examples of natural community types, or that serve to permit natural ecological processes to occur.
 - B. Significant threats that should be managed include many activities, some of which are not commonly recognized:
 - 1. Poorly managed cattle or sheep grazing.
 - 2. Hard rock, gravel, or other mining activities.
 - 3. Subdivision and residential or commercial development.
 - 4. Poorly managed recreational activities.
 - 5. Introduction or poor management of non-native species.
 - 6. Management of water resources.
- VIII. Summary.
- A. Within its current legal mandate, the State Land Board should invest more heavily in scientific inventories and ongoing ecological monitoring of the lands within its purview. It should also invest in long-term stewardship activities. As Trustee, the State Land Board should maintain the corpus of the trust for the benefit of future generations of Coloradans, whose values include the protection of biological diversity. The Land Board's mandate should be clarified to support long-term stewardship and protection of Colorado's remarkable natural diversity.