



State entrusted grazing lands : a study of regulation and price
by David Karsten Gaarder

A thesis submitted in partial fulfillment of the requirements for the degree of MASTER OF SCIENCE
in Applied Economics
Montana State University
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Abstract:

The Montana Department of State Lands manages, as a Trustee, 4,112,302 acres of grazing land. Most of this land was granted through the Enabling Act for the support of common schools. Statutory objectives of the Trust created under this act are: (1) to secure the largest measure of legitimate and reasonable advantage to the trust without impairing long-term productivity; (2) to fully compensate the trust for all interests disposed of; and (3) to secure a sustained income to the trust.

The hypothesis presented is that statutory objectives of the Trust are not effectively being met, that grazing fees on state land are too low, and that the grazing fee formula should be modified. It was the author's intent to examine the current administrative program in light of the objectives set forth, to identify existing barriers to their achievement and to present alternatives. The base grazing fee at the time the study was initiated (1976) was \$1.30 per animal-unit-month and is \$1.48 per AUM for 1977.

Results of the study produced the following factors to be considered in pricing state grazing lands; (1) approximately 85 percent of Montana's leased grazing land supply is made up of public and state land; (2) only 8 percent of state grazing leases are competitive (1976) - the competitive system faces many barriers including the effects of good neighbor relations, preference rights, competitive bid hearings, limited access, and the influence of "big operators" and grazing districts and associations; (3) 1976 AUM prices are significantly higher for competitive state leases (\$3.52 ave.), the private sector (\$7.40), state and federal lands in other western states (\$2.37 ave.) and the value of grazing as determined by the 1969 BLM fee system (\$1.94); (4) significant explanatory variables of competitive bids, as determined by a multiple regression model include the number of potential bidders, the tract size, the previous year's land value index, and the presence of water and fence.

Recommendations made include: (1) Recognize and consider the sales alternative; (2) Complete the remaining in-lieu selections (approximately 22,918 acres); (3) Open information channels concerning land use and lease renewal dates for state leases; (4) Initiate prompt cancellation of leases when warranted; (5) Eliminate charging for "grass crops" on grazing land; (6) Adopt a uniform competitive grazing bid format that gives flexibility, e.g. \$X.XX plus the statutory minimum fee per AUM; (7) Adopt a new grazing fee formula that allows for changes in production costs, and land values as well as beef prices.

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Date 8/4/77

STATE ENTRUSTED GRAZING LANDS: A STUDY OF REGULATION AND PRICE

by

DAVID KARSTEN GAARDER

A thesis submitted in partial fulfillment
of the requirements for the degree

of

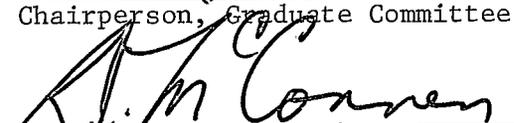
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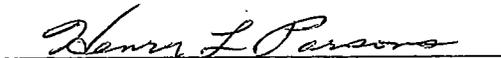
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ABSTRACT

The Montana Department of State Lands manages, as a Trustee, 4,112,302 acres of grazing land. Most of this land was granted through the Enabling Act for the support of common schools. Statutory objectives of the Trust created under this act are: (1) to secure the largest measure of legitimate and reasonable advantage to the trust without impairing long-term productivity; (2) to fully compensate the trust for all interests disposed of; and (3) to secure a sustained income to the trust.

The hypothesis presented is that statutory objectives of the Trust are not effectively being met, that grazing fees on state land are too low, and that the grazing fee formula should be modified. It was the author's intent to examine the current administrative program in light of the objectives set forth, to identify existing barriers to their achievement and to present alternatives. The base grazing fee at the time the study was initiated (1976) was \$1.30 per animal-unit-month and is \$1.48 per AUM for 1977.

Results of the study produced the following factors to be considered in pricing state grazing lands; (1) approximately 85 percent of Montana's leased grazing land supply is made up of public and state land; (2) only 8 percent of state grazing leases are competitive (1976) - the competitive system faces many barriers including the effects of good neighbor relations, preference rights, competitive bid hearings, limited access, and the influence of "big operators" and grazing districts and associations; (3) 1976 AUM prices are significantly higher for competitive state leases (\$3.52 ave.), the private sector (\$7.40), state and federal lands in other western states (\$2.37 ave.) and the value of grazing as determined by the 1969 BLM fee system (\$1.94); (4) significant explanatory variables of competitive bids, as determined by a multiple regression model include the number of potential bidders, the tract size, the previous year's land value index, and the presence of water and fence.

Recommendations made include:

- (1) Recognize and consider the sales alternative;
- (2) Complete the remaining in-lieu selections (approximately 22,918 acres);
- (3) Open information channels concerning land use and lease renewal dates for state leases;
- (4) Initiate prompt cancellation of leases when warranted;
- (5) Eliminate charging for "grass crops" on grazing land;
- (6) Adopt a uniform competitive grazing bid format that gives flexibility, e.g. \$X.XX plus the statutory minimum fee per AUM;
- (7) Adopt a new grazing fee formula that allows for changes in production costs, and land values as well as beef prices.

Chapter 1

INTRODUCTION

General Background

Most of the land owned by the State of Montana came into State ownership through three (3) legislative grants from the federal government.

The first of these grants, the Morrill Grant, was made by an act of July 2, 1862 (12 Stat. 503). The grant was made to the territory of Montana, to be vested in the state upon statehood, and totalled 90,000 acres. It was specified that: the monies derived from the sale of the lands to be used for the endowment, support, and maintenance of an agricultural college (now Montana State University).

In 1864, the Organic Act (13 Stat. 85), while not a grant itself, reserved all sections numbered sixteen (16) and thirty-six (36) in each township of the Montana Territory. This reservation was for the purpose of providing for schools in the states erected from the territory.

A second land grant of 46,080 acres, for the use and support of a university (now the University of Montana), was made by an act of February 18, 1881 (21 Stat. 326).¹ Like the Morrill, this grant was

¹Two additional grants for this purpose, totalling 640 acres were made in 1904 and 1905 (33 Stat. 64, 33 Stat. L 1080).

effective upon Montana's admission into the union.

The Enabling Act, (25 Stat. 676) approved February 22, 1889, admitted Montana into the Union along with North Dakota, South Dakota, and Washington, and granted to the state, those lands reserved by the Organic Act. These lands, sections sixteen (16) and thirty-six (36) in each township, were granted for the support of common schools (§10). This public school grant, by far the largest of the three, totalled 5,188,000 acres. Since some of these sections had been homesteaded, some included within boundaries of Indian reservations, and some otherwise disposed of prior to the Enabling Act, other lands were to be selected by the state in lieu thereof.² Approximately 22,918 acres remain to be selected from the public domain (see page 44 for elaboration).

The Enabling Act also granted additional lands, for various purposes, as follows:

- 32,000 acres for public buildings at the capital for legislative, executive, and judicial purposes (§12).
- 46,080 acres (confirming the grant of February 18, 1881) for university purposes (§14).
- 9.75 acres for a penitentiary at Deer Lodge City, Montana (§15).

²For an in-depth history of this selection process, see Burnett, G. Wesley Jr., "Montana Becomes a Landlord - A Study of State Land Selection," unpublished Ph.D. dissertation (Philosophy), Graduate College, University of Oklahoma, Norman, Oklahoma, 1976.

- 90,000 acres (confirming the grant of July 2, 1862) for the use and support of agricultural colleges (§16).
- 100,000 acres for the establishment and maintenance of a school of mines (Montana College of Mineral Science and Technology) (§17).
- 100,000 acres for state normal schools (Eastern and Western Montana Colleges) (§17).
- 50,000 acres for agricultural colleges (Montana State University) (§17).
- 50,000 acres for the establishment of a state reform school (Pine Hills School) (§17).
- 50,000 acres for the establishment of a deaf and dumb asylum (School for the Deaf and Dumb) (§17).
- 150,000 acres for public buildings at the Capital (§17).

The major grants totalled approximately 5,856,720 acres. Several minor grants later followed.

The state acquired an additional 159,229 acres of land from the federal government in 1958, when an exchange of 9,354 acres of state land; within Glacier National Park, was made for 168,583 acres of public domain throughout the state.³

The state also gained title to 340,979 acres of land, due to fore-closed mortgages on farm loans which were financed through an investment of school trust funds.⁴ The lands acquired through defaulted farm

³ Biennial Report, Commissioner of State Lands and Investments, June 30, 1960, p. 11.

⁴ Biennial Report, Commissioner of State Lands and Investments, June 30, 1954, p. 21.

loans became the property of the state, were transferred to the common school funds, and thereafter became subject to sale and disposal in the same manner as other state lands.

As of June 30, 1976, unsold land in the school and institution accounts totalled 5,130,623.66 acres.

The Enabling Act specifically provides that all monies received from the sale of lands belonging to the common school grant, and the other grants, together with proceeds from the sale of timber, oil royalties and other minerals should be credited to a permanent fund for each of the land grants.⁵ It also provides that permanent funds cannot be used for any other purpose than for the support and maintenance of the various land grant institutions and must forever remain inviolate as the property of each of the land grant funds.

The Board of Land Commissioners was created by the 1899 Constitution and was recreated by Article X, Sec. 4 of the 1972 Constitution. The board consists of the Governor, the Attorney General, the Secretary of State, the State Auditor, and the Superintendent of Public Instruction. The Constitution gives the board the authority to "direct, control, lease, exchange, and sell school lands and (other) lands . . . under such regulations and restrictions as may be

⁵Statistical Report, Commissioner of State Lands, June 30, 1976, p. 1.

provided by law." The Department of State Lands acts under the direction of the board and administers the laws charged to the Board.

The Constitution provides that "the public school fund and the permanent funds of the Montana university system and all other state institutions of learning shall be safely and conservatively invested in:

- (a) Public securities of the state, its subdivisions, local government units, and districts within the state, or
- (b) Bonds of the United States or other securities fully guaranteed as to principal and interest by the United States, or
- (c) Such other safe investments bearing a fixed rate of interest as may be provided by law."⁶

Rentals received from land leases, interest on deferred payments on land sold, mineral lease rentals, interest on funds derived from land sales and invested in specified securities and all other actual income is made available for the maintenance and support of the public school and other land grant institutions.⁷

Table 1.1 shows the original grant, the acreage remaining and the fund for each grant as of June 30, 1976.

⁶Constitution of Montana (1972), Article VII, Section 13.

⁷Statistical Report, 1976, p. 1.

Table 1.1

Original Grants of Land to the State of Montana,
Land Grant Institutions, and Acreages and Funds
as of June 30, 1976⁸

Fund	Original Grant	Acreage as of June 30, 1976	Fund as of June 30, 1976
Public School	5,188,000	4,595,800.81	\$71,653,649.30
University of Montana	46,720	18,160.87	943,713.11
Montana State University-Morrill Grant	90,000	62,977.31	1,499,422.51
Montana State University-Second Grant	50,000	32,408.31	793,287.52
Montana College of Mineral Science and Technology	100,000	59,606.22	1,513,638.69
State Normal School	100,000	62,890.00	1,294,005.08
Deaf and Blind Asylum	50,000	36,235.86	628,967.81
State Reform School	50,000	28,744.01	650,015.98
Public Buildings	182,000	186,227.08	---
Veterans Home	1,275.61	1,275.61	8,398.47
"Militia Camp" now used as an Agricultural Experiment Station	640	640	---
Agricultural and Manual Training School	5,000	5,000	---
State Penitentiary	9.75	9.75	---

⁸Statistical Report, 1976, p. 1.

The Focus

The Department of State Lands manages approximately 4,648,990 acres of range and cropland, which it leases to Montana farmers and ranchers. As of June 30, 1976, the amount of land classified as "grazing" was 4,112,301.93 acres which represents approximately 88 percent of the total acreage of state lands administered by the Department. It is this vast acreage of grazing lands to which this study is directed.

Base grazing fees per animal unit month (as determined by the statutory formula) and total income per year from state grazing lands, for the past ten years are shown in Table 1.2. For 1977, the base grazing fee is \$1.48 per AUM.

Table 1.2

Base Grazing Fee per AUM and Total Grazing Income per Year (1967-76)

Year	Base Grazing Fee	Total Grazing Income ⁹
1967	\$.74	\$ 964,897.41
1968	.76	1,000,003.45
1969	.76	987,657.79
1970	.80	1,046,969.41
1971	.85	1,129,996.48
1972	.87	1,186,595.62
1973	.95	1,320,466.94
1974	1.69	2,163,806.97
1975	1.79	2,287,853.57
1976	1.30	1,754,287.39

⁹ Biennial Report, Commissioner of State Lands and Investments, June 30, 1968, and Statistical Reports, Commissioner of State Lands, June 30, 1970, 1972, 1974, 1976.

Chapter 2

NATURE OF THE RESEARCH

The Problem

In 1942, Henry T. Murray wrote, "The problem of the administration of these lands may be likened unto a two edged sword; on the one hand we have the school interest, on the other we have the livestock and farming interests. Unless this extensive acreage is fairly and impartially administered, injustices may result."¹⁰ Although much has changed since then, the basic problem still exists thirty five years later, in 1977.

The hypothesis presented is that statutory objectives of state grazing land administration are not effectively being met, that grazing fees on state land are low, and that the grazing fee formula should be modified.

Montana's grazing fees are lower than current BLM and Forest Service fees and also lower than other state grazing fees in most surrounding states. The estimated average price of grazing on private land in Montana for 1976 was \$7.40 per A.U.M., as reported by the U.S.D.A. High competitive bids and the fact that grazing leases are

¹⁰ Murray, Henry T. "State Land Management in Montana", unpublished M.S. Thesis, Department of Agricultural Economics, Montana State College, Bozeman, MT, 1942, p. 10.

marketable also support the hypothesis.

Purpose and Procedure of the Study

The purpose of the study is to examine the current administration of state grazing lands in light of the guiding objectives set forth by law. Questions to be addressed include: Under what conditions were lands granted to the State of Montana? Are the objectives stated in these conditions being met? If not, what can be done to better accomplish and maintain the desired goals? What is the "market price" of state land grazing? Is the present grazing fee formula in need of revision?

The study will begin with an overview of the present goals and constraints of the system, including relevant laws, land board policies and current administrative procedures (all with respect to grazing lands). Existing barriers to the achievement of statutory obligations will then be identified. Special emphasis will be given to a statistical analysis of grazing revenues, specifically, the areas of competition and grazing fees. The study will conclude with a presentation of possible management alternatives along with their expected implications, and the author's recommendations.

Chapter 3

GOALS AND CONSTRAINTS OF STATE GRAZING

LAND ADMINISTRATION

Laws

The Enabling Act (§11) stipulates that all lands granted by the Act "shall be disposed of only at public sale after advertising." Minimum sale prices of \$10 per acre for tillable lands capable of producing agricultural crops and \$5 per acre for lands principally valuable for grazing purposes are set forth. The Act states that "any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area."

The Act allows the lands to be leased "under such regulations as the legislature may prescribe." It does however make restrictions on lease tenure; "leases for grazing and agricultural purposes shall be for a term not longer than ten years."

It is the Enabling Act which also requires the full market value concept to guide all dispositions of land interests. The relevant part of §11 reads as follows:

The state may also, upon such terms as it may prescribe grant such easements or rights in any of the lands granted by this act, as may be acquired in privately owned lands through proceedings in eminent domain; provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws

providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state. (Emphasis added)

This "full market value" principle also is included, in nearly the exact language in the 1972 Constitution of Montana, Article X, Section 11, which is titled "Public land trust, disposition."

Section 81-103, R.C.M. 1947 specifies guiding rules and principles for the Board of Land Commissioners to follow in the administration and management of state lands. The section is as follows:

81-103. POWERS AND DUTIES OF BOARD. The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands, and subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding rule and principle is that these lands and funds are held in trust for the support of education, and for the attainment of other worthy objects helpful to the well-being of the people of this state; and the board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state. The board shall manage these lands under the multiple-use management concept defined as: The management of all the various resources of the state lands so that they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources, and harmonious and coordinated management of the various resources each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources. (Emphasis added)

That portion implementing the multiple-use management concept was added through an amendment in 1969.

Section 81-302 concerns the classification-reclassification of state lands and land use. This section was amended to its present form by the 1974 Legislature through House Bill 22. This bill is one of the most significant pieces of legislation dealing with the administration of state lands, that has been passed in recent years.

81-302. CLASSIFICATION -- RECLASSIFICATION -- RECORDS.

(1) The state lands are classified as follows:

(a) Class 1. Lands which are principally valuable for grazing purposes.

(b) Class 2. Lands which are principally valuable for the timber that is on them, or for the growing of timber or for watershed protection.

(c) Class 3. Lands which are principally valuable for the production of crops.

(d) Class 4. Lands which are principally valuable for uses other than grazing, crop production, timber production or watershed protection.

(2) The classification or reclassification shall be so made as to place state land in the class which best accomplishes the powers and duties of the state board of land commissioners as specified in section 81-103.

When state lands are classified or reclassified in accordance with these duties and responsibilities, special attention shall be paid to the capability of the land to support an actual or proposed land use authorized by each classification. A capability inventory shall be made prior to changing the classification, information on soils capability, vegetation, wildlife use, mineral characteristics, public use, aesthetic values, cultural values, surrounding land use and any other resource, zoning or planning information which is related to the classification. Should a parcel of state land in one class have other multiple use or resource values which are of such significance that they do not warrant classification for the value, the land shall, nevertheless, be managed insofar as is possible to maintain or enhance these multiple-use values.

(3) It is the duty of the department to classify or reclassify state lands so that no state land will be sold, leased or used under a different classification from that to which it actually belongs.

(4) All field books, plats, maps, and records of the department shall show the class to which each tract therein belongs, and whether it belongs to the public schools of the state or to a state institution or other entity according to the grant or instrument by which title to the land has passed to the state; they shall also show whether or not the coal or other minerals in the land are reserved by the United States; and shall contain any other information the department considers necessary.

This statute modified the previous classifications of state lands.

Prior to this enactment, the classes were as follows:

- a) Class 1. Grazing lands, being all those lands which are valuable only for grazing.
- b) Class 2. Timber lands, being all those lands which are principally valuable for the timber that is on them.
- c) Class 3. Agricultural lands.
- d) Class 4. Lands within the limits of any town or city or within three (3) miles of those limits.

Of major importance was the addition that state land be placed "in the class which best accomplishes the powers and duties of the state board of land commissioners as specified in section 81-103."

Also important was the addition of the sentence concerning multiple-use management.

Section 81-401 contains the policy for appraising and leasing state land. It states that "in the interest of accomplishing a

sustained income for the school and other trust funds . . . , agricultural and grazing lands and town and city lots shall be appraised from time to time but not less than once during the term of every lease by competent appraisers." The purpose of appraising grazing lands is to determine "the general condition . . . , and the carrying capacity. . ." Section 81-402 stipulates that the "rental rate for leasing all state grazing lands shall be based upon the appraised animal-unit-month carrying capacity as provided in section 81-433."

Section 81-404 outlines the relevant factors to be considered in the appraisal of grazing lands as follows:

81-404. APPRAISAL OF GRAZING LANDS.

(1) The department shall appraise the grazing lands owned by the state as to their animal-unit-month carrying capacity, and make and preserve records thereof in its office, and from time to time re-examine these lands as to their animal-unit-month carrying capacity so as to keep the records thereof in its office reasonably accurate.

(2) In appraising these grazing lands the following factors shall be taken into consideration:

(a) Inventory of the forage resources--kind, amount, and location of vegetation.

(b) Accessibility and usability of this forage resource as influenced by topography, availability of stockwater, and season of usability.

(c) Condition of soils--the erosion situation.

(d) Other and related resources--such as timber, game animals, need for watershed protection.

(e) Record of needed improvements and facilities--fuel and stock water, revegetation, rodent control, trails, fences, and the like.

(f) Pertinent facts and figures submitted by stockmen living in the area and directors of state grazing districts including the land or in its vicinity.

(g) Carrying capacity set for similar land in a state grazing district in which the land is situated.

Section 81-405 deals with renewal of leases, competitive bids, and the "preference right" of lessees. When a lease expires and no applications have been received 30 days prior to expiration, the lessee may renew his lease at the rental rate provided by law. If other bid applications have been received, the "holder of the lease has the preference right to lease the land covered by his former lease by meeting the highest bid made by any other applicant." Bids for leases and renewal applications must be in writing, sealed, and submitted to the Department.

Section 81-407 requires that no agricultural or grazing lease may be for a period other than five (5) or ten (10) years. It also provides that:

When a lease expires or is canceled the department shall immediately notify the holder of the lease and all persons who have expressed an interest in leasing the land during, or immediately preceding, the term of the expired or canceled lease. If the legislature raises the rentals for state grazing lands during the term of any leases of grazing land which are not issued as a result of competitive bidding, the lessee shall, for the years after the increase becomes effective, pay the increased rental, and the terms of grazing leases shall so provide.

Section 81-412 sets a rental due date and provides for cancellation for nonpayment. Rental for the first year of the leasing term is due at the time of the lease execution. "The rental for each succeeding year on leases . . . , is due and payable before

March 1, and if not paid by April 1 the lease is cancelled." Thus rental for grazing land is paid prior to the normal grazing season.

Sections 81-413, 81-414, and 81-415 are important in determination of "best use" and reasonable management rules:

81-413. LAND TO BE LEASED IN COMPACT BODIES--INSPECTIONS TO DETERMINE BEST USE OF LAND. All lands shall be leased in as compact bodies as possible, and care shall be taken not to separate parts of any section from the section lines of public highways or from any available water supply, or in a form that will make it more difficult to lease the remaining state lands in the section in which they are located. If there are applications or bids for renting certain land for grazing purposes and also applications or bids for renting the same land for agricultural purposes, an inspection of the land shall be made by the department at the earliest practical opportunity and a determination made, based on its findings, of the highest and best use which can be made of the land or portions thereof. Any lease of the land subsequent to the application or bids shall be such as to return to the state revenue commensurate with the highest and best use.

81-414. CHANGE IN TERMS OF LEASE. When land is leased for grazing purposes, and the lessee desires to cultivate any part of the land, he shall, before doing any such cultivation, make application to the department stating how much land he desires to cultivate and showing the location in the section of the land, and agree that for the remainder of the term of the lease the annual rental shall be at the rate of the original lease until such time as the first crop is harvested from the cultivated portion of the lease. At the time of the first harvest, the lease shall be at the original rate for that portion remaining as grazing land plus crop share rental for that portion cultivated. If any person cultivates lands leased for grazing purposes without first securing the right to do so under this section, the department shall either cancel the lease, subject to the appeal procedure provided in section 81-422, or require the lessee to pay twice the regular agricultural rental on the land so cultivated in addition to the grazing rental. The provisions of this section shall be incorporated in every lease.

81-415. CONDITIONS OF LEASES--CANCELLATION FOR VIOLATION OF RULES. It shall be a condition of all leases of agricultural or grazing state lands, (a) that, in the case of agricultural lands, the lessee shall observe the ordinary rules for good management of agricultural lands and shall handle the leased land with the view of maintaining its productivity and minimizing wind and soil erosion and noxious weeds, and planting crops with a view of securing the greatest yields of good quality, and (b) that, in the case of grazing lands, the lessee shall observe the ordinary rules for good range management and shall manipulate the numbers, class, distribution, and season of the range use and the handling, feeding, breeding, and marketing of grazing livestock with a view of securing the production of the maximum of livestock and livestock products, consistent with the conservation of the land resources and the perpetuation of its productivity, and to these ends the state land lease may not be abused by over-grazing.

(2) For the gross violation of any of these rules, the lease involved shall be canceled by the department, subject to the appeal procedure provided in section 81-422.

Section 81-419 allows for leases on state lands to be assigned and subleased. However, it is important to note that "if a lessee subleases state lands on terms less advantageous to the sublessee than the terms given by the state, or subleases state lands without filing a copy of the sublease with the department and without receiving its approval, the department shall cancel the lease subject to the appeal procedure provided in section 81-422."

Section 81-421 allows for compensating the former lessee for improvements and describes the conditions for doing so:

81-421. COMPENSATION FOR IMPROVEMENTS.

(1) A lessee of state lands may place upon the lands a reasonable amount of improvements directly related to conservation of the land or necessary for proper utilization of it. These

improvements may consist of fences, cultivation, and improvement of the land itself, irrigation ditches, sheds, wells, and reservoirs, and similar improvements. When another person becomes the lessee of such lands, he shall pay to the former lessee the reasonable value of these improvements at the time the new lessee takes possession. However, if any of the improvements consists of breaking (meaning the original plowing of the land), and one (1) year's crops have been raised on the land after the breaking, the compensation for the breaking may not exceed two dollars and fifty cents (\$2.50) per acre, and if two (2) or more crops have been raised on the land after the breaking, the breaking shall not be considered as an improvement to the land. If the former lessee and the new lessee are unable to agree on the reasonable value of the improvements, the value shall be ascertained and fixed as provided in section 81-421.1.

(2) In determining the value of these improvements, consideration shall be given to their original cost, their present condition, their suitability for the uses ordinarily made of the lands on which they are located, and to the general state of cultivation of the land, its productive capacity as affected by former use, and its condition with reference to the infestation of noxious weeds. Consideration shall be given to all actual improvements and to all known effects that the use and occupancy of the land have had upon its productive capacity and desirableness for the new lessee. The former lessee may, however, remove the movable improvements on the land and dispose of them to parties other than the lessee; if he fails to remove the improvements from the land within sixty (60) days from the date of the expiration of his lease, all of the improvements become the property of the state, unless the department for good cause grants additional time for their removal. Before a lease is issued to the new lessee he shall show that he has paid the former lessee the value of the improvements as agreed upon by them or as fixed and determined under section 81-421.1, or that he has offered to pay the value of the improvements as so fixed and determined, or that the former lessee elects to remove the improvements.

Section 81-422 sets forth the reasons for, and the procedure following the cancellation of a lease:

81-422. CANCELLATION OF LEASES.

(1) The department may cancel a lease for any of the following causes: fraud, misrepresentation, or concealment of facts relating to its issue, which if known would have prevented its issue in the form or to the party issued; using the land for other purposes than those authorized by the lease; and for any other cause which in the judgement of the department makes the cancellation of the lease necessary in order to do justice to all parties concerned and to protect the interests of the state. Such cancellation does not entitle the lessee to any refund of rentals paid or exemption from the payment of any rentals, penalties, or other compensation due the estate.

(2) When the department cancels a lease pursuant to this section or sections 81-414, 81-415, or 81-419, it shall immediately notify the lessee by certified mail of the cancellation and the reasons therefor. The date of cancellation is fifteen (15) days from the date the notice is received by the lessee. The lessee has fifteen (15) days after the receipt of the notice to file with the department a notice of appeal for a hearing before the board. If notice of appeal is filed, the lease remains in effect until the decision of the board. Within ten (10) days after notice of appeal has been filed, the department shall set the time and place of hearing and shall so notify the lessee. The board may, after ten (10) days' notice to the lessee, change the time and place of hearing.

(3) Under rules it adopts, the board shall conduct an open hearing to determine whether the lease should be reinstated. The burden of proof is on the lessee to show why the lease should not be canceled. If the lease is reinstated, all of the lessee's rights and privileges thereunder shall be preserved; if not, the land shall be open for releasing as provided by law. If the board finds that the terms of the lease have been violated, but in its judgment the violation is not serious enough to warrant cancellation, it may reinstate the lease and assess a penalty up to three (3) times the annual rental against the lessee.

Section 81-425 authorizes any lessee of a grazing or agricultural lease of state lands to pledge his lease or mortgage his leasehold interest. Copies of receipts of pledge agreements or mortgages must be filed with the Department.

The method and formula for calculating the minimum annual state grazing land rental is found in section 81-433:

81-433. FORMULA FOR FIXING ANNUAL RENTAL.

(1) In this section:

(a) "Animal unit" means one (1) cow, one (1) horse, five (5) sheep, or five (5) goats.

(b) "Animal-unit-month carrying capacity" means that amount of natural feed necessary for the complete subsistence of one (1) animal unit for one (1) month.

(2) The board shall establish the per annum rental rate per section of all grazing lands which are the property of the state upon the animal-unit-month basis as provided in this section.

(3) In fixing the minimum annual rental per section, the following formula shall be used:

The base rental shall be computed by multiplying fifty cents (50¢) plus three (3) times the average price per pound of beef cattle on the farm in Montana for the previous year times the animal-unit-month carrying capacity of the land.

(a) The minimum annual rental for grazing lands with an annual carrying capacity of more than fourteen (14) and less than twenty (20) animal units per section is the base rental.

(b) The minimum annual rental for grazing lands with an annual carrying capacity of more than nineteen (19) animal units per section is ten cents (10¢) more than the base rental.

(c) The minimum annual rental for grazing lands with an annual carrying capacity of less than fifteen (15) animal units per section is ten cents (10¢) less than the base rental.

(4) The carrying capacity of the land, to be used in the above formula, shall be in accordance with the determinations of the department made under section 81-404.

(5) The average price per pound of beef cattle on the farm in Montana shall be taken from statistics published by the United States Department of Agriculture current at the time of computation of the rental, or from other reliable sources current at such time.

A grazing fee "formula" based on beef prices was initiated in 1952. Prior to that year, fees had been based on land value. The present formula was adopted by the 1973 Legislature. From 1964 to 1973, the base rental had been thirty-two cents (32¢) plus two (2) times the average price per pound of beef. It has been a common practice to charge the minimum when no competitive bids are in effect.

Section 81-434 provides that conservation requirements necessary for the protection of grass or forage crops shall be incorporated into competitive bid leases, when rental prices are higher than that set by the formula.

The Board of Land Commissioners is authorized to exchange and sell state land when in the best interests of the state. Regarding exchanges, Section 81-307 states: "The board is authorized to exchange state land for private land provided that the private land is of equal or greater value than the state land and as closely as possible, equal in area. The board shall place priority on exchanges which result in consolidation of state lands in more compact bodies."

The power to decide when to hold land sales and what lands to sell lies with the Land Board, "as the best interests of the state may appear to require," as set forth in Section 81-907. This section states that "as a general rule no sale of state lands shall be held unless applications have been made for the purchase of lands within one (1) county by prospective purchasers representing at least twelve

(12) families." Other relevant regulations worth noting, concerning the sale of grazing lands, are as follows:

- 1) All sales are made only at public auction held at the county seats of the county in which the land is located.
- 2) No person or corporation is entitled to purchase more than one (1) section of state land; grazing lands may be listed not exceeding that size tract.
- 3) Lands are sold to the highest qualified bidder with the restrictions that:
 - a) No lands may be sold for less than the appraised value.
 - b) Lands principally valuable for grazing purposes may not be sold for less than five dollars (\$5) per acre.
 - c) The lessee of the land has a preference right to meet the high bid.
- 4) Terms of payment on sales: No less than 10 percent of the purchase price must be paid on the day of the sale. The balance is payable through a period of thirty-three (33) years on the amortization plan; the interest rate on the balance is set by the Board, but can be no less than five (5) percent per year. Payment may be made in full at any time before maturity by paying the balance on the principal and interest accrued up to date of payment.

- 5) The purchaser of state lands must, in addition to the land purchase price, make payments for any improvements on the land belonging to the lessee, unless the lessee desires to remove such improvements.

Cost sharing for improving state grazing land is provided for through the Resource Development Program. Chapter 24 of Title 81, R.C.M. 1947 allows for the development of state land resources, with Section 81-2401 setting forth this policy:

It is in the best interest and to the great advantage of the State of Montana to seek the highest development of state-owned lands in order that they might be placed in their highest and best use and thereby derive greater revenue for the support of the common schools, the university system and other institutions benefiting therefrom and that in so doing the economy of the local community as well as the state is benefited as a result of the impact of such development.

Section 81-2403 provides for a resource development account in the earmarked revenue fund to be used for investments in the improvement and development of state lands. The types of development to be considered are:

. . . those projects that will develop or conserve the various state land resources including: water, both surface and underground, grazing land, agricultural land and timber land to the benefit of the state. They may also include expenses necessary to perfect title to lands claimed by the state which are suitable for development and other expenses or costs which in the judgment of the board of land commissioners are desirable or necessary in order to develop or increase the value of the land or the revenue therefrom. Appropriations from the account shall be expended for no other purpose.

Since the enactment of the Resource Development Law (1967 Legislative Session), the following types of investment projects have been undertaken: land leveling, sprinkler irrigation, water spreading, irrigation wells, rip-rap, range renovation, surveys and inventories, sagebrush spraying, stockwells, and stockwater pipelines.

Land Board Policies

There are three land board policies concerning grazing land that have been adopted and which are in effect. It should be noted that when a new Land Board comes into existence, old policies remain in effect unless they are changed by the new Board, legislation, or court decisions.

The first policy concerns competitive bids. This policy came about through the court case of Thompson vs. Babcock, 147 Mont. 46. In the case the Montana Supreme Court ruled that the Land Board has the right to reject certain bids; but, that if the bid is within the range of the market values of the community, the procedures of 81-405, R.C.M. 1947 must be followed. The court ruled that the Board of Land Commissioners has considerable discretionary power when dealing with dispositions of interest; that the board should not speculate on short term benefits but should seek to secure a sustained income to the Trust. On March 9, 1966, two months after the case was decided, the Land Board adopted a policy that "the

Commissioner be authorized to hold hearings when appeals of competitive bids are made, in order to obtain findings of fact and conclusions for submission to the board for a decision."¹¹

The second policy has to do with the sales of state land. On June 14, 1967 the Land Board adopted a policy that state lands only be sold when said sale shows a clear cut advantage to the trust.

The criteria to be used in determining such advantage are as follows:¹²

- 1) The return from the sale of agricultural land when invested at the current rate, must yield at least double the present income.
- 2) Grazing land will only be sold when the land is so situated either as to size of tract or topography as to make future leasing difficult or when said sale will make possible a needed community or industrial development. In these cases sales will be considered only when the application contains a guaranteed bid of fair market value of the land which value when invested at the current rate of return will at least exceed three times the present rental.

¹¹Minutes, State Board of Land Commissioners. Vol. XIII, p. 350.
This policy has now been adopted into law through the passage of HB 526, 1977 Legislative Session.

¹²Ibid., p. 481.

Of significance is the fact that at the present time, and for nearly the last 6 years, the Land Board has had an unwritten policy of "no land sales" at all.

The third policy allows a rental waiver on lessee-financed range renovation. This policy was adopted April 17, 1972 and reads as follows:¹³

On those state lands where the lessee has filed a written request with the Commissioner stating he will invest his own time and money to renovate state grazing land, the Land Board may waive grazing rental during period of non-use not to exceed two years.

It is required that the plan be submitted to and approved by the Department prior to renovation. Rental guidelines for both partial and complete renovation were also adopted. Lessee financed renovation of range land is considered an "improvement" and is compensable under Section 81-421.

The Administrative System

Administrative Practices

The responsibilities for administration of state grazing land, along with the 536,700 acres of agricultural land, lies with the Land Administration Division. The management structure currently consists of the Administrator, the Chief of the Field Bureau, and five (5)

¹³Minutes, State Board of Land Commissioners. Vol. XV, p. 120.

fieldmen. Rental billing and collection is handled by the Centralized Services Division.

The first administrative practice to be described is the classification of state grazing lands. These lands are categorized as Class 1 - lands which are principally valuable for grazing purposes. The criteria for classifying land as such are as follows:

- 1) The land is Class IV to Class VIII as determined by the Soil Conservation Service land capability classifications
or
- 2) Even if Class III or better, the land is not deemed suitable by the Department, for crop production. The following are the Department's minimum requirements for land breaking:
 - a) Soils 20 inches or more in depth over shale, bedrock, or sand and gravel.
 - b) Not over a 9 percent slope.
 - c) Must be sandy loam through clay loam textures.
 - d) Not over 35 percent coarse fragments throughout profile.
 - e) Water table must be at least 20 inches below the surface during the growing season.
 - f) Saline or alkali condition no more than slight.
 - g) No saline-seep potential.
 - h) Annual precipitation must be at least 10 inches.
 - i) Frost free period (32° F.) of 90 or more days.

- j) Soils shall not be subject to flooding or surface ponding during the growing season.
 - k) Soils with wind erosion potential shall be put in strips of not more than 10 rods. As the hazard increases, the maximum width or strips will be decreased as determined by the department.
- 3) Or if no applications with higher bids for other acceptable uses are received prior to renewal of the lease.

Appraising state grazing land to determine carrying capacity is probably the most important practice related to grazing land administration. Appraisals are conducted usually one (1) year prior to renewal of the leases. A field evaluation is completed for each tract of land in each lease. The number of lease renewals per year varies considerably; there is a sequence of five (5) relatively small years (range of 121-402¹⁴ lease renewals) followed by five (5) big years (range of 1140-1758 lease renewals). In the years of the large number of lease renewals, an additional fieldman is usually employed to handle the increased appraising responsibilities.¹⁵

¹⁴These lease renewal figures include the total number of grazing and agricultural leases.

¹⁵SB 261, passed by the 1977 Legislature, will allow the Department to issue 4, 5, and 6 year leases during the 5-year period 1979-1983, in order to achieve uniformity in the number of lease renewals per year.

Range appraisal methods are adopted from those recommended by the USDA - Soil Conservation Service. The fieldmen make use of the "Technicians' Guides to Range Sites, Condition Classes and Recommended Stocking Rates in Soil Conservation Districts of Montana." These guides give an animal-unit-month per acre rating based on species and quantity of species, range soil groups, and precipitation zones. This rating can be modified if warranted by other factors, namely water and shelter. When a tract has available stockwater, the capacity rating is increased by one (1) animal unit per section. This same increase of one (1) animal unit applies to tracts with adequate available shelter (usually timber shelter). Also for Resource Development projects involving development of stockwater such as wells, springs, etc., the carrying capacity rating is increased by one (1) animal unit per section, resulting in an increased rental for the tract.

The Department tries to maintain state grazing land in better than "fair" condition. If a fair range condition or less is approached and is the result of overgrazing or poor management, the carrying capacity rating will not be reduced. When overgrazing is determined, the lessee is contacted and required to adopt and implement a plan for renovation. The Department has the authority to cancel the lease, if necessary. Past reports indicate that the heaviest use of state land

is during those years near the time the leases are to be reappraised. This may be so it won't look too good to the neighbors for competitive bids nor for the appraisal.¹⁶

Lessees of state grazing lands are allowed to participate freely in federal cost-sharing programs. In many cases the Department, through the Resource Development Fund, cost shares in conjunction with Federal programs. Lessees are also able to incorporate state grazing lands into cooperative management plans such as BLM allotments, State Grazing Districts, grazing associations, etc. In such cases, the district or association usually becomes the "lessee".

Rentals

The AUM rental is determined through a statutory formula.

As previously stated in Section 81-433, it reads as follows:

The base rental shall be computed by multiplying fifty cents (50¢) plus three (3) times the average price per pound of beef cattle on the farm in Montana for the previous year times the animal-unit-month carrying capacity of the land.

In calculating this rate, there are some administrative practices that should be mentioned. The data used to determine the "average price" are supplied to the Department by the Statistical Reporting Service. These figures cover the period from September of one year through August of the next year, and are then used to

¹⁶Communication with Department field personnel.

calculate rentals due on March 1 the following spring. For continuing leases, this means a lag of six (6) months between the calculation of the AUM rate and the rental due date. In other words, "the average price . . . for the previous year" is not actually used but rather, the average price for a year's period ending six (6) months prior to the rental due date. The main necessity for this lag has been the preparation of lease applications and bid forms (manually prepared) which are usually mailed out in late November to prospective lessees. Since the bid forms must state the minimum price, the rental calculations must be completed prior to their preparation.

With regard to "average price per pound of beef cattle on the farm," the average prices used represent a combined average price for both feeder and fattened cattle. According to the SRS, the statistical base for either feeder or fattened cattle alone is too low to produce a reliable figure.¹⁷ Also the average price data used is weighted by monthly cattle movement data which was determined for the 1968-1970 period using brand inspection records of the State Department of Agriculture. The project to monitor cattle movements by this means has been discontinued.

Another Department policy involving rentals concerns the harvest

¹⁷Memorandum, Robert Duncan to Commissioner Ted Schwinden, November 13, 1974, p. 2.

harvest of grass on grazing land. Presently, a lessee must pay the AUM rental plus one-fourth crop share on any grass that is cut. The crop-share payment is required only in those years that a grass "crop" is taken, which is usually those years of above average precipitation. If the lessee chooses to graze more cattle instead, only the regular AUM rental applies. Whether this results in resource abuse is not known. This irregular "double payment" policy is specifically addressed in Chapter 7.

Chapter 4

BARRIERS TO ACHIEVING STATUTORY OBLIGATIONS

A major obstacle to sound policy development has been the inconsistency between the Enabling Act and the Revised Codes of Montana concerning the purpose of state school lands, and various resulting interpretations. A consistent administrative program requires a precise statement of purpose, acceptance of that purpose, and elimination of ambiguities.

Since the Enabling Act grant of 1889, the Montana Supreme Court has held that the lands granted by Congress for the support of common schools and the funds established from the proceeds and income of those lands constitute a trust.¹⁸ The Court has likewise adopted a consistent view that the Enabling Act terms are to be strictly interpreted and adhered to.

Conflicts have arisen when interest groups and the legislature through statutory amendments have tended to treat school trust lands as if all the rights in those lands belonged to the State of Montana. If this were the case, then the legislature would have the authority to specify land uses without full compensation to the fund such as

¹⁸Griffing, Virginia G. "The Significance of the Trust Concept in the Administration and Management of Montana's School Lands." Unpublished paper, the School of Law, the University of Montana, Missoula, MT, 1975, p. 47.

for general educational purposes, recreation, preservation, etc.¹⁹ Such treatment is not consistent with the trust concept. The State does not have proprietary rights in its lands as does the Federal Government in its public lands. Virginia Griffing in "The Significance of the Trust Concept in the Management and Administration of Montana School Lands" describes the States' rights as follows:

The State..., has only the legal title to the granted lands as trustee of a charitable trust. The equitable title is in the beneficiaries of the trust, which are, according to the Enabling Act, the common schools of the state. The Montana constitutional language regarding a "trust for the people" conveys the same meaning in this context... - that the beneficiaries of the trust are the people of the state who may use the benefits of the trust for the support of common schools.²⁰

In 1927, the Montana legislature adopted the statute declaring the guiding rule and principle in administering state lands and trust funds is that they are "held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state...". In 1969, the added multiple-use concept clause called for "the management of all the various resources of the state lands so that they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust." (emphasis added.) Griffing states: "Insofar as these statutory directives are acted upon in a way that

¹⁹ Ibid., P. 48.

²⁰ Ibid., p. 48.

would result in the diversion of either the funds or the lands from the purpose of producing income for the common schools, the state opens itself to liability to suit for breach of trust or breach of contract by any person properly in a position to enforce the trust or the contract."²¹

The multiple-use concept of school lands can be implemented within the requirements that each use that has value to the land compensates the school fund for that value. A use may not be donated by the state to private persons, other state agencies, or to the people as a whole.²²

More recently, the Montana Natural Areas Act of 1975 probably contains the most inconsistencies with the Enabling Act. It is grounded on the assumption that the legislature may create additional purposes for the trust, either those which are generally educational, or others for the well-being of the people in general.²³ It allows for natural areas to be designated on state land or state owned trust land to be traded for natural areas on federal, county or private land, without compensation to the school trust fund. Because of the subsequent controversies since its enactment, the Department postponed

²¹Ibid., p. 49.

²²Ibid.

²³Ibid., p. 50.

making any formal proposals to designate State Natural Areas, and sought the Attorney General's legal opinion on the question regarding the need to compensate the School Trust Fund.

On July 7, 1976 the Attorney General issued the opinion, which supports the contentions of Griffing and is based on several pertinent court cases.²⁴ It reads as follows:

So that the state will not commit a breach of trust under the Enabling Act and Montana Constitution, the state must actually compensate its school trust in money for the full appraised value of any school trust lands designated as or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974. Such compensation can only be avoided by securing the consent of Congress.

Of importance is a paragraph in the letter containing the opinion, which emphasizes trust objectives:

While the Enabling Act does not say in so many words that the state is under a duty to sell or lease school trust lands, it is elementary that this trust be administered so as to secure the largest measure of legitimate advantage to the beneficiary. Rider, 94 Mont. at 307. As a practical matter this means the state must do something to generate and sustain income from school trust lands whenever possible. State ex rel. Ebke v. Board of Educational Lands and Funds, 47 N.W. 2d 520, 523 (Neb. 1957); Lassen v. Arizona, *infra*, 385 U.S. at 463. The state's discretion is not whether but how to seek gain from school lands for best advantage to the trust. See Thompson v. Babcock, 147 Mont. 46, 409 P. 2d 808 (1966).

We are now in a position to summarize the statutory objectives of state land administration:

²⁴36 Opinions of the Attorney General, No. 92, (1976).

1. The Board shall administer the trust to secure the largest measure of legitimate and reasonable advantage to the beneficiaries of the trust.
2. The "full market value" concept shall guide all dispositions of interests in state school trust lands.
3. Long term productivity shall not be impaired; the Board shall seek to secure a sustained income to the Trust.

For purposes of this thesis and for the development of a consistent administrative policy, an assumption is made that these objectives are correct and documented as such. It is upon these objectives that the framework for a sound policy can and must be based. An additional assumption to be made in developing administrative policy for state grazing land is that the state, as trustee, will seek to avert risk.²⁵

Current Administration

Classification-Reclassification

The classification-reclassification of state lands (Section 81-302) is a major responsibility charged to the Department by the 1974 legislature. It involves classifying and leasing land in the class "which best accomplishes the powers and duties of the state board of land commissioners as specified in section 81-103." It also

²⁵Two U.S. Supreme Court decisions support this assumption: Ervien v. U.S., 251 U.S. 41, 64 L. Ed. 2d 128 (1919); Lassen v. Arizona, 385 U.S. 458 (1967).

emphasizes multiple-use management. In being consistent with the "objectives", this system should seek to secure the largest measure of legitimate and reasonable advantage to the beneficiaries of the trust; in other words, to seek the highest and best uses which compensate the trust.

Implementation of this system has been slow and problematic. Of concern has been just how much control and influence the Department should exert in seeking optimum land uses. Initial attempts of planning for the implementation called for extensive data collections and analyses of land characteristics in order to determine best use. What was missing from these initial attempts and of major importance, was the realization of the significance of demand. A tract of land cannot be leased for a particular land use unless someone is willing to lease it for that use. Highest and best use is highly dependent upon the various use demands, as would be indicated through a bidding process. The Attorney General's opinion on natural areas and monetary compensation to the Trust strengthens the bidding process as a viable solution to land use determination. Because the general public is not the beneficiary of the school trust, welfare considerations and non-monetary satisfactions are not priority items. Maximizing long term returns to the beneficiaries is of priority.

Stimulating demand for state land would seem to be an effective mode of achieving administrative objectives. A preliminary draft of

