

The National Agricultural  
Law Center



University of Arkansas · School of Law · Division of Agriculture  
NatAgLaw@uark.edu · (479) 575-7646

---

## **An Agricultural Law Research Article**

# **Going Once, Going Twice, Sold: Implications for Leasing State Trust Lands to Environmental Organizations and Other High Bidders**

by

Stacey Allison

Originally published in PUBLIC LAND & RESOURCES LAW REVIEW  
25 PUB. LAND & RESOURCES L. REV. 39 (2004)

[www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org)

# Articles

## Going Once, Going Twice, Sold: Implications for Leasing State Trust Lands to Environmental Organizations and Other High Bidders

Stacey Allison \*

### I. INTRODUCTION

Natural resource extraction in the form of livestock grazing, logging and mining has shaped much of the history of the American West.<sup>1</sup> While mining and timber industries have declined as a result of lower prices and reduced availability of resources on public lands, grazing has maintained its place on the western frontier. As a result, three base uses currently exist for open lands in the West: livestock production, habitat protection, and ex-urban development.<sup>2</sup> Although habitat protection and development can and do bring controversy to the West, grazing is currently at the forefront of public land debates.

Because much of the West is arid, ranchers rely on expansive amounts of public rangeland to graze their cattle.<sup>3</sup> Without federal and state grazing leases, many ranchers would be unable to sustain their operations.<sup>4</sup> Furthermore, studies show ranchers with public land grazing leases obtain higher net returns on their operations than those without leases.<sup>5</sup> Because public lands are a critical component to successful large scale ranching, the availability of public lands will shape the future of the grazing industry.

Each year, the U.S. and state governments provide public land grazing permits on federal and state land to more than 20,000 cattle ranchers.<sup>6</sup> Although the number of federal permits is impressive, state grazing leases comprise more than 90% of surface state land uses in 18 of the 22 states with trust land.<sup>7</sup> While the cost of these leases varies between states, they

---

\* J.D. expected May of 2005 University of Montana School of Law. The author would like to thank John Horwich and Andre Gurr for their help with this manuscript.

1. Jeremy D. Maestas, Richard L. Knight & Wendell C. Gilbert, *Biodiversity and Land-Use Change in the American Mountain West*, 91 *The Geographical Review* 509, 510 (2001).

2. *Id.* at 510.

3. Martha J. Sullins et al. *Lay of the Land: Ranch Land and Ranching*, in *Ranching West of the 100<sup>th</sup> Meridian: Culture, Ecology, and Economics* 25-26 (Richard L. Knight, Wendell C. Gilbert & Ed Marston, eds., Island Press 2002).

4. *Id.* at 26.

5. *Id.*

6. L. Allen Torell et al., Presented Paper, *Impacts of Grazing Policy on Grazing Practices and Ranch Income* (Salt Lake City, Utah, Aug. 2-5, 1998).

7. Jon A. Souder & Sally K. Fairfax, *State Trust Lands: History, Management, and Sustainable Use* 101 (University Press of Kansas 1996).

are relatively inexpensive, often costing ranchers less than two dollars per animal unit month (the amount of forage one cow consumes in one month's time).<sup>8</sup>

Recently, environmental groups and natural resource managers began monitoring public land grazing trends as part of an effort to improve grazing land quality. Some of these groups oppose all manner of public grazing, and allege that public lands used for grazing are often poorly managed and depleted in natural resources.<sup>9</sup> Others support a less hard-line approach, and advocate better management of public lands and monitoring of lease users. Although federal legislation such as the Taylor Grazing Act (TGA),<sup>10</sup> the Endangered Species Act (ESA),<sup>11</sup> and the National Environmental Protection Act (NEPA)<sup>12</sup> provides for the way these lands are managed, poor monitoring can lead to destruction of wildlife habitat and range health.<sup>13</sup>

Opponents of public land grazing promote a variety of methods to reform the grazing industry. The most obvious solution, implementing better management and monitoring strategies, has had little success due to the costs required to implement the strategies and monitor the results.<sup>14</sup> Others use scholarly publications in an attempt to convince legislators of the evils of grazing.<sup>15</sup> Yet another trend in grazing reform is the voluntary permit "buy-out." Currently, Bills are before both the Arizona State Legislature and the U.S. Congress that would allow the government to buyout permits from grazers who wish to voluntarily relinquish their permits in exchange for monetary compensation. Although this proposal is in theory a win/win situation for all involved, there may be serious implications and consequences if the government "buys" property it already owns.<sup>16</sup>

### A. *Litigation as Grazing Reform*

In addition to improved management, publications and permit buyout programs, grazing opponents advocate numerous litigation strategies to battle consumptive uses of public land. One such group, Forest Guardians, routinely sues federal and state agencies in an attempt to force compliance with the ESA, NEPA, and state legislation.<sup>17</sup> Forest Guardians' lawsuits allege a multitude of public land wrongdoings, from agency and individual

---

8. *Id.*

9. See e.g. Debra L. Donahue, *The Western Range Revisited: Removing Livestock from Public Lands to Conserve Native Biodiversity* 118 (University of Oklahoma Press, 1999).

10. 43 U.S.C. § 315(a) (1934).

11. 16 U.S.C. § 1531 (1973).

12. 42 U.S.C. § 4321-4347 (1969).

13. Debra L. Donahue, *supra* n. 9, at 118.

14. *Id.* at 138.

15. See e.g. Debra L. Donahue, *supra* n. 9.

16. While this issue presents an interesting topic for analysis, it is beyond the scope of this article.

17. See generally *Forest Guardians v. U.S. Forest Service*, 2001 WL 1708775 (D.N.M. Aug. 9, 2001); *Forest Guardians v. U.S. Forest Service*, 180 F. Supp. 2d 1273 (D.N.M. 2001); *Forest Guardians v. Babbit*, 174 F.3d 1178 (D.N.M. 1999).

permit holder non-compliance, to flawed U.S.D.A. Forest Service (USFS) and Bureau of Land Management (BLM) policies.<sup>18</sup> For example, Forest Guardians and other environmental groups recently sued USFS for failing to reform the federal land grazing fee because the agency knew the mathematical formula used to calculate the fee was flawed.<sup>19</sup>

Forest Guardians claims their lawsuits have “stopped dozens of timber sales, protected ancient forests, eliminated livestock grazing from hundreds of river miles and provided first-time instream flows to the over-appropriated Rio Grande.”<sup>20</sup> While Forest Guardians alleges their courtroom tactics have improved wildlife and range health, it would ultimately like to see an end to public land grazing.<sup>21</sup> Toward that end, Forest Guardians obtain grazing permits on public state land and leave the land fallow to restore ecosystem health. Although the TGA requires that federal grazing lands be used solely for grazing,<sup>22</sup> some states allow conservation uses on state-owned grazing lands.<sup>23</sup> As a result, Forest Guardians currently holds four separate grazing leases—three in New Mexico and one in Arizona.<sup>24</sup>

The road to obtaining grazing leases has not been easy. When Forest Guardians’ bids are rejected by state departments, it brings suit, alleging the respective department violated its fiduciary duty to the state schools by rejecting bids that are substantially higher than those offered by grazers.<sup>25</sup> Forest Guardians is thus dependent on the state judiciary to validate its allegations and allow it to outbid public land grazers for state trust land. Recently, in a challenge that went to the Arizona Supreme Court, Forest Guardians were successful in such a pursuit.<sup>26</sup> The Arizona Supreme Court held the state must consider *all* bids on state trust land leases even if the applicants have no intention of using the land in accordance with the its identified use.<sup>27</sup> The implications of such a court holding are immense—any person or organization who wishes to control state land for any reason can potentially do so. In addition, Forest Guardians have potentially created a new method for eliminating grazing on state lands.

18. Forest Guardians, *Your Public Lands: Grazed to the Bone* <<http://www.fguardians.org/graz.html>> (accessed March 14, 2003).

19. *Environmental Coalition Sues U.S. Forest Service over Grazing Fees*, 122 *Frontline* 2 (Mar. 13, 2003). Note: *Frontline* is the newsletter of the Forest Guardians.

20. John C. Horning & Doyne Farmer, *Thirteen Years of Uncompromising Advocacy*, True to Our Nature - Forest Guardians Annual Report 2-3 (2001) (available at <<http://www.fguardians.org/reports/fg2001-annualreport.pdf>>).

21. *Id.*

22. 43 U.S.C. § 315(a).

23. Forest Guardians has grazing leases on New Mexico state lands. Petition for Review at 3, *Forest Guardians*, 34 P.3d 364 (2001).

24. Personal communication, John Horning, Director, Forest Guardians (October 2003).

25. See e.g. *Forest Guardians v. Wells*, 34 P.3d 364 (2001).

26. *Id.*

27. *Id.*

### B. Purpose and Scope

In this paper, I argue the Arizona Supreme Court erroneously decided the *Forest Guardians* case and provide some insight into the potential drawbacks accompanying the decision. The strategies used by the Forest Guardians and other environmental groups in obtaining grazing leases are often inconsistent with state and federal law. Paramount to the Forest Guardians' litigation strategy is the state's fiduciary duty regarding the management of state trust lands. However, the definition of "highest and best" bid is not necessarily the bid offering the most amount of money. Although what is "best" for a trust often appears to be the highest immediate financial gain, ignoring long-term effects of leasing to the highest bidder could be costly.

Although this paper is specific to Arizona laws and policies, it has a broader relevance. The grazing industry is currently facing substantial changes, and court decisions will play a major role in shaping its future. In an attempt to influence the grazing industry, many environmental organizations are moving to legislation and advocating for broad interpretations of grazing statutes in order to lease grazing lands and/or buy out permit holders. Although the federal government and most state governments have refused to lease public land for uses other than those originally intended, environmental organizations will likely challenge the grazing policies of other states. Arizona's laws have influenced the management of state trust lands in other states for decades.<sup>28</sup> If Arizona's recent decision regarding state trust lands is adopted, it will likely effect public land use, the grazing industry and the lifestyle and ecological health of the West.

This paper is divided into five major sections. The next section discusses the history and origin of Arizona's school trust lands and describes some of the overarching rules that apply to these lands. Section three fully details Arizona's duties in managing its school trust lands and overviews the laws and cases that have helped shape the current management scheme. Section four uses the *Forest Guardians* case as a microcosm for looking into the manner in which states lease their school trust lands. Finally, section five argues the Arizona Supreme Court decided the *Forest Guardians* case erroneously. It also summarizes the major points, discusses long range financial impacts in managing school trust lands and provides an outlook on the future of public lands grazing.

---

28. See generally Souder & Fairfax, *supra*, n. 7.

## II. STATE TRUST LANDS

### A. History of the State Trust Land Program

The General Land Ordinance of 1785 was the first piece of legislation that allocated federal land grants to states in the western territories.<sup>29</sup> The act, which authorized the sale and survey of western lands, declared that section number 16 in every township would be preserved for the township and held in trust for the state schools.<sup>30</sup> Two years later, Congress passed the Northwest Ordinance, which was designed to be a guideline for territories aspiring to enter the Union.<sup>31</sup> The Northwest Ordinance required a territory desiring statehood to petition for admittance to the Union once its population reached 60,000 and authorized Congress to pass an enabling act that would allow the territory to create a constitution.<sup>32</sup> After the constitution was drafted, it had to be approved by both the territory and Congress. At that point, the new state would become an equal part of the Union.<sup>33</sup>

Between 1785 and 1803, none of the 15 states that entered the Union received state trust lands upon admittance.<sup>34</sup> In 1803, Ohio became the first state to receive trust lands in accordance with the General Land Ordinance of 1785.<sup>35</sup> Over the next 100 years, the majority of the Union's current states entered the Union and received trust lands in accordance with each state's enabling act and the circumstances surrounding its path to statehood. As a result of differing legislation and a state's previous status, only 29 of the 50 states received state trust lands upon accession.<sup>36</sup> For example, Texas entered the Nation as a former independent republic and thus had no federal lands for conveyance to the state.<sup>37</sup>

### B. Management of State Trust Lands

State trust lands are lands owned by a state and are to be held in trust for that state's schools.<sup>38</sup> Although early enabling acts did not refer to trust principles, each of the 22 states with state trust lands currently manages its lands as if held in trust for the state schools.<sup>39</sup> However, this was not always the case. Trust principles relating to state trust lands did not clearly arise

---

29. *Id.* at 18.

30. Land Ordinance of 1785.

31. Souder & Fairfax, *supra* n. 7, at 18.

32. Northwest Ordinance of 1787, art. 5.

33. *Id.*

34. Souder & Fairfax, *supra* n. 7, at 19.

35. *Id.* at 22.

36. *Id.* at 20-21.

37. *Id.* at 22.

38. Sally K. Fairfax & Andrea Issod, *Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases*, 33 *Envtl. L.* 341, 347 (Spring 2003).

39. Souder & Fairfax, *supra* n. 7, at 33.

until 1967,<sup>40</sup> when the U.S. Supreme Court decided *Lassen v. Arizona ex rel. Arizona Highway Department*.<sup>41</sup> *Lassen* involved an appeal in which the Arizona Supreme Court held the state land Commissioner had no authority to adopt a rule that required the state highway department to compensate the state land department for rights of way over and on trust lands. The Supreme Court reversed, maintaining the Arizona-New Mexico Enabling Act of 1910 (Enabling Act) “unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given.”<sup>42</sup> This holding quickly radiated to all of the western states because the Arizona-New Mexico Enabling Act provides the most definitive illustrations on the management of state trust lands.<sup>43</sup> As a result, Arizona’s management of its trust lands is a strong indication of the method by which other states manage their trust lands.

### C. Trust Principles Relating to the State trust Lands

Under *Lassen*, state trust lands must be managed in accordance with trust principles. Thus, it is necessary to provide a brief insight into those principles. A trust is a “fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.”<sup>44</sup> The trustee holds the property in trust for the beneficiary, the entity or person who benefits from the property.<sup>45</sup> The relationship between the trustee and the beneficiary is fiduciary. The trustee has a duty to “act with strict honesty and candor and solely in the interest of the beneficiary.”<sup>46</sup> Following these principles, the state of Arizona instructs the State Land Department (Department), acting through the Land Commissioner (Commissioner), to manage, lease, and sell state trust lands in the best interest of the state’s schools.<sup>47</sup> The next section provides further insight into how Arizona manages its state trust lands.

---

40. *Id.*

41. 385 U.S. 458 (1967).

42. *Lassen*, 385 U.S. at 466.

43. Souder & Fairfax, *supra* n. 7, at 34-35.

44. Restatement (Second) of Trusts § 2 (1959).

45. Restatement (Second) of Trusts § 3.

46. G.T. Bogert, *Trusts* (1987), 1-2.

47. Ariz. Rev. Stat. §§ 37-102, 37-132 (2001).

## III. HISTORY OF ARIZONA TRUST LAND LAW

A. *Arizona-New Mexico Enabling Act and the Arizona Constitution*

The Enabling Act authorized New Mexico and Arizona to develop state constitutions and assured statehood for the two territories.<sup>48</sup> This legislation also granted to the state of Arizona almost 10 million acres of land to be held in trust for the state's schools.<sup>49</sup> Section 24 of the Enabling Act granted sections 16, 36, 2 and 32 in every township to the state of Arizona "for the support of the common schools."<sup>50</sup> Although only one or two sections in each township were historically granted to new states, Arizona and New Mexico received four sections in each township, providing the two states with more state trust land acres than any other state in the Union.<sup>51</sup> Two years later, in 1912, Arizona became a state.<sup>52</sup>

In addition to granting land to the states, the Enabling Act required the lands be held in trust by the state.<sup>53</sup> The Enabling Act also mandated that state trust lands be sold or leased to the "highest and best bidder" and for grazing, agricultural, commercial, and homesite purposes.<sup>54</sup> Thus, the federal legislation enacted in relation to Arizona's ascension to statehood provided mandatory guidelines for the state to follow in regard to managing its state trust lands. As a result, any violation of these guidelines should constitute a federal question for the courts.

If inconsistent with Arizona's Constitution on the subject of granted lands, Arizona courts have consistently found the Enabling Act to be the supreme law of the State of Arizona.<sup>55</sup> As Arizona's Constitution states:

The state of Arizona and its people hereby consent to all and singular the provisions of the enabling act approved June 20, 1910, concerning the lands thereby granted or confirmed to the state, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in the aforesaid enabling act provided.<sup>56</sup>

---

48. Act of June 20, 1910, Pub. L. 219 (c. 310), 36 Stat. 557, 568-579 (1910).

49. *Id.*

50. *Id.*

51. Souder & Fairfax, *supra* n. 7, at 21.

52. *Id.*

53. Pub. L. 219 § 28

54. Pub. L. 219 § 28(1)

55. See e.g. *Murphy v. State*, 181 P.2d 336 (Ariz. 1947); *Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981); *Kadish v. Ariz. State Land Dept.*, 747 P.2d 1183 (Ariz. 1987).

56. Ariz. Const. art. 20 § 12; see also *Murphy*, 181 P.2d at 342.

Thus, without Congressional approval, the state of Arizona may not act outside the provisions of the Enabling Act.<sup>57</sup> As stated in *Kadish v. Arizona State Land Department*, “[Congress] intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust. The duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager.”<sup>58</sup>

Article 10 of the Arizona Constitution reads almost verbatim to the Enabling Act and mandates that state lands be held in trust and managed in accordance with the Enabling Act.<sup>59</sup> Any disposition of the state trust lands in any manner contrary to the Enabling Act will be considered a breach of trust under the constitution.<sup>60</sup> The Constitution gives Arizona authority to lease land under the same categories as the Enabling Act: grazing, agricultural, commercial, and homesite.<sup>61</sup> It also requires the state to lease or sell lands to the “highest and best bidder.”<sup>62</sup> As such, the Arizona Constitution and the Enabling Act are harmonious and it would seem few issues should arise as to the management of Arizona state trust lands.

### B. Arizona Statutory Law

To further clarify the goals of the Enabling Act and the Arizona Constitution, the Arizona Legislature has implemented guidelines for how the state should manage its state trust lands. In Arizona, state land is “any land owned or held in trust, or otherwise, by the state, including leased school or university land.”<sup>63</sup> As mentioned, the Department, through the guidance of the Commissioner and monitored by the governor, is charged with the task of administering trust lands for the state.<sup>64</sup> The statutes divide the leaseable trust lands into four classifications: agricultural, grazing, homesite, and commercial.<sup>65</sup> No other categories are allowed. Grazing lands are defined as “lands which can be used only for the ranging of livestock.”<sup>66</sup>

The Commissioner may not lease state trust lands for any purpose other than the land’s designation, and “no lessee shall use lands leased to him except for the purpose for which the lands are leased.”<sup>67</sup> However, the Commissioner is permitted to “authorize non-use for part or all of the grazing use upon request of the lessee at least sixty days prior to the beginning of the billing date.”<sup>68</sup> While the scope of this section remains unclear, the

---

57. Ariz. Const. art. 20 § 12; *Murphy*, 181 P.2d at 345.

58. *Kadish*, 747 P.2d at 1186.

59. Ariz. Const. art. 10.

60. *Id.* at § 2.

61. *Id.* at § 3(1).

62. *Id.* at § 3.

63. Ariz. Rev. Stat. § 37-101(17).

64. Ariz. Rev. Stat. §§ 37-102, 37-132.

65. Ariz. Rev. Stat. § 37-281(A).

66. Ariz. Rev. Stat. § 37-101(7).

67. Ariz. Rev. Stat. § 37-281(D).

68. Ariz. Rev. Stat. § 37-285(H).

Commissioner is *required* to “withdraw state land from surface or subsurface sales or lease applications if the Commissioner deems it to be in the best interest of the trust.”<sup>69</sup> In addition, the Commissioner has the authority to designate trust land suitable for conservation purposes in specific areas of the state.<sup>70</sup> Accordingly, the Commissioner is responsible for the health of state trust land and must ensure it remains a viable commodity for the state trust in the future.

### C. Arizona Case Law

The Arizona Supreme Court has had some opportunity to discuss the state’s fiduciary duty in managing its state trust lands.<sup>71</sup> Although Arizona’s statutory and case law is clear regarding land classifications and the Commissioner’s duties, it is less clear on two issues: whether the Enabling Act or the Arizona Constitution is the controlling authority for state trust land conflicts, and the meaning of “best” in terms of bids for state trust lands.

#### 1. Interpretation of the Enabling Act

In resolving state trust land conflicts, two important Arizona cases looked to the Enabling Act for controlling authority instead of the Arizona Constitution. In *Kadish*, the court held the restrictions placed on the Department are in place to ensure the state trust is managed in the best manner possible, and concluded that Congress intended the Enabling Act to go beyond the power of the state government.<sup>72</sup> *Kadish* involved a suit brought by taxpayers to challenge the Department’s decision to lease minerals on state trust lands at a flat rate lower than the appraised value of the leases.<sup>73</sup> The court held the Department violated the state’s Enabling Act and Constitution, and that Congress “intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common state trust. The duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager.”<sup>74</sup> Thus, *Kadish* set a standard for the leasing of state trust lands and expressly placed the fiduciary duty foremost in accepting lease applications.

A second landmark case that looked to the Enabling Act for guidance in resolving a conflict concerning the sale of state trust lands was *Gladden Farms, Inc. v. Arizona*, which dealt with a corporation’s desire to void a sale of state trust lands because the Department did not sell the land at pub-

---

69. Ariz. Rev. Stat. § 37-132(A)(11).

70. Ariz. Rev. Stat. § 37-312(A).

71. See generally *Kadish*, 747 P.2d 1183; *Jeffries v. Hassell*, 3 P.3d 1071 (Ariz. 1999); *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prod., Inc.*, 807 P.2d 1119 (Ariz. 1990); *Ariz. Highway Dept.*, 407 P.2d 747.

72. 747 P.2d at 1185.

73. 747 P.2d at 1184-1185.

74. 747 P.2d at 1186.

lic auction.<sup>75</sup> There, the Arizona Supreme Court expressly held that the Enabling Act is “superior to the Constitution of the State of Arizona” and cannot be changed without an act of Congress.<sup>76</sup> The court concluded that because the Department did not sell the land at public auction, as the statute provided, its fiduciary duty to the school had been violated.<sup>77</sup> “We do not believe that the sale without auction and bid assures the ‘highest and best’ price that the Enabling Act requires.”<sup>78</sup> Thus, the Enabling Act’s place in Arizona law was confirmed.

The only case in which the Supreme Court looks to the Arizona Constitution as controlling authority over the Enabling Act is when the Enabling Act is found to be ambiguous or silent on an issue.<sup>79</sup> In *Deer Valley*, the Arizona Supreme Court found the controlling authority to be the Arizona Constitution because the Court did not agree with the construction of the Enabling Act in *Lassen*.<sup>80</sup> Although *Lassen* interpreted the Enabling Act to mean condemnation was an acceptable way to dispose of state trust lands, the court in *Deer Valley* looked to almost identical language in the Arizona Constitution and held the state did not allow it.<sup>81</sup> While *Deer Valley* seems to support the proposition that the Arizona Constitution controls trust land issues, it is important to remember that only when there is a disagreement as to interpretation should the Arizona Constitution control, and even then, the Constitution should be read in conjunction with the Enabling Act.<sup>82</sup>

## 2. Definition of the “Best” bid

Two other cases attempt to define the meaning of “highest and best” in relation to the trustee’s fiduciary duty. As mentioned, the Enabling Act, the Arizona Constitution, and state statutory law require trust lands to be leased to the “highest and best” bidder. Although the meaning of “highest” in this context is clear, there has been much debate over the meaning of “best.” In *Jeffries v. Hassell*, taxpayers brought suit against the state alleging the Department violated its fiduciary duty when it failed to maximize revenue from the state’s trust grazing lands.<sup>83</sup> The court concluded that summary judgment for the taxpayers was improper, and defined the “highest and best” requirement for acceptance of lease bids. While “highest” bid is simply the bid that promises the most money, what is the “best” bid presents a question of law and fact. The court maintained the Commissioner has con-

---

75. 633 P.2d 325, 327 (Ariz. 1981).

76. *Id.* at 327.

77. *Id.* at 330.

78. *Id.*

79. See *Deer Valley Unified School Dist. No. 97 of Maricopa Co. v. Superior Ct. of the state of Ariz., in and for the Co. of Maricopa*, 760 P.2d 537 (Ariz. 1988).

80. *Id.* at 541.

81. *Id.*

82. *Id.*

83. 3 P.3d at 1074.

siderable discretion in determining the “best” bid,<sup>84</sup> but failed to elaborate further or provide guidelines for the Commissioner.

In *Havasu Heights Ranch & Development v. Desert Valley Wood Products*, the plaintiff argued the Department violated its fiduciary duty when it rejected the plaintiff’s bid for lease renewal because the Department did not have a replacement lessee, and thus, would not earn any money off the land.<sup>85</sup> Although the court agreed the Department “has a duty to maximize the financial benefits flowing from the trust, [it concluded] the ‘best interest’ standard does not require blind adherence.”<sup>86</sup> The issue in *Havasu Heights* was whether “the sole or predominant interest of the state is the maximization of lease revenue.”<sup>87</sup> The court concluded:

Lease revenue is not the sole factor which governs the department’s decision. The Legislature chose a broader, “best interest” standard that permits other considerations, such as the public benefits flowing from employing state land in uses of higher value than would the applicant for a lease.<sup>88</sup>

In so holding, the court indicated that long term concerns regarding the use of land are “legitimate considerations” in denying an otherwise “best” bid.<sup>89</sup>

Although the Enabling Act and the Arizona Constitution arguably provide the most unambiguous guidelines of all the states’ enabling acts and constitutions,<sup>90</sup> Arizona has seen a handful of cases regarding the management of the state’s state trust lands. Two common themes arise from these cases: (1) The Enabling Act is a definitive resource for state trust land management questions, and (2) “Highest and best” can be satisfied in ways other than accepting the bid that offers the highest financial gain.

#### IV. FOREST GUARDIANS V. WELLS

Prior to 2001, Arizona did not allow grazing lands to be used for conservation purposes. In *Forest Guardians*, the Forest Guardians sought to acquire a grazing lease on state trust land in order to restore the land’s health. In a landmark decision, the Arizona Supreme Court held the state was required to consider all bids, regardless of proposed use, and accept only those bids in the best interest of the state trust.<sup>91</sup> This case sets a precedent for the state of Arizona, and allows conservationists and hunters to apply for grazing permits. Although the ruling is unique only to a few jurisdic-

---

84. *Id.*

85. 807 P.2d at 1127.

86. *Id.*

87. *Id.*

88. *Id.* at 1128.

89. *Id.*

90. See generally Souder & Fairfax, *supra* n. 7.

91. *Id.* at 373.

tions, it could be an indication of the future of state-run public lands grazing, and seriously undermines the ability of ranchers to earn a living. While the short-term financial gains of leasing to the highest bidder are clear, the indirect, long-term implications of allowing conservationists to bid on grazing permits could be costly. An unstable grazing market could cause some ranchers to go out of business without suitable grazing land to lease. If public land grazers no longer use public grazing lands, there will be no need for environmental organizations to bid on grazing lands, as the land will already be in non-use. This phenomenon could cost Arizona and similar states millions in fees for the schools, because there will be substantially fewer potential lessees. This section details the facts of the *Forest Guardians* case, the court's decision, and the dissenting opinion. The next section resolves issues presented by the case and argues the Arizona Supreme Court incorrectly decided this it.

### A. Facts

Plaintiffs in this case are the Forest Guardians, a New Mexico organization that "seeks to protect and restore southwest streams, rivers, and wetlands that have been damaged by the grazing of livestock," and Jonathan Tate, a concerned citizen and Western Gamebird Alliance member (collectively Plaintiffs).<sup>92</sup> In 1995, Forest Guardians began bidding on and receiving grazing leases in the state of New Mexico, with the purpose of resting the land and improving it as wildlife habitat.<sup>93</sup> In 1997, Plaintiffs bid on grazing leases in Arizona with the hopes of continuing their mission in another state. After the Commissioner, David Wells, and the Department rejected their bids because Plaintiffs did not intend to graze livestock on the lands, Plaintiffs sued the Commissioner and the Department, arguing their refusal to consider Plaintiffs' bids was contrary to the Arizona Constitution and the state's Enabling Act.<sup>94</sup>

In 1997, Forest Guardians applied for two state trust land grazing leases. The first lease was located in Coconino County and consisted of 5,000 acres. Forest Guardians offered to pay nearly twice as much for the Coconino lease as the then-current lessee offered to pay for a renewal. Forest Guardians' second bid was for a 162-acre grazing lease in Santa Cruz County. For this lease, Forest Guardians offered five times the previous lessee's bid. In both lease applications, Forest Guardians noted they would not use the land for grazing cattle; instead, they would rest the property for the duration of the ten-year lease.<sup>95</sup>

---

92. Appellants' Opening Br. at 3, *Forest Guardians*, 34 P.3d 364 (2001).

93. Ollie Reed, Jr., *Environment Group Secures Grazing Lease*, *The Albuquerque Tribune* (October 5, 2002).

94. Petition for Review at 8, *Forest Guardians*, 34 P.3d 364 (2001).

95. *Forest Guardians*, 334 P.3d at 366.

The same year, Jonathan Tate applied for a 15,000 acre lease in Pinal County, offering to pay twice the amount offered by the previous lessee. As in the Forest Guardians' applications, Tate notified the Commissioner he would not graze the land. Forest Guardians and Tate asked the Commissioner to allow the land to be used "for purposes other than domestic live-stock grazing." Both applicants argued the leases were in the best interest of the trust because they allowed the land to rest and provided the highest financial gain for the state trust.<sup>96</sup>

The Department refused to consider Plaintiffs' applications, stating that in order to have their bids considered by the Department, they would have to apply for a reclassification of the land from grazing to commercial use. Plaintiffs chose not to retract their bids or have the land reclassified as they would be forced to pay a higher lease rate.

### B. Procedural History

After the Department rejected Plaintiffs' bids, Plaintiffs appealed the decision to an administrative law judge (ALR), arguing the Department had a duty to accept bids that were in the best interest of the state schools. The ALR found the Department did not breach its duty to the state schools when it denied Plaintiffs' bids, and the Department reinstated its opinion.<sup>97</sup>

Plaintiffs' appeals to the trial court and then the court of appeals were unsuccessful. Both courts affirmed the Department's decision, and the court of appeals held that state trust land was required by law to be used in the manner for which it was classified, and without reclassification, conservation uses were not permitted on grazing lands.<sup>98</sup> The majority relied on the 10<sup>th</sup> Circuit Court of Appeals' decision in *Public Lands Council v. Babbitt*<sup>99</sup> and concluded that Arizona statutes prohibited awarding grazing leases for the purpose of restoration.<sup>100</sup> Further, the court of appeals found Plaintiffs' bids were not in the best interest of the state trust, so the Department was not required to consider them.<sup>101</sup>

### C. Court's Reasoning

In *Forest Guardians*, the Arizona Supreme Court overturned the lower courts' decisions and held the Department must consider the Forest Guardians' bids and issue leases based upon its fiduciary duties to the state trust. It held that grazing permits could be issued to groups with no intention of using the land for livestock if it was in the best interest of the state trust,

---

96. *Id.*

97. *Id.* at 367.

98. *Forest Guardians v. Wells*, 197 Ariz. 511, 516 (App. 2000) (*rev'd*) [Hereinafter *Forest Guardians I*].

99. 154 F.3d 1160 (10<sup>th</sup> Cir. 1998) [Hereinafter *Public Lands Council I*].

100. *Forest Guardians I*, 197 Ariz. at 517.

101. *Id.* at 518.

and the Department breached its duty to the state trust when it refused to consider Plaintiffs' bids.<sup>102</sup> The court reasoned that if livestock-owning permit holders could apply for a non-use permit of grazing land, so could a conservation group.<sup>103</sup>

The court reached two main conclusions as to why Forest Guardians have the right to obtain grazing leases absent an intention to graze. First, the Enabling Act instituted the state trust land and requires the lands be leased to the "highest and best" bidder of public land.<sup>104</sup> The Arizona Constitution incorporates the Enabling Act, and thus it applies to state trust land grazing leases. In this case, the court decided the constitutional issues using solely the Arizona Constitution, arguing the fiduciary duty imposed in the state's Constitution is more stringent than the one imposed by the Enabling Act. The court cited *Kadish*, arguing that requiring the Department to accept the "highest and best" bids "prevent[s] dissipation of the trust assets."<sup>105</sup> The court also looked to the meaning of trustee, and determined "the Commissioner is subject to the same fiduciary obligations as any private trustee."<sup>106</sup> The court cited the Restatement (Second) of Trusts and ruled that "a trustee of land is normally under a duty to lease it or manage it so that it will produce income."<sup>107</sup>

The court's second justification concerned the classification of state trust land. Grazing land "can be used only for the ranging of animals," and commercial land "can be used primarily for business, institutional, religious, charitable, governmental or recreational purposes, or any general purpose other than agricultural, grazing, mining, oil, homesite or rights-of-way."<sup>108</sup> State trust lands are classified based on their highest and best use. Commercial use is a higher category than grazing use, the lowest category. The court rebutted the Department's argument that Plaintiffs should apply for reclassification of the land by suggesting that commercial lands have a higher rental rate,<sup>109</sup> thus potentially discouraging prospective conservationists.<sup>110</sup> The court reasoned the Arizona Constitution and the Commissioner's fiduciary duties as trustee overpower the Department's argument that Plaintiffs should have to apply for reclassification. Plaintiffs did not wish to have the land reclassified as commercial, which can run up to 99 years, while grazing leases run up to 10 years. Plaintiffs sought to obtain 10-year leases that would remain in the grazing classification. The court found "nothing in the definition of commercial land to suggest that it per-

---

102. *Forest Guardians*, 34 P.3d at 372-373.

103. *Id.* at 372.

104. Ariz. Const. art 10 § 8.

105. *Forest Guardians*, 34 P.3d at 369.

106. *Id.*

107. § 176, cmt. a (1959).

108. Ariz. Rev. Stat. § 37-107(1).

109. *Id.* at § 37-281.02.

110. *Forest Guardians*, 34 P.3d at 369.

mits the type of non-use Plaintiffs propose.”<sup>111</sup> The court said the non-use proposed by Plaintiffs “does not really conflict with grazing use.”<sup>112</sup> Because the Department has the authority to provide lease owners with a non-use status for all or part of their grazing area,<sup>113</sup> and the Department has awarded non-use permits to grazing lessees, the court concluded non-use permits should be considered even if the potential lessee has no intention of grazing any time during the duration of the lease.<sup>114</sup> Finally, the court specified that grazing land is identified as such simply because it has no other practical use. They reasoned Plaintiffs should not have to apply for reclassification because the Department already allows partial non-use permits, and a commercial classification would drive potential bidders away due to higher costs.<sup>115</sup>

In summary, the court maintained the Arizona Constitution does not require property classification; just that the “highest and best bidder” is awarded the lease.<sup>116</sup> The court concluded property classification is simply an option to aid in the management of trust lands. The court focused on the Commissioner’s fiduciary duty, and determined this case turned only on whether the Department breached its fiduciary duty to the trust. Because that duty required the Commissioner to consider all bids in order to correctly determine whether they were in the best interest of the trust, the Department violated its fiduciary duty to the state schools.<sup>117</sup>

#### D. Dissent

Only Justice Martone dissented, maintaining the majority construed the issue too narrowly by limiting it to the Department’s fiduciary duty. Unlike the majority, which based its decision solely on the Arizona Constitution, the dissent looks to the Enabling Act, which is “superior to the Constitution of the state of Arizona.”<sup>118</sup> The dissent reasoned that the issue of breach of fiduciary duty is a federal question. Justice Martone opined the majority’s “express refusal to rest its decision on the Enabling Act is both an admission that the Act does not support its position, and an attempt to avoid further federal judicial review.”<sup>119</sup>

The dissent focused on land classification and found the Enabling Act expressly creates land classifications, including grazing, and authorizes the legislature to grant leases in accordance with those classifications. When the legislature incorporated the Enabling Act in the Arizona Constitution,

---

111. *Id.* at 370.

112. *Id.*

113. Ariz. Rev. Stat. § 37-285(H).

114. *Forest Guardians*, 34 P.3d at 370.

115. *Forest Guardians*, 34 P.3d at 370-371.

116. Ariz. Const. art 10 § 8.

117. *Forest Guardians*, 34 P.3d at 371.

118. *Gladden Farms, Inc.*, 633 P.2d at 327.

119. *Forest Guardians*, 34 P.3d at 373 (Martone, J., dissenting).

the “highest and best bidder” language and the land classification system were incorporated into Arizona law.<sup>120</sup> Thus, the legislature requires the Commissioner to classify the state trust lands and lease those lands according to their classification.<sup>121</sup> “Without classification of best use,” the dissent argued, “state lands would always go to the highest bidder, the lands would be dissipated, and Arizona would have no public lands.”<sup>122</sup>

Next, the dissent turned to non-use of state grazing lands. Arizona law requires “the Commissioner shall...[w]ithdraw state land from surface or subsurface sales or lease applications if the Commissioner deems it to be in the best interest of the trust.”<sup>123</sup> While the majority suggested the Commissioner could withdraw lands from leasing when it is in the best interest of the trust,<sup>124</sup> the legislature expressly requires it.<sup>125</sup> The dissent concluded if the lands were overgrazed and needed rest, the Commissioner breached his fiduciary duty when he did not withdraw the lands from the lease pool. The dissent suggested Plaintiffs’ solution could be to ask the Commissioner to withdraw the lands, and if he refused, Plaintiffs’ could seek judicial review of the decision, thus avoiding the classification system, which requires that “leasee[s] shall use lands leased to him...for the purpose for which the lands are leased.”<sup>126</sup>

The dissent also detailed the Grazing Land Valuation Commission, which is charged with appraising the value of grazing lands and includes a university professor, a professional appraiser, and a conservationist.<sup>127</sup> In appraising all grazing lands, the Commissioner must consider land health and carrying capacity, and can reclassify or reappraise the land if needed. Although the Department “may authorize non-use for part or all of the grazing lease upon request of the leasee at least 60 days prior to the start of the billing date,”<sup>128</sup> the dissent construed this to mean only land originally leased for grazing purposes can be placed in the non-use category. Bidders with no intention to graze or use the land should not be considered as non-use because to do so would be inconsistent with the duties of the Grazing Land Valuation Commission and the Department.<sup>129</sup>

In summary, the dissent reasoned it is the Commissioner’s responsibility to withdraw lands from the lease pool if they are in need of rest. It failed to clearly address and reconcile the “highest and best” language on which the majority relied. Instead, Justice Martone argued this case should have been

---

120. Ariz. Const. art. 10 § 3.

121. Ariz. Rev. Stat. § 37-212 (1993).

122. *Forest Guardians*, 34 P.3d at 374 (Martone, J., dissenting).

123. Ariz. Rev. Stat. § 37-132(A)(11).

124. *Forest Guardians*, 34 P.3d at 372.

125. *Forest Guardians*, 34 P.3d at 374 (Martone, J., dissenting).

126. Ariz. Rev. Stat. § 37-281(D).

127. Ariz. Rev. Stat. § 37-285(C).

128. Ariz. Rev. Stat. § 37-285(H).

129. *Forest Guardians*, 34 P.3d at 375 (Martone, J., dissenting).

decided using the Enabling Act and the land classification system. In addition, the dissent argued that although third parties can nominate lands for removal from the leasing pool, they should not determine whether non-use is required. Justice Martone believed “difficult cases sometimes create bad law...this is one of them. It is hard to predict the consequences that might flow from the majority’s ruling that requires the Commissioner to consider the highest bid even when the property is not going to be used for the purpose for which the lease is intended.”<sup>130</sup>

## V. DISCUSSION

### A. *Resolving Forest Guardians*

Based on the above information, it would seem the court was forced to decide *Forest Guardians* for Plaintiffs, using the fiduciary duty, or for the Department, using the classification system. This section will demonstrate these concepts are not incongruous, and the court should have found for the Department using both the classification system and the fiduciary duty. While the majority incorrectly construed the state’s statutory and case law, both the majority and the dissent failed to consider long-term financial returns.

#### 1. *Proving the Majority Wrong*

The majority in *Forest Guardians* made four major mistakes in its analysis. First, it decided the case using the state Constitution, despite earlier case law holding the Enabling Act is “superior to the Constitution of the State of Arizona”<sup>131</sup> and should be considered in accordance with the state Constitution in resolving state trust land disputes.<sup>132</sup> As Justice Martone indicated, using the Arizona Constitution instead of the Enabling Act was simply an attempt to avoid further judicial scrutiny.<sup>133</sup> Had the court looked to the Enabling Act as controlling, this case could have gone to the U.S. Supreme Court on appeal. There, the Court would likely have looked to the unambiguous language of the Enabling Act and found it did not allow the issuance of grazing permits absent intent to graze, just as the 10th Circuit did in *Public Lands Council*.<sup>134</sup> Although the U.S. Supreme Court was not asked to decide the issue when it considered *Public Lands Council* on appeal, it provided dicta on the subject, stating, “the regulations do not allow [conservation use]. The regulations specify that regular grazing permits will be issued for livestock grazing or suspended use.”<sup>135</sup> While the statutes at

---

130. *Id.*

131. *Gladden Farms, Inc.*, 633 P.2d at 327.

132. *See Kadish*, 747 P.2d 1183; *Gladden Farms, Inc.*, 633 P.2d 325.

133. *Forest Guardians*, 34 P.3d at 373 (Martone, J., dissenting).

134. 167 F.3d 1287, 1307-1308 (1999).

135. *Public Lands Council v. Babbitt*, 529 U.S. 728, 747 (2000).

issue were different than the statutes at issue in *Forest Guardians*, the federal courts have demonstrated a trend of following the clear and unambiguous language of the statute.

Second, the court completely disregarded the state trust land classification system and, without justification, held there is “nothing in the definition of commercial land to suggest that it permits the type of non-use Plaintiffs propose.”<sup>136</sup> In fact, while the definition of commercial includes “any general purpose” in its statutory definition, the statutory definition of grazing includes no general purpose element.<sup>137</sup> It simply requires that the land is used for “the ranging of animals.”<sup>138</sup> As a result, non-use would be consistent with a commercial classification, and completely inconsistent with a grazing classification, unless accompanied by some form of grazing.

Third, the majority omitted relevant statutes in making its decision, and maintained the Department *could* withdraw lands from the lease pool at its discretion.<sup>139</sup> However, the legislature expressly *requires* the Commissioner to remove lands from the leasing pool if it is in the best interest of the trust.<sup>140</sup> If the lands were in such bad repair as to require complete non-use, removing the lands from the leasing pool would have been in the best interest of the trust and the duty of the Commissioner. The majority’s assertion that providing the lease to an organization or person that would not use the land would benefit the trust financially and ecologically is not compelling. Nothing in the Enabling Act or the state’s statutory language allows the court to arbitrarily allow public citizens to do the Commissioner’s job. If the land needed to be rested, the Commissioner should have been required to remove it from the lease pool. Fourth, while the majority is correct that the “highest and best bidder” language is incorporated in the Arizona Constitution, so too is the Department’s classification system, which should not be ignored.<sup>141</sup>

## 2. *Interpreting the Dissent*

Although the dissent did not completely remedy the “highest” use provision of the Enabling Act, its reasoning proves to be more effective and supported by law than the majority’s. According to the dissent, the answer is simple: if lands are in need of restoration, the Department has an obligation to withdraw them from the lease pool. Allowing a third party to do the work of the Department is against the duties owed to the state trust. In other words, although there is no question as to whether the Commissioner has a duty to accept the “highest and best” bid, the Commissioner also has a duty

---

136. *Forest Guardians*, 34 P.3d at 369.

137. Ariz. Rev. Stat. § 37-101(3),(7).

138. *Id.*

139. *Forest Guardians*, 34 P.3d at 372.

140. *Forest Guardians*, 34 P.3d at 374 (Martone, J., dissenting).

141. Ariz. Const. art. 10 § 3.

to withdraw lands that are in need of restoration.<sup>142</sup> Withdrawing the lands does not conflict with the Commissioner's fiduciary duty because it is in the best interest of the state trust to withdraw the lands if they are in need of restoration.

### 3. *Beyond the Court's Reasoning*

In addition to the dissent's opinion, the Department could have undergone further analysis of the meaning of "highest and best." The majority considered only short-term financial gains in considering whether the bids were in the best interest of the trust. As mentioned, the "best" bid presents a question of law and fact.<sup>143</sup> Although the Department is required to maximize financial returns on state trust lands, "the 'best interest' standard does not require blind adherence."<sup>144</sup> The court has allowed other factors to be considered in determining the "best" bidder, including long range concerns regarding the use of land.<sup>145</sup> Here, the court did not take into account other factors that might constitute the "best" bid. Policy implications alone should put a lower grazing bid above a higher non-use bid because of the potential long term effects of ousting grazers. Allowing non-grazers to lease grazing land could significantly affect the grazing market. Fluctuations in lease rates and bidding competition could cause some grazers to look elsewhere to supplement their land holdings. In addition, some ranchers will go out of business, as livestock grazing is one of the most popular land uses in western North America.<sup>146</sup> Although the loss of cattle grazers in the state of Arizona would not directly affect the state trust, a loss of bidders would. With the decline in need by cattle grazers for state trust grazing lands, the need by environmental organizations will also fall, causing a lack of financial gain from the trust lands. Grazing opponents that lease grazing lands desire to put an end to public land grazing. If there is no potential for grazing on a piece of state trust property, the environmental organizations will withdraw their bids and the Department will be faced with financial losses for the state schools. These long-term considerations should have been considered by the court in *Forest Guardians* to ensure the lands would be subjected to the "best" use for the state trust.

Although the Department can increase its temporary revenue by awarding non-use leases to Plaintiffs, the court opened the Department to unclear and potentially difficult decisions by simplifying the Department's fiduciary duty. In addition to the policy implications, when the highest bid is to be accepted, regardless of proposed use, the classification system becomes

---

142. Ariz. Rev. Stat. § 37-132(A)(11).

143. *Jeffries*, 3 P.3d at 1074.

144. *Havasu Heights Ranch & Dev. Corp.*, 807 P.2d at 1127.

145. *Id.*

146. Thomas L. Fleischer, *Ecological Costs of Livestock Grazing in Western North America*, 8 *Conservation Biology* 629 (Sept. 1994).

meaningless. Although the majority identifies non-use as a grazing component, the dissent correctly concludes that non-use is only a grazing element when it is accompanied by grazing in some form. If land uses overlap in the classification system, it creates a potential slippery slope for the state legislature and courts. Bidders may try to beat the system by obtaining grazing land for uses normally deemed to be commercial or agricultural. While non-use is not beyond the scope of grazing, a loose interpretation of non-use may provide a forum for non-grazing advocates to remove grazing from public land, which is certainly against the interest of the state trust.

### B. *The Arizona Preserve Initiative as a Conservation Tool*

Both the majority and the dissent neglected to discuss the implications of the Arizona Preserve Initiative.<sup>147</sup> Passed in 1996, the Initiative allows for the selection of state trust land parcels, including former grazing lands, to be reclassified for conservation uses. These lands must be within designated areas and close to urban regions in Arizona. The Arizona Preserve Initiative expressly provides an avenue for conservationists desiring to restore state trust grazing land. Citizens and organizations can nominate areas they feel are in need of restoration and, once the reclassification is complete, bid on the land for conservation purposes. Regardless of whether the lands in this case were within the designated areas, the Arizona Preserve Initiative provides a lawful and effective tool for conservationists.

Instead of circumventing statutory law to apply for grazing leases, conservation organizations should embrace the Arizona Preserve Initiative as the legal remedy for over-grazed state trust land. Under the Initiative, the state trust still benefits financially, and conservation groups can ensure degraded land is improved. In addition, because there is no limit to the amount of land that can be nominated,<sup>148</sup> the Arizona Preserve Initiative provides conservation groups more certainty than a bidding war can provide.

Interestingly, the Arizona Preserve Initiative creates a new classification of state trust land.<sup>149</sup> The court in *Forest Guardians* evaded the classification system and held that the Commissioner's fiduciary duty is foremost in the Department's consideration of bids. Under the Majority's reasoning, a grazing operator could be the highest bidder for lands designated for conservation use and win a conservation lease because it was in the trust's best financial interest.

---

147. Ariz. Rev. Stat. § 37-312.

148. *See Id.*

149. *Id.*

### C. Additional Long-Term Effects

In addition to causing severe financial setbacks for the state's schools, the *Forest Guardians* decision will likely invite negative ecological consequences. While grazing is a natural component of ecosystems, there is little argument that overgrazing is detrimental to landscapes, wildlife, and other resources.<sup>150</sup> However, the private lands tied to these public grazing permits provide critical habitat for endangered species. Private lands provide habitat for about 75% of the nation's endangered species<sup>151</sup> and comprise half of the Rocky Mountain West.<sup>152</sup> In addition, western private lands are more productive than their public counterparts.<sup>153</sup> The prevention of future public land grazing by third parties may encourage or force the sale of private lands tied to public land grazing permits. As mentioned, grazing operators could go out of business or experience financial setbacks from a lack of rangeland to sustain their cattle operations. This phenomenon could negate the efforts of conservation organizations by creating fragmentation of valuable private wildlife habitat through the sale and subsequent parcelization of large private landholdings. In other words, cattle grazers who cease operations will likely sell off parcels of their private land for exurban development, one of the foremost open land uses in the West.<sup>154</sup>

Because the West is currently experiencing some of the fastest population growth in the nation,<sup>155</sup> understanding the effects of parcelization and fragmentation in this area is paramount. Instead of moving into already urban areas, the people in the West are flooding to exurban areas and creating fragmented "ranchettes," numerous golf courses, and expansive residential developments. This conversion of open private grazing land to exurban developments to support the growing population of the West will likely have a more detrimental effect on native biodiversity than large-scale ranching operations.<sup>156</sup> Ranches sustain better native plant and faunal biodiversity than areas of exurban development, while exurban developments favor nonnative and human-adapted species.<sup>157</sup>

Although the majority does not require the Department to accept Plaintiffs' bids, they do require it to place fiduciary duty foremost in the selection process. While the short term financial benefits are clear, the majority

---

150. Debra L. Donahue, *supra* n. 9, at 118.

151. J. A. Lockwood, *The Intent and Implementation of the Endangered Species Act: A Matter of Scale*, in *Private Property and the Endangered Species Act* 73 (J. F. Shogren, ed., University of Texas Press 1998).

152. Maestas, Knight & Gilbert, *supra* n. 1, at 510.

153. *Id.*

154. *Id.*

155. See W. E. Riebsame, *Ranching a Changing Landscape: Development, Perception, and the Political Ecology of the Western Range*, in *Writers on the Range: Western Writers Exploring the Changing Face of the American West* (K. Hess and J. Baden, eds., University of Colorado Press, 1998).

156. See Maestas, Knight & Gilbert, *supra* n. 1.

157. *Id.* at 514.

failed to consider the long term effects of their decision. The state trust's financial and ecological status could suffer if conservation organizations successfully bid for grazing permits. Thus, awarding leases to the highest bidder, regardless of their intentions, is not in the best interest of the state trust.

#### D. Conclusion

*Forest Guardians* represents a shift in public land grazing litigation. Although the decision held the Department only has to consider each bid, regardless of use, this case represents a slippery slope for the management of state trust lands. Arizona has a great history of managing its state trust lands for the benefit of schools.<sup>158</sup> While other states have squandered their lands away over the past 100 years, Arizona has managed to create a system of leases, sales, and management that provides financial compensation for the state schools.<sup>159</sup> As a result, Arizona should avoid far-reaching decisions that change the face of state trust land management. This is especially true when prior law suggests contrary conclusions. This paper is not meant to be pro-grazing rhetoric, and there is no doubt something should be done to improve grazing practices on public and private lands. However, acting contrary to law and changing a system of land management that has lasted for almost 100 years is not the answer.<sup>160</sup> Not only does *Forest Guardians* fail to comply with available constitutional and statutory law, but states should look to less invasive solutions before revamping their state trust land policies. Otherwise, both the schools and the landscape will suffer.

---

158. See generally Souder & Fairfax, *supra* n. 7.

159. *Id.*

160. Interestingly, Arizona's Legislature acted swiftly in response to *Forest Guardians* and amended the statutory law to negate its effect. Any new lessee must now compensate the former lessee for any non-removable improvements made to the land. The effect of this amendment will be to drastically reduce bidding by conservation organizations because the cost of non-removable improvements such as fences is often too expensive for most non-profit conservation groups. David Kader et al., *The Arizona Supreme Court: Its 2001-2002 Decisions*, 35 Arizona State L. J. 311, 341 (Summer 2003).