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An Agricultural Law Research Article

**Grazing Our School Endowment Lands: *Idaho
Watersheds Project v. State Board of Land
Commissioners***

by

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Grazing Our School Endowment Lands: *Idaho Watersheds Project v. State Board of Land Commissioners*

I. INTRODUCTION

As the herd and the Hat Creek outfit slowly rode into Montana out of the barren Wyoming plain, it seemed to all of them that they were leaving behind not only heat and drought, but ugliness and danger too. Instead of being chalky and covered with tough sage, the rolling plains were covered with tall grass and a sprinkling of yellow flowers. The roll of the plains got longer; the heat shimmers they had looked through all summer gave way to cool air, crisp in the mornings and cold at night. They rode for days beside the Bighorn Mountains, whose peaks were sometimes hidden in cloud . . . It was a cattleman's paradise, and they were the only cattlemen in it.¹

Cattle grazing in the west goes hand in hand with the deeply entrenched, idyllic images of the cowboy astride his saddle, silhouetted against the dark ridge line, deftly maneuvering his horse back into the corrals after a day of earnest labor on the range. The vision holds its roots in any number of sources from the Jeffersonian Dream of each man toiling his own piece of land to earn the fruits of survival to modern day movies like *City Slickers* where urban dwellers from New York City come west to fulfill their childhood fantasies on a dude ranch. Despite the perpetuation of these images, the reality of cattle grazing in the west, particularly on the public lands, rarely mirrors these expectations, except on the Hollywood sets.

Over a century of grazing on the public lands in the western United States has left a legacy of environmental damage with effects that are only beginning to be understood. For many of the ranchers, the rangeland that they are leasing from the state or federal government is range that has been in their families for generations, a range that they are intimately familiar with and which they have helped to maintain because that range, in turn, is their livelihood.² On the other hand, a concerned public, backed by a growing arsenal of environmental legislation, has voiced fears that the perpetuation of these practices will result in the destruction of lands and watersheds that can never be fully restored.³

Despite unprecedented growth in communication abilities throughout the twentieth century and the advent of a "global community," the ideologies held by

¹ LARRY MCMURTRY, *LONESOME DOVE* 741-42 (1985).

² See Janet D. Howard, *Ranchers vs. Marvel Part II*, *INTERMOUNTAIN FARM & RANCH*, April 30, 1999, at 2.

³ See generally DENZEL FERGUSON & NANCY FERGUSON, *SACRED COWS AT THE PUBLIC TROUGH* (1983).

these two interest groups still often remain worlds apart. The Idaho supreme court recently encountered this struggle in three separate decisions all entitled *Idaho Watersheds Project v. State Board Of Land Commissioners*.⁴ In 1993, the Idaho Watersheds Project (IWP), a nonprofit organization, began taking inventory of the riparian and watershed areas around the state that were being degraded by the mismanagement of livestock. Compounding this injury to the public lands was the fact that the profits from these leases were intended to go directly to the School Endowment Fund, but because so many of the leases were awarded at a rate that represented only a fraction of their market value, the public schools of Idaho received very little income from the lands. In hopes of raising the revenue from these leases, as well as helping to repair the ailing public lands, IWP began bidding on the school endowment lands at auction. Although IWP experienced initial success in being the high bidder at these auctions, the State Board of Land Commissioners (Land Board) repeatedly decided to award the lease to the prior holder. When the court overturned these decisions as outside the constitutional authority of the Land Board, the Idaho Legislature enacted both statutory and constitutional provisions to impede IWP from bidding on the school endowment land leases. Commonly referred to as the 'anti-Marvel' bills, one of the provisions set up a number of criteria that would determine if an applicant was eligible to bid on a school endowment lease while another provision attempted to prevent bidding on leases altogether. In three consecutive decisions, the Idaho supreme court struck down these provisions as unconstitutional because they required the Land Board to consider the impact of its leases on the health of the livestock industry and the state, whereas the constitution specifically required these leases provide only for "the maximum long term financial return" of the schools.⁵

In this article, I will present an overview of the history of grazing on public lands and how its legacy continues to impact our modern day system of grazing management. I will then provide a brief profile of grazing practices in the modern day and the impacts of this system on our public lands. With this background in mind, I will then review the Supreme Court of Idaho's holding in the Idaho Watersheds Project cases and how this conflict came to terms with the interest struggle, or if it really needs to be a struggle at all.

⁴ See *Idaho Watersheds Project v. State Bd. of Land Comm'rs (Idaho Watersheds Project I)*, 982 P.2d 358 (Idaho 1999); *Idaho Watersheds Project v. State Bd. of Land Comm'rs (Idaho Watersheds Project II)*, 982 P.2d 367 (Idaho 1999); *Idaho Watersheds Project v. State Bd. of Land Comm'rs (Idaho Watersheds Project III)*, 982 P.2d 371 (Idaho 1999).

⁵ IDAHO CONST. art. IX, § 8.

II. BACKGROUND

A. *The History of Grazing*

For almost one hundred and fifty years, the United States sought to strengthen their hold on the lands west of the Mississippi by sending settlers to these new territories and granting them land in return for their hard labor.⁶

[T]he policy of using the public domain in the promotion of settlement, the very basis of national strength and security, of civilization itself, was accepted and furthered in the disposition of the western lands. It was the fruition of the work and teachings of such men as Gallatin, Jefferson, and Benton . . . Thus debts were to be forgiven, preemption was to be granted, land was to be made easy of access and of acquisition, indeed free as soon as the East could be converted to the view.⁷

Grazing had already established its presence in parts of the American west with the arrival of Spanish conquistadors in the New Mexico Territories as early as 1598.⁸ Consequently, the practice of grazing livestock on the unclaimed federal lands was encouraged by the Army and U.S. presidents who wished to quickly settle and occupy these lands and thereby circumvent any attempts by foreign powers to take control of the lands through occupation.⁹ In addition, the government hoped to secure the land from hostile Indian tribes and provide protection for the general public traveling across the continent.¹⁰

Several statutes were enacted by the federal government with the intent of divesting the public lands into the hands of settlers. Most predominate were the Homestead Act of 1862¹¹ and the Desert Lands Act of 1877.¹² Both Acts authorized entry onto federal public land for either no fee or a nominal fee, if the individual could demonstrate that he or she had been working the land, which was evidenced by building a homestead or proof of irrigation.¹³ However, the semi-arid climate of the western United States was essentially incompatible with the vision of a small family farm. In order to make the land viable for producing

⁶ See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 79 (3d ed. 1993).

⁷ *Id.* at 79–80 (quoting B.H. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 136, 138–39 (U. Wis. 1965) (1924)).

⁸ See Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 *IDAHO L. REV.* 505, 511 (1994).

⁹ See *id.* at 514.

¹⁰ See *id.* at 515.

¹¹ 43 U.S.C. §§ 161–164 (repealed 1976).

¹² *Id.* §§ 321–339 (1994).

¹³ See COGGINS ET AL., *supra* note 6, at 702.

crops or sustaining livestock, it needed to be irrigated and irrigation required large amounts of capital as well as large blocks of land.¹⁴ Although on paper it appeared that the West had been settled by individual farmers, homesteaders, and settlers, in reality, large corporations got the bulk of the available land through dummies and fraud to the federal government.¹⁵

Notably, there remained millions of acres of unappropriated federal land in the western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.¹⁶ This land was essentially left open for unregulated use by miners, loggers, and ranchers. Unsurprisingly, each rancher sought the greatest amount of economic benefit by taking as much free forage as possible for their own herds and livestock before anyone else did.¹⁷ The unregulated use of these public lands resulted in a tragedy of the commons that was felt all the way to New York City and Washington, D.C. where, during a dust storm in 1934, dust from what had become a great western desert filtered down from the sky onto the sidewalks and around the dome of the Capitol.¹⁸ It was undeniable that the arid lands of the West had been turned into wastelands due to their unregulated use.¹⁹ Consequently, the abuse forced the federal government to change its land policy from one of disposal to one of federal retention and management.²⁰

In 1934, Congress responded to the damaged western range lands with the passage of the Taylor Grazing Act (TGA).²¹ Primarily, the TGA "establish[ed] a threefold legislative goal: to regulate the occupancy and use of the federal lands, 'to preserve the land and its resources from injury due to overgrazing, and to provide for the orderly use, improvement, and development of the range.'"²² Until the advent of the TGA, cattle ranchers in the West had been able to graze the public domain without fee, restriction, or accountability.²³ The Act was intended to stabilize the livestock industry by preserving ranchers' access to the federal lands while at the same time guarding against further degradation of the public domain.²⁴ To achieve this end, Congress created the Division of Grazing in the Department of Interior and transferred into their control 80 million acres of public domain (that would eventually grow to 157

¹⁴ See *id.* at 85.

¹⁵ See *id.*

¹⁶ See *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1290 (10th Cir. 1999).

¹⁷ See COGGINS ET AL., *supra* note 6, at 129.

¹⁸ See E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL & RESERVATION POLICIES* 214-44 (Arno Press 1972).

¹⁹ See *id.*

²⁰ See *id.*

²¹ 43 U.S.C. §§ 315-316(o) (1994).

²² *Public Lands Council*, 167 F.3d at 1290 (quoting 43 U.S.C. § 315(a)).

²³ See FERGUSON & FERGUSON, *supra* note 3, at 36.

²⁴ See *Public Lands Council*, 167 F.3d at 1290.

million acres).²⁵ Under the supervision of the Secretary of the Interior, the land was divided into grazing districts, guidelines were set for selecting grazing permittees entitled to use the lands, a charge was established for a reasonable grazing fee, and authorized committees of local stockmen were chosen to manage the grazing districts jointly with the Department of the Interior.²⁶ Notably, the TGA granted the Secretary broad authority to balance the interests of the land users against the need to protect the land, commanding the Secretary to “[m]ake such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes” of the Act.²⁷ Initially, a fee of five cents per Animal Unit Monthly (AUM) was set, representing the cost for the amount of forage required to feed a cow and her calf, a horse, or five sheep or goats for a month.²⁸ Notably, in contrast to the management of the school endowment lands in Idaho, the TGA recognized that a “[p]reference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights.”²⁹

Although many of the stockmen resented the imposition of federal authority on their domain, there were others who welcomed the passage of the TGA because of its promise to revitalize the ailing public lands.³⁰ Furthermore, the TGA was effectively toothless with its general and vague language and the broad concessions it gave to the stockmen. The directors and committees were primarily composed of ranchers; consequently, the livestock industry had little to fear because in reality they were able to further strengthen the tenure they had already established on the public domain.³¹

After a little more than a decade, the Division of Grazing was done away with and in its place the Bureau of Land Management was founded.³² Undeniably, the TGA represented a growing public concern for the health of our public lands. Yet, at the same time, it helped to perpetuate the customs, tenures, and abuses that had taken a stronghold on the western domain of public lands. BLM stewardship had largely the same goal as the Division of Grazing—to help maintain and manage the public lands. Over the years, the internal policy of the BLM evolved into a multiple-use philosophy with an emphasis on grazing and mining, largely failing to undo any of the damage that had been wrought before the agency existed.³³ In fact, a 1990 Public Land Statistics survey showed that a

²⁵ See FERGUSON & FERGUSON, *supra* note 3, at 36.

²⁶ See *Public Lands Council*, 167 F.3d at 1290.

²⁷ 43 U.S.C. § 315(a).

²⁸ See FERGUSON & FERGUSON, *supra* note 3, at 36.

²⁹ 43 U.S.C. § 315(b).

³⁰ See FERGUSON & FERGUSON, *supra* note 3, at 36–37.

³¹ See *id.* at 37.

³² See *id.*

³³ See COGGINS ET AL., *supra* note 6, at 138.

majority of the BLM lands remained, by BLM estimates, in less than “good” condition.³⁴

The 1976 enactment of the Federal Land Policy and Management Act (FLPMA)³⁵ represented “Congress’ express recognition that in over forty years of land management under the TGA, the BLM had failed adequately to protect and enhance the federal lands.”³⁶ During the decade leading up to FLPMA, citizens and conservation groups had begun to take a more active interest in public land management and grazing programs, hoping to loosen the grip of commodity interests and allow a broader array of interests to share in the use of the public lands.³⁷ Specifically, in 1960, the Multiple-Use, Sustained-Yield Act (MUSY)³⁸ recognized that “[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”³⁹

FLPMA reiterates many of the multiple-use and sustained-yield principles of MUSY, but lists an even broader range of uses for the public BLM lands, emphasizing the goal of meeting the present and future needs of the American people.⁴⁰ Along these lines, FLPMA requires comprehensive land use planning on the part of the BLM, as well as public participation in public land management.⁴¹

FLPMA was followed shortly by the Public Rangelands Improvement Act of 1978 (PRIA).⁴² PRIA reasserted that the public rangelands continued to be in unsatisfactory conditions and that increased management and funds were needed to address the problem.⁴³ Its intent was to reaffirm “a national policy and commitment to: . . . (2) manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values.”⁴⁴ Predominately, this succession of legislation evidenced a growing concern and interest by the public in the health, condition, and management of the public lands.

³⁴ See *id.* at 135.

³⁵ 43 U.S.C. §§ 1701–1784 (1994).

³⁶ *Public Lands Council*, 167 F.3d at 1290. See also 43 U.S.C. § 1751(b)(1) (“[A] substantial amount of the Federal range lands is deteriorating in quality.”).

³⁷ See FERGUSON & FERGUSON, *supra* note 3, at 38.

³⁸ 16 U.S.C. §§ 528–531 (1994).

³⁹ *Id.* § 528.

⁴⁰ See FERGUSON & FERGUSON, *supra* note 3, at 39.

⁴¹ See 43 U.S.C. § 1712(a) (1994).

⁴² *Id.* §§ 1901–1908.

⁴³ See FERGUSON & FERGUSON, *supra* note 3, at 39.

⁴⁴ 43 U.S.C. § 1901(b)(2).

B. Modern Day Grazing

The growing public interest in the condition of the public lands has also proven to be a source of controversy. Range allocation is a volatile issue due to the limited nature of the resource. Many of the farmers and ranchers who use these lands have a way of life entrenched in their ability to use them. On the other hand, as previously mentioned, more people are using the public lands for activities like hiking, motorcycling, historic research, or wildlife observation. BLM lands encompass tens of millions of acres of spectacular desert, mountain, and canyon scenery that has begun to constitute a major recreational resource for the American people.⁴⁵ Notably, “[t]he economic value of the recreational use of BLM land alone far exceeds the value of the livestock forage that the same land provides.”⁴⁶ The way in which the land is used by each of these interests groups causes an inevitable clash of ideologies and perspectives on how the land should be maintained.

As seen through the eyes of a representative of the cattlemen’s association:

In addition to cattle production, [the nation’s cattlemen] are interested, as conservationists, in fish and wildlife, improved water quality, erosion control, and aesthetics [T]he grazing of rangelands can have positive influences on the vegetative and soil resources, rather than all negative impacts in uncontrolled situations, which are occurring less today There are many examples that rangelands properly used can maintain or improve the plant communities. There are also examples which show that prolonged nonuse can result in range deterioration as surely as overuse will The rangelands of this nation, public and private, are a valuable national resource. They must receive the appropriate consideration by the users of such resource, including the general public. As one of the prime users, the nation’s cattlemen are hopeful that their story will be heard and fully considered.⁴⁷

On the other hand, the western novelist Richard Manning expresses an opposing view:

⁴⁵ See generally EDWARD ABBEY, *DESERT SOLITAIRE* (1972); T. WATKINS & C. WATSON, *THE LANDS NO ONE KNOWS: AMERICA AND THE PUBLIC DOMAIN* (1975).

⁴⁶ Joseph M. Feller, *What is Wrong with the BLM’s Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 559 (1994).

⁴⁷ COGGINS ET AL., *supra* note 6, at 689 (quoting MICHIELI, *Response to “Role of Land Treatments on Public and Private Lands,”* in *DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT* 1421 (1984)).

On an October day when there are no clouds, the sun lights all creatures from valley rim to valley rim with an equanimity that includes cows. In this light it seemed forgivable to believe the cattle a part of the landscape just as the cattlemen believe . . . Cattle do not belong in Montana. Their importation has wreaked a terrible havoc on every turn of the Blackfoot, not to mention virtually every square inch of ground between the Mississippi and the Rockies. "Every inch" is overstatement, but not nearly the overstatement one might believe . . . One of our most dramatic feats of engineering came in the extinction of the native bison and their replacement with cattle . . . Superficially, at least, this was not a great stretch . . . In coevolution, however, occupying the same genus is no guarantee of a fit to an alien ecology . . . Cattle, especially the British strain, evolved in the wet regions of the British Isles. Their genes were tuned by an abundance of water; the bison's by water's scarcity, guaranteed by that 60 million years of rain shadow. Transplanted to the arid West, cattle adapted by seeking out the closest analog they could find to their evolutionary roots. They, like humans, bunched up along the streams and rivers and chomped off everything in sight.⁴⁸

Almost all of the 159 million acres of public land managed by the BLM are located in "eleven western states of the lower forty-eight."⁴⁹ Together with the Forest Service land, about 30,000 ranchers graze approximately 3.2 million cattle on the public lands of the Western United States.⁵⁰ These numbers, however, represent only 3.8% of the nation's beef cattle and fewer than 10% of the total livestock producers in the United States.⁵¹

Grazing fees illustrate a similarly disproportionate share of the price for leasing public rangeland. In 1906, the Forest Service began charging a nominal fee for the privilege of grazing livestock in the national forests.⁵² The fee increased slowly to \$0.56 per AUM by 1968; however, the fee still remained well below the market value for an AUM (about 750–800 pounds of grass and a total weight gain of 28–90 pounds).⁵³ Notably, the BLM historically charged even less per AUM than the Forest Service.⁵⁴ Even at these low rates, both the fees and the amount charged were repeatedly challenged in courts by the cattlemen who had historically enjoyed the use of the public lands forage at no cost at all.⁵⁵

⁴⁸ RICHARD MANNING, *ONE ROUND RIVER* 59–62 (1997).

⁴⁹ COGGINS ET AL., *supra* note 6, at 688.

⁵⁰ See *Cash Cows: The Giveaway of the West* (visited Jan. 17, 2000) <<http://www.mercurycenter.com/nation/giveaway.html>>.

⁵¹ See *id.* See also COGGINS ET AL., *supra* note 6, at 688.

⁵² See COGGINS ET AL., *supra* note 6, at 702.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See generally *United States v. Grimaud*, 220 U.S. 506 (1911); *Brooks v. Dewar*, 313 U.S. 354 (1941); *Pankey Land & Cattle Co. v. Hardin*, 427 F.2d 43 (10th Cir. 1970).

Typically, the fees were set only to cover administrative costs and often anticipated the allocation of more forage than was actually available.⁵⁶

Although the general trend for grazing fees in both the Forest Service and the B.M. has been upward, it was not until 1974 that either agency reached a dollar per AUM.⁵⁷ "For example, in 1981, while the cost of grazing public land was dropping 45 cents to \$1.86 per AUM, the cost of leasing private grazing lands was increasing 12 percent to an average cost of \$8.83 per AUM."⁵⁸ Agency costs for operating grazing programs increased with inflation, far exceeding the income from the grazing fees.⁵⁹ Consequently, taxpayers paid more than \$100 million last year in subsidies for leases managed by the B.M.⁶⁰ Efforts to change the grazing fee regime through legislation have largely been defeated by the votes of conservative western congressmen who have considerable clout regarding the issue.⁶¹ Furthermore, the subsidies on grazing fees have been criticized for the value they build into the price of the base ranch leasing the public land.⁶² "[T]he subsidy is capitalized into the purchase price and mortgage value of the base ranch, leading the subsidy recipients to resist fiercely any cuts in their permitted arms, even when the reductions would ultimately redound to the ranchers' economic benefit."⁶³

Notably, the permit system, recognizing a preference for ranchers already using public lands as indoctrinated by the TGA, allows "a small group of ranchers [to enjoy] a monopoly on federal lands, as they have for decades."⁶⁴ "Even when hunters, fishermen or environmentalists have offered to outbid cattle operators and remove cows, a 1934 law prohibits it" because of the preference built into the TGA for those already holding permits.⁶⁵ However, certain state lands leased for grazing, such as the School Endowment Lands in Idaho, have a different priority system when it comes to reissuing leases.

C. School Endowment Lands

As new states joined the emerging Union, each received extensive tracts of federal land for support of schools and local governments through the

⁵⁶ See FERGUSON & FERGUSON, *supra* note 3, at 40.

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *See Cash Cows, supra* note 50.

⁶¹ *See* COGGINS ET AL., *supra* note 6, at 703-04.

⁶² *See* GEORGE CAMERON COGGINS & MARGARET CINDEBERG-JOHNSON, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 74-75 (1982).

⁶³ COGGINS ET AL., *supra* note 6, at 704.

⁶⁴ *Cash Cows, supra* note 50.

⁶⁵ *Id.*

Northwest Ordinance.⁶⁶ Ohio's admission into the union in 1803 served as the initial model for this land allocation, and after much debate, Congress agreed to grant the new state four percent of its total land area for the benefit of schools.⁶⁷ The school land grant was seen as a "solemn agreement" between the newly admitted state and the United States, an agreement "in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry."⁶⁸ State education systems benefitted greatly from the land grants, in all receiving "77 million acres for schools and 21 million acres for higher education."⁶⁹ The land, however, was distributed by sections within each township which left a checkerboard allocation of 640-acre noncontiguous parcels scattered throughout the state.⁷⁰ For example, under Utah's Enabling Act of 1894, the State received sections 2, 16, 32, and 36 in each township for the benefit of the public schools.⁷¹

The management difficulties created by this erratic allocation have encouraged proposals for land exchanges that would help to amass the various parcels. Predominately, however, land management policies on the school endowment lands around the nation have focused on maximizing the revenue for the schools.⁷² This approach has received criticism for failing to take into account both the long term impacts and the potential noneconomic uses of the land. Notably, both California and Arizona have enacted legislation that hopes to engage some of these unconventional values into land management decisions. In particular, the California Code states that "[t]he commission shall prepare a master plan for all school and lieu lands Such plan shall include a recreational element which requires, to the extent possible, that lands be maintained in a natural state, and shall incorporate a multiple use concept for land use planning."⁷³ Consequently, states that have yet to incorporate such a multi-use provision into their codes cannot approve of the conversion of these lands from an income-generating use such as grazing, to a non-income use such as conservation. The void of statutory authority to help protect school endowment lands in many western states has caused citizens of these states to search for other means to help protect the integrity of their school endowment lands.

⁶⁶ Northwest Ordinance, ch.8, 1 Stat. 50 (1789); Act of April 30, 1802, ch. 40, § 7(1), 2 Stat. 173, 175 (1802).

⁶⁷ See COGGINS ET AL., *supra* note 6, at 67.

⁶⁸ *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

⁶⁹ COGGINS ET AL., *supra* note 6, at 67.

⁷⁰ See Wayne McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525.

⁷¹ See *Andrus*, 446 U.S. at 502 n.1 (quoting The Utah Enabling Act of 1894, ch. 138, 28 Stat. 109 (1894)).

⁷² See McCormack, *supra* note 70, at 525.

⁷³ CAL. PUB. RES. CODE § 6201.5 (West Supp. 1999).

Idaho was admitted as a state in 1890. With its inauguration, the federal government granted 2.5 million acres of land.⁷⁴ The land received was to be managed for the benefit of the endowments to which it was dedicated.⁷⁵ In total, about 85% of the land deeded to the new state of Idaho was placed in a trust dedicated to the benefit of the public school endowment fund, and all income from the land was to go to the fund.⁷⁶

Currently, about 1,900,000 acres of school endowment land are leased to ranchers throughout southern Idaho.⁷⁷ At a rate equaling about fifty cents per acre per year, the leases on these public lands generate approximately \$900,000 per year for the school endowment fund.⁷⁸ Although these are state endowment lands managed by the State Board of Land Commissioners, the below market grazing fees that are perpetuated on the federal public lands throughout the nation are also perpetuated here. Of the money generated by these leases, about \$800,000 goes to the cost of administering the grazing leases.⁷⁹ This modest return is even further diminished by the degraded state of the lands.⁸⁰

D. The Idaho Watersheds Project

In contrast to the management of federal public lands, which recognizes a preference for ranchers who already hold the permit or who own the base property adjacent to the leased land, the Idaho Constitution specifically provides that the land shall be managed “in such manner as will secure the maximum long term financial return to the institution to which granted.”⁸¹ Enter Jon Marvel (Marvel) and the IWP. Marvel founded the IWP in 1993 “to inventory Idaho school endowment lands for important riparian and watershed values and then apply to lease the most important areas and protect them by preventing abusive mismanagement.”⁸² By applying for leases on expiring school endowment land allotments, Marvel intended to raise the price paid for these leases through competitive bidding as well as generate media coverage that would bring the issue of the health of these public lands to the forefront.⁸³ “Marvel mock[ed] federal grazing fees—\$1.35 per cow-calf pair per month in 1999—by comparing

⁷⁴ See *General Information about Idaho Watersheds Project* (visited Jan. 17, 2000) <<http://www.idahowatersheds.org/iwpinfo/checkus.html>>.

⁷⁵ See *Idaho Watersheds Project I*, 982 P.2d at 359 n.1.

⁷⁶ See *General Information*, *supra* note 74.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ IDAHO CONST. art. IX, § 8.

⁸² *General Information*, *supra* note 74.

⁸³ See *id.*

them to the cost of feeding a pet hamster. That, he estimate[d], [was] \$3 per month, while feeding a pet tarantula a month's supply of crickets cost[] \$4.75."⁸⁴

The tactics of IWP were initially successful in winning the leases away from the previous holder by outbidding them during the auction for the lease.⁸⁵ Marvel was even happy to lose a bid on a conflict lease because the outcome was still more money for the school endowment fund.⁸⁶ In September of 1993, IWP filed an application with the Idaho Department of Lands to lease 640 acres of state public land in Custer County, Idaho.⁸⁷ William E. Ingram, the current lease holder, also filed an application to renew his lease on the contested 640 acres.⁸⁸ In a meeting before the State Board of Land Commissioners (Land Board), Marvel explained that a creek running through the allotment provided a spawning habitat for the threatened Chinook salmon and that if he won the lease, he would fence off one mile of the creek to protect this habitat.⁸⁹ Ingram's attorney also appeared before the Land Board to contest IWP's plan and emphasize that the economic reality of Ingram's situation prevented him from paying an increased fee for the grazing lease.⁹⁰ In the end, the Land Board decided that a conflict auction was appropriate, pursuant to the Idaho Code, which provides:

[w]hen two (2) or more persons apply to lease the same land, the director of the department of lands, or his agent, shall, at a stated time, and at such place as he may designate, auction off and lease the land to the applicant who will pay the highest premium bid therefore.⁹¹

Ingram attempted to appeal the decision prior to the conflict auction, but the Land Board held that he could not appeal the conflict auction until after the proceeding and only then if his rights were afflicted in some manner by the proceedings.⁹²

Both IWP and Ingram appeared on January 28, 1994, for the conflict auction at the Idaho Department of Lands office.⁹³ Ingram chose not to make a bid, and IWP made the sole bid of \$30.00, after which it won the auction having been the highest bidder.⁹⁴ Ingram appealed the award to the Land Board on a number of grounds including the importance of the 640 acres of state public land

⁸⁴ Stephen Stuebner, *Jon Marvel vs. The Marlboro Man: Idaho Architect Gets Nasty in Hopes of Healing Public Lands*, HIGH COUNTRY NEWS, Aug. 2, 1999, at 8.

⁸⁵ See *General Information*, *supra* note 74.

⁸⁶ See Stuebner, *supra* note 84, at 8.

⁸⁷ See *Idaho Watersheds Project v. State Bd. of Land Comm'rs (Idaho Watersheds Project 1996)*, 918 P.2d 1206, 1207 (Idaho 1996).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ IDAHO CODE § 58-310 (Supp. 1999).

⁹² See *Idaho Watersheds Project 1996*, 918 P.2d at 1208.

⁹³ See *id.*

⁹⁴ See *id.*

relative to Ingram's overall use of the entire allotment, the potential for IWP's plan to cause degradation to the surrounding public lands, and the fact "that the Ingram family ranch was a long-term, stable, and contributing factor to the local economy."⁹⁵ After reviewing Ingram's appeal, as well as opinions submitted from other agencies, the Land Board decided to award the contested lease of 640 acres to Ingram.⁹⁶ The Land Board primarily based their decision on the longstanding relationship that had been established with Ingram and the fact that the 640 acres of state public land were part of a larger grazing allotment managed by a multi-agency grazing allotment plan.⁹⁷

IWP appealed the decision to the district court, which after review on the record, affirmed the decision of the Land Board in October of 1994.⁹⁸ Following the defeat in the district court, IWP appealed the decision to the Supreme Court of Idaho.⁹⁹ The supreme court held that the decision of the Land Board had violated article IX, section 8 of the Idaho Constitution by leasing the 640 acres of state public land to Ingram because Ingram had failed to even enter a bid and was, therefore, not considered a qualified applicant for the lease.¹⁰⁰ Primarily, the supreme court addressed the issue of whether it was within the Land Board's discretion to grant the lease to Ingram without requiring a competitive bid for the lease of the state public land.¹⁰¹

Notably, the Land Board's discretion in rejecting any bid is broadly stated: "[The Board] shall have power to reject any and all bids made at such auction sales, when in their judgment there has been fraud or collusion, or for any other reason, which in the judgment of said [Board] justified the rejection of said bids."¹⁰² However, because Ingram had failed to even make a nominal bid, the Land Board did not have the discretion or the authority to grant the lease to a non-bidder at a conflict auction.¹⁰³ The rationale behind these conflict auctions arises directly from the language of the Idaho Constitution, which requires the leases to be granted "in such manner as will secure the maximum long term financial return" to Idaho's schools.¹⁰⁴ By soliciting competing bids, the conflict auctions have the potential to raise the greatest amount of financial reward for the schools. Under these circumstances, the supreme court held that the Land Board's discretion was not so broad as to award the lease to Ingram who had failed to

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 1209.

¹⁰¹ *See id.* at 1211.

¹⁰² IDAHO CODE § 58-310 (Supp. 1999).

¹⁰³ *See Idaho Watersheds Project 1996*, 918 P.2d at 1211.

¹⁰⁴ IDAHO CONST. art. IX, § 8.

even place a bid at the conflict auction.¹⁰⁵ Undeniably, IWP had found a crack in the wall through which it would be able to participate in the leasing process of Idaho state lands. In response, however, the Land Board and the state legislature crafted a law and effectively amended the state's constitution in a manner that would prevent non-ranchers, such as Marvel, from bidding on these state public lands leases.

III. THE 1999 CASES

On April 2, 1999, the Supreme Court of Idaho decided three related cases concerning the Idaho Watersheds Project and their applications for leases on state school endowment lands.

A. Idaho Watersheds Project v. State Board of Land Commissioners I

In 1994, despite IWP's failure to actually receive any of the leases it had applied for in 1993, it again submitted lease applications for expiring grazing leases on state endowment lands throughout southern Idaho.¹⁰⁶ Conflict auctions were held to determine the outcome of these leases, and although IWP lost two and won three, more than \$29,500 was raised during the competitive bidding process to be invested in the school endowment fund.¹⁰⁷ During 1995, "the Idaho Legislature enacted section 58-310B of the Idaho Code which authorize[d] the Land Board to avoid holding auctions over competing lease applications if it determine[d] that an applicant [was] not 'qualified' to go to auction. The purpose of the enactment [was] to 'encourag[e] a healthy Idaho livestock industry.'"¹⁰⁸ Effectively, the new law disqualified IWP from bidding on the expiring leases of state public lands. Consequently, although IWP submitted applications for leases in both 1995 and 1996, the Land Board refused to hold auctions over most of them because IWP no longer qualified as an applicant.¹⁰⁹ In 1998 House Joint Resolution (HJR) 6 was adopted by the state legislature proposing to amend two separate sections of article IX of the Idaho Constitution as follows:

A joint resolution proposing Amendments to Section 4, Article IX and Section 8, Article IX, of the Constitution of the State of Idaho, relating to the Public School Permanent Endowment Fund and Endowment Lands, to change the name of the Public School Fund to the Public School Permanent Endowment Fund, to provide that the Public School

¹⁰⁵ See *Idaho Watersheds Project 1996*, 918 P.2d at 1211.

¹⁰⁶ See *Idaho Watersheds Project I*, 982 P.2d at 359.

¹⁰⁷ See *General Information*, *supra* note 74.

¹⁰⁸ *Idaho Watersheds Project I*, 982 P.2d at 359 (quoting IDAHO CODE § 58-310 B(2)(a) (1995)).

¹⁰⁹ See *id.*

Permanent Endowment Fund shall include proceeds from the sale of school lands and amounts allocated from the Public School Earnings Reserve Fund, to provide that proceeds from the sale of school lands may be deposited into a Land Bank Fund to be used to acquire other lands within the state, to provide that if proceeds are not used to acquire other lands with a time provide by the legislature the proceeds shall be deposited into the Public School Permanent Endowment Fund along with earnings and to change the word disposal to the word sale in the context of the disposition of endowment lands; stating the question to be submitted to the electorate; directing the Legislative Council to prepare the statements required by law, and directing the Secretary of State to publish the amendment and arguments as required by law.¹¹⁰

In response, IWP petitioned for a writ of prohibition barring implementation of the amendment due to its failure to comply with the Idaho Code and the Idaho Constitution, which requires that the actual text of a proposed amendment be published, that the statements and explanations of a ballot measure not be misleading, and because the resolution unconstitutionally combined separate and incongruous amendments in violation of article 20, section 2 of the Idaho Constitution.¹¹¹

Specifically, IWP argued that in accordance with article 20, section 1 of the Idaho Constitution the actual text of the proposed amendment, as well as the arguments opposing and proposing the amendment, must be published prior to the election.¹¹² Similarly, section 67-913 of the Idaho Code regarding proposed constitutional amendments directs the Secretary of State to provide for the publication of the proposed amendment, as well as the arguments of the legislative council for and against the amendment.¹¹³ Due to the failure of the

¹¹⁰ *Id.* at 363-64 (caps omitted).

¹¹¹ *See id.* at 360.

¹¹² *See id.* at 361. *See also* IDAHO CONST. art. XX, § 1. Section 1 provides:

[A]nd it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least three (3) times in every newspaper qualified to publish legal notices as provided by law. Said publication shall provide the arguments proposing and opposing said amendment or amendments as provided by law, and if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

Id.

¹¹³ *See Idaho Watersheds Project I*, 982 P.2d at 361. *See also* IDAHO CODE § 67-913 (1995). Section 67-913 provides:

Whenever the legislature shall have directed the submission of a proposal to amend the constitution of the state of Idaho to the electors, the secretary of state shall provided for the publication of the statement of meaning and purpose, and the presentation of major arguments submitted by the legislative council, as well as the text of the proposed amendment.

Id.

actual language of HJR 6 never being published prior to the election, IWP claimed that the voters never had a fair opportunity to understand the nature of the proposed amendments.¹¹⁴

IWP further contended that the materials regarding the ballot measure had failed to provide a simple and understandable statement of the meaning and purpose of the proposed amendment in violation of article 20, section 1 of the Idaho Constitution, section 67-453 of the Idaho Code, as well as constitutional due process guarantees.¹¹⁵ Specifically, IWP asserted that the proposals failed to give a fair representation of the effects of the amendments and that they contained "false and inaccurate assertions which failed to properly inform voters."¹¹⁶ Embedded within the language of the proposition was a fundamental change in how proceedings for state land leases should be handled.¹¹⁷ By changing the wording of the constitution from "disposal" to "sale" there would no longer be the requirement that a lease for public school endowment lands be offered at auction.¹¹⁸ The proposed amendment would only require a public auction during the "sale" of these public lands.¹¹⁹ As amended, the constitution would eliminate competition for these public school endowment land leases. This would result in the reduction of the potential to earn the most revenue, as well as the prevention of competing bids from citizens like Marvel and IWP.¹²⁰

Notably, the standard of review for a ballot measure of a constitutional amendment after an election is intentionally quite narrow because "[t]he will of the electors as indicated by their ballots should not be defeated by a mere irregularity in the procedure of submission of the amendment."¹²¹ The supreme court held that IWP could have acted to correct the constitutional and statutory failures of publishing the text of the proposed amendment prior to the election, and, therefore, its complaints on these grounds were time barred.¹²² "[T]he effect

¹¹⁴ See *Idaho Watersheds Project I*, 982 P.2d at 361.

¹¹⁵ See *id.* See also IDAHO CODE § 67-453 (1995). Section 67-453 provides:

Whenever the legislature shall have directed the submission of a proposal to amend the constitution of the state of Idaho to the electors . . . a brief statement setting forth in simple, understandable language the meaning and purpose of the proposed amendment and the result to be accomplished by such amendment. The statement shall be included in the publications of the proposed amendment required by law of the secretary of state, and shall be printed on the official ballot by which proposed amendment is submitted to the electors

Id.

¹¹⁶ *Idaho Watershed Project I*, 982 P.2d at 361.

¹¹⁷ See *id.* at 367.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ *Id.* at 361 (quoting *Penrod v. Crowley*, 356 P.2d 73, 83 (1960)).

¹²² See *id.* at 362.

[of a favorable] vote by the people is to cure defects in the form of the submission.”¹²³

Due to the fact that any procedural errors in submitting the proposed amendment could be remedied by a favorable voter response, the Supreme Court of Idaho stated that the measure would only be overturned if the defects were such that the voters had been misled.¹²⁴ On these grounds, the supreme court found that the materials were not misleading because although the actual text of the proposed amendments was not published, sufficient material was provided to set forth the purpose and effect of the amendments.¹²⁵ Furthermore, the supreme court held that the arguments of the proponents and opponents of the measure had been adequately represented by their statements for and against the amendments.¹²⁶

Defeated on their procedural challenge arguments, IWP further contested the amendment on the grounds that HJR 6 had improperly combined distinct and incongruous amendments in contravention of article 20, section 2 of the Idaho Constitution.¹²⁷ Specifically, article 20, section 2 states that “[i]f two (2) or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately.”¹²⁸ The supreme court allowed IWP to make this argument following the election because instead of challenging the procedures of the amendment the argument challenged their very substance.¹²⁹

In determining whether a proposed constitutional amendment violated article 20, section 2 of the Idaho Constitution, the supreme court had to determine “whether the change as proposed relates to one subject and accomplishes a single purpose . . . [or whether] the change or changes proposed [can] be divided into subjects distinct and independent, and can any one of which be adopted without in any way being controlled, modified or qualified by the other?”¹³⁰ The test intends to prevent two inconsistent and distinct issues from being presented on the same measure, forcing voters to reject or accept the amendment as a whole when they may have only preferred one of them.¹³¹ Furthermore, the policy was “to prevent the pernicious practice of ‘logrolling’ in the submission of a

¹²³ *Id.* at 361 (quoting *Penrod*, 356 P.2d at 82).

¹²⁴ *See id.* at 362.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ IDAHO CONST. art. XX, § 2.

¹²⁹ *See Idaho Watersheds Project I*, 982 P.2d at 362. *See also Idaho Water Resource Bd. v. Kramer*, 548 P.2d 35 (1976); *Penrod v. Crowley* 356 P.2d 73 (1960); *Keenan v. Price*, 195 P.2d 662 (1948); *McBee v. Brady*, 100 P. 97 (1909).

¹³⁰ *Idaho Watersheds Project I*, 982 P.2d at 363 (quoting *McBee*, 100 P. at 103).

¹³¹ *See id.* (citing *McBee*, 100 P. at 101).

constitutional amendment.”¹³² Although the Land Board argued that all of the language affecting the constitution referred to the sale of school endowment land, the supreme court found that distinct and incongruous subjects had been combined in the proposed amendments to section 4 and section 8 of article nine of the Idaho Constitution.¹³³ Specifically, the supreme court held that the investments of school endowment lands are a distinct issue from the matter of whether auctions should be held for only the sale of school endowment lands as opposed to also being held for the lease of these lands.¹³⁴ Consequently, the supreme court declared that these distinct subjects should have been submitted separately and, therefore, that the amendments proposed by HJR 6 were in violation of the Idaho Constitution.¹³⁵ IWP’s challenge of the amendment effectively struck down one of the barriers that had been imposed in order to prevent Marvel and IWP from applying for leases on the school endowment lands.

B. Idaho Watersheds Project v. State Board of Land Commissioners II

Once again, in 1996, IWP applied to the Idaho Department of Lands (the Department) for twenty-four expiring grazing leases throughout the state of Idaho.¹³⁶ However, in 1995, section 58-310B of the Idaho Code was enacted by the Idaho Legislature providing criteria to determine if an applicant is qualified or not to apply for state endowment land leases.¹³⁷ As a result of section 58-310B, the Department recommended to the Land Board that IWP was not a qualified bidder on eighteen of the twenty-four applications.¹³⁸ In turn, the Land Board decided that IWP was a “qualified applicant” for exactly three of the lease auctions.¹³⁹ At the auctions themselves, IWP was successful in placing the highest bid for two of the three leases, but was later disqualified by the Land Board who followed the Department’s recommendation for disqualification.¹⁴⁰ IWP’s failure to receive a single lease from their 1996 lease applications prompted them to file for a declaratory judgment against both the Land Board and the Department (collectively the State), claiming that Idaho Code section 58-310B was unconstitutional on its face, and to seek judicial review of the Land Board’s decisions, which they claimed were arbitrary and discriminatory.¹⁴¹ After the trial

¹³² *Id.* (quoting *Keenan*, 195 P.2d at 676).

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See Idaho Watersheds Project II*, 982 P.2d at 368.

¹³⁷ *See Idaho Watersheds Project I*, 982 P.2d at 359. *See also* IDAHO CODE § 58-310B (Supp. 1999).

¹³⁸ *See Idaho Watersheds Project II*, 982 P.2d at 368.

¹³⁹ *See id.* at 368–69.

¹⁴⁰ *See id.* at 369.

¹⁴¹ *See id.*

court found that section 58-310B was constitutional and upheld the actions of the Land Board, IWP appealed to the Supreme Court of Idaho.

Before reaching the merits of their claim, IWP had to first clear the hurdle of standing in its action for declaratory judgment.¹⁴² In order to have standing to challenge the constitutional validity of the statute, IWP had to prove that section 58-310B applied to it and that it had been adversely and personally affected by the provision.¹⁴³ To begin with, after IWP had submitted its applications for leases on the school endowment lands, the Department had mailed out letters requesting information that would help determine if the applicant was a qualified bidder.¹⁴⁴ The Department used the criteria listed under section 58-310B to conclude that IWP was not a qualified applicant on several of the leases¹⁴⁵ and also later to deny the award of a lease that IWP had won at public auction.¹⁴⁶ Consequently, IWP illustrated how it had been adversely

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁶ See IDAHO CODE § 58-310B(4) (Supp. 1999). Section 58-310B(4) provides:

To be a qualified applicant and therefore entitled to participate at an auction for a lease under this section: (a) The conflict applicant must have provided payment of one (1) year's rental on the lease payable at the time of application to lease; (b) The applicant must be capable of and willing to fulfill all provisions of any existing written grazing management plan which meets department standards associated with the parcel; (c) The conflict applicant's proposed use of the state land must be compatible with the purpose and terms of a written grazing management plan which meets department standards; (d) The applicant must have filed applications in the manner and at the time provided for by statute and rules duly promulgated thereunder; (e) Nothing herein shall limit the state board of land commissioner's discretion to consider other qualification criteria, including but not limited to applicable criteria contained in subsection (6) of this section.

Id.

¹⁴⁶ See *Idaho Watersheds Project II*, 982 P.2d at 369. See also IDAHO CODE § 58-310B(6). Section 58-310B(6) provides:

Criteria that may be considered by the state board of land commissioners, in deciding to whom the lease should be awarded, include, but are not limited to the following: (a) Whether the participant satisfies the requirements of subsection (4) of this section; (b) Whether the current lessee owns or controls sufficient real property to adequately feed the livestock in the lessee's agricultural operation when the lessee is not utilizing the state lands for grazing purposes; (c) The importance of the state grazing lands to be leased upon the current lessee's total annual livestock operation, and the ability of the lessee to remain economically viable without the lease; (d) The future revenues reasonably anticipated to be generated for the beneficiaries of the endowment and the state as a result of awarding the lease to one (1) applicant over others. If a conflict auction has been held, the board also may consider the premium bids resulting from the auction. (e) The indirect benefits to the beneficiaries of the endowment from tax revenues from all sources generated by the lessee's proposed activities on the leasehold and those activities related thereto, and the long-term stability or appreciation of such tax revenues; (f) The impact on endowment land or the return to the endowment if the leasehold is not managed in conjunction with adjacent grazing lands; (g) Whether the current lessee has managed the conflicted parcels in accordance with a written cooperative grazing management plan which meets department standards; (h) Whether the current lessee has applied in writing

affected by the statute by the fact it had not been awarded any of the leases it applied for in 1996. Furthermore, as an actual applicant for the leases on state endowment lands, IWP was able to demonstrate it had a personal stake in the constitutional validity of section 58-310B.¹⁴⁷ Finally, IWP was able to show a causal connection between the injury it suffered, disqualification as a bidder, and the challenged statute, section 58-310B (4) and (6) of the Idaho Code which had effectively disqualified it as an applicant.¹⁴⁸

The supreme court framed the issue before it by asking whether section 58-310B of the Idaho Code was constitutional as a "regulation . . . prescribed by law."¹⁴⁹ The objectives of the sale and lease of school endowment lands are clearly described in article IX, section 8 of the Idaho Constitution as "secur[ing] the maximum long term financial return to the institution to which granted," in this case, the Idaho public schools.¹⁵⁰ In order to determine if the statute met this requirement, the supreme court referred to the legislative history prior to the enactment of section 58-310B. Supporters of the bill pointed to the significant contribution the Idaho Livestock Industry made to the economy, approximately between \$1.2 and \$3.8 billion, as compared to about \$78,000 that the state earns from conflict bids.¹⁵¹ Beyond the financial gain, supporters pointed to other factors, including "the stability of the livestock industry, the effect on the overall economy of ranchers going out of business, jobs and additional tax funds generated by the livestock industry, and the effect on those who supply the livestock industry."¹⁵² Above all, the new statute promoted stability for the livestock industry which, in turn, would provide increased income for the state of Idaho as a whole.

Although the profits and benefits professed by the new statute appeared to provide a general good for the schools, the state, and the livestock industry, the supreme court was required to go back to the letter of the law as clearly delineated under article IX, section 8 of the Idaho Constitution, which required the Land Board to regulate the lands "in such manner as will secure the maximum long term financial return to the [Idaho public schools]."¹⁵³ Article IX, section 8

to the director for the development and implementation of a written cooperative grazing management plan which meets department standards; (i) Nothing herein shall limit the state board of land commissioner's discretion to consider other criteria in deciding to whom the lease should be awarded.

Id.

¹⁴⁷ See *Idaho Watersheds Project II*, 982 P.2d at 369.

¹⁴⁸ See *id.* at 369-70.

¹⁴⁹ *Id.* at 370 (quoting IDAHO CONST. art. IX, § 8) (directing that the Land Board provide "rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law").

¹⁵⁰ IDAHO CONST. art. IX, § 8. See also *Idaho Watersheds Project II*, 982 P.2d at 370.

¹⁵¹ See *Idaho Watersheds Project II*, 982 P.2d at 370.

¹⁵² *Id.*

¹⁵³ IDAHO CONST. art. IX, § 8. See also *Idaho Watersheds Project II*, 982 P.2d at 370.

further states that the benefits from the disposal of school endowment lands must go toward the object or institution for which the grants were made, in this case the Idaho schools.¹⁵⁴ Because section 58-310B sought to enhance funding for both the state and the schools through the leasing of school endowment lands, the supreme court found that the section was unconstitutional because it violated article IX, section 8 of the Idaho Constitution.¹⁵⁵ After declaring section 58-310B void, the supreme court, on remand, ordered the Land Board to follow the procedures from the original section 58-310 in reissuing the 1996 leases.¹⁵⁶

C. Idaho Watersheds Project v. State Board of Land Commissioners III

Idaho Watersheds Project III was a companion case to *Idaho Watershed Projects II* in which both cases contested the constitutionality of section 58-310B of the Idaho Code.¹⁵⁷ The distinction was that *Idaho Watersheds Project III* was in respect to lease applications from 1995, and *Idaho Watersheds Project II* was in respect to lease applications from 1996.¹⁵⁸ A further distinction was that IWP's 1995 applications were denied as being inconsistent with the land's current grazing classification, while IWP's 1996 applications were initially accepted as being compliant with the land management plan but rejected on the grounds that IWP was not a "qualified applicant."¹⁵⁹ The district court denied a motion by IWP to combine the two cases, resulting in them proceeding separately.¹⁶⁰

In 1995, undeterred by their previous defeats, IWP submitted sixteen applications for grazing leases on state school endowment lands throughout Idaho.¹⁶¹ Their stated purpose was to lease the lands for "grazing and riparian enhancement."¹⁶² In response to the applications, the Land Board decided to hold a special meeting to consider the conflict leases and provide an opportunity for the applicants with questionable qualifying status to testify on the merits of their application.¹⁶³ Applicants were also required to provide written information showing that they qualified as bidders under section 58-310B of the Idaho Code in support of their lease applications.¹⁶⁴ Compliantly, IWP submitted statements verifying its qualifications as a bidder for each of its sixteen school endowment

¹⁵⁴ See *Idaho Watersheds Project II*, 982 P.2d at 370.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 371. See also IDAHO CODE § 58-310 (Supp. 1999).

¹⁵⁷ See *Idaho Watersheds Project III*, 982 P.2d 371.

¹⁵⁸ See generally *id.*

¹⁵⁹ See *id.* at 373.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 372.

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

land's applications.¹⁶⁵ However, in protest to this requirement, IWP filed a motion asking the Land Board to acknowledge section 58-310B as unconstitutional and to operate the auctions according to the single mandate of "maximum long term financial return" as instructed by article IX, section 8 of the Idaho Constitution.¹⁶⁶ In further support of its position, IWP referred to *East Side Blaine County Livestock Ass'n v. State Board of Land Commissioners*,¹⁶⁷ which held that "[t]he public welfare to be subserved is a sufficient reason for granting this writ to compel obedience to a plain provision of the law, which requires these lands to be leased at public auction to the highest bidder therefore."¹⁶⁸ Both the Board and the Department agreed, however, that IWP's motion should be denied and that section 58-310B must be followed "absent a finding by the court that [its provisions] are unconstitutional."¹⁶⁹

Initially, the Board voted to deny some of IWP's applications, approve one, and delay consideration on the remaining ones.¹⁷⁰ In response, IWP commenced the present action challenging the Land Board's decision and only agreed to stay the litigation when the Land Board agreed to reconsider its decision.¹⁷¹ After hearing additional testimony from the Department, IWP, and other sources, "the [Land] Board voted to reject fourteen of IWP's remaining applications and to accept [one]."¹⁷² Significantly, the Land Board believed IWP's true motive for acquiring the school endowment land was for "non-grazing purposes" and because "non-grazing" use was inconsistent with the current grazing management plan, the Land Board rejected IWP's applications for these leases.¹⁷³ The Board's threshold consideration was "that the lands be leased for uses consistent with their current classification for grazing purposes as part of large, multiple-ownership grazing management systems."¹⁷⁴ Because of the Land Board's implicit belief that IWP did not truly intend to use the school endowment lands in this manner, all of the related leases were awarded to the prior lessee without holding an auction.¹⁷⁵

Following this rejection, IWP filed an amended complaint seeking a writ of mandate from the district court that would order the Land Board to hold auctions on the contested lease applications.¹⁷⁶ The district court denied the writ

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* (quoting IDAHO CONST. art. IX, § 8).

¹⁶⁷ 198 P. 760 (1921).

¹⁶⁸ *Id.* at 763. *See also Idaho Watersheds Project III*, 982 P.2d at 372.

¹⁶⁹ *Idaho Watersheds Project III*, 982 P.2d at 373 (alteration in original) (quoting *East Side Blaine County Livestock Ass'n*, 198 P. at 760).

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² *Id.*

¹⁷³ *See id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

on the basis that the constitutionality of the statute could not be determined by mandamus.¹⁷⁷ Consequently, IWP followed up with a motion for partial summary judgment challenging the constitutionality of the section 58-310B.¹⁷⁸ The district court granted summary judgment in favor of the state, “[n]oting that the [Land] Board had wide discretion to ‘direct, control and dispose of [state endowment] lands,’ [and] . . . concluded that there was ‘no reason for judicial interference with the Land Board’s decision and . . . that Idaho Code § 58-310B is constitutional.’”¹⁷⁹ After an amended judgement was entered denying IWP’s claims for declaratory relief, writ of mandate and judicial review, IWP appealed the amended judgement to the Supreme Court of Idaho.¹⁸⁰

IWP made the same argument regarding the unconstitutionality of section 58-310B of the Idaho Code in *Idaho Watersheds Project III* as it made in *Idaho Watersheds Project II*.¹⁸¹ Consequently, the supreme court’s holding that “Article IX, § 8 requires that the State consider only the maximum long term financial return to the schools in the leasing of school endowment public grazing lands,” also applies to the instant case.¹⁸² Essentially, the supreme court reiterated that it would not allow a constitutional provision that was designed specifically to promote funding for schools to also promote funding for the welfare of the state as a whole and the livestock industry in particular.¹⁸³

Similar to *Idaho Watersheds Project II*, the State contested IWP’s standing to challenge the constitutionality of section 58-310B of the Idaho Code.¹⁸⁴ Despite the fact that IWP was held to have standing in *Idaho Watersheds Project II*, the State attempted to distinguish this case by asserting that the Board did not rely on the language of section 58-310B in rejecting IWP’s 1995 lease applications, but rather the applications were rejected on the basis of land designation concerns in general.¹⁸⁵ These contentions were quickly pushed aside by the evidence of numerous instances where the Land Board was shown to directly rely on the criteria of section 58-310B in determining the validity of the lease application. Specifically, the Department issued several letters to IWP informing it that its applications were valid and the next step would be the Land Board’s determination if it was qualified to bid according to the criteria of section 58-310B.¹⁸⁶ Similarly, the Department required that IWP complete a “Statement of Qualification” that would help verify its criteria as a qualified applicant under

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *Id.* (quoting *Idaho Watershed Project II*, 982 P.2d at 367).

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

the section.¹⁸⁷ Undeniably, section 58-310B “‘create[d] a new layer of pre-auction Board review in cases involving expiring grazing leases’ and that this level of review did not exist prior to the enactment of [the new Idaho Code section 58-310B].”¹⁸⁸ Thus, the supreme court held that “‘for the same reasons IWP had standing in *Idaho Watersheds Project II*, IWP also has standing [here].”¹⁸⁹ In holding that section 58-310B was unconstitutional, the supreme court remanded the case to the Board and ordered that the leases that had been improperly awarded be reopened for applications again.¹⁹⁰

IV. CONCLUSION

Notably, grazing on the public lands of the Western United States has never been an easy business. Even when the ranges were unregulated and held open for indiscriminate use during the nineteenth century, the cattlemen continuously fought the arid climate of the land with its scarce sources of food and even scarcer amounts of water. Today, ranchers continue to face these same problems of scarcity, but they are compounded by the competing demands for different uses as well as the diminished productivity of these same lands from years of exhaustive use, to name only a few of the difficulties. The politics of the range have long since been polarized by factors like the policies of the agency, its finite nature, and the different lifestyles it supports.

Jon Marvel acknowledged the problems the state endowment lands were suffering as a result of mismanagement of livestock and decided to do something about it. Beginning in 1993, IWP repeatedly outbid many of the ranchers during conflict auctions for their expired leases. At first, the Land Board attempted to overturn the auctions and return the leases to the prior holder on the grounds that these ranchers had a longstanding relationship with the Land Board and that the leases for the school endowment lands were “‘part of a larger grazing allotment [plan] covered by a multi-agency grazing management plan.”¹⁹¹ When the court overturned these decisions as outside the constitutional grant of authority to the Land Board, the Idaho Legislature enacted both statutory and constitutional provisions to impede IWP from bidding on the school endowment land leases.

Commonly referred to as the ‘Anti-Marvel’ Bill, section 58-310B of the Idaho Code set up a series of qualifications that determined if an individual was eligible to participate as an applicant for school land endowment leases.¹⁹²

¹⁸⁷ See *id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 374–75.

¹⁹¹ See *Idaho Watersheds Projects 1996*, 918 P.2d at 1208.

¹⁹² See generally *Idaho Watersheds Project I*, 982 P.2d 358; *Idaho Watersheds Project II*, 982 P.2d

Similarly, HJR 6 proposed amending Idaho's constitution so that, effectively, auctions would no longer be required for leases of school endowment lands, only for sales of these lands. After reviewing the record, and more significantly, the language of the law, the supreme court had no choice but to overturn the measures because of their direct conflict with the mandate that lands should be managed "[i]n such manner as will secure the maximum long term financial return to the institution to which granted," in this case, the public schools.¹⁹³ Although the measures hoped to promote funding for the schools, the State in general, and more specifically, the livestock industry, the supreme court held only the first of these considerations to be constitutionally viable. Essentially, the supreme court refused to change the law so that it would protect the livestock industry at the expense of Idaho's school children.

The decisions in the three *Idaho Watersheds Project* cases cannot be read to condone or approve of the methods that Marvel is using to help rejuvenate and protect the ailing public lands; rather, the Idaho Supreme Court simply refused to let the leasing process become exclusionary by unconstitutional means. Many of the public land ranchers acknowledge problems in range health, but it is often a problem of funding rather than willingness that makes the improvements hard to implement.¹⁹⁴ The problems caused by livestock on Idaho's lands took generations to create, and there are many different opinions as to how to rejuvenate them. Marvel, for one, believes taking the livestock completely off the range will help bring the land back to health.¹⁹⁵ On the other hand, some range managers and ranchers believe that livestock grazing done properly can actually enhance the benefits to wildlife by knocking down vegetation and keeping new growth soft and fresh.¹⁹⁶

V. EPILOGUE

The Supreme Court of Idaho rejected petitions by the State of Idaho for rehearing on the IWP cases in the fall of 1999, thus reaffirming its own decisions.¹⁹⁷ The issue now before the Land Board is what procedure should it implement in evaluating conflict grazing lease auctions in light of the invalidation of Idaho Code section 58-310B. Although the supreme court directed that section 58-310 should be used in evaluating the affected leases, it is uncertain if the Land Board should use the form of section 58-310 that is currently on the books or the

¹⁹³ IDAHO CONST. art. IX, § 8.

¹⁹⁴ See Howard, *supra* note 2, at 10.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *Steady Stream of Idaho Grazing Victories Continues!*, LAW NOTES (LAND AND WATER FUND OF THE ROCKIES, Boulder, Colo.), Fall 1999, at 1.

form of section 58-310 as it stood prior to the creation of section 58-310B.¹⁹⁸ Notably, certain provisions were deleted from section 58-310 upon the enactment of section 58-310B.¹⁹⁹ The Land Board has been advised that the rules of statutory construction should be referred to in determining which of the two forms of the statute to implement.²⁰⁰

If a portion of a statute or at [sic] statutory enactment is struck down as unconstitutional, it's necessary to look at legislative intent to determine whether or not the remainder of the statute should be given effect or if that part that's not held unconstitutional is so integral to the total operation of the statute that it should not be given effect as well.²⁰¹

In section 58-310's case, the legislature took provisions out of one section of the code and transplanted them into another code section that was intended to deal entirely with the subject of grazing leases. Consequently, the advisory opinion presented to the Land Board stated that since the statutory provision that dealt exclusively with grazing leases had been struck down, the legislative intent would not allow the previous statute dealing with grazing leases to stand without those provisions.²⁰² Normally, the prior statute would simply be resurrected, but in the wake of the *Idaho Watersheds Project* decisions, the Land Board was advised that two of the prior provisions may also be unconstitutional because they are so similar to the provisions of section 58-310B.²⁰³ Specifically, one provision required the ability by any party making an application to lease the lands to fulfill all provisions of an approved grazing management contract, while another provision instructed "[t]he Land Board to look at the effect of the award of the lease on the [lessee's] total operation and the effect of the award of the lease on the total number of acres to be grazed."²⁰⁴ Primarily, it was noted that the Land Board had broad discretion in the factors that could be considered in awarding leases.²⁰⁵ As "prudent land managers," the Land Board has the constitutional discretion to obtain the maximum long-term return for the endowment, as well as the ability to reject any and all bids for "any other reason."²⁰⁶

In January of 2000, the Idaho Board of Land Commissioners awarded two ten-year grazing leases on Idaho school endowment land to IWP, the first

¹⁹⁸ See State Bd. of Land Comm'rs, Idaho Dep't of Lands, Summary Minutes, Special Land Board Meeting 6 (July 6, 1999) (on file with author).

¹⁹⁹ See *id.* at 7.

²⁰⁰ See *id.*

²⁰¹ *Id.*

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ *Id.*

²⁰⁵ See *id.*

²⁰⁶ *Id.* See also IDAHO CODE, § 58-310(4) (Supp. 1999).

leases ever actually awarded to IWP after six and a half years of failed applications and legal battles.²⁰⁷ Over the next ten years, IWP hopes to lease and remove livestock from approximately 40,000 acres of Idaho school endowment land.²⁰⁸

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²⁰⁷ See *Victory!!!*, Idaho Watersheds Project (visited Jan. 12, 2000) <<http://www.idahowatersheds.org/archives/email/newspt72.html>>.

²⁰⁸ See *General Information*, *supra* note 74.