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This opinion responds to questions raised by the State Land Board (board), relating to certain lands granted by the United States to the state upon admission into the Union "for the use of schools" (hereinafter "Admission Act lands"[1/]). In general, these questions deal with the lawful uses of these lands and the effect of federal or state regulations on such uses.[2/] Below, we state the questions and our brief answers, then discuss the reasons for those answers.

FIRST QUESTION PRESENTED

Does the Oregon Admission Act limit the board in applying the standard in Article VIII, section 5(2), of the Oregon Constitution, for management of Admission Act lands?

ANSWER GIVEN

The Oregon Admission Act does impose an obligation upon the board to manage Admission Act lands "for the use of schools." This objective is consistent with the duty imposed by Article VIII of the Oregon Constitution for management of those lands. The management standard in Article VIII, section 5(2), to obtain the "greatest benefit" for the people, presumes an objective that is found elsewhere in Article VIII. In that sense, therefore, the Admission Act does not limit the board in applying the management standard in Article VIII, section 5(2).

SECOND QUESTION PRESENTED

Does the Oregon Admission Act or the Oregon Constitution require the board to maximize revenue, consistent with the prudent investor rule,[3/] from management of Admission Act lands?

ANSWER GIVEN

Yes, to the extent the Admission Act lands are retained and not directly used for schools, e.g., for siting school facilities. However, the board is not required to maximize present income from the Admission Act lands without regard to other considerations. Rather, the board's duty is to manage the lands for the long-term benefit of the schools. Thus, the board may sacrifice present income to preserve the property, if it determines this will enhance income for the future. Noneconomic factors may be considered only if they do not adversely affect the potential financial contribution to the Common School Fund over the long-term.

THIRD QUESTION PRESENTED

Does the Oregon Admission Act or the Oregon Constitution exempt the board from complying with the federal or state Endangered Species Acts (ESAs) on Admission Act lands?

ANSWER GIVEN

No. Neither the Oregon Admission Act nor the Oregon Constitution exempts the board from complying with the federal or state Endangered Species Acts. By virtue of the Supremacy Clause of the United States Constitution, the federal ESA lawfully may limit the state's use of the Admission Act lands, subject to the possibility of a compensable "taking."

The state ESA may not unduly restrict the constitutional powers of the board. The Act does not, on its face, appear to do so. Thus, a conflict would arise only if the Act is applied in a manner which unduly restricts the board's constitutional powers. This would be a fact-specific determination.

FOURTH QUESTION PRESENTED

Is the Common School Fund entitled to compensation from the federal government for asset or revenue reductions caused by compliance with the federal ESA?

ANSWER GIVEN

Probably not. While it is conceivable that the fund might be entitled to compensation for an unconstitutional taking of property without compensation, evaluation of such

a claim is fact intensive and must be conducted on a case by case basis. Even assuming the benefit of an adequate factual record, in our opinion it is unlikely that a takings claim could succeed. Courts are disinclined to award compensation for regulatory takings unless the regulation deprives the property owner of all or virtually all use of the land. Moreover, recent court decisions indicate that damage to property as a result of endangered species regulation will not be considered a basis for compensation.

FIFTH QUESTION PRESENTED

Is the Common School Fund entitled to compensation from the state General Fund for asset or revenue reductions caused by compliance with the state ESA?

ANSWER GIVEN

No. As stated in our answer to your third question, the board is not required to comply with the state ESA if compliance would unduly burden or restrict the board's exercise of its constitutional powers to dispose of and manage Admission Act lands. Accordingly, there is no issue concerning taking of trust property without just compensation, since the state ESA could not lawfully prevent the board from maximizing revenue from Admission Act lands over the long term.

DISCUSSION

I. Use and Management of Admission Act Lands

A. Oregon Admission Act

To address whether the grant of Admission Act lands to Oregon imposes legal restrictions on the use of those lands, it is appropriate to consider the nature and history of this and similar grants.[4/] The history of land grants to newly admitted states is nearly as old as that of the United States itself. The original thirteen states had sovereign authority over all of the lands within their borders. This land provided a tax base for the support of education and other governmental functions. See Andrus v. Utah, 446 US 500, 522, 100 S Ct 1803, 64 L Ed2d 458 (1980). In contrast, the federal government owned vast areas of

the territories that later became states. This land was immune from taxation, and the federal government was disinclined to waive its immunity. As a result, states created from these public lands would not have been on an "equal footing" with those of the original thirteen. Congress, therefore, made land grants to the newly admitted states in order to equalize their tax base status with that of the original thirteen.[5] See generally Utah v. Kleppe, 586 F2d 756, 758 (10th Cir 1978), rev'd, 446 US 500 (1980).

To ensure that land would be available for the school land grants to the new states, Congress established a practice of reserving certain sections in every township within the territories for the support of the schools. Thus, the first enactment for the sale of the public lands in the "western territory," the Land Ordinance of 1785, provided for setting apart section sixteen of every township for the maintenance of the public schools. 1 Laws of the United States 565 (1815). Andrus v. Utah, supra, at 523 n 2. See generally United States v. Morrison, 240 US 192, 36 S Ct 326, 60 L Ed 599 (1916). And, when Ohio was admitted into the Union by the Act of April 30, 1802, it was granted section sixteen in every township "for the use of schools."[6] 2 Stat 175, ch 40, § 7 (1802).

This was the basic pattern followed for subsequent states, although the specific terms of the school land reservations and grants have differed over time. In virtually every case, the school land grants are found in the states' admission or enabling acts. The grants have varied in terms of the number of sections

granted per township, in the wording of the purpose of the grant (e.g., "for the use of schools," "for the support of common schools") and in the extent of explicit restrictions placed upon the state. See Papasan v. Allain, 478 US 265, 270, 106 S Ct 2932, 92 L Ed2d 209 (1986); Andrus v. Utah, supra, 446 US at 506-07; United States v. Morrison, supra, 240 US at 198.

In Oregon's case, Congress first passed the Act of August 14, 1848, 9 Stat 323, ch 177 (1848), reserving certain lands of the Oregon Territory for the schools. It provided:

> That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.

Id. at § 20 (emphasis added). Five years later, Congress passed the Act of January 7, 1853, 10 Stat 150, ch 6, §§ 1, 2 (1853), authorizing the territory to select "lieu" lands when the original granted secticns sixteen or thirty-six were "taken" or "occupied" before title could vest in the territory.[7] Section 2 of this Act provided:

> And be it further enacted, That when selections are made * * * said lands so selected, and their proceeds, shall be forever inviolably set apart for the benefit of common schools.

Id. (emphasis added).

Finally, in 1859, Congress passed the Admission Act, which proposed a grant of sections sixteen and thirty-six "for the use of schools." Section 4 of the Act, which includes the grant of land for the use of schools, is in the form of six propositions

offered to the people of Oregon for their acceptance or rejection. It provides in part:

> That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, * * * shall be granted to said State for the use of schools. * * * Provided that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never [inter alia, tax federal lands].

11 Stat 383, § 4 (1859)(emphasis added).

The Oregon legislature accepted the propositions offered by Congress by an Act dated June 3, 1859. 1 Oregon Code Annotated § 1, at 37 (1930). This acceptance sets out verbatim section 4 of the Admission Act, and then provides:

> Propositions of congress accepted. The six propositions offered to the people of Oregon in the above-recited portion of the act of congress aforesaid, be, and each and all of them are hereby, accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:
>
> Be it ordained by the legislative assembly of the State of Oregon, That the said state shall never [do those things listed in the latter part of section 4 of the Admission Act].[8/]

Id. (emphasis added). Thus, the legislature accepted the grant of sections sixteen and thirty-six for the use of schools and bound the state to section 4 of the Admissions Act.

This offer and acceptance was a "solemn agreement" or "compact," which may be analogized to a contract between private parties. See Andrus v. Utah, supra, 446 US at 507; United States

v. Morrison, supra, 240 US at 201-02; Cooper v. Roberts, 59 US (18 How) 173, 177-79 (1856). The question is: Did this agreement impose any binding obligations on the state with regard to the lands that Congress granted "for the use of schools"?

We conclude that Congress intended to impose restrictions on Oregon's use of its Admission Act lands. Oregon's acceptance of the proposition of its Admission Act, granting land to the state "for the use of schools," imposed a binding obligation on the state. Our conclusion is based on the history of Oregon's Admission Act land grant and the construction of similar land grants to other states.

Concerning the history of Oregon's land grant, we find compelling the language of the Act of 1853, which provided that lands selected "in lieu" of already occupied grant lands "shall be forever inviolably set apart for the benefit of common schools." 10 Stat 150, ch 6, § 2 (1853). If Congress had intended that there be no restrictions on the use of these lands, we think it would not have used such language. Further, it seems probable that Congress, having so clearly expressed its intentions regarding the use of the lieu lands, also intended the same restrictions to apply to the original granted lands. Similarly, it is likely that Congress, having imposed this "inviolabl[e]" restriction on the Oregon Territory in 1853, would have intended to continue the same restrictions upon Oregon's admission into statehood a few years later.

We also find compelling the consistency with which Congress imposed this obligation on other public land states. While the

language of admission acts and acts accepting admission varied somewhat from state to state, they consistently declared that the land grants be used for schools. Indeed, in the earliest grants, Congress explicitly referred to the creation of trust obligations. In amending the 1802 Act granting school lands to the state of Ohio, for example, Congress provided:

> That the following several tracts of land in the state of Ohio, be, and the same are hereby appropriated for the use of schools in that state, and shall, together with all the tracts of land heretofore appropriated for that purpose, be vested in the legislature of that state, in trust for the use aforesaid, and for no other use, intent or purpose * * *.

2 Stat 225, ch 21, § 1 (1802)(emphasis added). We think it unlikely that Congress would have imposed a trust in Ohio and other early public land states and then have imposed no binding obligations at all on other states.

The precise nature of the obligations imposed by Oregon's Admission Act compact is not entirely clear. The Supreme Court's characterization of the school land grants has not been consistent, as the court notes in Papasan v. Allain, supra, 478 US at 290 n 18. Yet, there is a substantial body of caselaw concluding -- in fact, virtually taking for granted -- that the admission acts created trust obligations on the public land states. See, e.g., Department of State Lands v. Pettibone, 702 P2d 948 (1985); County of Skamania v. State, 685 P2d 576 (1984); Oklahoma Ed. Ass'n, Inc. v. Nigh, 642 P2d 230 (1982). There is also authority to the contrary. See, e.g., Madison County Bd. of Educ. v. Illinois Cent. R.R., 939 F2d 292 (5th Cir 1991); see also Bradley v. Case, 4 Ill 585 (1842).

Oregon caselaw sheds little light on the matter. In Schneider v. Hutchinson, 35 Or 253, 258, 57 P 324 (1899), the Oregon Supreme Court spoke of the Admission Act grant as "an absolute grant, vesting title in the state for a special purpose." The court gave no clues as to the meaning of "absolute grant * * * for a special purpose." That language, however, is not entirely consistent with the notion that the Admission Act created a trust.[9/] But then in Grand Prize Hydraulic Mines v. Boswell, 83 Or 1, 6, 162 P 1063 (1917), the court stated that "the school lands granted to the State of Oregon are a trust for the benefit for public education."[10/]

In our view, it is unnecessary at this juncture to characterize the Admission Act obligations in terms of a trust, a public dedication or some other theory. The important point is that the obligations are binding. They cannot be disregarded. Oregon must use the Admission Act lands for schools and not for any purpose that is inconsistent with such use.

Having concluded that the Admission Act imposes binding obligations upon the state, we next consider how these obligations compare to the board's management responsibilities under Article VIII of the Oregon Constitution. If Article VIII imposes obligations that are at least as restrictive as those imposed by the Admission Act, the Admission Act would have no independent effect on the board's management authority. We turn next to that question.

B. Article VIII of the Oregon Constitution

We begin with the history of Article VIII of the Oregon Constitution. As approved by vote of the people of the territory on November 9, 1857, Article VIII referred to the Admission Act lands only in the context of a general provision for education. Section 2 related to the school lands and Common School Fund:

> The proceeds of all the lands which have been or hereafter may be granted to this state, for educational purposes (excepting the lands heretofore granted to and [aid] in the establishment of a university), [along with other moneys and properties described] shall be set apart as a seperate (sic), and irreducible fund, to be called the common school fund, the interest of which, together with all other revenues derived from the school land mentioned in this section, shall be exclusively applied to the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor.

General Laws of Oregon, Constitution of Oregon at 91 (Deady & Lane 1874)(emphasis added). Section 5 described the composition and duties of the board relating to school lands as follows:

> The governor, secretary of state, and state treasurer, shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law.

Id. (emphasis added). This article clearly dedicated the proceeds from the sale of Admission Act lands to the support of the schools, impressing the resulting Common School Fund with a trust "of the highest nature." Eagle Point Irr. Dist. v. Cowden, 137 Or 121, 124, 1 P2d 606 (1931). It also contemplated that the board would sell those lands and deposit the proceeds in the Common School Fund.

It may be inferred that the Admission Act lands themselves are legally dedicated to the same purpose, for if they were not, and the board elected not to raise revenue from the sale or use of the Admission Act lands, the purpose of dedicating those proceeds would fail. In any case, the Oregon Supreme Court on at least one occasion has held that Article VIII subjects the school lands to a trust.

> On the other hand, the school lands granted to the State of Oregon are a trust for the benefit of public education. It is the duty of the state to dispose of them for as near their full value as may be, and to create thereby a continuing fund for the maintenance of public schools.

Grand Prize Hydraulic Mines v. Boswell, supra, 83 Or at 6-7. Thus, we conclude that the obligations imposed upon the use of the Admission Act lands by the original provisions of Article VIII of the Oregon Constitution are consistent with those imposed by the Admission Act.

In 1968, the people of Oregon adopted certain amendments to Article VIII, sections 2 and 5. The amendments to section 2, among other things, authorized the board to expend moneys in the Common School Fund to carry out its duties to manage the lands under its jurisdiction. Official Voters' Pamphlet, Primary Election, May 28, 1968, at 7. The amendments to section 5 expanded the board's duties for the lands described in section 2 and added a new statement of the board's management obligations:

> (1) The Governor, Secretary of State and State Treasurer shall constitute a State Land Board for the disposition and management of lands described in section 2 of this Article, and other lands owned by

> this state that are placed under their jurisdiction by law. Their powers and duties shall be prescribed by law.
>
> (2) The board shall manage lands under its jurisdiction with the object of obtaining the greatestbenefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.

Id. at 6-7 (emphasis indicates text added by 1968 amendments).

For purposes of this opinion, we must consider whether the new management standard was intended to alter the trust impressed upon the Admission Act lands by Article VIII, and to authorize the use of such lands for purposes other than for the schools.[11/]

To ascertain that intent, we look first to the language of the constitutional amendment. See Northwest Natural Gas Co. v. Frank, 293 Or 374, 648 P2d 1284 (1982); Monaghan v. School District No. 1, 211 Or 360, 315 P2d 797 (1957). We do not find in that language any intent to alter the purpose for which the Admission Act lands may be used, i.e., for the use of schools.

The management standard in Article VIII, section 5(2), of the Oregon Constitution simply directs the board to manage the lands

> with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.

The words "with the object of obtaining" do refer to purpose and intent. Yet the stated purpose, "obtaining the greatest benefit for the people of this state," is consistent with the dedication of the Admission Act lands for the use of schools, and that use exclusively. The "greatest benefit" would mean only "greatest

benefit not otherwise inconsistent with the trust purpose of 'use for schools.'" Such a reading also would avoid any conflict between the management standard in Article VIII and the dedication "for the use of schools" in the Admission Act. And, conservation of the Admission Act lands is fully consistent with the duty of a trustee to conserve the corpus of the trust, in this case the lands. Without more, we are unwilling to read into such vague and ambiguous language an intent to alter or supplement the original trust purpose, which was to use the lands for common school purposes. Thus, we conclude that the language of the management standard in Article VIII, section 5(2), of the Oregon Constitution does not, on its face, indicate any intent to change the purpose for which the Admission Act lands are held in trust.

Because analysis of the text of the 1968 amendment does not dispositively reveal the voters' intent, it is appropriate to consider historical evidence. See Lipscomb v. State Bd. of Higher Ed., 305 Or 472, 484-85, 753 P2d 939 (1988). One source of intent is the official explanation for the proposed amendments in the Voters' Pamphlet. See Northwest Natural Gas Co. v. Frank, supra, 293 Or at 383. This explanation stated in part:

> [The proposed amendments] will authorize the State Land Board, with Legislative approval, to expend money from the Common School Fund for improvement of lands under its jurisdiction, and to manage its lands to obtain the greatest benefit for the people of this state consistent with the conservation of the resource.
>
> * * * In managing these lands, the Board is now restricted to a single objective -- to maximize its cash income. * * * The Board normally cannot set aside land for public recreation, parks or scenic purposes.

> The proposed amendment will remove this strict cash income objective, permitting land uses varying with the location, type of land and needs of the citizens of the state.

Official Voters' Pamphlet, supra, at 4 (emphasis added).

The explanation could be read to suggest that the voters intended to alter the permissible purposes of the Admission Act lands, by permitting the use of those lands for recreation or scenic purposes. Clearly, the pamphlet reflects an intent to alter the "strict cash income objective." However, this language does not refer directly or even by implication to the concept that the lands be managed "for the use of schools." The reference to other permissible uses, e.g., public recreation, can easily be explained as an express authorization for such uses where no good economic use of the lands for schools could presently be found, as we have concluded previously. See 38 Op Atty Gen 850, 856 (1977). It also would reflect a recognition that the board would in the future have management responsibility for lands placed under its control by statute, pursuant to new language in Article VIII, section 5(1), in addition to the "school lands" referenced in Article VIII, section 2(1). These "statutory lands" would not necessarily be dedicated to school purposes. At most, we find the language of the Voters' Pamphlet explanatory statement ambiguous. Thus, we do not infer from it an intent to alter the fundamental purpose of the Admission Act lands.

Because there is ambiguity in the Voters' Pamphlet itself, it is appropriate to look at historical evidence of its intent.

It was the duty of the citizens committee that drafted the explanatory statement to provide an "impartial * * * statement explaining the measure and its effect." See ORS 251.215(1). To do this, it is probable that the committee considered the whole of House Joint Resolution (HJR) 7, which included recitals stating the legislature's assumptions and purpose in referring the measure. Thus, these recitals aid in construing the intent of the explanatory statement. Moreover, the recitals are entitled to some weight in determining the intent of the voters themselves, because it is likely that at least some voters were aware of the discussion which led to the referral legislation.

These recitals state:

> Whereas the framers of the Oregon Constitution more than a century ago contemplated the ultimate sale of nearly all lands owned by this state, and the retention of the sale proceeds in the Common School Fund; and
>
> Whereas vast areas of such lands have not been sold, and conditions prevailing in this century may require the State of Oregon to retain some or all of these lands for an indefinite period; and
>
> Whereas it is essential that the State of Oregon, through the State Land Board, manage such retained lands with the object of obtaining the highest returns for the people of this state, consistent with the conservation of this resource under sound techniques of land management developed form time to time; and
>
> Whereas it is essential that the State of Oregon use and invest the assets of the Common School Fund with the object of conferring maximum aid to education in this state, consistent with prudent investment practices prevailing from time to time; and
>
> Whereas it is essential that these management and investment activities be financed adequately * * *.

HJR 7, Or Laws 1967 (emphasis added).

Recognizing the impracticality of the existing constitutional focus on the sale of the land, the resolution notes that it is essential for the board to manage the retained lands "with the object of obtaining the highest returns for the people" of the state. Id. Here, again, there is no suggestion that the purpose for which the Admission Act lands are dedicated or held in trust would be changed. Indeed, the object of obtaining the highest returns for the people of the state from those lands is consistent with the purpose of using the lands for schools by producing income for the Common School Fund. See Johnson v. Dept. of Revenue, 292 Or 373, 382, 639 P2d 128 (1982)("The goal imposed by section 5(2) * * * requires the State Land Board * * * to use lands dedicated to the common school fund in such a way as to derive the greatest net profit for the people of this state.")

Consistent with this purpose, the legislature proposed the constitutional amendment to authorize the board to use moneys in the Common School Fund to finance improvements and to rehabilitate the land.[12/] Our review of the legislative history of HJR 7 discloses no reference to an intention to change the purpose for which the Admission Act lands are to be used.

In sum, we think it highly unlikely that the people of Oregon would so significantly alter a trust that had been in place since statehood and recognized by the Oregon Supreme Court, without more discussion and clearer language. For these reasons, we conclude that, although the 1968 amendment altered the scope of the board's general management authority regarding lands under

its jurisdiction, it was not intended to and did not alter the fundamental purpose of the Admission Act lands, which is to benefit the schools of the state.

The trust obligations imposed on Admission Act lands by Article VIII of the Oregon Constitution are no less restrictive than those imposed by the Admission Act. Both require the Admission Act lands to be used for schools. Having determined the legal purpose of these lands under the Admission Act and Article VIII of the Oregon Constitution, the remaining issue is the nature of the board's management duties with respect to these lands under Article VIII, section 5(2), of the Oregon Constitution.[13/]

C. Management Standard in Article VIII, Section 5(2), of the Oregon Constitution

Article VIII, section 5(2), of the Oregon Constitution requires the board to manage the lands under its jurisdiction "with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management." This "greatest benefit" standard applies to all lands under the board's jurisdiction. However, this standard is not itself an objective; it necessarily requires identification of the objective that would be the greatest benefit for the people, e.g., production of income, recreation, conservation.

In light of our conclusion above that the 1968 amendment did not alter the trust impressed upon the Admission Act lands by Article VIII of the Oregon Constitution, it follows that

fulfillment of the trust purpose is the objective that is the greatest benefit for the people of the state with respect to Admission Act lands.

Thus, we conclude that with respect to Admission Act lands, the "greatest benefit for the people" is to use the land for schools and the production of income for the Common School Fund. In this regard, the Admission Act does not limit the board in applying the management standard in Article VIII, section 5(2). The Admission Act and Article VIII of the Oregon Constitution both define the purpose for which the Admission Act lands are to be used and, therefore, define the "greatest benefit" for the people from these lands. Accordingly, the board's management responsibilities under section 5(2) with respect to Admission Act lands is to attain the greatest benefit for the schools "consistent with the conservation of the lands under sound techniques of land management."

These management responsibilities require the board to obtain full market value from the sale, rental, or other use of the Admission Act lands, while conserving the corpus of the trust. 37 Op Atty Gen 569, 574 (1975). We have previously characterized this obligation as a duty to maximize the value of, and revenue from, these lands over the long term. 38 Op Atty Gen 850, 853 (1977); 39 Op Atty Gen 2199, 2204 (1978). We turn next to the practical requirements of the duty to maximize revenue from the Admission Act lands.

II. Maximization of Revenue

To the extent the Admission Act lands are retained and not directly used for schools, e.g., for siting school facilities, the board must maximize revenue from its management of these lands. What does this "revenue maximization" obligation require in practice? While on the one hand the board must receive full market value from that resource, on the other, the duty to "maximize revenue" does not limit the board to "mechanical consideration" of economic factors:

> [A] trustee must consider risks, make predictions of future developments, and generally take into account all factors which affect risk and return and which may affect risk and return in the future. Consideration of the present and predicted economic situation in Oregon is appropriate with respect to evaluating risk and return of any possible investments in Oregon, as is consideration of the effect those investments could have on other investments of the Common School Fund in Oregon. But in every case the consideration must be directed to determination of the appropriate action to be taken to achieve * * * benefit to the Common School Fund * * *.

43 Op Atty Gen 140, 143 (1983).

For example, in addressing the board's management of the Elliott State Forest, we previously have advised that determining a parcel's potential for financial return would include reducing projected timber sale revenues by the cost of timber management activities (such as road building) that the state would bear. Letter of Advice dated June 22, 1990, to James Brown, Martha Pagel, and Randy Fisher (OP-6383), at 26. In that same letter of advice, we noted that the requirement of maximum return over the long run necessarily requires a policy of sustained yield from a forest resource, because the trustee's duty to conserve trust

property requires the board to conserve the resources committed to its management. Id. In other words, the board may incur present expenses or take management actions which reduce present income if these actions are intended to maximize income over the long term.

The "resources" of Admission Act lands are not limited to those, such as timber, that currently are recognized as revenue generators for the Common School Fund, but include all of the features of the land that may be of use to schools. Just as a trustee diversifies a trust portfolio, the board should consider uses of other resources, such as minerals, water, yew bark, etc., that may offer revenues for the fund. The board may set lands aside temporarily for the purpose of "banking" an asset while its economic value appreciates, if the board has a rational, non-speculative basis for concluding that such action will maximize economic return to the Common School Fund over the long term.

Also, the board may have good trust reasons for conserving resources that have little or no commercial value at the present time. With conservation of productive trust property as its goal, the board must view the land resource as an interrelated whole.[14/] Promoting the long-term health of revenue-producing resources may require conservation measures aimed at non-commercial resources such as water or soils. Above all, the board's management directive requires it to remain flexible. No land board can predict with certainty what revenue-generating opportunities or resource conservation and management concerns may develop in the future.

Revenue for the Common School Fund must remain the board's overriding objective with respect to Admission Act lands that are retained and not directly used for schools, e.g., for siting school facilities. However, the management standard in section 5(2) calls on the board to seek methods for accommodating the broader public interest, if that can be done while still maximizing revenue for the Common School Fund. Letter of Advice dated June 22, 1990, supra, at 26. For example, the board is free to explore innovative mechanisms for securing the environmental and social benefits of preserving habitat for endangered or threatened species. Id. However, the board may use Admission Act lands to pursue these and other non-economic benefits only so long as doing so would not diminish prudent long-term economic return:

> [E]ven though the board's management of common school grant lands must be primarily controlled by Article VIII, § 2, the board's obligation set forth in Article VIII, § 5 to obtain the greatest benefit for the people of the state must also be considered. Where a nonincome-producing use co-exists with and does not diminish income-producing characteristics of the land, we cannot say that the State Land Board is prohibited from taking steps to implement such use.

38 Op Atty Gen 850, 853 (1977)(emphasis added)(designation of Admission Act lands as natural area preserve is proper if designation would not diminish financial contribution to Common School Fund); cf. 37 Op Atty Gen 569, 575-76 (1975)(experimental legislation to improve competition in timber industry through sales of state timber permissible if it would, in the long run, benefit the Common School Fund). Thus, if the board determines that a particular parcel of Admission Act land does not currently

offer revenue-generating potential, the board is free to manage it for any values that obtain the greatest benefit for Oregonians, consistent with the conservation of the resource under sound techniques of land management.[15] 36 Op Atty Gen 150, 223 (1972).

Within the constraints noted above, the board has considerable discretion in exercising its management duties. Although constitutional officers, like other public officials, are responsible in the first instance for determining their duties, courts are not constrained from reviewing that determination to assure that it was correctly interpreted. Lipscomb v. State Bd. of Higher Ed., 305 Or 472, 479, 753 P2d 939 (1988). However, if the officer has correctly interpreted his or her constitutional duty or power, a court cannot substitute its judgment for that of the officer in carrying out that duty or power. See Putnam v. Norblad, 134 Or 433, 293 P 940 (1930); Eacret v. Holmes, 215 Or 121, 333 P2d 741 (1958); Corpe v. Brooks, 8 Or 222, 223-24 (1880).

III. Exemption from Federal or State Endangered Species Acts

Neither the Oregon Admission Act nor the Oregon Constitution expressly exempts the board from complying with any law. Thus, we consider whether either creates an implied exemption from the federal[16] or state ESAs to the extent those acts conflict with the board's duty to maximize financial return from Admission Act lands.

A. Federal ESA

In discussing the possible exemption of Admission Act lands from the federal ESA, we previously have stated:

> Under the law of private trusts, to which we have analogized the Admission Act trust, the trustee's duty of loyalty to the object of the trust is not unlimited. For example, that an action called for under a trust was legal at the time the trust was created is immaterial if that action has since become unlawful. Restatement (Second) of Trusts § 166 at 347 (1959). Moreover, an intended trust is invalid if it calls for conducting an unlawful business. Id., § 61 at 162. Therefore, the State Land Board's management of Admission Act lands is subject to applicable federal regulation.
>
> That principle, however, does not inevitably lead to the conclusion that, where actions to achieve the goal of maximizing financial return to the fund would violate the federal ESA, the State Land Board must comply with that federal Act at the expense of the fund. Despite our extensive research, we have found no authority that resolves the issue whether the federal government may use its plenary commerce and treaty powers to alter the use of Admission Act lands, where the change in use would defeat the purposes of the original land grant. We reserve that question for further study.

Letter of Advice dated June 22, 1990, supra, at 24-25.

We now consider three arguments against application of the federal ESA to Admission Act lands.[17/] Each argument presupposes that compliance with the federal ESA would prevent the board from maximizing financial return from the Admission Act lands.

1. Trust

An argument could be made that, if Congress established a binding trust by virtue of the Admission Act, the Admission Act lands would be exempt from the federal ESA to the extent the federal ESA would interfere with the purpose of the trust. As noted above, with respect to private trusts, a trustee is not

under a duty to do an act that is illegal, even though the act was not illegal at the time the trust was created. Restatement (Second) of Trusts § 166 at 347 (1959). However, this answer may be less than satisfactory where it is the settlor of the trust (Congress) that subsequently made the act illegal. This situation is more akin to an attempt by the settlor to modify the trust terms.

As a general rule,[18/] the settlor of a trust may modify the trust only if the settlor has reserved a power of modification. Restatement, supra, § 331 at 143. If the written instrument creating a trust does not contain a provision reserving such a power, the trust may be modified if it is shown that the settlor intended to reserve a power to modify the trust but by mistake omitted to insert such a provision. Restatement, supra, § 332 at 149, and § 367 at 246. Assuming for the sake of discussion that these principles would apply to a trust created by the Oregon Admission Act, we believe a court would conclude that Congress intended to reserve the power to modify the terms of a trust of Admission Act lands through the exercise of its power to enact general legislation that only incidently affects those lands.

Evidence of the Supreme Court's view of congressional intent may be found in Case v. Bowles, 327 US 92, 66 S Ct 438, 90 L Ed 552 (1946), which held that school grant lands in Washington were not exempt from federal law setting a wartime ceiling price for timber. The Court acknowledged that "[b]oth the [Admission] Act of Congress * * * and the Constitution of the State, had provided safeguards in the disposition of school lands," but characterized

the school land grants as having "transferred exclusive ownership and control over those lands to the State." Id. at 100. Nevertheless, the Court found no evidence that Congress intended to restrict its power to regulate the use of those grant lands:

> No part of all the history concerning these [Enabling Act] grants, however, indicates a purpose on the part of Congress to enter into a permanent agreement with the States under which the States would be free to use the lands in a manner which would conflict with valid legislation enacted by Congress in the national interest.

Id.

In Board of Natural Resources v. Mosbacher, No. C90-5495T/C (D Wash Oct. 8, 1991), the court was presented with the argument that the federal government breached its fiduciary duty to the beneficiaries of Washington's Enabling Act land grants by enacting legislation prohibiting the export of unprocessed timber from federal and state lands. It recognized that Washington's Enabling Act and its constitution, which contains explicit trust language, create an enforceable trust for the benefit of schools, and that although the state acts as trustee, "the United States retains an interest in the administration of these lands." Slip op at 4-5. Even so, the court rejected plaintiffs' argument that the federal legislation violated a fiduciary duty owed by the federal government to the Washington land grant trust beneficiaries:

> Case law, however, does not indicate that the federal government has a direct fiduciary duty regarding state land grant trust lands. Similarly, federal legislation, incidentally affecting state land grant trust income, is not invalid at law as a breach of fiduciary duty.

Id. at 5.

We have found no support for an argument that a trust established by the Admission Act would create an implied exemption from the federal ESA. We conclude that the Admission Act lands are not exempt from the federal ESA because Congress intended to reserve the power to incidentally affect the trust by subsequent general legislation.

2. Contract

An argument also may be made that the Admission Act is a binding contract involving bargained-for consideration (i.e., Oregon received the Admission Act lands for the use of schools in exchange for giving up the right to tax federal lands), and that Congress would breach this contract by depriving the state of the opportunity to obtain maximum financial return for the schools from that land. Again, we think this argument would fail.

The Contracts Clause, Article I, section 10, of the United States Constitution, which prohibits "impairment of contracts," applies to the states but not to the federal government. Thus, Congress is not prohibited from passing laws that may impair contractual obligations. In Bowen v. Agencies Opposed to Soc. Sec. Entrap., 477 US 41, 52, 106 S Ct 2390, 91 L Ed2d 35 (1986)(quoting from Merrion v. Jicarilla Apache Tribe, 455 US 130, 147 (1982)), the court concluded that "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." Similarly, the Ninth Circuit rejected the notion that contracts to which the United States is a party can never be modified. Peterson v. United States Dept. of Interior, 899

F2d 799 (9th Cir 1990), cert den, 111 S Ct 567 (1990). See also Case v. Bowles, supra, 327 US at 100.

Accordingly, we conclude that even if the Admission Act were viewed as a solemn agreement or binding contract, Congress could modify its own contracts through exercise of its sovereign power to legislate. Cf. Board of Natural Resources v. Mosbacher, supra, slip op at 7-8 (indirect impairment of state's contractual rights under school lands trust by Forest Resources Conservation and Shortage Relief Act is permissible exercise of sovereign power).

3. Special versus General Legislation

Two federal courts have labeled an Admission Act "special"[19/] legislation and held that it governs over subsequent "general" legislation. Both cases dealt with the Utah Enabling Act, which is similar to Oregon's Admission Act in that it granted Utah certain sections of land in each township for school purposes.

The application of the "special versus general" theory in this context originated in Utah v. Kleppe, 586 F2d 756 (10th Cir 1978) rev'd, Andrus v. Utah, 446 US 500 (1980), where the state resisted the federal government's attempt to use standards in the Taylor Grazing Act to screen state indemnity land selections. In affirming a District Court judgment in favor of the state, the Tenth Circuit compared the Utah Enabling Act and the Taylor Grazing Act as follows:

> Where there are two statutes upon the same subject, the earlier being special (as is the case with regard to [the Utah Enabling Act]) and the later being general

(as is the case with regard to the 1936 amendment to the Taylor Grazing Act, 43 U.S.C. § 315f, supra) it is settled law that the special act remains in effect as an exception to the general act unless absolute incompatibility exists between the two, and all matters coming within the scope of the special statute are governed by its provisions. Sutherland Statutory Construction, 4th Ed., Vol. 2A § 51.05. The latter authority summarized the general-special acts rule:

> General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05, p. 315.

We submit that the strict, continuing "trust" obligations imposed by the Congress upon the "public land" states (and willingly accepted by them) in the school land grant statutes clearly set these enactments aside as special acts complete separate and apart from all other public land grant enactments. In that sense, then, these enactments are set apart and given special, independent treatment, much akin to the special preference and treatment of Indians recognized in Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

Id. at 768-69 (citations omitted). The Supreme Court reversed the Tenth Circuit on other grounds. Andrus v. Utah, 446 US 500, 100 S Ct 1803, 64 L Ed2d 458 (1980).

The "special versus general" theory was resurrected by the United States District Court for the District of Utah in Utah v. Andrus, 486 F Supp 995 (1979), where the state sought a right of access across Bureau of Land Management land to allow exploitation of oil and gas in an isolated section of state school grant land. The federal government refused access because

the Federal Land Policy and Management Act (FLPMA) prohibited degradation of wilderness study areas such as that which surrounded the state tract. Although the court's decision in the state's favor was based largely on the traditional property doctrine of implied right of access, the opinion included the following dicta on the "special versus general" theory:

> The court further finds that the school land grants were accomplished under what is termed "special" legislation. Under statutory rules of construction, when "special acts" conflict with acts which deal with the same subject matter in a more general way, the special acts are to prevail, regardless of whether the special acts were passed prior to or after the general act. See Utah v. Kleppe, supra, at 768-69. Of course, this rule does not apply if there is some indication that Congress intended to modify the special act. There is, however, no such indication in the legislative history of FLPMA. Indeed, the terms of FLPMA itself would indicate that Congress did not intend to amend rights under the school land grant program. See section 701(g)(6) (codified at 43 U.S.C.A. § 1701 note (Supp. 1979)).

Id. at 1009-10.

There are at least two reasons why this argument is not likely to be successful with respect to Oregon's Admission Act and the federal ESA. First, the canon favoring a "special" statute over a "general" one applies only when there is a conflict between two statutes dealing with the same subject matter. In Kleppe, a conflict arguably did exist: The Enabling Act gave Utah the absolute right to select indemnity lands while the Taylor Grazing Act purported to restrict that right. We find no such conflict between Oregon's Admission Act and the federal ESA. The Admission Act is a land grant, while the federal ESA addresses wildlife conservation. Because the two acts concern

different subjects, this canon of statutory construction does not seem to apply. Moreover, even if the Oregon Admission Act does impose an obligation to maximize the financial return from the Admission Act lands, the federal ESA does not necessarily contradict it. The ESA itself says absolutely nothing about management of state lands, and in practice the ESA's prohibition against "taking" an endangered or threatened species may result only in a deferral of financial gain (rather than a loss of such revenue). Thus, if a conflict arises, it is not from what the federal ESA expressly states, but rather from how it may be applied in a particular instance.

Second, the "canons" of statutory construction, such as those used by the Kleppe and Andrus courts, are merely aids for determining legislative intent. 2A Sutherland Statutory Construction § 45.05, at 23 (5th ed Singer 1972). The fundamental issue is whether Congress intended the federal ESA to limit the state's use of all state land, including Admission Act lands.[20/] If it were necessary to resort to canons of statutory construction in order to ascertain legislative intent with respect to the federal ESA, we believe it is more likely that other canons of statutory construction (such as that favoring a broad interpretation of remedial legislation, such as the ESA) would lead a court to the opposite conclusion.

Thus, we believe it is very unlikely that the state could successfully resist application of the federal ESA to Admission Act lands on the ground that the Admission Act, as special

legislation, prevails over general legislation such as the federal ESA.

B. State ESA

We consider three bases for an argument that there is an implied exemption from the state ESA for Admission Act lands: First, that the lands are subject to a trust requiring maximization of revenue; second, that the Admission Act is a binding contract between the state and the federal government; and third, that the board's constitutional duty to manage the Admission Act lands overrides the state ESA.

1. Trust

Assuming the Admission Act creates a trust, the state could not alter the terms of the trust without the consent of the settlor (Congress). Restatement, supra, § 338 at 167. The state ESA, however, does not alter the terms of the trust. Since the state ESA is a lawful exercise of the state's inherent power to legislate, and its effect on trust lands, if any, is only incidental to its primary purpose, we doubt that a court would find the Admission Act lands to be exempt from the state ESA based upon a trust created by the Admission Act. Cf. Mosbacher, supra, slip op at 5 (enactment of legislation incidentally affecting trust is not a breach of fiduciary duty).

Where a trust is imposed by the Oregon Constitution, the question becomes one of the legislature's authority to interfere with the constitutional duties of the board (the trustee). We discuss this issue below.

2. Contract

Both federal and state constitutions provide that the state may not enact laws that impair contractual obligations. An argument could be made that, by enacting the state ESA, Oregon has impaired the state's obligations under the Admission Act compact. In our opinion, however, such an argument would not be sustained by the courts.

a. Federal Contract Clause

Article I, section 10, of the Federal Constitution provides that "no state shall * * * pass any * * * law impairing the obligation of contracts." As we have already noted, by its terms, this clause applies to the states, and this has been held to include contracts to which the state is a party. Fletcher v. Peck, 10 US (6 Cranch) 87, 3 L Ed 162 (1810)(Contract Clause prevents state legislature from invalidating state land grants).

The Contract Clause, however, has never been read literally. See, e.g., Keystone Bituminous Coal Assn. v. DeBenedictis, 480 US 470, 502-03, 107 S Ct 732, 94 L Ed2d 472 (1987); W.B. Worthen Co. v. Thomas, 292 US 426, 433, 54 S Ct 816, 78 L Ed 1344 (1934). Instead, it has been read to accommodate the legitimate exercise of other state powers. In particular, the courts have read the Contract Clause to permit states to enact laws that promote the health, safety and welfare of its citizens. Thus, in the landmark case of Home Bldg. & L. Assn. v. Blaisdell, 290 US 398, 54 S Ct 231, 78 L Ed 413 (1934), the court upheld a statutory moratorium on home foreclosures, even though the effect of the

moratorium was an impairment of obligations under existing mortgage contracts. As the court explained:

> 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.'

Id. at 437 (quoting Manigault v. Springs, 199 US 473, 480 (1905).

We know of no suggestion that the state ESA represents anything other than a valid enactment resulting from the legitimate exercise of the state's "sovereign right" to protect and promote the welfare of its people. To the contrary, the power of the state to enact laws for the protection of fish and wildlife is well-established. See, e.g., Anthony v. Veatch, 189 Or 462, 474, 220 P2d 493 (1950)("the preservation of fish and game is within the proper scope of the police power"). Thus, we find it highly unlikely that the courts would entertain any notion that the state ESA violates the federal impairment of Contracts Clause.

b. State Contract Clause

Article I, section 21, of the Oregon Constitution provides that "No * * * law impairing the obligation of contracts shall ever be passed * * *." As in the case of the federal impairment of Contract Clause, Oregon's counterpart has been held to apply to contracts to which the state is a party. Campbell v. Aldrich,

159 Or 208, 213-14, 79 P2d 257 (1938). Also as in the case of the Federal Contract Clause, the Oregon Contract Clause has never been read literally. It has instead been read to permit the state to enact laws pursuant to other constitutional or sovereign powers that have the incidental effect of altering contractual obligations. As the Oregon Supreme Court has stated: "[T]he police power cannot be bargained away." State Highway Com. v. Clackamas W. Dist., 247 Or 216, 221, 428 P2d 395 (1967); see also Campbell, 159 Or at 217 ("the obligations of contracts must yield to a proper exercise of the police power"); Schmidt v. Masters, 7 Or App 421, 434, 490 P2d 1029 (1971)(all contracts are "necessarily subject to being modified by requirements of laws enacted in pursuance of the police power").[21/]

There is dictum in one recent Oregon Supreme Court opinion suggesting that this view of the Contract Clause may no longer be valid. Eckles v. State of Oregon, 306 Or 380, 399, 760 P2d 846 (1988)("the state cannot avoid a constitutional command [i.e., the Contract Clause] by balancing it against another of the state's interests or obligations," [i.e., its police power]). The court, however, has never directly discredited or overruled any of its prior Contract Clause cases, and so we take them as controlling on this question.

Accordingly, we conclude that, as in the case of the Federal Contracts Clause, Oregon's Contracts Clause does not provide a likely basis for invalidating the state ESA as against the Land Board's obligations under the Admission Act compact.

3. Constitutional Duties of State Land Board

Article VIII, section 5, of the Oregon Constitution gives responsibility for the "disposition and management" of Admission Act lands to the board. This is a constitutional grant of power, upon which the legislature may not infringe.[22/] Thus, we previously advised that the legislature cannot impose regulatory requirements on the board's management of lands constitutionally dedicated to the Common School Fund if to do so would interfere with the board's exercise of its management responsibilities under Article VIII, section 5, of the Oregon Constitution. 42 Op Atty Gen 260 (1982); Letter of Advice dated May 24, 1982, to Ed Zajonc, Director, Division of State Lands (OP-5326) at 6. That advice remains accurate, but its application should be clarified in light of your questions.[23/]

The general rule is that legislative action may not unduly burden or unduly interfere with another constitutional body in the exercise of its constitutional function. See Ramstead v. Morgan, 219 Or 383, 399, 347 P2d 594 (1959). In its decisions on claims that legislative enactments unconstitutionally infringe on the powers of the judicial branch, the Oregon Supreme Court has been hesitant to invalidate a statute under the "unduly burden" standard. For instance, holding that the Public Employes Collective Bargaining Act applied to juvenile court judges and counselors, the court reviewed a number of cases upholding legislation that had "considerably more direct impact" on the adjudicative process. The court stated that a violation of the judiciary's constitutional authority would occur only when

legislation constituted "an outright hindrance of a court's ability to adjudicate a case" or a "substantial destruction of the exercise of a power essential to the adjudicatory function." Circuit Court v. AFSCME, 295 Or 542, 551, 669 P2d 314 (1983). Mere apprehension of unconstitutional interference will not invalidate a statute on separation of powers grounds. Id. See also State ex rel Emerald PUD v. Joseph, 292 Or 357, 362, 640 P2d 1011 (1982)(upholding constitutionality of statute requiring Court of Appeals to hear and decide certain type of case within 90 days); Sadler v. Oregon State Bar, 275 Or 279, 295, 550 P2d 1218 (1976)(application of Public Records Law to State Bar disciplinary records "does not unreasonably encroach" on judicial function of disciplining lawyers and is therefore constitutional.) From these decisions, it is clear that a statute does not impose an unconstitutional burden on the judicial branch unless there is a substantial destruction of the exercise of a power essential to the functioning of the judicial branch. We think that a similar analysis would apply to general statutory regulations that do not substantially destroy the board's management powers over Admission Act lands.

The state ESA requires a state agency to "consult and cooperate" with the Oregon Department of Fish and Wildlife (ODFW) and, before taking any action on land owned by the state, to "[d]etermine that the action * * * is consistent with programs established by the [State Fish and Wildlife] [C]ommission pursuant to ORS 496.172(3)" for the protection and conservation of threatened or endangered species. ORS 496.182(2)(a). If no

such program has been established by the commission, an agency must "determine whether [the intended] action has the potential to appreciably reduce the likelihood of the survival or recovery" of a threatened or endangered species and, if so, notify ODFW. ORS 496.182(2)(b), (3). If the agency then fails to adopt ODFW's recommendations, the agency must, after consultation with ODFW, demonstrate that:

> (a) The potential public benefits of the proposed action outweigh the potential harm from failure to adopt the recommendations; and
>
> (b) Reasonable mitigation and enhancement measures shall be taken, to the extent practicable, to minimize the adverse impact of the action on the affected species.

ORS 496.182(4).

On its face, the state ESA does not restrict the board's exercise of its constitutional powers over the disposition and management of Admission Act lands. The restrictive portions of the ESA are not directed at the board alone, but apply generally to all state agencies. Unlike a statute purporting to require the board to sell, or not to sell, a specified amount of timber from Admission Act lands, the state ESA does not explicitly require or prohibit any particular action with respect to the "management" of the Admission Act lands. A "general institutional inconvenience is not enough to render legislation constitutionally defective." Circuit Court v. AFSCME, supra, 295 Or at 551.

The question, therefore, is whether the state ESA, as applied, unduly burdens or interferes with the board's

irreducible constitutional task of disposing of and managing Admission Act lands consistent with its trust responsibilities under Article VIII. This necessarily is a fact-specific determination requiring consideration of both the range of the board's discretion in managing specific property and the range of options remaining to it after complying with the state ESA. The board's duty to maximize income to the Common School Fund over the long term includes a duty to treat beneficiaries even-handedly over time. Just as it may not deplete resources in the present so that no income-producing potential remains for future generations of school children, the board also may not sacrifice the needs of today's school children in order to preserve the resource exclusively for the distant future. Within that range, however, the constitutional management standard gives the board broad discretion to decide what is the wisest use of the resources that generate income for the Common School Fund, so long as that use is consistent with the goal of maximizing revenue over the long term.

The Oregon Supreme Court's decisions demonstrate that the "undue burden" standard is a high one. Clearly, not every regulation that narrows the board's discretion is an "undue burden" on the board's constitutional duty to manage the lands so as to maximize revenue for the Common School Fund over the long term. So long as the choices that remain open to the board after complying with the state ESA are choices that would not fundamentally impair its ability to maximize revenue over the long term -- that is, the remaining choices would fall within the

board's discretion absent the ESA -- the burden is not undue. Precisely when regulation crosses the line from a "general institutional inconvenience" to an undue interference with the board's duty is impossible to define, especially in the absence of a specific factual context. In the first instance, at least, locating that line is a matter for the board. Similarly, if the board is satisfied that application of the state ESA does not prevent the board from fulfilling its constitutional responsibilities, a court is likely to conclude that the burden from the ESA is not undue. If the board were to conclude that its constitutional duty required it to disregard the ESA, it is likely that a reviewing court would accord substantial weight to the board's interpretation of its constitutional responsibility.

IV. Compensation for Revenue Reductions Due to Federal ESA

The Common School Fund may have a right to compensation from the federal government for asset or revenue reductions caused by compliance with the Federal ESA under two sources of law: the "takings" provisions of the federal constitution, and statutes concerning federal indemnification for loss of certain school lands. We consider each of these possibilities.

A. Federal Constitutional Takings

Diminution in value of property is a common consequence of regulation by the federal government. Indeed, it is difficult to imagine any set of government regulations of the conduct of business that does not in some way adversely affect the value of someone's property. This is, as the United States Supreme Court frequently has stated, merely a "burden of common citizenship."

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 US 470, 491-92, 107 S Ct 1232, 94 L Ed2d 472 (1987)(quoting Mugler v. Kansas, 123 US 623, 665 (1887)).

Government regulation can go too far. At some point it can exact too high a price and trigger the constitutional requirement that "takings" of private property must be accompanied by just compensation.[24/] Pennsylvania Coal Co. v. Mahon, 260 US 393, 415, 43 S Ct 158, 67 L Ed 322 (1922)("if a regulation goes too far it will be recognized as a taking"). Thus, regulation depriving an owner of all economic use of property has been held to be a "taking," requiring the government to pay just compensation. First Lutheran Church v. Los Angeles County, 482 US 304, 107 S Ct 2378, 96 L Ed2d 250 (1987).[25/] Although the Constitution expressly refers only to takings of private property, the courts have held that this constraint on government action applies to takings of public property as well. See, e.g., United States v. 50 Acres of Land, 469 US 24, 31, 105 S Ct 451, 83 L E2d 376 (1984)(Takings Clause of Federal Constitution applies to state property because loss "to persons served by [the state property], and to the local taxpayers may be no less acute than the loss in a taking of private property"); Standard Oil Company of California v. Arizona, 738 F2d 1021, 1028 (9th Cir 1984), cert den, Chevron Corp. v. Arizona, 469 US 1132 (1985)("[d]espite the fact that the Fifth Amendment * * * is worded in terms of 'person' and 'private property,' this court has held that the United States had to pay just compensation" for a taking of state property).

The questions presented ask whether the application of the federal ESA has gone "too far" when it diminishes the value of Admission Act lands. Our answer is that it is unlikely that a taking occurs. However, any definitive opinion on these questions requires an evaluation of the particular facts of each particular case.

Regulatory takings can occur in either of two ways: "facial takings," resulting from the mere enactment of a law or regulation, or "as applied takings," resulting from the application of a law or regulation to a particular parcel of land or other property interest. See generally Keystone, supra, 480 US at 494-95 (discussing differences between facial and as applied takings claims). Your questions implicate the second of these two categories of takings cases.

There is no predetermined test by which the courts evaluate as applied regulatory takings claims. As the United States Supreme Court frequently has observed, "To this day we have no 'set formula to determine where regulation ends and taking begins.' Instead, we rely 'as much [on] the exercise of judgment as [on] the application of logic.'" MacDonald, Sommer & Frates v. Yolo County, 477 US 340, 348-49, 106 S Ct 2561, 91 L Ed2d 285 (1986)(quoting Goldblatt v. Hempstead, 369 US 590, 594 (1962)(citations omitted). Courts are instructed to evaluate as applied claims "by engaging in essentially ad hoc, factual inquiries," concerning the economic impact of the regulation, its interference with reasonable investment-backed expectations and

the character of the governmental action at issue. Kaiser Aetna v. United States, 444 US 164, 175, 100 S Ct 383, 61 L Ed2d 332 (1979).

Given the "essentially ad hoc, factual" nature of the inquiry, we cannot predict with any certainty how courts are likely to respond to an as applied takings claim without a complete factual record of the claim. Id. However, we can say that we think it unlikely that courts would entertain an as applied takings claim based on the adverse economic impacts of the federal ESA for at least two reasons.

First, concerning the economic impact of the regulation, the courts generally require that the regulation deprive property of all, or nearly all, of its value before finding that the regulation effects a taking requiring compensation. See, e.g., Andrus v. Allard, 444 US 51, 66, 100 S Ct 318, 62 L Ed2d 210 (1979)("a reduction in the value of property is not necessarily equated with a taking"); Village of Euclid v. Ambler Realty Co., 272 US 365, 396-97, 47 S Ct 114, 71 L Ed 303 (1926)(regulation producing 75 percent reduction in value upheld); Hadacheck v. Sebastian, 239 US 394, 410, 36 S Ct 143, 60 L Ed 348 (1915)(92 percent reduction in value upheld); Haas v. City of San Francisco, 605 F2d 1117, 1120 (9th Cir 1979), cert den, 445 US 928 (1980) (80 percent reduction upheld). The Supreme Court's most recent taking decision, Lucas v. South Carolina Coastal Council, ___ S Ct ___, 60 USLW 4842, 1992 WL 142517 (USSC, June 29, 1992), No. 91-453, confirms this principle. Here, the Court observed that, while states generally may not deprive land of all

economically viable use without compensation, regulations that burden landowners with as much as a 95 percent loss may well be noncompensable. Id., 1992 WL 142517 n 8 at * 12.

In light of the substantial returns that Admission Act lands have brought the state since the imposition of the ESA, it would be difficult to assert a takings claim based on the impact of the federal ESA. In the case of the Elliott Forest, for example, the Division of State Lands estimates that approximately 70 percent of the forest timber currently is in some way restricted by federal and state endangered species regulation but that, since the listing of the Northern Spotted Owl as a threatened species under the federal ESA, approximately 43,288,000 board feet of timber have been sold, valued in excess of $18 million.

Second, courts have exhibited great reluctance to allow compensation for takings under the Fifth Amendment to the United States Constitution that are limited and only incidental to regulation. This reluctance has been evident in cases involving wildlife conservation. For example, even when outright destruction of private property results from government protection of protected species of wildlife, courts have declined to find that compensation is required. In Christy v. Hodel, 857 F2d 1324 (9th Cir 1988), cert den, Christy v. Lujan, 490 US 1114 (1989), owners of livestock complained that government protection of grizzly bears pursuant to the federal ESA resulted in large-scale destruction of their sheep herds. They asserted a regulatory takings claim based on the loss of their livestock, but the Court of Appeals for the Ninth Circuit rejected the claim: "[W]e hold

that the ESA, and the grizzly bear regulations do not effect a taking of plaintiffs' property by the government so as to trigger the just compensation clause of the Fifth Amendment * * *." Id. at 1335. The harm plaintiffs suffered, the court held, was "the incidental, and by no means inevitable, result of reasonable regulation in the public interest." Id. See also Mountain States Legal Foundation v. Hodel, 799 F2d 1423, 1428-29 (10th Cir 1986), cert den, 480 US 951 (1987)(rejecting takings claim based on damage caused by protected wildlife).

In short, it is not possible at this juncture for us to predict with precision the extent to which application of the federal ESA to Admission Act lands could result in a claim for taking of property. The essentially "ad hoc, factual" nature of the courts' inquiry necessitates a case by case determination. We can say, however, that the cases in this area suggest that it would be unlikely such a claim would prevail, given the requirements of an as applied regulatory takings claim.

B. Potential Statutory Indemnity Claim

The Federal School Land Indemnity Act, 43 USC §§ 851, 852 (1986), provides that, if school lands are disposed of by the federal government prior to the time the lands have been surveyed and title has actually passed to the state, the federal government is obligated to indemnify the state for the lost land with "lieu lands," that is, equivalent alternate property. For example, if the land to be granted to the state is located within a national forest, the federal government is obligated to permit the state to select other land in lieu of that forest land. See, e.g., Andrus

v. Utah, supra, 446 US 500, (1980); Oregon v. Bureau of Land Management, 876 F2d 1419 (9th Cir 1989).

It could be argued that, if the federal government must compensate the state for using school lands for national forests, it likewise should be required to compensate the state for effectively imposing the same restriction under the federal ESA by requiring land to be reserved for the protection of threatened or endangered species. That the argument is plausible, however, is not to say that it would be accepted by the courts. The language of the statute refers to "deficiencies" in the grants to the state by virtue of prior grants or reservations. A deficiency is far more than a diminution in value of the grant incident to otherwise valid regulation.

V. Compensation for Revenue Reductions Due to State ESA

Your fifth question asks whether the Common School Fund would be entitled to compensation from the state General Fund for asset or revenue reductions caused by compliance with the state ESA. The question offers no theory under which compensation might be due, and we are aware of none other than a possible claim under Article I, section 18, of the Oregon Constitution, which provides that "property shall not be taken for public use * * * without just compensation." Because the Oregon Supreme Court has held that the "basic thrust" of the Takings Clause of the Federal Constitution and Article I, section 18, of the Oregon Constitution "is generally the same," Suess Builders Co. v. Beaverton, 294 Or 254, 259 n 5 (1982), analysis of a state takings claim would

follow the principles discussed above concerning a federal takings claim.

However, our view of the interrelation of the state ESA and the board's constitutional duties indicates that the board will not encounter a situation under the state ESA that would give rise to a state takings claim. We conclude above that the board is not required to comply with the state ESA if compliance would unduly burden or restrict the board's exercise of its constitutional powers to dispose of and manage Admission Act lands. This amounts to a "safety valve" that averts a potential state takings claim: The state ESA lawfully could not prevent the board from maximizing revenue from trust property over the long term.

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CSC:JLL:DCA:ALV:JSL:RWM:WRC:tmt/JGG03640

[1/] Our reference to "Admission Act lands" is limited to those lands granted to Oregon by the Admissions Act "for the use of schools" and those lands received by the state in lieu of the original school lands. This term does not include any other lands, the proceeds of which may be dedicated to the Common School Fund, nor does it include any lands that are placed under the board's jurisdiction by statute.

[2/] We have considered similar questions in a number of our prior opinions. See, e.g., 17 Op Atty Gen 59 (1934); 18 Op Atty Gen 238 (1937); 32 Op Atty Gen 307 (1965); 37 Op Atty Gen 569 (1975); 38 Op Atty Gen 850 (1977); 42 Op Atty Gen 260 (1982); Letter of Advice dated March 31, 1987, to Ed Zajonc, Director, Division of State Lands (OP-6094); 46 Op Atty Gen 195 (No. 8201, April 10, 1989). We do not re-examine our earlier opinions, but rather take a fresh look at the questions presented.

[3/] By "maximize revenue consistent with the prudent investor rule," we understand you to mean "maximize revenue over the long term." Because that is the definition of "maximize

revenue" we have used in previous opinions on the State Land Board's responsibilities, we use it in this opinion as well. See 43 Op Atty Gen 140 (1983), 38 Op Atty Gen 850 (1977).

[4/] In Johanson v. Washington, 190 US 179, 23 S Ct 825, 47 L Ed 1008 (1903), the court construed the Washington Admission Act grant of school lands, noting that acts making grants

> 'are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.'

Id. at 184 (quoting Winona & St P R Co v. Barney, 113 US 618, 625 (1885)).

[5/] The land grants were predominantly for schools. There also were grants of salt spring lands and lands for the seat of government and public buildings. Our discussion focuses only on the school land grants. Beyond the purpose of equalizing the states' tax bases, the land grants for schools undoubtedly had the additional purpose of encouraging education and accelerating the disposition of western lands at a higher price. See Papasan v. Alain, 478 US 265, 269 n 4, 106 S Ct 2932, 92 L Ed2d 209 (1986); cf. Northwest Ordinance, 1 Stat 52, Art III (1787)("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

[6/] This Act was modified by the Act of March 3, 1803, granting additional lands "for the use of the schools," in lieu of certain sections sixteen which were no longer available, "in trust for the use aforesaid, and for no other use, intent or purpose whatever." 2 Stat 225, ch 21, §§ 1, 3 (1802). Later, Congress authorized Ohio to sell these school lands, and "to invest the money arising from the sale thereof * * * for the use and support of the schools within the several townships * * * and for no other use or purpose whatsoever." 4 Stat 138, ch 6, § 1 (1826). These statutes are the first indication that Congress may have intended to impose a trust upon the states by the grants for school lands.

[7/] The interest in granted school lands vests in the state at the date of admission into the Union, and then only as to those sections which are surveyed at that time by the United States and of which the United States has not previously disposed. United States v. Wyoming, 331 US 440, 443-44, 67 S Ct 1319, 91 L Ed 1590 (1947). Until the status of the lands was fixed by survey, and they were capable of identification, Congress reserved absolute

power over them; but if Congress disposed of any part of the section sixteen or thirty-six lands, Oregon was to be compensated by other lands equal in quantity and as nearly as may be in quality. United States v. Morrison, supra, 240 US at 204.

[8/] The list of promises that follows the quoted language does not include an express promise to use the section 16 and 36 lands only for schools. However, for the reasons discussed in the text -- the state's general acceptance of Congress's propositions and the historical context, including other states' land grants and Oregon's territorial acts -- we conclude that the state intended to bind itself to use the lands only for schools.

[9/] According to a leading authority on the subject of trusts, lands designated for public purposes are not, strictly speaking, trust obligations:

> Where states hold land for special public purposes it is sometimes stated that there is a trust, but this is usually not true in a strict sense. There is a duty to use the property for a limited or general purpose but it arises from the acquisition of the property under special circumstances and the duties of the state created by its constitution and statutes.

Bogert, Trusts and Trustees § 34 at 411-12 (2d ed rev 1984) (footnotes omitted).

[10/] The court did not state whether the trust arises from the Admission Act or the Oregon Constitution, but later cases suggest that the source is the Constitution. Eagle Point Irr. Dist. v. Cowden, 137 Or 121, 124, 1 P2d 605 (1931); State Land Board v. Lee, 84 Or 431, 437-38, 165 P 372 (1917). See also United States v. Morrison, supra, 240 US at 207 (1916)(approving Secretary of Interior's statement that grant of school lands does not take effect until after lands are surveyed, but then vests "absolute fee" to the specified sections).

[11/] We previously have stated that the "greatest benefit" standard was intended to "enlarge the constitutionally restricted management authority of the State Land Board with respect to the uses that could be made of Common School Fund lands." 36 Op Atty Gen 150, 230 (1972)(emphasis in original). This is undeniable to the extent the 1968 amendment now authorizes the board to manage the lands instead of simply to sell state lands. That opinion, however, did not address whether the intent was to change the purpose for which those lands are managed.

[12/] See Public Lands Interim Committee Report to Legislative Fiscal Orientation Conference, December 16, 1966, at 4; Minutes, House State and Federal Affairs Committee, March 6, 1967, at 3; Minutes, Ways and Means Committee, May 12, 1967, at 208. The committee discussion and the recitals of HJR 7 reflect a concern

with two points of trust law, which were assumed to apply to common school fund lands. Significantly, neither of these points arose from the text of the constitution, but rather from the common law of trusts.

The first point is that a trustee of a trust fund has a duty (limited by the "prudent person" standard) to "maximize" earnings from the corpus of the trust. Although this is a correct interpretation of trust law, it is not clear how this alone presented any practical difficulty for the board; it was simply required to obtain full market value from the sale, rental or other use of the lands. See 37 Op Atty Gen 569, 574 (1975). In addition, in a perpetual trust it is not necessary to maximize earnings now at the expense of earnings later. Rather, the requirement is to maximize earnings over the life of the trust, and consistent with the needs of the beneficiaries, which may grow. Thus, reduced income now in order to assure sustained or growing income later often is consistent with such trusts.

The second point was critical: Prior to 1967, we had concluded in several opinions that the administrative expenses of the Common School Fund could not be paid from the fund itself; rather they must be paid from the General Fund. See, e.g., 32 Op Atty Gen 307 (1965). Common School Fund moneys could not be used, for instance, to maintain and develop Common School Fund lands. Although we recognized a split of authority, we adhered to the holding of State ex rel Owen v. Donald, 162 Wis 609, 157 NW 794 (1916). It is not necessary to reexamine the correctness of our assumption because the issue was mooted by the 1968 amendment to Article VIII, which clearly authorized the board to use Common School Fund moneys to maintain and develop school lands. Or Const Art VIII, § 2(2).

[13/] This opinion addresses only the Admission Act lands. However, we see nothing in Article VIII, sections 2(1) and (2) to distinguish Admission Act lands from other lands the proceeds and revenues of which are dedicated by these sections to the Common School Fund. Thus, we believe that the same management standard applies to all of these "constitutional" lands. We note that other lands are placed under the board's management by statute, pursuant to Article VIII, section 5(1). The nature of the board's authority over these statutory lands is outside the scope of this opinion.

[14/] A trustee has a duty to protect trust property against damage or destruction. The trustee must do all acts necessary for preservation of trust property which would be performed by a reasonably prudent person holding property for similar purposes. Bogert, Trusts and Trustees § 582 at 346 (2d ed rev 1980)(footnotes omitted). Of course, what acts may be necessary will depend upon the facts of the particular situation.

[15] By referring to the board's "determination" that a particular parcel of Admission Act land does not currently offer revenue-generating potential, we do not mean to imply that written findings are legally required. However, the board may, in its discretion, adopt whatever findings or procedures it believes may be useful in applying its constitutional trust standard to day-to-day land management decisions.

[16] As to any trust or dedication of the Admission Act lands created by the Oregon Constitution, the state constitution must bend to federal law. US Const Art VI ("This Constitution and the Laws of the United States * * * made in Pursuance thereof * * * shall be the supreme Law of the Land").

[17] We note a possible Tenth Amendment violation, suggested by dicta in Garcia v. San Antonio Metro. Transit Auth., 469 US 528, 556, 105 S Ct 1005, 83 L Ed2d 1016 (1985), cert den, 488 US 889 (1988), that the Court might find unconstitutional any regulation by Congress under the Commerce Clause that "directly eliminate[s] state sovereignty." Any remaining vitality in the Tenth Amendment as a means of overturning duly enacted federal legislation appears to have been extinguished by South Carolina v. Baker, 485 US 505, 513, 108 S Ct 1355, 99 L Ed2d 592 (1988)("Where * * * the national political process [does] not operate in a defective manner, the Tenth Amendment is not implicated."). Because Oregon's congressional delegation participated in the passage of the federal ESA, we do not believe a court would sustain a Tenth Amendment challenge. Cf. Board of Natural Resources v. Mosbacher, No. C90-5495T/C (D Wash Oct 8, 1991).

[18] Again, for lack of other authority, we rely on the law of private trusts.

[19] In this context, "special" refers to a type of legislation directed at an individual or group of individuals rather than to society as a whole.

[20] The federal ESA is explicitly applicable to the states. 16 USC §§ 1533(d), 1538(a)(1)(B-C); see also 16 USC § 1535(f). There is no express exemption in the federal ESA for Admission Act lands. The courts have been reluctant to find that Congress intended an exemption for Admission Act lands in subsequent legislation merely because it affects the state's ability to derive maximum revenue from those lands. See Case v. Bowles, supra, 327 US at 100; and cf. Board of Natural Resources v. Mosbacher, supra, slip op at 5.

[21] We acknowledge that the Oregon Supreme Court has suggested that the "police power" is nothing other than the general plenary power to legislate. Dennehy v. Department of Revenue, 305 Or 595, 604 n 3, 756 P2d 13 (1988).

[22/] Despite the language in section 5(1) that the board's "powers and duties shall be prescribed by law," we previously concluded that the board has exclusive power and authority to sell and to manage the lands under its jurisdiction independent of any legislative action. 42 Op Atty Gen, supra, at 265 n 3; 36 Op Atty Gen 150, 230 (1972).

[23/] In a Letter of Advice dated May 24, 1982, to Ed Zajonc, Director, Division of State Lands (OP-5326), we responded to the question whether the board was subject to ORS 273.201. That statute directly regulated the sale of state land. We concluded that the requirements of ORS 273.201

> cannot validly be applied to lands belonging to the Common School Fund if the board, in exercising its management responsibility under Or Const Art VIII, sec 5, determines that application to it * * * would impair its ability to achieve the maximum financial benefits for the Common School Fund Trust.

Id. at 6. This advice was limited to the applicability of ORS 273.201, which on its face conflicted with the essential constitutional duty of the board to dispose of school lands.

[24/] The Fifth Amendment of the Federal Constitution provides "nor shall private property be taken for public use, without just compensation."

[25/] Even so, the Constitution permits the government to "take" property only for "public use." See Hawaii Housing Authority v. Midkiff, 467 US 229, 104 S Ct 2321, 81 L Ed2d 186 (1984). There is no question here that the ESA serves a public use.