

STATE OF UTAH  
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF  
ATTORNEY GENERAL

RAY HINTZE  
Chief Deputy

KIRK TORGENSEN  
Chief Deputy

January 30, 2003

Mr. Steven O. Laing  
State Superintendent of Public Instruction  
Utah State Office of Education  
250 East 500 South  
Salt Lake City UT 84111

Re: Assessment of State Fire Suppression Costs  
Against School Trust Lands Proceeds

Dear Superintendent Laing:

By letter dated January 15, 2003, a copy of which is attached hereto and incorporated by reference, you requested that the Attorney General's office review the legality of a proposal to transfer approximately 6 million dollars of state school trust lands proceeds to the state general fund. The transfer would defray fire suppression costs incurred by the United States, the State of Utah, and Utah counties during summer 2002 in suppressing wildfires that included lands administered by the School and Institutional Trust Lands Administration within the fire boundaries.

**Question Presented**

May the State of Utah appropriate school trust funds to defray fire suppression costs incurred by the United States, the State of Utah and Utah counties in suppressing wildfires that include Utah school and institutional trust lands within the fire boundaries without regard to the benefit obtained from such efforts or the value of the trust lands involved?

**Conclusion**

No. The diversion of school trust proceeds to pay for firefighting under the circumstances here is legally impermissible for at least three reasons:

(1) As the trustee for the state school and institutional land trusts, the State has a duty of undivided loyalty to act solely in the interest of the trust beneficiaries, without regard for the interests of third parties or for the general welfare of the public. Notwithstanding the State's actual expenditure of funds involving trust lands, reimbursement through appropriation of large sums of trust funds for a public purpose – wildfire suppression – without consideration of the interests of the trust beneficiaries represents a violation of the duty of undivided loyalty and thus an unconstitutional diversion of funds from the permanent State School Fund. This conclusion is particularly clear to the extent that trust funds are to be diverted to replenish the state Wildland Fire Suppression Fund; this would constitute a direct subsidy to a fund that does not benefit the school trust beneficiaries, and would be unconstitutional.

(2) Trust law imposes a duty upon the trustee to make only reasonable expenditures, taking into account the size and nature of the trust. In this case, the proposed diversion of funds from the permanent State School Fund, based upon information made available to the Attorney General's office, greatly exceeds annual forestry income from school trust lands, and the costs of fire suppression may in fact exceed the entire fee simple value of the lands purportedly being protected.

(3) Permitting third parties -- in this case largely federal fire control entities such as the U.S. Forest Service and the Bureau of Land Management -- to determine the scope of fire response (and thus ultimate charge to trust funds under the current proposal) represents an improper delegation of the trustee's responsibility to an entity not bound by the trustee's fiduciary responsibilities. Such payment violates the trustee's duty to not delegate trust responsibility to a person or entity not bound by fiduciary rules.

### Constitutional and Statutory Background

#### *1. The Utah Enabling Act.*

As a condition of statehood, Section 4 of the Utah Enabling Act, Act of July 16, 1894, ch. 138, 28 Stat. 107 (1894), required Utah to establish and maintain a system of public schools. Section 6 of the Enabling Act granted four sections in every township to the state for support of the common schools, while Section 10 of the Enabling Act required the proceeds of the granted school lands to be placed in a permanent State School Fund from which interest only could be expended to support the schools. Enabling Act grants of school lands, such as that contained in the Utah Enabling Act, have been held to impose an enforceable trust responsibility upon the grantee state as a matter of federal law. *Branson School Dist. RE-82 v. Romer*, 161 F. 3d 619, 633-636 (10<sup>th</sup> Cir. 1998). This trust responsibility extends to funds generated from trust lands as well as the lands themselves. *Duchesne County v. Utah State Tax Comm'n*, 140 P. 2d. 335, 338 (Utah 1943) ("the state holds the 'fund' as a trustee of an express trust, limited in the amount that can be expended, and the purposes and uses thereof").

## 2. *The Utah Constitution*

The Utah Constitution expressly incorporates the trust responsibilities imposed by the Utah Enabling Act with respect to state school and institutional trust lands. Article XX, Section 2 of the Utah Constitution provides:

Lands granted to the State under Sections 6, 8, and 12 of the Utah Enabling Act ...are declared to be school and institutional trust lands, held in trust by the State for the respective beneficiaries and purposes stated in the Enabling Act grants.

Article X, Section 5 of the Utah Constitution governs the use of funds generated from school trust lands<sup>1</sup>. It provides for the creation of a permanent State School Fund comprised of all revenues derived from the sale or use of school trust lands, Utah Const. Art. X, § 5(1), and mandates that "only the interest and dividends received from investment of the State School Fund may be expended for the support of the public education system...." Id., §5(2)(b).

With respect to operating expenditures associated with school trust lands, the Constitution provides:

(c) The Legislature may make appropriations from school trust land revenues to provide funding necessary for the proper administration and management of those lands consistent with the state's fiduciary responsibilities towards the beneficiaries of the school land trust. Unexpended balances remaining from the appropriation at the end of each fiscal year shall be deposited in the State School Fund.

(d) The State School Fund shall be guaranteed by the state against loss or diversion.

Utah Const., Art. X, § 5(2)(c), (d). (Emphasis added).

In summary, the Utah Constitution imposes a constitutional trust obligation upon the State with respect to school trust lands and proceeds; requires that trust revenues be used exclusively for trust purposes; requires that any legislative appropriations from school trust lands revenues be necessary for the proper administration and management of the lands and consistent with the State's fiduciary responsibilities to the school trust beneficiaries; and guarantees the permanent fund against loss or diversion.

## 3. *Trust Lands Legislation.*

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<sup>1</sup>In addition to school trust lands granted under Section 6 of the Utah Enabling Act, Congress granted lands for the support of universities and other public institutions under Sections 8 and 12 of the Enabling Act. The Utah Constitution imposes trust responsibilities upon the State with respect to these institutional trust land grants just as with the school trust land grant. *District 22 UMW v. Utah*, 229 F. 3d 982 (10<sup>th</sup> Cir. 2000).

The Utah Legislature has entrusted management of state school and institutional trust lands to the Utah School and Institutional Trust Lands Administration (the "Trust Lands Administration") pursuant to the School and Institutional Trust Lands Management Act, *Utah Code Ann.* §§ 53C-1-101 *et seq.* (the "Trust Lands Management Act"). In the preamble to the Trust Lands Management Act, the Legislature expressly recognized the State's Enabling Act and constitutional responsibilities with respect to school and institutional trust lands:

- (1)(a) The purpose of this title is to establish an administration and board to manage lands that Congress granted to the state for the support of common schools and other beneficiary institutions, under the Utah Enabling Act.
- (b) This grant was expressly accepted in the Utah Constitution, thereby creating a compact between the federal and state governments which imposes upon the state a perpetual trust obligation to which standard trust principles are applied.
- (c) Title to these trust lands is vested in the state as trustee to be administered for the financial support of the trust beneficiaries.
- (2) (a) The trust principles referred to in Subsection (1) impose fiduciary duties upon the state, including a duty of undivided loyalty to, and a strict requirement to administer the trust corpus for the exclusive benefit of, the trust beneficiaries.
- (b) As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.
- (c) The trustee must be concerned with both income for the current beneficiaries and the preservation of trust assets for future beneficiaries, which requires a balancing of short and long-term interests so that long-term benefits are not lost in an effort to maximize short-term gains.
- (d) The beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of this state.
- (3) This title shall be liberally construed to enable the board of trustees, the director, and the administration to faithfully fulfill the state's obligations to the trust beneficiaries.

*Utah Code Ann.* § 53C-1-102. (Emphasis added)

The Trust Lands Management Act assigns sole responsibility to the Trust Lands Administration for the management of school and institutional trust lands and assets within the state.<sup>2</sup> *Utah Code Ann.* § 53C-1-201(1)(b). In turn, the director of the Trust Lands Administration is granted broad authority to manage the agency, subject to compliance with

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<sup>2</sup> The only statutory exceptions to this delegation of authority to the Trust Lands Administration are investment activities conducted by the state treasurer and disposition of revenue from the reservoir land grant, which is entrusted to the Board of Water Resources.

Enabling Act and Constitutional requirements of undivided loyalty to the trust beneficiaries, obtaining "optimum values from use of trust lands and revenues" for the trust beneficiaries", and receiving at least fair market value for all dispositions of trust assets. *Utah Code Ann.* § 53C-1-302(1). The director is specifically required to prevent misapplication of trust lands and revenues. *Utah Code Ann.* § 53C-1-302(3).

Under the Trust Lands Management Act, the director of the Trust Lands Administration is required to submit an annual budget to the Trust Lands Administration Board of Trustees and the public by October 1 of each year, and after approval by the Board, to submit the budget to the Governor. *Utah Code Ann.* § 53C-1303(1)(e). Once the budget is approved, expenditures must be made from an enterprise fund created by the Legislature pursuant to *Utah Code Ann.* § 53C-3-101, and designated the Land Grant Management Fund. The Land Grant Management Fund consists of all revenues derived from trust lands except for proceeds from the sale of those lands. *Utah Code Ann.* § 53C-3-101(1)(b). The director is empowered to make expenditures from the Land Grant Management Fund only "in accordance with the approved budget for the support of director and administration activities". *Utah Code Ann.* § 53C-3-101(2) (Emphasis added). Otherwise there is no authority for any expenditure of trust land proceeds which has not been adopted and approved through the regular budget process.

#### 4. *Fire Suppression Legislation*

The Utah legislature has also enacted several statutes concerning wildland fire suppression that are relevant to the issue under discussion. As an initial matter, the legislature has made a determination that uncontrolled forest and range fires are a public nuisance:

Any fire on forest, range, or watershed land in the state burning uncontrolled and without proper and adequate action being taken to control or prevent its spread is a public nuisance.

*Utah Code Ann.* § 65A-8-4.

The Division of Fire, Forestry, and State Lands ("DFFSL") within the Department of Natural Resources is empowered to take action it considers necessary to control wildland fires and protect life and property on nonfederal forest and range lands in unincorporated areas of Utah. *Utah Code Ann.* § 65A-8-1(2). DFFSL is also empowered to enter into reciprocal agreements with other fire protection organizations, including federal agencies, to provide fire protection to lands normally protected by the other. *Utah Code Ann.* § 65A-8-1(4). With respect to private lands in unincorporated areas, counties are required to abate uncontrolled wildfires, and DFFSL may recover its costs of controlling such fires on private lands from the respective counties. *Utah Code Ann.* § 65A-8-5. However, the legislature has also created an insurance fund, the Wildland Fire Suppression Fund, whereby counties may deposit certain amounts in the

fund, as determined by a legislative formula, and obtain DFFSL coverage equal to the entire amount of the fund, plus ½ the county's remaining costs. *Utah Code Ann.* §§ 65A-8-6.1, 6.2 (Supp. 2002).

With respect to fire suppression on state lands, the legislature has provided as follows:

- (1) The division shall abate the public nuisance caused by uncontrolled fire on state-owned forest, range, and watershed lands.
- (2) (a) State agencies responsible for the administration of state-owned lands shall recognize the need for providing wildland fire protection and the responsibility for sharing the costs.  
(b) Those agencies shall annually allocate funds to the division in amounts as are determined to be fair and equitable proportionate costs for providing a basic level of fire protection.  
(c) The amount of protection costs shall be negotiated by the respective land agencies and the division.

*Utah Code Ann.* § 65A-8-8.

### **The Proposed Appropriation from School Trust Funds<sup>3</sup>**

Wildland fire suppression activities are conducted in Utah by various federal, state and local entities, including the USDA - Forest Service, the U.S. Bureau of Land Management ("BLM"), DFFSL, and county governments. DFFSL, the Forest Service, BLM and other federal agencies are parties to a "Cooperative Fire Management Agreement" dated March 2001 (the "CFM Agreement"). Under the CFM Agreement, particular agencies are assigned responsibility for wildland fire suppression in particular geographic and/or ownership areas. Where a particular fire appears to include multiple jurisdictions, the agencies are generally required to execute a fire-specific cost-sharing agreement. CFM Agreement, ¶ 37. At the end of the fire season, reciprocal billings are presented by the agencies to the other agencies, based upon costs incurred by individual agencies in fire suppression in accordance with executed cost sharing agreements.

The proposed appropriation of \$6.1 million from school trust funds for 2002 fires was determined by DFFSL by: (1) taking the total estimated costs of fire suppression expended by federal, state and county entities on individual fires where any school trust lands were located within the fire boundaries; (2) determining the state's share based upon the cost-sharing agreement for that particular fire; (3) multiplying the total fire cost by the state percentage share to determine total state cost responsibility; and (4) multiplying the state cost responsibility by the

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<sup>3</sup>The Attorney General's office has obtained the factual information contained in this section from the Trust Lands Administration.

percentage of school trust lands versus all state-owned lands within the fire boundary. For example, the Parsnip fire in Iron County involved estimated costs of \$515,879.36, borne by BLM and the Forest Service. The cost-sharing agreement provided that the costs would be borne 53.8% by BLM and 46.2% by the state, resulting in a state responsibility of \$238,336. All of the state-owned lands were school trust lands, so DFFSL calculated that SITLA should bear the entire \$238,336 cost.

It is the understanding of the Trust Lands Administration that DFFSL has not been billed by BLM and the Forest Service for the state's share of fire costs, and that, in past years, the State has not always reimbursed those entities for amounts due under the CFM Agreement. Based upon a spreadsheet provided to the Trust Lands Administration, the actual expenditures incurred by DFFSL for fire suppression in the 2002 fire season was only \$2,155,394, or slightly more than one third of the proposed appropriation from trust funds.<sup>4</sup>

#### Analysis

***1. Diversion of Trust Funds For a Public Purpose Without Consideration of The Interests of the Trust Beneficiaries Violates the Trustee's Duty of Loyalty, and Is Therefore Impermissible.***

***A. Governing Legal Principles.***

A trustee's duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties, is a rule that is enforced by the courts with "uncompromising rigidity." *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (19\_\_). The Utah Supreme Court has followed this principle in holding that school trust lands and proceeds cannot be used to further other governmental objectives, even if there is some indirect benefit to the public schools. *National Parks and Conservation Association v. Board of State Lands, et al*, 869 P.2d, 909 (Utah 1993) ("*NPCA*"). The *NPCA* court quoted the United States Supreme Court in *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458 (1967). In *Lassen*, Arizona proposed to build a highway across school trust lands, claiming that the highway would enhance the value of the remaining trust land by an amount equal to the land taken, and that consequently no monetary consideration to the trust was necessary. The U.S. Supreme Court disagreed, holding that even if the remaining trust property increased in value, the school trust must receive full monetary compensation for the right-of-way:

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<sup>4</sup>This opinion is intended to address only constitutional and statutory issues associated with fire suppression costs, not the accuracy of information submitted by DFFSL. However, the Trust Lands Administration has determined that significant errors may exist in the calculations, including significant overstatements of trust lands ownership in certain fires, and failure to credit significant funding received from other federal sources to defray the costs of at least one large fire.

All these [constitutional] restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that *only those beneficiaries profit from the trust*.

. . . [T]he purposes of Congress require that the Act's designated beneficiaries "derive the full benefit" of the grant . . . [A course should not be followed which could] result in diminishing the benefits conferred by Congress and in effect deflecting a portion of them to the State's highway program.

*NPCA*, 896 P.2d at 918 quoting *Lassen*.

Thus, the State as trustee cannot deflect benefits to another public program at the expense of the school trust. "In short, trust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be administered for the general welfare of the State." *NPCA*, 869 P.2d at 919. As the Utah legislature recognized in creating the Trust Lands Administration, these trust principles require the State to act as a fiduciary, acting with undivided loyalty to, and for the exclusive benefit of, the trust beneficiaries, and not for any purpose inconsistent with the best interests of the beneficiaries. *Utah Code Ann.* § 53C-1-102(2).

Prior Attorney General opinions have reached the same conclusion. In response to a question about using school trust resources or proceeds to subsidize other public purposes, the Attorney General opined:

Trust resources, even those with marginal revenue potential, may not be administered to benefit public purposes for which there is no compensation to the trust and where the trust resource may be depleted. The mere presence of compatible, incidental public uses or purposes which do not deplete the trust resource are trust neutral and would likely not violate the trust. While the trustee should consider costs and benefits of particular management options, it cannot consider benefits to non-trust public interests or purposes. The interest of the school and institutional trust beneficiary is paramount and must always prevail over any conflicting public use or purpose.

Informal Opinion No. 87-44, June 23, 1989, page 6.

In response to a further question about an agreement between state agencies providing for financial help from the school trust for wildlife habitat management and reseeding, the opinion concluded:

The details of this cooperation are not contained in the document. It is implied that DSLF [Division of State Lands and Forestry] will use its funds and resources to provide technical and financial support to improve wildlife habitat and management. While such cooperation is beneficial, to the extent that school and institutional trust resources are used in conflict with (or without significant benefit to) the trust beneficiaries' interest, the application of the agreement would be unlawful.

For example, a planned increase in wildlife herds on trust lands valuable for grazing may impair the trustee's ability to generate revenue for the trust and be of great concern to DSLF [Division of State Lands and Forestry]. Moreover, if trust revenue is used for projects benefitting wildlife with no commensurate benefit to the trust, a serious question is raised about protecting the beneficiary's interest. No matter how beneficial a reseeding project may be to the state or DWR, use of trust funds or restriction of trust activity in support of the project is justified only if the project reasonably returns commensurate revenue, or increased capacity to generate revenue, or provides some other commensurate benefit to the beneficiary.

Informal Opinion No. 87-44, June 23, 1989, page 6.

Finally, the Attorney General has concluded that the Utah legislature may not enact a statute which diminishes the income potential of trust lands, but is not equally applicable to similarly situated private property:

Therefore, the Legislature may not enact provisions relative to trust lands which have the effect of diminishing the income potential or value of those lands to the beneficiary. Any attempt to do so is not legally enforceable.

Informal Opinion No. 89-01, February 17, 1989, page 5.

**B. Application to Fire Suppression Costs.**

As an initial matter, it is unclear from the documentation that has been made available to the Attorney General's Office exactly how and where the funds proposed to be deducted from state school trust funds are to be applied. To the extent that the funds are to be applied to replenish the Wildland Fire Suppression Fund created by *Utah Code Ann.* §§ 65A-8-6.1, 6.2 (Supp. 2002), the appropriation would be clearly unconstitutional. The Wildland Fire Suppression Fund was created by the Utah legislature to assist Utah counties with fire suppression costs on private and county-owned lands. Utilizing school trust funds to assist counties with fire suppression on non-trust lands would effectively divert trust assets for a non-trust purpose, in violation of the overriding principle that trust assets are to be used solely for the benefit of the trust beneficiaries.

The same conclusion of unconstitutionality would apply if the appropriation from trust funds exceeds the actual costs incurred by DFFSL in fighting fires on trust lands. As noted above, DFFSL indicated that its actual costs incurred during the 2002 fire season were approximately \$2.2 million, or slightly more than a third of the proposed \$6.1 million appropriation. To the extent that DFFSL has not actually incurred expenses that may be payable under the CFM Agreement (as apparently has been the case in past years, where CFM bills were not collected by the United States), the appropriation of trust funds in excess of actual costs would clearly be an impermissible diversion of trust assets to non-trust purposes.

Even assuming that DFFSL does in fact pay the amounts billed to it under the CFM, such payment does not in itself establish that such costs can be passed on to the permanent state school fund. As noted above, trust assets must be used for the exclusive benefit of the trust beneficiaries, and not for any purpose inconsistent with their interests. *Utah Code Ann.* § 53C-1-102(2). The relevant questions with respect to fire suppression costs are therefore: (1) were the fire suppression costs incurred solely for the benefit of the trust beneficiaries; and (2) would incurring the costs be inconsistent with their interests? The trust lands administration, as designated trustee, must make a sound determination in response.

The Utah legislature has made an express determination that wildland fire suppression is a benefit to the general public, by declaring that uncontained fires are a public nuisance. *Utah Code Ann.* § 65A-8-4. In concert with this determination that fire control is a necessary public service, the State has historically funded fire control on state lands from general funds and use of federal grants, and also has determined that it is appropriate as well to subsidize county fire control costs on private lands through the Wildland Fire Suppression Fund.

In contrast with this determination of public interest, the interests of the trust beneficiaries do not necessarily benefit from unlimited fire control on trust lands. As an initial matter, scientific consensus at the current time is that historic fire suppression has decreased

rather than improved land health in much of the western United States, and that in many cases fires may improve rather than harm range productivity. More importantly, where the costs of fire suppression exceed the benefits of such activity, it would clearly be inconsistent with the interests of the trust beneficiaries, whatever the general public interest. *See County of Skamania v. State*, 685 P. 2d 576, 582 (Wash. 1985) (“...every case that has considered similar issues has held that the state as trustee may not use trust assets to pursue other state goals.”); *Gladden Farms Inc. v. State*, 633 P.2d 325, 330 (Ariz. 1981) (“The Enabling Act does not allow trust lands to be used for subsidizing public programs no matter how meritorious the programs.”).

It is important to note that even if there is some incidental benefit to trust assets from the state action, legality is determined by whether the trust receives “full value”; in other words, whether the action could stand alone on its benefit to the trust. This principle is illustrated by the case of *Ervien v. United States*, 251 U.S. 41, 40 S. Ct. 75 (1919). In *Ervien*, the New Mexico legislature had appropriated school trust funds to advertise the resources and advantages of the state. These promotional expenses would have increased the value of the state trust lands, but the expenditure was nevertheless set aside by the Supreme Court because its’ primary benefit was to the state as a whole. *See also Lassen v. Arizona, supra* (increased value to trust lands of highway construction did not permit below market-value right-of-way grant). Therefore, even if it is assumed that the fire suppression activities carried some benefit to trust lands, the fact that the activities were carried out for the public purpose of eliminating wildfires would indicate that charging trust funds with all costs associated with fire suppression would not meet constitutional muster.

As discussed above, the proposed appropriation is based upon costs incurred by the U.S. Forest Service, the BLM, and to a lesser extent DFFSL suppressing various fires around the state, and then prorating those costs based upon the amount of trust lands within fire boundaries. No consideration was given in these calculations to whether improvements on trust or non-trust improvements were threatened, whether suppression costs might exceed future revenues from the lands or even the value of the lands in fee simple, the value of resources that might be lost, potential benefits from allowing fires to burn, or other factors. The failure to consider the interests of the trust beneficiaries in determining these costs (or in determining whether and how to engage in fire suppression at all, as discussed in sections 2 and 3 below) is an indication that the costs were incurred without regard to the interests of the trust beneficiaries, and for purposes that were primarily public rather than for the benefit of the beneficiaries. In these circumstances, the proposed appropriation does not pass constitutional muster.

This conclusion is not affected by *Utah Code Ann.* § 65A-8-8, which states that State agencies responsible for the administration of state-owned lands shall recognize the need for providing wildland fire protection and the responsibility for sharing the costs thereof; negotiate those costs with DFFSL, and allocate funds to DFFSL in amounts as are determined to be fair and equitable proportionate costs for providing a basic level of fire protection. To the extent that

a state statute such as § 65A-8-8 requires the Trust Lands Administration to pay costs in excess of those that could be justified by a prudent trustee, it is unenforceable as violative of the state's constitutional trust responsibilities. *County of Skamania v. State, supra*, 685 P. 2d 576 (statute forgiving contractual obligations of private timber companies held unconstitutional); *Montanans for the Responsible Use of the School Trust v. State*, 989 P. 2d 800, 805 (Mont. 1999)(statutes that did not meet fiduciary test held unconstitutional and unenforceable).

A final legal concern with the appropriation is that it would create a situation where state trust lands were arguably treated in a discriminatory fashion vis a vis similarly situated private lands. Private landowners are not obligated to pay for fire suppression efforts conducted by county, state or federal governments on their private lands; instead, these efforts are treated as a government service funded at the county level by property taxes. In the case of trust lands, counties receive payments in lieu of taxes from the state that are the functional equivalent of the payment of property taxes on trust lands, *Utah Code Ann.* § 59-21-2(3)(j), yet the school trust is being asked to bear fire suppression costs that a similarly situated private landowner would not. This appears to violate the general principle, discussed in connection with Attorney General Informal Opinion No. 89-01, that statutes cannot impose burdens on trust lands that are not applicable to similarly situated private lands.

**2. *Fire Suppression Costs In Excess of Benefits Gained or Land Values Cannot Legally Be Deducted from Trust Funds.***

Under applicable trust law, a trustee that expends its own funds may recover them only if the expenditure was reasonably necessary to carry out the purposes of the trust; however, if no benefit is conferred on the trust estate, the trustee may not recover the expenditure. *Conservatorship of Lefkowitz*, 58 Cal. Rptr. 2d 299, 50 Cal. App. 4th 1310 (Cal. App. 1996). This holding is consistent with the Utah Constitution's provision that only expenditures necessary for the proper administration and management of those lands consistent with the state's fiduciary responsibilities towards the beneficiaries of the school land trust may be made. Utah Const., Art V, § 5(2)(c). Courts looking at expenditures from trust land accounts in other states have similarly allowed reasonable expenditures for the benefit of trust management activities. See *Moon v. State Board of Land Commissioners*, 724 P. 2d 125 (Idaho 1986)(expenditure of 10% of timber receipts for resource management permissible); *United States v. Swope*, 16 F. 2d 215, 216 (10th Cir. 1926)(allowing certain expenditures from trust funds; but expressly excepting consideration of expenditures that were excessive or not for the benefit of trust lands).

The Trust Lands Administration has provided the Attorney General's office with estimates of gross statewide trust lands revenues from forestry activities in recent fiscal years, as follows:

FY 2000	-	\$505,839
FY 2001	-	\$210,250
FY 2002	-	\$384,562

The proposed appropriation of \$6.1 million therefore greatly exceeds gross annual school trust revenues from forestry activities, representing over 10 years of gross revenue. In addition, the Trust Lands Administration has indicated that for certain fires for which suppression costs are to be charged, the proposed appropriation for that fire exceeds the estimated total value of the lands in question.

In this circumstance, it appears that the fire suppression expenditures over asset values and out of proportion to income would not have been incurred by a prudent manager considering only the interests of the trust beneficiaries. This is not to say that a public purpose was not served by such efforts, but rather that the expenditure should not be borne by the beneficiaries where they did not benefit. Similarly, this is not to say that there may be situations where there is a particular, significant, demonstrable and direct benefit from fire control to the school trust lands which clearly protects trust lands against substantial loss or improves the ability to generate proceeds from trust lands. For example, on one hand, if certain sparse rangeland is burned by wildfire, any damage would be incidental. The fire might actually improve range production, and there would be no significant benefit from fire control. On the other hand, if a marina or resort facility operated by the Trust Lands Administration were in the path of a wild fire, the benefit from fire control may be direct and substantial. Under these circumstances, fire control might preserve the trustee's ability to generate income. The problem with the proposed appropriation is that no calculations of benefit to the trust beneficiaries have been performed, and on its face the suppression costs appear disproportionate to the benefits received, if any.

**3. *Delegation of Fire Suppression Decisions to Federal or Non-Trust State Entities Is Impermissible If Costs Are to Be Billed to Trust Funds.***

As discussed above, the CFM Agreement between federal agencies and DFFSL is apparently the basis for the proposed appropriation of trust funds for 2002 fire suppression costs. Under the CFM Agreement, specific federal agencies and DFFSL are delegated geographic areas of responsibility, and charged with fire suppression in those areas without regard to land ownership or value. These fire managers have full discretion on fire suppression methodologies and costs, for example, whether to utilize air tankers on a particular fire. In contrast, the Trust Lands Administration has no control whatsoever over what costs will be assessed against the trust, or over whether fire suppression is worthwhile at all in view of the lands involved.

In this circumstance, the appropriation of trust funds where the trustee has been divorced from the decision on whether and how to expend the funds appears to be an improper delegation

of a trustee's fiduciary duties. A clear example of the problem created by such delegation is found in *NPCA, supra*. In that case, the State had relied upon an appraisal submitted by a landowner who was engaged in a land exchange with the State. The *NPCA* court held this invalid, stating that by not securing appraisals of land value from appraisers either retained or employed by the trustee, the State had violated its fiduciary duty to the school trust:

An appraisal submitted by a party intending to purchase a trust asset is suspect on its face, even when performed by an independent and reputable appraiser, because the buyer has the opportunity to shop for favorable appraisers. For a trustee to rely on appraisals submitted by a purchaser of trust assets is to leave the trust subject to sharp dealing on the part of the purchaser. For that reason, we hold that a breach of trust occurs when a trustee uses an appraisal submitted by the purchaser as the basis for ascertaining the fair market value of a trust asset. To comply with its fiduciary duties the Division itself must obtain the appraisals on which it bases its decision.

*NPCA*, 896 P.2d at 922; See also *Jerke v. State Department of Lands*, 597 P.2d 49 (Mont. 1979)(vesting a trust grazing preference right in a grazing district violated the constitution because the district was not subject to fiduciary duties and therefore, not bound to act in the best interest of the beneficiary).

The Utah legislature has vested the responsibility of approving the annual budget for the Trust Lands Administration with the director and Board of Trustees of the administration. *Utah Code Ann.* §53C-1303(1)(e). Once the budget is approved, expenditures must be made from an enterprise fund created by the Legislature pursuant to *Utah Code Ann.* § 53C-3-101, the Land Grant Management Fund. The director is empowered to make expenditures from the Land Grant Management Fund only "for the support of director and administration activities". *Utah Code Ann.* § 53C-3-101(2) (Emphasis added). The determination whether there is any direct benefit to the trust lands from a particular management activity has thus been left to the sound discretion of the Trust Lands Administration, the designated agency for the state as trustee.

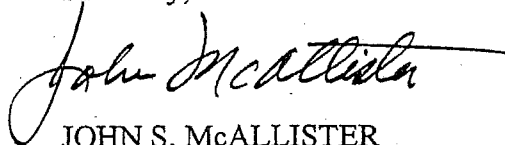
If the proposed appropriation is made, the decisions concerning what level of fire suppression to provide on trust lands will instead have been made by third parties, typically federal fire managers, with no responsibility to protect the legal interests of Utah's school trust. As noted above, in this case these decisions resulted in expenditures of funds far beyond annual trust forestry revenues, and perhaps beyond the full value of the lands in question. It seems clear that a prudent trustee would not have made these decisions if the interests of the trust beneficiaries were alone considered. This result appears to constitute an improper delegation of the State's fiduciary responsibility for trust management.

Mr. Steven O. Laing  
January 30, 2003  
Page 15

**Conclusion**

The appropriation of school trust funds to defray the state's general expenses for suppression of fires that include school trust lands within the burned areas, without the trustee's sound determination of significant benefit to the trust beneficiaries, constitutes an impermissible diversion of school trust assets for a general public purpose, an improper delegation to an entity not subject to trust lands fiduciary duties, and an imprudent trustee action, and therefore violates the constitutional compact and related school trust lands law.

Sincerely,



JOHN S. McALLISTER  
Assistant Attorney General  
Education Division

JSM/da