

January 2001

The New Colorado State Land Board

Charles E. Bedford

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Charles E. Bedford, The New Colorado State Land Board, 78 Denv. U. L. Rev. 347 (2001).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

The New Colorado State Land Board

THE “NEW” COLORADO STATE LAND BOARD

CHARLES E. BEDFORD*

INTRODUCTION

During the decade preceding the constitutional overhaul of trust land management in Colorado through the passage of Amendment 16¹ in 1996, the Colorado State Board of Land Commissioners (hereinafter the “Board” or the “Land Board”) entered into numerous real estate transactions that opened the Board to a high level of public exposure and a great deal of criticism. These deals ultimately led to the demise of the old way of doing business for the Land Board. This article is a discussion of five of these controversial transactions and their political impact. These transactions set the stage for a discussion of the solutions to the historical problems and the possible future direction of the Land Board.

I. HISTORY OF THE COLORADO STATE LAND BOARD UP TO 1996

When Colorado entered the Union in 1876, the federal government gave the state approximately 4.6 million acres of federal lands.² The federal government granted the largest portion of these lands for the support of common schools (the “school lands”).³ Today, the state still owns about 3 million of those acres, as well as an additional 1.5 million acres of mineral rights in which the state does not own the surface land.⁴ The Board manages all these lands to benefit the School Trust and seven smaller trusts, and the Board has a “fiduciary” responsibility to these beneficiaries.⁵ Before the passage of Amendment 16, the Board consisted of three full-time salaried commissioners.⁶ Although neither the Colorado Constitution nor state statutes specifically directed the Board to “maximize revenue,” courts had interpreted a phrase in the Constitution, which dealt with land sales and directed the Board to receive the “maxi-

*. Formerly Director of Colorado State Board of Land Commissioners. The views of the author do not necessarily represent the views of the Colorado State Board of Land Commissioners.

1. Colo. Dept. of State, Digest of Initiated and Referred Constitutional Amendments and Laws Voted Upon by the Electorate of Colorado from 1964 to Present, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/research/constnl.htm. Amendment 16, which passed in 1996, was a citizen-initiated amendment to the Colorado Constitution.

2. Sally K. Fairfax, Jon A. Souder, and Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 833 fig. 1 (1992).

3. COLO. CONST. ENABLING ACT, § 1 (hereinafter ENABLING ACT). See also Colo. State Land Bd., Answers to Frequently Asked Questions, http://trustlands.state.co.us/general_faq.html.

4. Fairfax, *supra* note 2.

5. Colo. State Land Bd., *supra* note 3.

6. Colorado State Land Bd., Amendment 16: An Overview, http://trustlands.state.co.us/amendment_16.html.

mum possible amount” for acres sold, as meaning that the Board had to obtain the highest price possible on each individual transaction. Efforts to increase revenue for the School Trust and other beneficiaries, coupled with a belief that—as constitutional trustees—the Board did not need to heed the Governor, the Legislature or the citizens of Colorado, but only its beneficiaries, led the Board into numerous highly controversial land deals in the late 1980s and early 1990s.

A. *Seven Utes*

Governor Roy Romer received more letters from opponents of the proposed Seven Utes Ski Resort in Jackson County than from any other single issue that arose during his 12-year term as governor.⁷ Without significant public process or notice, Land Board Commissioners (the Governor’s appointees) entered negotiations with a California developer to develop a ski resort on trust land in a mountainous area in northern Colorado, located near the top of Cameron Pass along Highway 14 between Fort Collins and Walden in an area also known as the State Forest.⁸ Fred Sauer, the developer, approached the Land Board with a plan to develop a ski resort with a large base area.⁹ The Land Board pursued a deal to create ski runs and develop a base area.¹⁰ When the deal came to light in the press and public pressure began to mount, the Board scheduled public meetings; the comments overwhelmingly opposed the deal.

Opponents of the development cited a number of concerns; speculation and insufficiency of the promised economic return to the School Trust, high environmental degradation, and greatly diminished future opportunities for the land due to preference for a present-day development scheme. Proponents argued that the income stream was significant and that the project stood to have a spin-off benefit to the depressed economy of Jackson County.¹¹ The developer planned to locate the ski area on the border between economically distressed Jackson County, a county of less than 1,500 people, and Larimer County, a populous and booming northern Front Range county. Many residents of Jackson County perceived the development as an economic opportunity.¹² The residents of Larimer County viewed the development as a destruction of a natural resource without reasonable due diligence and public comment.

7. Interview with Doug Young, Environmental Policy Director for Governor Roy Romer in Denver, Colorado (January 20, 1998).

8. See *Gould North Park Ski Proposal*, ROCKY MTN. NEWS, Aug. 19, 1993, at 10A.

9. See Kevin McCullen, *Resort Proposal Stirs Fears*, ROCKY MTN. NEWS, Aug. 30, 1993, at 10A.

10. See *id.*

11. See Robert Baun, *North Park Ski Resort Could Get Another Lift*, FORT COLLINS COLORADOAN, Feb. 1, 1997, at A3.

12. See Baun, *supra* note 11.

In December 1994, due to a massive letter-writing campaign and the Governor's intervention, the Board rejected the development scheme but not without causing an uproar about the Board's lack of public process and behind-closed-doors deal making, as well as concern that the Board had sacrificed long-term stewardship of state lands for short-term and speculative gain. The opponents of the ski area proved to be major activists in the campaign to reform the State Land Board through Amendment 16.

B. *Rangeview*

The Land Board received the former Lowry Bombing Range, a 24,000-acre parcel adjacent to metropolitan Denver, from the Department of Defense in exchange for many small parcels of land outside of Colorado Springs in the early 1960s.¹³ The Lowry Bombing Range parcel was considered suitable for development, and the Board contracted with land planners and water developers to pursue the maximization of value for this asset.¹⁴ One of the contracts into which the Board entered allowed for the provision of water and sewer services for the entire parcel of land.¹⁵ Investors created the Rangeview Metropolitan District to provide those services.¹⁶ However, the Board later determined that the contract undervalued the hydrologic asset that Rangeview Metropolitan District intended to exploit. People also criticized the Board for its lack of sophistication and poor business judgment for embarking on the project.¹⁷ A series of scathing newspaper articles critical of the Board's business practices ensued and resulted in a public black eye for the old Land Board.¹⁸

C. *Hogs*

In 1989, the Land Board entered into a 50-year commercial lease with a company called National Hog Farms for 5,500 acres of agricultural ground outside of Kersey, Colorado. The Board did not place any environmental remediation or environmental technology restrictions on National Hog Farms as part of the lease. At the time the parties signed the lease, the hog farm was the largest commercial confined hog-feeding operation in the United States. Controversy about the operation came to the forefront because of a growing awareness, including a citizen initiative, in Colorado about environmental effects of large-scale commercial

13. See Dan Luzadder, *Water Deal No Deal For Public*, ROCKY MTN. NEWS, Dec. 27, 1994, at 5A.

14. See *id.*

15. See *id.*

16. See *id.*

17. See generally Luzadder, *supra* note 13.

18. See generally *id.*

hog farms.¹⁹ Proponents of the initiative asserted that the hog farms had recently immigrated to Colorado since other states had begun to regulate the farms' activities aggressively, while Colorado's law had remained fairly silent on environmental regulation of hog-farming activities. Additionally, National Hog Farms' site along the South Platte River was located next door to the hunting lodge of prominent Denver businessperson Phil Anschutz. Anschutz has supported regulation of confined animal-feeding operations since the mid-1990s and has requested that the Board take aggressive action to prevent degradation of the property on which National Hog Farms operates.

Anschutz questioned whether the original lease was obtained fraudulently and why the Board would choose to allow such intensive uses on its land without close monitoring. Anschutz was the main backer of a successful citizen initiative in 1998 to regulate hog farms. This conflict between a neighbor of Land Board land and a lessee of state trust lands for commercial hog farming will continue to be a problem for the Land Board.

D. 35-Acre Developments

In 1995, the Land Board entered into a contract with a developer to subdivide the 640-acre "McCoy" parcel, in mountainous southern Routt County, into 35-acre ranchettes. The standard reason that developers divide tracts into 35-acre or larger parcels is to avoid local government oversight and input into their development plans.²⁰ While this avoidance might be appropriate for private developers, the Routt County Commissioners were understandably disturbed that a state agency would undertake such an action without consulting the local government in charge of land use and planning. Growth issues have been at the forefront in Colorado in the 1990s, and public concern with sprawl development was heightened.²¹ In this political climate, the Land Board entered into a contract to divest itself of a high-value property. Because of this action, the Land Board alienated the Routt County Commissioners, as well as many northwest Colorado citizens.

E. Eagle County

In October 1996, three weeks before the election in which Amendment 16 passed, the Land Board entered into a complicated three-way exchange proposal to divest itself of nearly all of its lands in the state's, and perhaps the nation's, most expensive real estate market, the Vail

19. Colo. Gen. Assembly, Legis. Council, Colo. Gen. Assembly 1996 Ballot Proposals, Amendment 14, Regulation of Commercial Hog Facilities, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/ballot/text-14.htm.

20. COLO. REV. STAT. § 30-28-101(10)(c)(VIII) (2001).

21. See *Letters to the Post*, DENV. POST, Feb. 19, 1996, at B07.

Valley. The Land Board proposed giving complete development control of 6,000 acres in and around the county's ski resort area to a private developer and in return receive a set dollar figure for all of its interests. The developer received this option to develop 6,000 acres for \$5,000. The option was given to the developer by Board decision at a public meeting, but, without any published notification of a pending transaction, it seemed to be the crowning blow to the old Land Board's credibility. Extensive newspaper articles ran both before and after the election, contributing to the public distaste for Board process. Since that time, a similar transaction did not survive district or appellate court review. The Colorado state courts struck down various parts of that deal as being *prima facie* unconstitutional.²²

F. *Tension Between Communities and the fiduciary*

The above examples of the historical problems that the old Land Board encountered are examples of the tensions that can arise between communities and a public agency that manages an asset or resource upon which that community relies. It is tempting to chalk this up to an inherent legal tension between a fiduciary and an indirect beneficiary or non-beneficiary such as a local government.

In truth, however, that tension is the same whether the land or asset is owned by a private party or by a state or federal agency. In both cases the disposition and use of the land is, to a great extent, controlled by valid local land use plans. Also, in both cases the developer or public landowner must enter into a partnership with local government in order to achieve their respective goals. The partnership, as with all partnerships, contains many tensions and will undergo transformation over time, but it is a mandatory partnership. The partnership should be structured to accomplish the goals of both parties: the developer or public landowner must be treated fairly and be able to receive fair market value for the asset should she want to dispose of it; and local governments and communities must be able to influence the project for aesthetic reasons, infrastructure issues, traffic and pollution concerns, and cultural and neighborhood character issues.

It is incorrect to say that there is a difference between a developer and the State Land Board in the context of extracting value from assets adjacent to or inside a community. The Land Board has a fiduciary obligation to generate income for its beneficiaries and a developer or private landowner has a similar obligation to his or her family, stockholders, and

22. See, e.g., *E. Creek Ranch v. Brotman*, 998 P.2d 46 (Colo. Ct. App. 1999) *rev'd* *Brotman v. E. Creek Ranch*, 31 P.3d 886 (Colo. 2001). However, at press time, the State Supreme Court ruled that the plaintiff, an owner of the Denver Post and neighbor of the subject parcel did not have standing. *Brotman*, 31 P.3d. 886. The Governor has indicated that he will use a little known statute to condemn the property into general government ownership.

partners. More and more, developers are engaged with local governments because they find it easier to work in cooperation with, rather than in opposition to, local government land use authority.

The true tension arises because of the Board's status as a public agency and arm of state government. The Board is subject to "good government" laws that statutorily require open meetings and open records.²³ In contrast, private real estate developers do not have to divulge any of their planning activities to the public, interested parties, or competitors. Additionally, the Board's budget is set by the Legislature.²⁴ Statutes and custom require annual reports to the legislature about Board activities.²⁵ Again, private landowners may make intelligent business decisions without legislative oversight or approval of those decisions.

If the Board begins to perceive itself as a private landowner, it runs the risk of violating principles of open government and public accountability. If the Board's self-perception shifts to a classical "public" landowner, it may not be fulfilling its responsibility to the trust beneficiaries. The spectrum of land ownership in the United States runs from a private land developer on one end to the National Park Service on the other. By trying to find the fine line between its two roles, the Board inevitably fails to meet expectations of either the public or the beneficiaries, or both. But, by law, the Board must satisfy both of these constituencies.²⁶ This seemingly impossible problem caused the pre-1996 Board to over-emphasize its developer role to the exclusion of good government. The 1996 constitutional amendment attempted to correct this imbalance.²⁷ The next several sections of this article attempt to explore that amendment, its structure, and possibilities for dealing with the tension between the Board's two roles.

II. AMENDMENT 16 TO THE COLORADO CONSTITUTION

A. *Campaign to Save Our Trust Land*

Governor Romer asked his staff and the Executive Director of the Department of Natural Resources, Jim Lochhead, to come up with a solution for the above-mentioned woes. Amendment 16 was born. The campaign to Save Our Trust Land won a difficult campaign by a slim margin.²⁸ The likely reasons for the slim win are that 1) this was a very complicated constitutional amendment and 2) there were a great many misperceptions about what it would and would not do. In the next several

23. COLO. REV. STAT. §§ 24-6-402, 24-72-101 et seq. (2001).

24. COLO. CONST. art. IX, § 9(4).

25. See, e.g., COLO. REV. STAT. § 36-1-148(4) (2001).

26. COLO. CONST. art IX § 10(1).

27. Amendment 16, *supra* note 1.

28. See Colo. Dept. of State, Elections Center, <http://www.sos.state.co.us/pubs/elections/main.htm>.

sections, I will attempt to outline the fundamental changes that Amendment 16 made, the misperceptions during the campaigns that continue today about Amendment 16, and finally what Amendment 16 contributes to the debate about land management and land use in the West.

B. *Overriding Requirements for Management of State Trust Lands*

The Colorado Constitution designates the State Land Board as the entity responsible for receiving all lands granted to the state by the federal government.²⁹ The Constitution provides that the Board

shall serve as the trustee for the lands granted to the state in public trust by the federal government, lands acquired in lieu thereof, and additional lands held by the board in public trust. It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made and section 10 of this article IX³⁰

Consistent with the Colorado Enabling Act under which the federal government granted lands to Colorado at statehood,³¹ the Colorado Constitution and the statutory direction for these and other lands granted prior to statehood, the State Land Board serves as trustee for eight separate land trusts with specific beneficiaries as follows:

School Trust: section 16 and 36 in every township "for the support of common schools" with the proceeds of any sales of such lands deposited into "a permanent school fund, the interest of which [must] be expended in the support of common schools."³² Current acres: 2,640,368 surface and mineral; 1,007,385 mineral only.³³ The State Treasurer manages money currently amounting to approximately \$299 million from the sale of land and from royalties from mineral development.³⁴

Public Building Trust: "[F]ifty entire sections of the unappropriated public lands, . . . selected and located by . . . the legislature for the purpose of erecting public buildings at the capital . . . for legislative and judicial purposes."³⁵ Current acres: 935 surface and mineral; 12 mineral only.³⁶

29. COLO. CONST. art IX § 9.

30. *Id.*

31. ENABLING ACT, *supra* note 3, § 1.

32. *Id.* at §§ 7, 14.

33. COLO. STATE LAND BD., STRATEGIC PLAN (June 1998), available at <http://trustlands.state.co.us/strategic.html> (hereinafter "STRATEGIC PLAN").

34. COLO. STATE LAND BD., 2000 ANNUAL REPORT, available at http://trustlands.state.co.us/2000%20Annual%20Report/charts_graphs.htm (hereinafter "2000 ANNUAL REPORT").

35. ENABLING ACT, *supra* note 3, § 8.

36. Interview with Margret Goebel, Land Record Custodian, Colorado State Land Board, in Denver, Colo. (Jan. 20, 1998).

Penitentiary Trust: “[F]ifty other entire sections of land . . . selected and located [by the legislature], . . . for the purpose of erecting a suitable building for a penitentiary or state prison.”³⁷ Current acres: 7,805 surface and mineral; 1,548 mineral only.³⁸

University of Colorado Trust: Seventy-two sections of land, selected and located by the legislature, to “be set apart and reserved for the use and support of a state university.”³⁹ Current acres: 3,681 surface and mineral; 8,023 mineral only.⁴⁰

Saline Trust: “[A]ll salt springs . . . not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, . . . selected by the governor” and not vested in any individual(s), for use by the state, the cash receipts from which “shall be credited to the parks and outdoor recreation cash fund.”⁴¹ Current acres: 16,583 surface and mineral; 457 mineral only.⁴²

Internal Improvements Trust: Five percent “of the proceeds of the sales of agricultural public lands [in Colorado sold by the federal government] shall be paid to [Colorado] for the purpose of making . . . internal improvements,” the cash receipts from which “shall be credited to the parks and outdoor recreation cash fund.”⁴³ Current acres: 130,019 surface and mineral; 85,627 mineral only.⁴⁴

Colorado State University Trust: Congressional grant of 1862, “[a]n Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts,”⁴⁵ “for the use and benefit of Colorado state university.”⁴⁶ Current acres: 20,299 surface and mineral; 22,383 mineral only.⁴⁷

Hesperus Trust: “[T]he property formerly known as the ‘Fort Lewis school’ granted . . . to . . . Colorado [in 1910], as modified by an act of congress [in 1916] . . . The income from [both the land and mineral rights] shall be appropriated by the general assembly and used by the state board of agriculture first for tuition waivers at Fort Lewis college for qualified Indian pupils . . .” with any remaining amount to be appro-

37. ENABLING ACT, *supra* note 3, § 9.

38. STRATEGIC PLAN, *supra* note 33.

39. ENABLING ACT, *supra* note 3, § 10.

40. STRATEGIC PLAN, *supra* note 33.

41. ENABLING ACT, *supra* note 3, § 11; COLO. REV. STAT. § 33-10-11 (2001).

42. STRATEGIC PLAN, *supra* note 33.

43. ENABLING ACT, *supra* note 3, § 12; COLO. REV. STAT. § 33-10-11 (2001).

44. STRATEGIC PLAN, *supra* note 33.

45. COLO. REV. STAT. § 23-32-101 (2001).

46. *Id.* § 23-32-102.

47. STRATEGIC PLAN, *supra* note 33.

priated by the board of agriculture subject to legislative approval.⁴⁸ Current acres: 6,270 surface and mineral.⁴⁹

The Colorado State Forest in Jackson County is the result of a land trade with the federal government made during the early 1930s.⁵⁰ Each of the above trusts, except Hesperus, holds an undivided percentage interest in the whole forest acreage of approximately 71,000 acres.⁵¹ Additionally, a separate statute imposes some additional conditions on management or disposition of the forest.⁵² Finally, Jackson County School District receives a yearly portion of the income generated from activities on the forest.⁵³

The Constitution also authorizes the board to "undertake non-simultaneous exchanges of land" provided that the purchase of lands to complete the exchange is finished within two years of the initial sale or disposition.⁵⁴

With specific reference to state school lands, the Constitution now provides that these lands are an "endowment of land assets."⁵⁵ The section further states that this endowment is to be "held in a perpetual, inter-generational public trust for the support of public schools, which should not be significantly diminished."⁵⁶ It further provides "that the disposition and use of [state school] lands should therefore benefit public schools including local school districts."⁵⁷ Through this section, the people of Colorado have expressed their will that the state lands should be managed on a long-term basis for current and future generations.

With respect to all state trust lands, both those that are designated as state school lands and those that are managed for other, smaller trusts, the Constitution states "that the economic productivity of [these lands] is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat" of these lands now and for future generations.⁵⁸ This provision recognizes that taking good care of the land enhances its economic value.

The fiduciary responsibility of the Board in its role as trustee is further defined as producing "reasonable and consistent income over

48. COLO. REV. STAT. §§ 23-30-114, 115 (2001).

49. STRATEGIC PLAN, *supra* note 33.

50. *Id.*

51. *Id.*

52. COLO. REV. STAT. § 36-7-201 (2001).

53. COLO. REV. STAT. § 30-29-101 (2001).

54. COLO. CONST. art. IX, § 9(7).

55. *Id.* § 10.

56. *Id.*

57. *Id.*

58. *Id.*

time.”⁵⁹ This provision proves that it is prudent for the board to develop a long-term strategy for managing its trust assets. Although the Board may be required to forego immediate short-term income opportunities that might compromise future income streams and enhanced future value, the provision will provide some level of certainty to trust beneficiaries that they will receive a reliable level of income into the future.

C. *The Stewardship Trust*

The new Colorado Constitution directs the Land Board to establish and maintain a long-term Stewardship Trust of 295,000 to 300,000 acres.⁶⁰ The Stewardship Trust builds upon the overall direction outlined above. By recognizing the perpetual, intergenerational nature of the trust, the constitutional provision acknowledges that immediate development may not always be appropriate for all lands. In addition, the Constitution recognizes that it is prudent to set aside a portion of the state trust lands, in this case, about 10 percent for the future. This is similar to what most individuals do in establishing a savings or retirement account or in estate planning. The Stewardship Trust represents a judgment by the people of Colorado that certain lands may be more valuable in the future through appreciation, if both the land and the natural resources on the land are well maintained for future use rather than sold immediately for short-term gain.

In order for land to be designated into the Stewardship Trust, the Board must determine “through a statewide public nomination process” that such land is “valuable primarily to preserve long-term benefits and returns to the state.”⁶¹ The amendment further provides that lands within the Stewardship Trust will be “managed to maximize options for continued stewardship, public use, or further disposition” by protecting and enhancing “the beauty, natural values, open space, and wildlife habitat” on these lands.⁶²

The Stewardship Trust operates within the general mandate to “produce reasonable and consistent income [for trust beneficiaries] over time.”⁶³ Therefore, the Trust is set up to preserve a valuable land base for the future.⁶⁴ The Trust, however, is not intended to set land aside to preserve it forever in a pristine condition nor solely for open space or public access uses.⁶⁵ The land in the Stewardship Trust will likely still generate income, including existing uses such as grazing, crop production and

59. COLO. CONST. art. IX, § 10.

60. *Id.* § 10(1)(b)(I).

61. *Id.*

62. *Id.*

63. COLO. CONST. art. IX, § 10(1).

64. *See id.* § 10(1)(b).

65. *See id.*

mineral development, to the extent that such uses can be managed in ways that are compatible with long-term protection of the land's natural resource values. In fact, many uses of state trust land, such as sound agriculture or wildlife recreation provided through the State Land Board's public access program with the Division of Wildlife, seem compatible with Stewardship Trust management goals.

D. Misperceptions

In political campaigns, the saying goes, there are a few rare moments when the truth actually slips out. Amendment 16 should have been an exception to that piece of political folk wisdom. There should not have been any controversy about it. There was no effect on any existing contracts that the Land Board had issued, no rates were raised for any uses on any Land Board lands, and there were no specific changes in use for state lands.⁶⁶ So, the question remains. Why was there a close vote, a great deal of controversy, and a campaign fraught with inaccuracy?

The campaigns for and against Amendment 16 tended to fix a number of misperceptions in the minds of voters, lessees and public officials. The opponents of the amendment characterized it as: immediate free public access to all state trust lands, instant and permanent open space designation for all 3 million acres of trust land, a revocation of all existing leases on state trust lands—and a plunge of revenues from \$24 million to \$0, forcing schoolchildren to do their homework on slates by the light of coal oil lanterns.⁶⁷ Amendment 16 backers, especially at the grassroots level, tended to echo the first two of those scenarios—free public access and permanent open space designation for all trust lands.⁶⁸ Governor Romer, who was the main backer, fundraiser and cheerleader for Amendment 16, was quite painstaking in his explanation of the amendment,⁶⁹ but his voice was drowned out by the need for the proponents' campaign to convince the state's voters that Amendment 16 was a good idea. The public debate had very little to do with the reality of Amendment 16. This brings me to the heart of this article.

E. Legal Tensions Within the Amendment

It is apparent from the language of the Constitution that the drafters of Amendment 16 were concerned with addressing many of the issues brought up in Section 2 above. Additionally, they drafted an amendment that comes close to the line of identifying other values and other benefi-

66. See Amendment 16, *supra* note 1.

67. Chris Roberts, *Amendment 16 Would Change School Trust Land Management*, BOULDER DAILY CAMERA, Oct. 14, 1996, at 1C.

68. See generally, *Letters to the Post*, DENV. POST, Feb. 19, 1996.

69. Mark Loudon, *Report Card: Land Board Needs Reform*, STEAMBOAT PILOT, May 16, 1996.

ciaries than those enumerated by the Enabling Act.⁷⁰ Judge Ebel in his legal opinion regarding the validity of Amendment 16 stated:

[i]n enacting Amendment 16, Colorado's voters sought to rewrite the management principles underlying their state's school land trust, shifting the state away from its prior focus on short-term profit maximization toward a more sustainable approach focusing on the long-term yields of the trust lands. We cannot say as a matter of law that this change in management philosophy necessarily will lead to a breach of Colorado's solemn fiduciary obligations arising out of the federal trust enacted by the Colorado Enabling Act.⁷¹

Additionally, the court found that reasonable and consistent income over time is an appropriate way to define the goals of the State Land Board.⁷² The Attorney General's office in their briefs to the court made the case that the new language of the Constitution is essentially an equation: sound stewardship equals economic productivity.⁷³

Rather than reading this provision [Section 10(1)(C)] as charging the exclusive purpose of the school lands trust, as the plaintiffs argue, we believe that the 'sound stewardship' principle merely announces a new management approach for the land trust. The trust obligation, after all, is unlimited in time and a long-range vision of how best to preserve the value and productivity of the trust assets may very well include attention to preserving the beauty and natural values of the property.⁷⁴

What these statements from the legal authorities do not take into account is that the total trust asset of 3 million acres is likely to be valued between \$3 and \$5 billion, given land values in Colorado.⁷⁵ The annual return in income, not including appreciation, is approximately \$20 million, thus the return on investment on an annual basis, again not including appreciation, is between .4 and .66 percent.⁷⁶ Such a calculus almost inevitably leads to a conclusion in many peoples' minds that a better disposition of State trust lands would be their immediate sale and reinvestment into higher yielding investments such as stocks, bonds, other higher

70. Sen. Wayne Allard and Reps. Mark Udall and Scott McInnis have proposed bills which change the statehood enabling act to align it with the Colorado Constitution. H.R. 2584, 107th Cong.; S. 1146, 10th Cong. These bills, should they pass, will go a long way toward eliminating some of the tensions internal to the land board.

71. *Branson Sch. Dist. v. Romer*, 161 F.3d. 619, 643 (10th Cir. 1998) (hereinafter "*Branson II*").

72. *Branson II*, 161 F.3d at 640.

73. Appellee's Answer Brief at 31-34, *Branson II* (No. 96-B-2969).

74. *Branson II*, 161 F.3d at 638.

75. Interview with John Brejcha, Deputy Director of Colorado State Land Board, January 20, 1998.

76. *Id.*

producing land assets. This is where the most cognitive dissonance occurs with respect to the land.

For a number of reasons, previous Land Boards have not been inclined to sell land over the last 120 years. When confronted with the rate of return on an asset so absurdly small, the previous and current Boards both point to a set of considerations that, while not necessarily economically quantifiable, certainly have an impact on the economics of such a decision. First, the lessees of the many state lands are well organized and have considerable political clout. The Legislature controls the Board's annual budget and has established procedures that the Board must follow.⁷⁷ These two factors taken together lead to an obvious internal problem should such a "sell it all" scheme ever be attempted. Secondly, the State Land Board has never been a true land management agency in the sense of actively managing its lands. It has been a lease management agency that relies upon lessees to conduct management activities such as fencing, weed control, trespass control and other improvements to the property.⁷⁸ Related to this is long-term reliance upon the ability to use state lands as lessees use their own private lands that are adjacent to state lands. Over 120 years a system has developed without challenge that has created interdependency between the State Land Board and its lessees. A destruction of this partnership would require enormous increases in staff at the Land Board to manage the land actively.

III. AMENDMENT 16'S ROLE IN CONSERVATION AND PRESERVATION OF OPEN SPACE, WILDLIFE HABITAT, NATURAL VALUES AND NATURAL BEAUTY

Each of the changes that Amendment 16 made has the potential to positively impact natural resource values on State Trust land in Colorado. Amendment 16 changed the structure of the State Land Board, added a set of provisions benefiting public schools, gave land banking authority to the Board, changed its economic mandate, created a Stewardship Trust, and created a new program to encourage good stewardship on State Trust lands.⁷⁹ I'd like to discuss each of these changes, starting with the changes that might not appear to have an obvious impact on the preservation and conservation of natural resource values. By natural resource values, I mean the long-term health of the State Trust lands,

77. See COLO. REV. STAT. § 36-101 et seq. (2001).

78. See, e.g., COLO. REV. STAT. §§ CRS 35-5.5-110 (2001)(state agencies must control noxious weeds on lands under their jurisdictions) and 35-5-112 (2001)(state agencies must control pests and noxious weeds on lands under their jurisdictions); Board of Land Commissioners, Policy 2000-1 (June 16, 2000), available at http://trustlands.state.co.us/policies/policy_weed_mgt.htm ("[L]essees will be directed to aggressively control noxious weeds on all state trust lands" and "Staff will oversee weed control efforts and educate lessees about their responsibilities to prevent and manage noxious weed problems, and the types of assistance that are available from the SLB and others.").

79. See Amendment 16, *supra* note 1; see also COLO. CONST. art. IX, §§ 9, 10.

which is indicated by its wildlife habitat, open space, beauty and other natural values. Amendment 16 equates this measurement of land health with the ability of that land to generate a reasonable income for beneficiaries in perpetuity.⁸⁰

A. Structure

The structure of the State Land Board changed from three full-time paid "manager" commissioners to a five-person volunteer Board.⁸¹ The problem with the previous structure was that the Board members were project managers first and policy experts second. As project managers, they tended to get vested in their projects. Each Board member would have his or her own portfolio, and the other two tended to defer to that one person as a professional courtesy when the time came for the Board to act in its fiduciary role as an adjudicatory body. The result was no independent review of deals that were brought to the whole Board by one of their co-Board members. This collegial deference may have overcome the fiduciary responsibility in a number of cases. This decision-making dynamic overstressed land sales and development schemes, as developers would shop their ideas to each Commissioner until they found a taker or patron who could shepherd them through the Board process. And Commissioners, acting as project managers, tended to measure their success by the number of deals done, rather than by the independent judgment they might exercise as a deliberative fiduciary body.

Amendment 16's solution to this difficulty was a five-person board that meets once a month to approve larger projects and to set the bounds within which staff may act and create policies, rules and regulations.⁸² The new organization functions like a Board of Directors of a corporation would. The new organization is one where the staff presents information to the Board and makes a recommendation based on that information, where proponents and opponents of a particular deal have a chance to speak, and where the Board acts based on that record.⁸³ Plans to cut up rural landscapes to the benefit of the developers but not necessarily to the benefit of the school children, take a backseat when a sophisticated policy board, without a vested interest in the project, reviews those schemes before the Land Board staff implements them.

80. *Id.*

81. COLO. CONST. art. IX, § 9(1).

82. *Id.* at § 9(1), (4).

83. Colo. State Land Bd., Board Policy No. 00-5, Policy Concerning Appeal of Decisions and Seeking Redress from the Board, available at http://www.trustlands.state.co.us/policies/policy_redress.htm. See also COLO. REV. STAT. § 24-6-401 et seq. (2001).

B. Education

A number of provisions in Amendment 16 benefit education directly.⁸⁴ One problem local school districts faced under the old Board was that they were not able to use state lands either for outdoor education or for siting schools.⁸⁵ The old Land Board thought that to favor one district by allowing "free" activities on state land would diminish the income returns to all the districts. New provisions in the law allow the Land Board to sell a site to a school district for the purpose of placing a school on it at no more than fair market value and in a cooperative and collaborative process.⁸⁶ Additionally, the Constitution now provides specifically for the Land Board to collaborate in outdoor education activities with local school districts to provide them access to conduct their educational activities on Land Board land.⁸⁷ These new provisions encourage the Board to enter into educational siting and use agreements on lands under their control, which will enrich education as well as provide an additional use that relies on and pays for those natural values. This double benefit is crucial to the Board's ongoing compliance with its Enabling Act and Constitutional mandates. Although Amendment 16 changed some of the subsidiary considerations and part of the underlying philosophy of the Board, it must still look at every transaction to ensure that it is in the best interest (both directly, through monetary return, and indirectly, through valuable use) of the beneficiaries.⁸⁸

C. Non-Simultaneous Exchanges

The Constitution now grants the Land Board authority to do non-simultaneous land exchanges, or "land banking."⁸⁹ The old Board assumed that it had this authority, but this assumption was never legally tested or proven. It typically tried to develop valuable mountain lands in order to purchase higher yielding assets, such as parking lots. The new Board does not appear to be moving quickly to liquidate its most valuable holdings; rather, it is seeking to consolidate land holdings to increase both the yield on those lands and the efficiency of management.⁹⁰ Using the tool of non-simultaneous land exchanges, this new Board will be able to create large, economically viable blocks of land upon which multiple uses can occur and a greater revenue stream can emanate over time.⁹¹ This consolidation also offers obvious advantages to environ-

84. See COLO. CONST. art. IX, § 10(1)(a), (1)(d), (1)(e).

85. *Amendment 16 Enhances Public-Lands Stewardship*, DAILY SENTINEL, Oct. 14, 1996.

86. COLO. CONST. art. IX, § 10 (1)(e).

87. *Id.* § 1(d).

88. See COLO. REV. STAT. § 36-1-101.5(6) (2001).

89. COLO. CONST. art. IX, § 9 (7).

90. Mark Loudon, *Report Card: Land Board Needs Reform*, DENV. POST, May 16, 1996.

91. *Id.*

mental health, since large blocks of land can sustain healthier wildlife and plant populations and provide more open space.

Additionally, the Board's area of expertise has historically been agriculture.⁹² It would make little sense to disregard this expertise; therefore, the new Board has indicated an interest in purchasing working ranches and leasing them to operators.⁹³ The return on their investment for intact ranches may be higher than the return for scattered parcels. In addition, it believes that this will accomplish the other objectives of the Constitution: community stability, sound stewardship, public use and protection of the beauty, natural values, and open space, and wildlife habitat.⁹⁴

D. *Economics*

Amendment 16 also changes the new Board's economic mandate from a directive to obtain the "maximum possible amount therefore" to a directive to achieve "reasonable and consistent income [from the Land Board lands] over time."⁹⁵ This may not appear to be a legally significant change, because under trust law, the classic "reasonable person" standards govern the Board. However, the practical effect of the change is more dramatic and illustrates the power of the predatory nature of Amendment 16 changes. The old Board appeared to feel the mandate to maximize revenue required it to consider selling land to whoever walked in the door at any time. It felt that maximizing revenue meant achieving a market rate whenever someone offered to buy that land. The new Board seems to have taken notice that land appreciates over time dramatically, and has always been a good, long-term investment. The new Board has taken the view that achieving reasonable and consistent revenue over time allows it to care for the health of the land, and, in doing so, increase its economic productivity and value over time.⁹⁶ This, combined with its ability to do land banking, positions the Board to be the owner of large tracts of land containing high natural values while also producing better-than-historic levels of income.

External forces drove the old Board's actions. Its long-range plan seemed to consist of a strategy of "let's see how much more we can get above this guy's initial offer."⁹⁷ The Board's recent past president, Tom Swanson, likened the old Board to the proprietor of a candy store open from 9-5; the busy hours are after school when the kids come in and say,

92. *Amendment 16 Enhances Public-Lands Stewardship*, DAILY SENTINEL, Oct. 14, 1996.

93. *Id.*

94. *Id.*

95. *A Yes on 16 Saves Trust Lands*, DAILY CAMERA; COLO. CONST. art. IX, § 10(1).

96. *A Yes on 16 Saves Trust Lands*, DAILY CAMERA.

97. *Preserve Colorado's lands*, ROCKY MOUNTAIN NEWS, Aug. 16, 1996 (stating that the old land board had to "sell to the highest bidder.").

"I'll have one of those, 2 of these and 7 of them."⁹⁸ Partly because of the change in mandate language and partly because the new appointees come from sophisticated financial backgrounds, the new Board now views itself as investment managers with the duty to manage for the extremely long term. It must manage values that may not return economically today, but may in the next 200 to 500 years. The Board can now be proactive rather than reactive in deciding their priorities. This takes the pressure to do transactions "on demand" off the Board and also allows it to postpone and preserve its options on specific properties while managing the whole portfolio of assets for reasonably increasing revenue.

E. Stewardship

Another Amendment 16 provision requires the Board to modify its leasing structure to give incentives to persons who conduct their activities on Land Board land with great environmental sensitivity.⁹⁹ The program, Stewardship Incentives Program, aims to sustain and increase the environmental health and natural values present on Land Board land.¹⁰⁰ Until 1996, if a lessee was careful about his grazing practices and conducted his operation in a way which improved and sustained the health of Land Board land and its carrying capacity for cattle grazing, the old Board responded by looking at the land as though it had increased in value, and rent should be raised. In effect, the old Board punished good stewards of State Land Board land by raising their rent. This created a disincentive to make improvements to leased land, or to treat it well. Amendment 16 regards land management as an explicit equation: Sound stewardship equals economic productivity.¹⁰¹ A corollary to this equation is that sound stewardship also improves natural values on trust lands.

Finally, the most highly touted new Constitutional provision is Amendment 16's Stewardship Trust.¹⁰² Amendment 16 directs the Land Board to place 300,000 acres of land into a special Stewardship Trust which it will manage for long-term productivity and to improve and enhance wildlife habitat, natural beauty, natural values and open space.¹⁰³ This provision anticipates continuing existing, non-conflicting uses on Land Board land while engaging in more aggressive management to improve and manage that land's health.¹⁰⁴ Essentially, the Stewardship

98. Interview with Tom Swanson, former President, Colorado State Board of Land Commissioners, Evergreen, Co., January 20, 1998.

99. COLO. CONST. art. IX, § 10(1)(b)(II).

100. *A Yes Vote Benefits Children, Open Space*, DENV. POST, Nov. 3, 1996.

101. *Id.*

102. *Id.*

103. COLO. CONST. art. IX, § 10(1)(b)(I).

104. *A Yes Vote Benefits Children, Open Space*, DENV. POST, Nov. 3, 1996.

Trust recognizes that state land has high natural values and management needs to enhance these values.¹⁰⁵

F. *Public Process*

From the above discussion about the specific incidences and transactions that motivated Amendment 16's proponents, the reader can infer that public relations was an organizationally disregarded area for the former Board. Amendment 16 and its accompanying legislation were specifically designed to open up the process by which the State Land Board makes its decisions. The old Board, in addition to receiving ex-parte comments on a daily basis, conducted its monthly meetings in a very peculiar way. On the day preceding the official meeting, the old Board conducted what it called a workshop. The workshop was actually an unrecorded, dress rehearsal for the meeting the following day. All the analysis, weighing and balancing the issues, and other relevant information was presented to the Board by staff during the workshop. The Board typically discussed issues and proposals at length and then held a shorter, more stilted, discussion during the public meeting. Thus, those not in attendance at the workshop never fully knew on what the Board was basing its decisions, nor were they allowed to interact with the Board during the true decision-making process.

An excellent example of how open public process can help to preserve open space and wildlife was the Seven Utes issue mentioned above. The Board was rapidly moving towards creating a new ski area and large base area development with very little public input. When light was finally shown on the process, and the public was notified, over 500 people showed up at the public meeting in Fort Collins to debate the merits of a ski area proposal and the Board reversed its course.¹⁰⁶

Vigorous public debate is now used to define the contours of the Board's public issues. Even though the Board must consider, first and foremost, the beneficiaries of the trust, those beneficiaries will benefit if the public is educated about the Board's responsibilities and can focus on helping the Board achieve those responsibilities while purely public values such as open space, wildlife habitat, beauty and other natural values are advanced.

G. *Tensions Between Amendment 16's New Programs and the Fiduciary Role of the Board*

The plaintiffs in the case against Amendment 16 asserted that the new structure of the Land Board, five volunteer commissioners, was not suf-

105. *Preserve Colorado's Lands*, ROCKY MOUNTAIN NEWS, Aug. 16, 1996.

106. Interview with Doug Young, former policy advisor to Governor Roy Romer, in Boulder, Colo. (Oct. 9, 2001).

ficient to protect the interests of the beneficiaries.¹⁰⁷ They asserted this because the Amendment directed that one of each of the commissioners have expertise in certain areas of importance to the Board.¹⁰⁸ The opponents to Amendment 16 made the claim that those areas of expertise essentially gave the constituents/customers and groups a seat on the Board with which to protect those constituent group's interests.¹⁰⁹ Judge Babcock was not convinced by this argument because the language of Amendment 16 states that a Board member is merely to have expertise in a particular area, and not to represent the constituent group interests related to those areas.¹¹⁰

The use and sale of lands to school districts for educational purposes, provided for in the Amendment, is a new program that could cause legal tension. Curiously, this program revisits a long-ago arrangement in which the Land Board gave land for free to local school districts so that they might place a school on the land. Most of the historic country schoolhouses in Colorado may still be found on the corners of a section 16 or 36. The new constitutional directive mandates that the Board allow school districts to purchase (at no more than fair market value) lands that they require for educational purposes.¹¹¹ Additionally it requires the Land Board to provide outdoor education opportunities to local schools.¹¹² The tension here is that the State equalization formulas are designed to correct imbalances between districts with high assets and income and districts that have low assets and low income from year to year.¹¹³ It would be very difficult to add the value of a school district's use of State Land Board land into that equalization formula. Additionally, many school districts do not have Land Board lands within their district at all and some have none that they could choose to take advantage of under these programs. So the application of this program will almost certainly be disparate across the school districts. How this is squared with the State's funding scheme remains to be seen.¹¹⁴ Additionally, outside the scope of the funding scheme, traditional trust law would not have a fiduciary trustee favor one set of beneficiaries over another. Perhaps one way of

107. *Branson II* at 631.

108. *Branson II* at 642; *Branson Sch. Dist. v. Romer*, 958 F.Supp. 1501, 1518 (D. Colo. 1997) (hereinafter "*Branson I*").

109. *Branson II* at 642; *Branson I*, at 1518.

110. *Branson I* at 1518.

111. COLO. CONST. art. X, § 10(1)(e).

112. COLO. CONST. art. X, § 10(1)(d).

113. See COLO. REV. STAT. § 22-54-102 (2001).

114. *Branson I* at 1522.

Plaintiffs argue that the phrase 'which shall not exceed the appraised fair market value' should be enjoined because the Board, as trustee, should never accept any less than fair market value. First, I am not convinced that schools, as beneficiaries of the trust, cannot be given a better price than other buyers or lessees of school lands. I need not decide that question, however, as nothing in this section requires the Board to accept any less than the most money it determines it can garner for a particular tract of school lands.

calming this tension is to make the program available to all and to work equally with all those who choose to avail themselves of it.

The Stewardship Incentives program offers another set of quandaries for the new commissioners. Currently, the fee schedule for grazing lessees is set by multiplying the carrying capacity of a piece of land in numbers of cattle by the regional average of the price of an animal unit months as determined by a survey conducted by the State Department of Agriculture.¹¹⁵ Then the Board discounts this rate by 35% as a credit for the cost of management of the land.¹¹⁶ Management activities are to include weed abatement, fencing, water development, and any other improvements needed to make the parcel productive.¹¹⁷ The Constitution now directs the Board to create a Stewardship Incentives Program that will reward agricultural lessees for good stewardship by structuring the lease and changing terms such as rate, length and other conditions to encourage continued high levels of stewardship on state trust land.¹¹⁸ The Board's lessees have requested a rate structure that would give them more of a management credit for higher levels of stewardship on state trust land. Many worry that this is essentially giving something away for nothing and therefore violates the fiduciary responsibility to generate income. On the other hand, the Board does not currently differentiate between good and bad stewards of its land. In fact, the Board penalizes good stewards for their stewardship when the carrying capacity of their land increases due to good stewardship by then charging the stewards a higher rate.

Amendment 16, while it solves many problems of the Board, does not dismiss all of the tensions that are inherent in land management. The provisions of Amendment 16 were written in a way to push the envelope on state trust land fiduciary law. As written, and on their face, they appear to be constitutional and have been upheld as such by the Federal District Court and the U.S. Circuit Court of Appeals.¹¹⁹ Their application will prove to be the true test of Amendment 16's constitutionality and its practicality.

IV. IMPACTS ON MANAGING TRUST LANDS

Through the above examination of some of the problems that gave rise to the solution embedded in Amendment 16, the examination of Amendment 16 itself, and the explanation of Amendment 16's role in

115. See Colo. State Land Bd., *News Release: Land Board to Consider Grazing Rate Increases*, Nov. 9, 1999, available at http://www.dnr.state.co.us/cdnr_news/land/1999111010013.html.

116. *Id.*

117. Interview with John Brejcha, Deputy Director, Colorado State Land Board, in Denver, Colo. (Jan. 20, 1998).

118. COLO. CONST. art. X, § 10(1)(b)(I).

119. See generally *Branson I*; *Branson II*.

conservation and preservation, it may be possible to speculate on some of the impacts that Amendment 16 may have on the practice of trust land management. Possibly the most productive way of doing this would be to examine several of the projects the new Board has undertaken in the 4 years since the passage of Amendment 16. From these projects, one can discern an ethical and practical sea change in the way that the Board does its work. The methodologies that will be discussed in this section may be applicable to other private, public and trust land management practices across the west. It would be presumptuous to say that these methodologies are not currently in use in land use and land management in various ways in various agencies across the west; specifically, one can look at the Resource Advisory Council process and various ecosystem and watershed scale management partnerships among federal, state and local governments. However, the methodologies may prove useful to other agencies and private individuals as people in the west struggle to come to grips with issues such as sprawl, air and water pollution, disappearing agricultural lands, and decreasing wildlife habitat.

This section will review three specific cases on which the Board is currently working, discuss the philosophy of the Board in each of these cases, reveal how that philosophy is borne out in practice and predict what the result of each of these issues could be for both public values as well as the trusts' interest. The three areas of initiative are: the Colorado State Forest planning process as it unfolds after the Seven Utes controversy, the Emerald Mountain working group proposal to the Board, and the Chico Basin Regional Ecosystem management process.

A. Colorado State Forest

1. Background

The Colorado State Forest, created in 1936 by act of the state legislature,¹²⁰ is about 71,000 acres of land on the east side of North Park in Jackson County, Colorado.¹²¹ It has received heavy logging pressure over the last fifty years, at one time being the location of the largest logging operation in the state.¹²² Since the late 1950s, the State Forest has been managed primarily for sustainable timber and grazing.¹²³ Since the improvement of Highway 14 across Cameron Pass from a seasonal dirt road to a year-round paved road in the 1970s, North Park and especially the Colorado State Forest have become destinations for recreational tourism.

120. COLO. REV. STAT. § 36-7-201 (2001).

121. COLO. STATE LAND BD., COLORADO STATE FOREST INTEGRATED MANAGEMENT PLAN 1 (2001), available at http://trustlands.state.co.us/State%20Forest%20Plan/state_forest_plan_intro.htm (hereinafter "INTEGRATED MANAGEMENT PLAN").

122. Interview with John Twitchell, District Forester, Colorado State Forest Service, in Gould, Colo. (Jan. 24, 1998).

123. *Id.*

Since the mid-1980s, the Land Board has contracted with Colorado State Parks to manage recreational activity on the State Forest. Currently loggers, ranchers, hunters, mountain bikers, hikers, fishermen, cross-country skiers, and wildlife enthusiasts use the State Forest.

The State Parks and the Colorado State Forest Service jointly manage the State Forest.¹²⁴ Additionally, the Land Board's Northwest District Manager closely monitors activities on the forest. Following the Seven Utes controversy described earlier, the Board created the Colorado State Forest Advisory Committee which is comprised of twelve members, one each from the four interested agencies (State Parks, Colorado Forest Service, State Land Board and the Division of Wildlife) and eight additional members from the community and users of the State Forest.¹²⁵

2. Board Philosophy and Direction

The Board directed the State Forest Advisory Committee to work with all of the stakeholders and interested parties in the State Forest to come up with a plan that would give some certainty to those parties about future activities and longer range plans for the State Forest. Additionally, the Committee was charged with determining the appropriate and sustainable level of revenue that the State Forest could generate for the Board's trust beneficiaries. In essence, the Board recognized that the State Forest was a unique large landscape for which there existed a great deal of experience and expertise that had not been tapped during previous planning processes for the parcel. The Board created a collaborative decision-making group comprised of parties with high levels of experience and expertise on the State Forest and directed them to come up with a plan using that collaborative process. In 1997, the State Forest Advisory Committee, using the services of a consultant, embarked on a process of creating a master plan for the State Forest.

3. Result and Lessons

By creating a collaborative atmosphere and placing trust in a set of experts and local stakeholders, the State Land Board has become the recipient of a highly detailed, extremely responsible long-range management plan for the Colorado State Forest.¹²⁶ This success came out of the ashes of a breakdown of public process and rational discourse in the Seven Utes case. The contrast between the top-down, non-consultative, edict-style of management that characterized the Seven Utes controversy and the bottom-up, collaborative, locally-invested process that the Advisory Committee uses cannot be more stark. On the one hand, the result was a high-profile public failure for an embattled board that further de-

124. INTEGRATED MANAGEMENT PLAN, *supra* note 121.

125. Colo. State Land Bd., Colo. State Forest Advisory Comm. Charter (Apr. 2, 1996).

126. See INTEGRATED MANAGEMENT PLAN, *supra* note 121.

creased its credibility and engendered a radical change to its operation. In the other case, the result so far has been a workable, sustainable, long-range multiple-use plan with buy-in from all interested parties, both into the result and into the process that generated that result. The Colorado State Forest Advisory Committee process may become a model to be duplicated in other large landscape management decisions in the State Trust lands context. It must work hard, however, to avoid the trap of becoming a captive of the interest groups that are represented on it, and to maintain an independent and creative organic mindset about opportunities for future uses of the State Forest.

B. *Emerald Mountain*

1. Background

Emerald Mountain is approximately 7,000 acres of land immediately adjacent to the town of Steamboat Springs in Routt County, Colorado, in the northwest part of the state.¹²⁷ Three or four lessees have leased this parcel for grazing purposes for the last eighty or ninety years with no public access to Emerald Mountain over those years. Emerald Mountain provides the scenic mountain backdrop for the resort town. The citizens of Routt County had always viewed Emerald Mountain as a local asset for its agricultural operators, as well as a permanently preserved mountain backdrop to the city.

Because of escalating real estate values in and around Colorado's ski towns, the value of Emerald Mountain for development purposes rose dramatically during the 1980s and early 90s. With the rising real estate values, the Board in the early 1990s felt compelled to examine the possibilities of developing residential home sites on the parcel. In order to avert what Routt County felt would be a disaster if Emerald Mountain was developed, the Routt County Commissioners and citizens of Routt County adopted two strategies. The first was to support enthusiastically Amendment 16 to the Colorado Constitution in the hope that Emerald Mountain might become a part of the newly conceived Stewardship Trust. The second was for Routt County to secure a planning lease with the State Land Board to engage in a citizen participation planning process to determine appropriate uses for Emerald Mountain.

The Routt County Commissioners, and especially Commissioner Ben Beall, convened a citizen working group to explore the various possibilities for land uses on Emerald Mountain. Routt County has a very sophisticated geographic information system in place and was able to generate very illustrative maps detailing forage, topography, existing uses, and other important considerations. The planning process resulted in the Emerald Mountain Land Use Plan, which was presented to the

127. 2000 ANNUAL REPORT, *supra* note 34.

Colorado State Land Board in January 1998.¹²⁸ The Board felt that the plan was deficient in a number of respects as it failed to fully and realistically address the Board's need to make economic decisions about the parcel of land. Specifically, while the plan included some income streams, the plan did not recognize the development value of the land. It only off-handedly planned for the purchase of a conservation easement and did not provide for any realistic funding source for this purchase.

The local working group went back to the drawing board and came up with a plan to purchase Emerald Mountain in segments over a five-year period.¹²⁹ The possibility of a locally sponsored limited development arrangement to raise funds for the project as well as other funding sources convinced the Board to accept the proposal.

2. Board Philosophy and Direction

When the Board agreed to the planning lease for Emerald Mountain the directive to Routt County was not clear that the development value of the parcel of land needed to be taken into account. Routt County also believed that Amendment 16's Stewardship Trust provided an off-ramp for the Board to take instead of continuing to focus on some of its economic requirements. After the passage of Amendment 16, the Board reaffirmed its fiduciary requirement to generate a reasonable amount of income that reflected the true value of the parcel. After much back and forth, Routt County agreed to move to a higher level of specificity on the economic part of the land use plan for Emerald Mountain. The Board also directed staff and Routt County to work with real estate and conservation professionals to try to achieve a creative solution to some of the problems raised by Routt County's proposal.

3. Result and Lessons

The result of this process has been that the working group began to understand the Board's fiduciary responsibility to generate income while at the same time searching for creative solutions to the problems. Last year, the working group successfully bid on and acquired the lease and an option to purchase the property over a five-year period. The jury is still out on Emerald Mountain, but with the greater level of understanding by the working group of the Board's responsibilities and through creative professional input to a local citizen planning process, the result is likely to be a far better one than before. The difficulties in making a local activist group understand the Board's fiduciary responsibility to generate income while at the same time searching for creative solutions to the problems, especially after Amendment 16's campaign, make this

128. Interview with Ben Beall, Routt County Commissioner and Chair of Working Group, in Steamboat Springs, Colo. (Jan. 9, 1998).

129. *Id.*

process very long and arduous. The alternative is gridlock through political missteps and confrontational tactics.

C. *Chico Basin*

1. Background

The Chico Basin is an assemblage of parcels of State Trust land in northeastern Pueblo County and southeast El Paso County on the southern Front Range in Colorado.¹³⁰ The total acreage owned by the State Land Board in Chico Basin is approximately 150,000 acres.¹³¹ In 1994, the old Board issued a request for proposals on one of the larger parcels of the Chico Basin in which it required a successful bidder to create a management plan for the parcel. The successful bidder on the Chico Basin RFP of 1994 was a consortium of three individuals. The consortium failed to live up to the requirement of completing a management plan. The Board terminated the long-term lease, but allowed them to stay on the ground on a year-to-year basis until a new management arrangement could be developed.

2. Board Philosophy and Direction

In late 1997, the new State Land Board began to focus on the Chico Basin as a chance to experiment with large landscape management and planning. Additionally, the Board purchased an adjacent large ranch from a long-time rancher through The Nature Conservancy ("TNC"). As a condition of the purchase of the ranch, the Board leased it back to TNC for 25 years, which subleased it to the long-time ranch manager. At the time they acquired the additional parcel, the Board also asked the staff to draft a goals statement for management of all parcels within the Chico Basin management area. Additionally, it directed staff to work with local residents and land use and resource experts to generate a landscape management plan for the Chico Basin. The central tenets of the goals document were: to take advantage of existing expertise and local knowledge of the parcel, to plan for long-term sustainable multiple-use and reasonable income generation from the parcel, and to incorporate outdoor education and recreation as elements into a long-term landscape plan.

3. Result and Lessons

The Chico Basin management advisory committee met intensively during the spring of 1998 and returned with a document detailing a set of goals, objectives and tasks for the Chico Basin, which the Board ap-

130. Interview with John Brejcha, Deputy Director, Colorado State Land Board, in Denver, Colo. (May 20, 1999).

131. *Id.*

proved in August 1998.¹³² These goals, objectives and tasks addressed all of the Board's goals and formed the basis for an RFP for the next manager of the Chico Basin landscape. The overlapping goal of both the Board and the management advisory committee has been to take advantage of efficiency of management of such a large landscape and, through the use of creative land management, to enhance the value of the property. The successful proponent for the parcel, Duke Philips, is now in his third year of managing the Chico Basin ranch.

CONCLUSION

Amendment 16 is a fascinating departure from previous Land Board management schemes. It has given the Board the opportunity to value stewardship, the environment and educational opportunities on a par with their requirement to generate revenues. It anticipates moving to another level of land management where the health of the land and public input are strong players in decisions. Isolated approaches rooted in a stubborn adherence to strict fiduciary principles should be rejected in favor of collaborative, cooperative processes. A delicate balancing act among divergent interests may be achieved through heightened local input into the management process. These approaches stand a greater chance of returning benefits, current income as well as natural resource and educational values, to the trust beneficiaries by avoiding the costly and counter-productive snarls of litigation and political backlash. The eyes of the Board's beneficiaries, the legislature, local government, lessees, and the people of Colorado—not to mention other states' land boards and other public land managers throughout the west—are on the State Land Board as it implements Amendment 16 and manages Colorado's state trust lands in the 21st century.

132. *Id.*