

# THE HISTORY OF SCHOOL TRUST LANDS IN NEVADA: THE NO CHILD LEFT BEHIND ACT OF 1864

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## ABSTRACT

*This Article details the history of the federal school lands grant program in Nevada—the first federal initiative to support public education in the new state. After providing a brief overview of federal land management history in the West, the Article presents the story of school lands in Nevada—tracing its birth in Congress and at the Nevada Constitutional Convention in 1864; analyzing the changes made by state constitutional amendments and court decisions; exploring Congress’s attempts to adapt the program to Nevada’s needs in the form of the two-million-acre grant of 1880 and the 30,000-acre exchange of 1926; and documenting government abuse and misuse of the Nevada school lands program in the twentieth century.*

*Tracing the history of the school lands grants in Nevada reveals several recurrent themes in federal land law development and the history of the West. First, federal land management policies seldom functioned as intended—due in large part to the pressures of local self-interest. A second and more pervasive reason for the theory/practice disconnect stems from Congress’s lack of understanding about the arid American West. Lastly, problems that plagued the school lands grants, as with many national initiatives, implicated the mechanics—and not necessarily the philosophy—of Congress’s initiative.*

## TABLE OF CONTENTS

ABSTRACT .....	110
TABLE OF CONTENTS .....	110
INTRODUCTION .....	111
I. “A NATION OF SQUARES” .....	112
A. <i>The Ohio Model</i> .....	116

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- B. *The Michigan Model* . . . . . 117
- C. *The Western Model* . . . . . 117
- D. *The Neo-Western Model* . . . . . 119
- II. SCHOOL LANDS GRANTS IN NEVADA . . . . . 120
  - A. *The “Princely” Gift* . . . . . 120
    - 1. *The Nevada Enabling Act of 1864* . . . . . 121
    - 2. *Nevada Constitution of 1864* . . . . . 122
    - 3. *Amendments and Judicial Refinements* . . . . . 124
  - B. *Re-Shaping Nevada’s School Lands* . . . . . 126
  - C. *(Re-) Re-Shaping Nevada’s School Lands* . . . . . 130
- III. ABUSE AND MISUSE IN TWENTIETH-CENTURY NEVADA . . . . . 135
  - A. *Abuse* . . . . . 136
  - B. *Abuse Exemplified: The Story of William B. Byrne* . . . . . 137
    - 1. *The Ormsby County Grand Jury Condemns* . . . . . 138
    - 2. *The Nevada Supreme Court Weighs In* . . . . . 142
    - 3. *Post-Script: Byrne’s Political Future* . . . . . 144
  - C. *Misuse* . . . . . 145
- CONCLUSION . . . . . 149

INTRODUCTION

The No Child Left Behind Act of 2001 (NCLB)<sup>1</sup> is perhaps Congress’s most ambitious attempt in the last century to influence K-12 public education—a sphere traditionally left to state and local governments. Contrary to popular belief, however, NCLB is not the first of its kind. In Nevada, it all started with President Lincoln, when he granted statehood on October 31, 1864. As was custom with new states to the Union, a school lands grant was built into the Nevada Constitution and approved by Congress. And like NCLB, this program was plagued with the pitfalls that often accompany national solutions to local problems. Professor Lawrence Friedman explains:

Unfortunately, national land programs never worked as they were meant to work on paper. Field administration was the weak point: feeble, incompetent, corrupt. Where national policy was more or less consistent with the economic self-interest of local residents, the policy worked more or less well. But when policy collided with self-interest, Washington’s arm was never long enough or steady enough to carry through.<sup>2</sup>

This Article is a modest attempt to document why (and how) the results were mixed in Nevada. The answers are unsurprising. Local self-interest and Congress’s inability to adapt the program to local needs are at the forefront. But, the story is nevertheless worth telling.

<sup>1</sup> No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (reauthorizing the Elementary and Secondary Education Act, 20 U.S.C. §§ 6301-7941 (2000)). I explore NCLB and education law more generally in another piece. See Christopher J. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 STAN. L. REV. 1563 (2006).

<sup>2</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 232 (2d ed. 1985) (citations omitted). See generally MALCOLM J. ROHRBOUGH, THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837 (1968) (focusing in particular on the ineffectiveness of local field administration).

Numerous book-length histories confirm Friedman's observation about land policy in the United States,<sup>3</sup> but none addresses federal school lands grants in any depth. And no publication treats the development of this obscure federal land law in Nevada. That is the aim of this Article: Part I provides a brief history of school lands grants to new states. Part II then explores the story of school lands in Nevada—tracing its birth in Congress and at the Nevada Constitutional Convention in 1864; analyzing the internal changes made by constitutional amendments and Nevada Supreme Court decisions; and exploring Congress's external attempts to adapt the program to Nevada's needs in the form of the two-million-acre grant of 1880 and the 30,000-acre exchange of 1926. Part III documents government abuse and misuse of the school lands program in the twentieth-century, focusing first on the corrupt practices at the Surveyor General's Office and the "enlightened self-interest" of Nevada's state legislators. Part III also explores the misuse of the school lands program in the late-twentieth century and current efforts to reimburse the Permanent School Fund for misappropriated school lands to other state agencies. From Nevada's unique experience many insights can be gleaned—some which might seem particularly important as Congress has once again embarked on the mission of making sure no child is left behind in Nevada.

### I. "A NATION OF SQUARES"

Before delving into the specifics of Nevada's school lands grants, the background behind federal land policy should be explored to understand how, as Friedman puts it, the United States became "a nation of squares."<sup>4</sup> As the emerging American nation set forth land policies that placed life, liberty, and *property* as fundamental citizen rights, two conflicting philosophies for federal land management emerged—the Hamiltonian goal of raising government revenue and the Jeffersonian ideal of individual ownership and private land use and development. Historian Paul Starrs succinctly outlines this tension:

Legislators sought to dismantle any vestige of English feudalism that had insinuated its way into the Colonies, substituting a different, and effectively American, concept of freehold tenure that would place land in the right hands. Dedicated lawmakers worked to encourage landownership, not simply land use, although other distractions occasionally entered the field of view: Alexander Hamilton, after all, suggested that the first reason for selling public-domain land was to raise federal revenue. So arrangements were made in the late 1700s for alienating land—selling it off in parcels; and those parcels were to be neat, replicable, and orthogonal, under the terms of

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<sup>3</sup> For more in-depth studies on general land law policy in the United States, see generally MARION CLAWSON, *THE FEDERAL LANDS REVISITED* (1983); MARION CLAWSON & BURNELL HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* (1957); EVERETT DICK, *THE LURE OF THE LAND* (1970); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968); MARSHALL HARRIS, *ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES* (1953); BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* (1965); E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES, 1900-1950* (1951); ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1970* (2d ed. 1976); ROHRBOUGH, *supra* note 2; Paul W. Gates, *An Overview of American Land Policy*, 50 *AGRIC. HIST.* 213 (1976).

<sup>4</sup> FRIEDMAN, *supra* note 2, at 231.

the Northwest Ordinance, which established the rectangular land-survey system from the western frontier of Ohio and beyond.

Getting rid of land was the consistent policy of the U.S. government. Yet the programs developed proved lush with problems.<sup>5</sup>

Any semblance of the Hamiltonian focus on selling land for government revenue vanished by the 1860s, perhaps typified by the emergence of the Homestead Act. As Friedman notes, “[t]he government did not choose to manage its land as a capital asset, but to get rid of it in an orderly, fruitful way.”<sup>6</sup> The Jeffersonian ideal of individual ownership and national development emerged as the driving rationale for U.S. policy on land management, use, and distribution.

Consequently, the federal government had to design an effective system for surveying, organizing, managing, and distributing its land. This policy emerged in the Act of May 18, 1796, which dealt with “the Sale of the Lands of the United States, in the territory northwest of the river Ohio, and above the mouth of Kentucky river.”<sup>7</sup> Such legislation established the federal surveyor general’s office and set forth the following basic land management policy:

Public lands were to be surveyed “without delay” and divided into townships of six miles square. Half of the townships were to be further divided into sections; each section contained one square mile, that is, 640 acres. Under later acts, sections were further divided into half-sections, and tracts of 160, 80, and 40 acres. In any event, the land had to be surveyed before it was sold, and the units of sale were strict rectangular plots. No chain of title could escape federal land policy, any more than the lots and farms could ignore the merciless, invisible grids stretched over the land at government order. The law of 1796, and its later versions, made us *a nation of squares*.<sup>8</sup>

This “nation of squares” allowed the federal government to better organize and manage its lands. Efficiency and order were the system’s hallmarks. Townships, for instance, were divided into thirty-six sections (see Figure 1 below), and the surveyor general’s office kept track of who received each section. As further explained with respect to school lands grants in Part I.B, this checkerboard arrangement allowed the federal government to dedicate and grant specific sections of each township—e.g., sections sixteen and thirty-six for school lands—for state or federal revenue generation.

Obviously, the history of federal land management is a story of enormous depth and detail,<sup>9</sup> but a basic overview places Nevada’s story in its proper context. The Jeffersonian chapter of development and private ownership arguably lasted from the mid-1800s until the end of homesteading in the late 1970s, when the federal government began to view its role over federal lands as

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<sup>5</sup> PAUL F. STARRS, *LET THE COWBOY RIDE: CATTLE RANCHING IN THE AMERICAN WEST* 38 (1998) (citations omitted).

<sup>6</sup> FRIEDMAN, *supra* note 2, at 231.

<sup>7</sup> Act of May 18, 1796, ch. 29, 1 Stat. 464.

<sup>8</sup> FRIEDMAN, *supra* note 2, at 231 (emphasis added) (quoting and commenting on the congressional Act of May 18, 1796, *supra* note 7).

<sup>9</sup> See *supra* note 3 (providing an extensive bibliography on treatments of federal land law policy).

a steward, instead of a mere land alienator.<sup>10</sup> While Hamilton emphasized the revenue-generating goals of federal land policy, Roger Kennedy argues that Jefferson focused on the yeoman's presence on the land—i.e., the need for individual property ownership—because “it was good for him and would, as a consequence, be good for the nation. Jefferson's therapeutic view of land won its proudest victory over a purely commodity theory of land in the Homestead Act.”<sup>11</sup>

But Kennedy's declaration of the Homestead Act as Jefferson's proudest victory might have been premature. In addition to favoring the yeomen landowner in federal land policy, Jefferson was a major proponent of national policies to shape public education and to ensure free public schooling.<sup>12</sup> The federal school lands grants of the nineteenth century served both purposes—to make land ownership more accessible to individual citizens and to create state revenue specifically earmarked for education.<sup>13</sup> Unlike other nationalized land policies, however, Jefferson advocated for federalism in education—i.e., education was best controlled by state and local governments, not federal bureaucracy.<sup>14</sup> That is, the federal government should only step in when local governments—especially those small settlements on the American frontier—could not provide for basic education.<sup>15</sup> From Jefferson's philosophy sprang the federal program of school lands grants, where Congress initially set aside one section per township surveyed in support of local education (see Figure 1).<sup>16</sup> New states to the union would receive one section from each township to sell, with the profits pledged to support public education. Typically, this money was placed in a permanent education fund or spent directly on public school construction and maintenance.<sup>17</sup>

Although the No Child Left Behind Act of 2001 might be the most aggressive and comprehensive national education initiative of the last century, it clearly was not the first. The Continental Congress initiated a national education measure in the form of the Land Ordinance of 1785.<sup>18</sup> The 1785 Ordi-

<sup>10</sup> For more information on land development in the West, see generally WALTER PRESCOTT WEBB, *THE GREAT PLAINS* (1931).

<sup>11</sup> ROGER G. KENNEDY, *MR. JEFFERSON'S LOST CAUSE: LAND, FARMERS, SLAVERY, AND THE LOUISIANA PURCHASE* 242-43 (2003) (detailing American land law history from 1776 to 1826 with particular emphasis on the role of Jefferson in shaping land law policy and practice).

<sup>12</sup> ROBERT M. HEALEY, *JEFFERSON ON RELIGION IN PUBLIC EDUCATION* 179 (1962); see also Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 *NAT. RESOURCES & ENV'T* 39, 39 (1997) (“Thomas Jefferson . . . wrote in his *Notes on the State of Virginia* of his proposals for free public education in Virginia. Jefferson would divide every county into small districts called hundreds, establish in each hundred a school for teaching reading, writing and arithmetic, require each hundred to pay the teacher and permit every white child three years of free education.”).

<sup>13</sup> KENNEDY, *supra* note 11, at 242 (“Thus Jefferson was vindicated in the two aspects of his public career for which he wished to be remembered, his formulation of a moral basis for the American Union [individual land ownership] and his labors on behalf of education.”).

<sup>14</sup> HEALEY, *supra* note 12, at 178-79.

<sup>15</sup> *Id.*

<sup>16</sup> GEORGE C. COGGINS, CHARLES WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 56-57, 67 (3d ed. 1993).

<sup>17</sup> *Id.*

<sup>18</sup> Hager, *supra* note 12, at 39.

nance initiated the school lands grant program by dedicating one section of every township in the Northwest Territory for public education. With the enactment of the U.S. Constitution, Congress replaced the Continental Congress, but the Land Ordinance of 1785 remained intact.<sup>19</sup> As new states entered the union, Congress included some form of this provision into each new state’s enabling act. As quickly as federal surveyors identified the section on the ground, it accrued to the state without further action—only requiring that the revenue generated from its management or sale be used for the furtherance of public education.

FIGURE 1. STANDARD TOWNSHIP GRID  
(township = 36 square miles)

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16*	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36**

\* Starting with Ohio’s statehood, Congress gave Section 16 of every township to new states to generate revenue for public education.

\*\* Congress doubled the amount of state school lands in 1850 by also including Section 36 of each township.

In return, the new states inserted language in their constitutions that formalized this federal-state school lands agreement and set forth additional regulations for land distribution and revenue use. By congressional mandate, the funds had to be used in some form for public education. State policies differ significantly based on time, location, and state-specific characteristics, but the evolution of school lands grants can be roughly divided into four main phases: (1) the Ohio model of one section per township; (2) the Michigan Model of state constitutional education mandates; (3) the Western Model of two sections

<sup>19</sup> COGGINS, WILKINSON & LESHY, *supra* note 16, at 56.

per township; and (4) the Neo-Western federally mandated trust model.<sup>20</sup> While Nevada falls under the Western Model, these four phases merit further discussion. Some scholars have written about school trust lands in other states,<sup>21</sup> but no one has focused on Nevada.

### A. *The Ohio Model*

As the first frontier state to join the Union in 1803, Ohio pioneered the school lands movement.<sup>22</sup> The Ohio Enabling Act of 1802 created a covenant between the new state and the federal government: the federal government would grant to the state the sixteenth section in every Ohio township for the support of public education,<sup>23</sup> while Ohio would promise not to tax unappropriated federal lands within the state.<sup>24</sup> Congress followed this pattern to admit nearly all post-Ohio states into the Union.<sup>25</sup> All states admitted after 1802—with the exception of Hawaii, Maine, Texas, and West Virginia—received school lands grants from the federal government upon statehood.<sup>26</sup> After Ohio in 1803, Congress admitted Alabama, Arkansas, Illinois, Indiana, Louisiana, Mississippi, and Missouri roughly in accordance with the Ohio Model.

<sup>20</sup> Wade R. Budge, *Changing the Focus: Managing State Trust Lands in the Twenty-First Century*, 19 J. LAND RESOURCES & ENVTL. L. 223, 225-230 (1999) (dividing the development of state trust land policy into four main stages). While Budge divides these policies into four stages, I have slightly altered these categories and named them as models for the purposes of this Article.

<sup>21</sup> See, e.g., Charles E. Bedford, *The "New" Colorado State Land Board*, 78 DENV. U. L. REV. 347 (2001); Tacy Bowling, *Rethinking the ABCs of Utah's School Trust Lands*, 1994 UTAH L. REV. 923 (reexamining how Utah should manage its six million acres of school trust lands); Douglas Dunipace, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, 8 ARIZ. L. REV. 133 (1966); Jeff Oven & Chris Voigt, *Wyoming's Last Great Range War: The Modern Debate Over the State's Public School Lands*, 34 LAND & WATER L. REV. 75 (1999); Michael J. Mortimer, *Condemnation Without Compensation: How Environmental Eminent Domain Diminishes the Value of Montana's School Trust Lands*, 8 DICK. J. ENVTL. L. & POL'Y 243 (1999); Tom Schultz & Tommy Butler, *Managing Montana's Trust Lands*, MONT. BUS. Q., Winter 2003, at 8-14; Elizabeth Sodastrom, Jennifer Sokolove & Sally K. Fairfax, *Federal Reserved Water Rights Applied to School Trust Lands?*, 34 LAND & WATER L. REV. 1 (1999) (evaluating water rights as applied to school trust lands primarily in Montana and Wyoming).

<sup>22</sup> For a more detailed history of the school lands development in each state, see JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE* 17-36 (1996). Souder and Fairfax also divide the school lands movement into four phases, but their phases are: (1) original colonial states; (2) Northwest Territory and Missouri Compromise; (3) sectoral divisions and territorial expansion; and (4) the arid West. *Id.* at 19-22.

<sup>23</sup> Each township is divided into 36 sections, so Section 16 would be near the middle of each township surveyed. See *supra* Figure 1.

<sup>24</sup> Ohio Enabling Act, ch. 40, 2 Stat. 173, 175 (1802).

<sup>25</sup> SOUDER & FAIRFAX, *supra* note 22, at 18.

<sup>26</sup> Hager, *supra* note 12, at 39. Maine and West Virginia did not since they were formed from pre-existing states, while Texas and Hawaii were both independent nations before admittance into the Union. *Id.* For a compilation of all states that received school trust lands, including the amounts of land received, see James B. Shows, *School Trust Lands in the United States* 204, 206 (1991) (unpublished Ed.D. dissertation, University of Southern Mississippi) (on file with author). For an overview of the manner in which the school lands were granted, see *Andrus v. Utah*, 446 U.S. 500, 522-28 (1980) (Powell, J., dissenting).

Namely, each state received the sixteenth section in each township for public education in exchange for a promise not to tax federal lands.<sup>27</sup> In accordance with the Jeffersonian vision, these school lands grants served two purposes: providing crucial funding for public education in these new settlements, while also facilitating individual land ownership and development.

### B. *The Michigan Model*

In 1837, three decades after the emergence of the Ohio Model, Michigan's entrance into the Union reshaped the process with the addition of state constitutional guarantees. Under the Ohio Model, states made a gentlemen's agreement to use the revenues generated from the sale of school lands for educational purposes, but Congress insisted that the State of Michigan take this commitment a step further by including state constitutional restrictions on the use of the revenues from the sale of school lands.<sup>28</sup> The Michigan state constitution resembled earlier ones, but its framers included a requirement that revenues from the sale of school lands be placed into a permanent education fund.<sup>29</sup> Direct revenues could not be withdrawn or used for any other purpose, and the accruing interest would be used annually for the construction and operation of public school systems.<sup>30</sup> Almost all subsequent states followed the Michigan Model, with state constitutional provisions that included permanent education fund language. As explained in Part II.A, Nevada adopted similar provisions in its state constitution;<sup>31</sup> Nevada's Permanent School Fund contained over \$189 million as of December 2004.<sup>32</sup>

### C. *The Western Model*

In 1850, Congress added the thirty-sixth section of each township as school lands, doubling the number of sections dedicated to education (see Figure 1 above).<sup>33</sup> This permutation mainly surfaced because—unlike the flat states of the Great Plains with roughly uniform geography—Congress realized that the West had less inhabitable and more arid, rugged geography; not every sixteenth section would be usable land, and equally important, not every town-

<sup>27</sup> SOUDER & FAIRFAX, *supra* note 22, at 20-21.

<sup>28</sup> *Id.* at 31-32.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 33.

<sup>31</sup> NEV. CONST. art. XI, § 3 (2005) (“All lands granted by Congress to this state for educational purposes . . . are hereby pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses. The interest only earned on the money derived from these sources must be apportioned by the legislature among the several counties for educational purposes, and, if necessary, a portion of that interest may be appropriated for the support of the state university, but any of that interest which is unexpended at the end of any year must be added to the principal sum pledged for educational purposes.”).

<sup>32</sup> KATHY AUGUSTINE, STATE CONTROLLER, STATE OF NEV. PERMANENT SCHOOL FUND FINANCIAL STATEMENTS, SECOND QUARTER ENDED ON DECEMBER 31, 2004, at 1 (Carson City, Nev.) [hereinafter 2004 PERMANENT SCHOOL FUND FINANCIAL STATEMENTS] (on file with author). It should be noted that the Permanent School Fund receives funding from a number of sources, not just from the sale of school trust lands. *See id.*

<sup>33</sup> Gates, *supra* note 3, at 313-14. *See supra* Figure 1 for an example of the standard township plat.



ship would be easily surveyable.<sup>34</sup> Congress further believed that the western lands were less attractive to settlers than their eastern counterparts—partly because available land was much less accessible, water was hard to come by, and settlements were small and scattered. Congress appeared to take these inequities into account when it doubled the amount of school lands.<sup>35</sup> In Nevada, the story is further complicated as Congress discovered<sup>36</sup> that the Sagebrush State had even less usable land than expected and, to compensate, exchanged the remaining school trust lands for a two-million-acre grant in 1880 and a subsequent 30,000-acre exchange in 1926.<sup>37</sup>

Doubling the land granted, of course, was accompanied with additional strings attached. The Michigan Model did not contain any federal obligations—only state constitutional stipulations to use the land and revenue for educational purposes. But Congress changed that with the Colorado Enabling Act of 1875.<sup>38</sup> Instead of just including the boilerplate allocation of two sections per township for school lands,<sup>39</sup> the Act also set a minimum price and required the establishment of a permanent education fund:

That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school-fund, the interest of which to be expended in the support of common schools.<sup>40</sup>

For the first time, in what will be referred to as the Western Model, Congress included statutory direction on how the property was to be sold and how the revenue was to be managed, though enforcement of the provisions did not come into question until recent years.<sup>41</sup> Nevada had similar provisions concerning the two sections,<sup>42</sup> but the original Nevada Enabling Act did not require a permanent school fund. This school fund, however, was set forth in

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<sup>34</sup> Hager, *supra* note 12, at 40.

<sup>35</sup> *Id.*

<sup>36</sup> In truth, Congress did not “discover” this fact, but the state surveyor general and legislature requested and Congress assented to the state’s request. A similar “discovery” took place for the 30,000-acre exchange discussed in *infra* Part II.C, in that this exchange was an outgrowth of the two-million-acre project.

<sup>37</sup> See *infra* Part II. for more information on the development of school trust land grants in Nevada, including the history of the two-million-acre grant, Part II.B, and the 30,000-acre exchange, Part II.C.

<sup>38</sup> Colorado Enabling Act, ch. 139, 18 Stat. 474 (1875). However, the 1875 Act was a modification of an earlier Colorado Enabling Act, ch. 37, 13 Stat. 32 (1864) that did not include the § 14 requirement of a permanent education fund. This stipulation was added in the 1875 Act.

<sup>39</sup> Colorado Enabling Act § 7.

<sup>40</sup> *Id.* § 14.

<sup>41</sup> Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 821 (1992). The implications of these additional requirements remain contested, as some argue that it demonstrates a congressional intent to federalize some parts of state land management. Budge, *supra* note 20, at 228-29. For instance, the Tenth Circuit recently ruled that Colorado’s statehood marked the first time Congress made “explicit restrictions on how the school lands could be managed or disposed.” *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). The court found that these provisions “create[d] a fiduciary obligation for the state of Colorado to manage the school lands in trust for the benefit of the state’s common schools.” *Id.* at 634.

<sup>42</sup> Nevada Enabling Act, ch. 36, § 7, 13 Stat. 30, 32 (1864).

the original state constitution.<sup>43</sup> Nevada's structure thus most appropriately fits under the Western Model.<sup>44</sup>

#### D. *The Neo-Western Model*

The Western Model further developed as Congress included more land sale and use restrictions in new states' enabling acts.<sup>45</sup> In particular, Congress heightened the federal trust requirements with the statehoods of Arizona and New Mexico, explicitly stipulating that school lands were to be held in trust.<sup>46</sup> This Neo-Western Model—exemplified by the Arizona-New Mexico Enabling Act<sup>47</sup>—set forth much more detailed and restrictive provisions than the Western Model.<sup>48</sup> For instance, the states could not sell school trust lands at or below market value, and more importantly, the trust lands could not be “leased, in whole or in part, except to the highest and best bidder at a public auction.”<sup>49</sup> Congress provided detailed guidelines and procedures for the states to follow with respect to these trust lands.<sup>50</sup> Unlike the Western Model, the Neo-Western Model also included an enforcement mechanism:

It shall be the duty of the Attorney-General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.<sup>51</sup>

While the Neo-Western Model continues to be the dominant one today, its provisions are less relevant to Nevada. Nevada followed the Western Model, which does not include an enforcement mechanism. Indeed, Nevada does not have a significant number of school lands remaining to sell or lease, so enforcement is not an issue.<sup>52</sup> With this brief overview in mind, we can take a closer look at the evolution of Nevada's “NCLB of 1864.”

<sup>43</sup> NEV. CONST. art. XI, § 3 (1864).

<sup>44</sup> See *infra* Part II.A (discussing the development of the Nevada school lands program in greater detail).

<sup>45</sup> Budge, *supra* note 20, at 229.

<sup>46</sup> See Arizona-New Mexico Enabling Act, ch. 310, 36 Stat. 557 (1910); see also Dunipace, *supra* note 21 (exploring in great detail the Arizona-New Mexico Enabling Act).

<sup>47</sup> Ch. 310, § 10, 36 Stat. 557.

<sup>48</sup> SOUDER & FAIRFAX, *supra* note 22, at 33. Additionally, Souder and Fairfax explain that the last three states to receive school lands grants—Arizona, New Mexico, and Utah—received four sections per township (Sections 2, 16, 32, and 36). *Id.* at 27. They note:

One could argue that generosity had little to do with the shift from two sections to four—that Utah, Nevada, Arizona, and New Mexico were given four sections because the land was arid and more of it was needed to achieve the purpose of the grant (namely, support for schools)

*Id.* This observation further illustrates why Nevada falls more appropriately under the Western Model, since it only received two sections per township. Note that Souder and Fairfax erroneously lump Nevada among the four-section-per-township states. As this Article documents, this was not the case.

<sup>49</sup> Ch. 310, § 10, 36 Stat. at 563.

<sup>50</sup> *Id.* at 563–64.

<sup>51</sup> *Id.* at 564–65. The enforcement provision is found in § 10 of the Act. For more information on these types of enforcement provisions, see SOUDER & FAIRFAX, *supra* note 22, at 26.

<sup>52</sup> Schultz & Butler, *supra* note 21, at 9 (relying on data represented in SOUDER & FAIRFAX, *supra* note 22).

## II. SCHOOL LANDS GRANTS IN NEVADA

Initial formation of the state lands grants can be neatly packaged into four models, but state-by-state evolution of such programs cannot. Each state molded the program to meet local needs and interests, echoing Friedman's observation that, in practice, "national land programs never worked as they were meant to work on paper."<sup>53</sup> Furthermore, as evidenced by Congress's addition of the thirty-sixth section for western states, the West did not have as much usable land. A pattern emerged of increasing the land grants, swapping lands, or otherwise adjusting the schools lands program to meet the needs of the western states. As historian Eugene Moehring notes, the Silver State exemplifies this evolutionary pattern:

Nowhere in the West was this pattern more pronounced than in Nevada, with its especially complex topography consisting of literally thousands of canyons, mesas, and arroyos, intermittently framed by sage-covered hills, lofty peaks, and the remorseless desert. The state's more than 160 autonomous mountain ranges extending in a generally northeast-southwest direction have been compared to "an army of caterpillars marching toward Mexico." For years Spanish caravans steered clear of this forbidding land. Soldiers, priests, and merchants heading to California blazed trails to the south, avoiding the Las Vegas Valley until 1829. But the Americans were more aggressive. Jedediah Smith, the Rocky Mountain Fur Company trapper from Long Island, became the first white person to enter southern Nevada in 1826—three years before the Mexicans and twenty-two years before this land joined the United States.<sup>54</sup>

To better understand Nevada's experience with school lands, this Part discusses its evolution in three stages. Stage one explores the initial enactment of the program at statehood in 1864, with further analysis on the early judicial and legislative actions taken to reform the program. Stage two details the 1880 two-million-acre grant, followed by the 30,000-acre exchange of 1926. This stage lays the foundation for further exploration into the abuse and misuse that took place in the mid- to late-twentieth century, which is explored in Part III.

### A. *The "Princely" Gift*

By the end of October 1864, the territorial government of Nevada had met Congress's terms, and President Lincoln declared the Battle-Born State to be the thirty-sixth state to join the Union—just in time for the Nevada residents to provide the votes necessary to re-elect Lincoln, help abolish slavery, and ratify the Civil Rights Amendments.<sup>55</sup> As a result of statehood, Nevada received the sixteenth and thirty-sixth sections of each township in order to generate revenue for public education. In his inaugural message to the State Legislature, Nevada's first elected governor,<sup>56</sup> Henry G. Blasdel, called the federal school

<sup>53</sup> See *supra* note 2 and accompanying text.

<sup>54</sup> EUGENE P. MOEHRING, *URBANISM AND EMPIRE IN THE FAR WEST, 1840-1890*, at 121 (2004).

<sup>55</sup> DON W. DRIGGS, *THE CONSTITUTION OF THE STATE OF NEVADA: A COMMENTARY* 14-16 (1961).

<sup>56</sup> While Governor Henry G. Blasdel was the first elected governor of the State of Nevada, it should be noted that James Warren Nye—first appointed by President Lincoln on March 22, 1861 as governor of the Nevada Territory—continued as Acting Governor of Nevada

lands grants “princely donations of lands which [the State of Nevada] has appropriated to educational purposes.”<sup>57</sup> Indeed, this princely gift would greatly influence education and land management in Nevada, though perhaps not in the manner its founders intended. Two events established the school lands program in Nevada: Congress passed the Nevada Enabling Act on March 21, 1864, the voters ratified the proposed Nevada Constitution on September 7, 1864, and the President approved the Nevada Constitution and admitted the State into the Union on Halloween, October 31, 1864.

### 1. *The Nevada Enabling Act of 1864*

The Nevada Enabling Act set forth the basic structure for the school lands grants in the state.<sup>58</sup> On February 8, 1864, U.S. Senator Doolittle of Wisconsin introduced Senate Bill No. 96, which would “enable the people of Nevada to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States.”<sup>59</sup> Eight days later Senator Wade reported the bill out of committee,<sup>60</sup> and the full Senate debated the bill on February 24, 1864.<sup>61</sup> The Vice President indicated during the debate that, in return for the school lands and various other federal land grants, the State of Nevada must: (1) reject slavery and involuntary servitude; (2) ensure religious freedom—a “perfect toleration of religious sentiment”; (3) “agree and declare that [the state and its citizens] forever disclaim all right and title to the unappropriated public lands”; (4) ensure that federal land grants “shall be and remain exempt from any [state] tax”; and (5) guarantee that “lands belonging to citizens of the United States residing without that State shall never be taxed higher than the land belonging to residents thereof.”<sup>62</sup> These requirements were typical of previous state enabling acts, with the exception of the anti-slavery provision, which was new and unique to Nevada.

On March 21, 1864, the Nevada Enabling Act became law,<sup>63</sup> extending an invitation to Nevadans to form a state. In fact, with the Civil War in full swing—and Lincoln in need of additional states to combat slavery with his reelection efforts and the ratification of the Civil Rights Amendments—the Nevada Enabling Act was a generous invitation to a territory that would otherwise not have qualified for statehood at that time.<sup>64</sup> (Hence, Nevada was

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until Blasdel was elected on November 8, 1865 and took office on December 5, 1865. See Guy Rocha, *Who Was the First Governor of the State of Nevada?*, SIERRA SAGE, Oct. 2003, available at <http://dmla.clan.lib.nv.us/docs/nsla/archives/myth/myth93.htm>. See generally DEAN HELLER, SEC’Y OF STATE OF NEV., *POLITICAL HISTORY OF NEVADA* 1996, (10th ed. 1997) (providing a comprehensive history of all elected and appointed officials in the State of Nevada).

<sup>57</sup> HENRY G. BLASDEL, NEV. STATE GOV., MESSAGE FROM THE GOVERNOR TO THE NEVADA LEGISLATURE (Dec. 14, 1864), reprinted in *THE JOURNAL OF THE ASSEMBLY DURING THE FIRST SESSION OF THE LEGISLATURE OF THE STATE OF NEVADA, 1864-5* 24 (1865).

<sup>58</sup> Nevada Enabling Act, ch. 36, 13 Stat. 30 (1864).

<sup>59</sup> CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864).

<sup>60</sup> *Id.* at 693.

<sup>61</sup> *Id.* at 787.

<sup>62</sup> *Id.*

<sup>63</sup> Ch. 36, § 7, 13 Stat. 30.

<sup>64</sup> For a general discussion of the founding of the State of Nevada and the development of the Nevada State Constitution, see MICHAEL W. BOWERS, *THE NEVADA STATE CONSTITU-*

coined the “Battle-Born State.”) The Enabling Act set forth provisions for state school lands grants:

Sec. 7. *And be it further enacted*, That sections numbers sixteen and thirty-six, in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal subdivisions of not less than one quarter-section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools.<sup>65</sup>

Note that, as explained in Part I.B, Congress followed the Western Model of two sections per township but did not explicitly require a permanent school fund.

## 2. Nevada Constitution of 1864

With a congressional invitation on the table, Nevada territorial legislators authorized a second state constitutional convention, which convened on July 4, 1864.<sup>66</sup> Not until the sixteenth day of the convention, however, did the representatives debate “the school funds.”<sup>67</sup> And during the convention, only three comments were made about Article XI, Section 7, which sets forth the provisions for the state’s school lands grants.<sup>68</sup>

First, Mr. Dunne questioned whether the interest from the school fund may be appropriated for support of the State University.<sup>69</sup> Mr. Hawley countered that the provision only allowed legislative deference: it did not obligate that funds go to higher education.<sup>70</sup> A vote was taken on whether to strike this provision, and Mr. Dunne’s amendment failed.<sup>71</sup> Second, Mr. Banks contended that the Section, as read, was incorrect because the Nevada Enabling Act “relates to the sixteenth and thirty-sixth sections,” and as Mr. Tagliabue noted, “it should be the thirty-sixth, instead of the thirty-second sections.”<sup>72</sup> This was merely a “verbal error,” and unanimous consent was reached to make the correction.<sup>73</sup> The third relevant comment, made by Mr. Collins, noted that a different federal land grant required congressional consent, so language was inserted to account for the need of congressional consent.<sup>74</sup>

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TION: A REFERENCE GUIDE (1993); ELEANORE BUSHNELL, *THE NEVADA CONSTITUTION: ORIGIN AND GROWTH* (1965); DRIGGS, *supra* note 55.

<sup>65</sup> Ch. 36, § 7, 13 Stat. at 32.

<sup>66</sup> There are three general histories on the Nevada State Constitution. *See* sources cited in *supra* note 64. None of these histories, however, treats the state school grants in any detail.

<sup>67</sup> ANDREW J. MARSH, OFFICIAL REPORTER, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA, ASSEMBLED AT CARSON CITY, JULY 4TH, 1864, TO FORM A CONSTITUTION AND STATE GOVERNMENT 579 (1866) [hereinafter DEBATES & PROCEEDINGS].

<sup>68</sup> It should be noted that there was more discussion of statehood lands grants during the first constitutional convention—though not of the school fund in particular.

<sup>69</sup> DEBATES & PROCEEDINGS, *supra* note 67, at 579.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 580.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

After addressing these three comments, “[t]he question was taken on the adoption of the section as amended, and it was adopted.”<sup>75</sup> In its adopted and final form, Section 3 of Article XI of the Nevada Constitution set forth:

Sec. 3. All lands, including the sixteenth and thirty-sixth sections in every township, donated for the benefit of the public schools in the Act of the Thirty-Eighth Congress, to enable the people of Nevada Territory to form a State Government . . . and all proceeds of lands that have been, or may hereafter be, granted or appropriated by the United States to this State . . . ; *provided*, that Congress make provisions for, or authorizes such diversion to be made for the purpose herein contained, all estates that may escheat to the State, all of such per cent. as may be granted by Congress on the sale of land, all fines collected under the penal laws of the State, all property given or bequeathed to the State for educational purposes, and all proceeds derived from any or all of said sources, shall be and the same are hereby solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses; and the interest thereon shall, from time to time, be apportioned among the several counties in proportion to the ascertained numbers of the persons between the ages of six and eighteen years in the different counties, and the Legislature shall provide for the sale of floating land warrants to cover the aforesaid lands, and for the investment of all proceeds derived from any of the above-mentioned sources, in United States bonds, or bonds of this State; *provided*, that the interest only of the aforesaid proceeds shall be used for educational purposes, and any surplus interest shall be added to the principal sum; *and, provided further*, that such portions of said interest as may be necessary may be appropriated for the support of the State University.<sup>76</sup>

This Section establishes the specific school lands provisions, as well as those for the Permanent School Fund. In addition to the proceeds from the sale of sixteenth and thirty-sixth sections of each township, “[m]oney derived from the sale of public lands, all estates escheated to the state, property given to the state for education, and fines collected by the state are deposited into the State Permanent School Fund.”<sup>77</sup> Additionally, “all fines collected under the penal laws of the State” are deposited in the Fund.<sup>78</sup> The interest derived from this fund would be placed in the State Distributive School Fund, which may be apportioned among the counties based on population or to the State University as deemed necessary.<sup>79</sup> The adoption of Section 3 of Article XI officially ushered in the school lands grant program in Nevada.

Nevada’s rubber-stamp approval of the congressional school lands initiative should be underscored. As discussed above, the Nevada’s constitutional framers did not even pause to consider whether they needed to adapt the national initiative to Nevada’s unique needs. The framers, instead, rubber-stamped Congress’s school lands proposal, and as hindsight reveals, this failure to adapt would lead to inefficiency, corruption, and the need for significant readjustment—some of which was never made.

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<sup>75</sup> *Id.*

<sup>76</sup> NEV. CONST. art. XI, § 3 (1864), *reprinted in* DEBATES AND PROCEEDINGS, *supra* note 67, at 845-46.

<sup>77</sup> BOWERS, *supra* note 64, at 116; *see also* Op. Nev. Att’y Gen. No. 112 (Jan. 21, 1924) (holding that under the provisions of this section, proceeds from a grant of public lands are made part of the state permanent school fund).

<sup>78</sup> BOWERS, *supra* note 64, at 116.

<sup>79</sup> *Id.*

### 3. Amendments and Judicial Refinements

During the first thirty years of statehood, several Nevada Supreme Court decisions and constitutional amendments attempted to refine the school lands grant process. First, the Nevada Supreme Court held that funds from the sale of school lands must be used for educational purposes,<sup>80</sup> and that this restriction applies to the interest as well as the principal.<sup>81</sup> The former decision was reviewed and affirmed by the U.S. Supreme Court in 1876.<sup>82</sup> With respect to proper educational purposes, the Nevada Supreme Court held that the trust funds may be used to cover administrative expenses of the Permanent Education Fund,<sup>83</sup> as well as the salary of the superintendent of public instruction,<sup>84</sup> but not teacher salaries at the state orphans' homes.<sup>85</sup>

The Section has also been amended five times since its initial adoption in 1864.<sup>86</sup> The first successful amendment was proposed and passed in 1885<sup>87</sup> and ratified at a special election on February 11, 1889. This amendment removed the provision that the interest must "be apportioned among the several counties in proportion to the ascertained numbers of persons between the ages of six and eighteen years in the different counties"<sup>88</sup> and inserted a less spe-

<sup>80</sup> See *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 10 Nev. 290, 314 (1875) ("The plain object of this provision [§ 3 of Article XI] of the Constitution was to prevent the legislature from passing any law that would appropriate the proceeds received by the State from the sale of such lands to any other than educational purposes."), *aff'd*, 93 U.S. 634 (1876).

<sup>81</sup> See *State ex rel. Keith v. Westerfield*, 49 P. 119 (Nev. 1897). Referring to its decision in *Heydenfeldt*, 10 Nev. at 314, the court noted:

The above construction of said section 3, that the legislature is prohibited from using the funds arising from the sale of lands which were granted for educational purposes for any other branch of state expenditures, except that immediately connected with the educational system, except, etc., is applicable to all moneys arising from the proceeds from the several sources named in said section, whether it be principal or interest, as all such moneys or funds are, by the same terms, included in the prohibition.

*Westerfield*, 49 P. at 120 (internal citations omitted); see also Op. Nev. Att'y Gen. 368 (Sept. 17, 1946) (stating that the scope of "educational purposes" does not forbid the partial use of proceeds for strictly administrative purposes).

<sup>82</sup> *Heydenfeldt.*, 93 U.S. 634 (1876).

<sup>83</sup> *State ex rel. Greenbaum v. Rhoades*, 4 Nev. 312, 317 (1868) ("[T]he State may select all its other lands, and the cost of selecting and selling those lands, the proceeds of which, when sold, go into the school fund, may be paid by warrants drawn on and payable out of the common school fund.").

<sup>84</sup> See *State ex rel. Cutting v. Westerfield*, 49 P. 554 (Nev. 1897).

<sup>85</sup> See *Westerfield*, 49 P. 119 (holding that teachers' salaries at state orphans' homes cannot be paid from the State Permanent School Fund); see also Op. Nev. Att'y Gen. B-32 (Jan. 13, 1941) (stating that providing for the payment of a deputy surveyor general's salary out of the state school fund was a violation of this Section).

<sup>86</sup> In fact, the Nevada Supreme Court struck down the first attempt to amend § 3 of Article XI because it violated the Nevada Constitution, NEV. CONST. art. XVI, §1 (1864), as no entry of the proposed amendment was made in the journal of either house. This omission was fatal to the adoption of the amendment. See *State ex rel. Stevenson v. Tufly*, 12 P. 835 (Nev. 1887). A similar amendment was ratified in 1912. See *infra* note 91 and accompanying text.

<sup>87</sup> 1885 Nev. Stat. 160.

<sup>88</sup> NEV. CONST. art. XI, § 3 (1864), reprinted in DEBATES AND PROCEEDINGS, *supra* note 67, at 845-46.

cific, more legislatively deferential standard in that funds can be apportioned to counties “as the Legislature may provide by law.”<sup>89</sup>

The second amendment was ratified by the 1912 general election—an amendment that had been struck down by the Nevada Supreme Court two decades earlier on procedural grounds<sup>90</sup>—which added the language “in United States bonds or the bonds of this State, or the bonds of other States of the Union, or the bonds of any county in the State of Nevada.”<sup>91</sup> This amendment expanded the bonds acceptable for investment from federal and Nevada bonds to also include bonds from other states and county bonds in Nevada. The third amendment, which was ratified in 1916, also dealt with the investment provisions. It expanded the investment opportunities from the various bonds to also include

loans at a rate of interest not less than six per cent per annum, secured by mortgage on agricultural lands in this state of not less than three times the value of the amount loaned, exclusive to perishable improvements, of exceptional title and free from all encumbrances, said loans to be under such further restrictions and regulations as may be provided by law.<sup>92</sup>

No additional amendments were ratified until 1980. These amendments obviously stray from the main path of this Article but merit a brief diversion to complete the history of federal school lands in Nevada.

The 1980 amendment removed the 1916 amendment’s additional terms and simplified the investment provisions “by permitting the legislature to determine the policies for investment of such revenues.”<sup>93</sup> Similarly, the 1988 amendment further simplified the Section by, among other things, explicitly clarifying that the funds cannot be used for noneducational purposes—a principle that had already been articulated by the Nevada Attorney General, the Nevada Supreme Court, as well as affirmed by the U.S. Supreme Court<sup>94</sup>—and that the interest not used at the end of the year must be added to the principal.<sup>95</sup> With the addition of the 1988 amendment, Section 3 of Article XI currently reads:

Section 3. Pledge of certain property and money, escheated estates and fines collected under penal laws for educational purposes; apportionment and use of interest.

All lands granted by Congress to this state for educational purposes, all estates that escheat to the state, all property given or bequeathed to the state for educational purposes, and the proceeds derived from these sources, together with that percentage of the proceeds from the sale of federal lands which has been granted by Congress to this state without restriction or for educational purposes and all fines collected under the penal laws of the state are hereby pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses. The interest only earned on the money derived from these sources must be apportioned by the legislature among the several counties for educational purposes, and, if necessary, a portion of that interest may be appropriated for the support of the state university, but

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<sup>89</sup> 1885 Nev. Stat. at 160-61.

<sup>90</sup> See *supra* note 86.

<sup>91</sup> 1909 Nev. Stat. 340.

<sup>92</sup> 1915 Nev. Stat. 513.

<sup>93</sup> 1977 Nev. Stat. 1716.

<sup>94</sup> See *supra* notes 80-85 and accompanying text.

<sup>95</sup> 1985 Nev. Stat. 2361, 2362.



any of that interest which is unexpended at the end of any year must be added to the principal sum pledged for educational purposes.<sup>96</sup>

This Part only *briefly* outlines the development of the federal school lands grants to the State of Nevada, as outlined in the Nevada Enabling Act, the Nevada Constitution, and subsequent judicial and legislative action. Notwithstanding, these several pages constitute the most comprehensive account of school lands grants in Nevada—much more comprehensive than other histories on Nevada<sup>97</sup> or federal school lands grants in general.<sup>98</sup> But, even this account is incomplete. One must look beyond the secondary historical accounts to primary sources to capture the complete history.<sup>99</sup> Two other developments significantly shaped and re-shaped the implementation of the federal government's school lands grant program in Nevada: the two-million-acre grant of 1880 and the 30,000-acre exchange of 1926.

### B. *Re-Shaping Nevada's School Lands*

The need to adapt this national initiative to state-specific contours spurred these two legislative developments in Nevada. Within the first fifteen years of the school lands grant initiative, state policymakers quickly realized that the two-sections-per-township approach would prove unworkable in Nevada for two main reasons. First, the process of surveying township plats to distribute the sections was painstakingly slow—in part because much of the land was mountainous or otherwise inaccessible. This slowness was also due to administrative inefficiency in obtaining federal government approval. For instance, Nevada Surveyor General John Daly reported: “[t]he state has selected, in behalf of applicants, all the land granted by the Government [excepting sections

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<sup>96</sup> NEV. CONST. art. XI, § 3.

<sup>97</sup> See, e.g., BOWERS, *supra* note 64, at 116-17 (providing only three paragraphs of history on NEV. CONST. art. XI, § 3); BUSHNELL, *supra* note 64, at 36-38, 147-50 (discussing the role of education at the constitutional convention but not exploring the school lands grants in any detail); DRIGGS, *supra* note 55, at 59-60 (reproducing the relevant Section but not providing any additional analysis or discussion); LEGIS. COUNSEL, STATE OF NEV., 37 NEVADA DIGEST § 10 (providing a two-paragraph summary on the history of NEV. CONST. art. XI, § 3); REPRODUCTION OF THOMPSON AND WEST'S HISTORY OF NEVADA, 1881: WITH ILLUSTRATIONS AND BIOGRAPHICAL SKETCHES OF ITS PROMINENT MEN AND PIONEERS 227 (Myron Angel, ed. Howell-North 1958) [hereinafter THOMPSON & WEST] (spending three paragraphs describing the history of federal land grants in support of public schools). Even the record of the debates and proceedings of the second Nevada Constitutional Convention did not discuss “the school funds” until the sixteenth day, and even then, only for a brief moment—i.e., two pages of the 829-page record cover the subject. See DEBATES & PROCEEDINGS, *supra* note 67, at 579-80.

<sup>98</sup> While research has been published on the history of school lands grants in other states—see, e.g., sources cited *supra* notes 20-22, 26, and 41—no law review or other legal or historical article has specifically treated Nevada school lands grant in any detail.

<sup>99</sup> I thank Professor Friedman for this lesson. See, e.g., Lawrence M. Friedman, Christopher J. Walker & Benjamin Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 Hous. L. Rev. (forthcoming Mar. 2007), available at <http://ssrn.com/abstract=922377> (“To measure these changes [in history], it is important to do what we have done: to examine the actual . . . records.”). There is no alternative to original research—spending countless hours in the archives and sifting through original records and correspondence—in order to understand how the process really worked.

16 and 36] . . . but [clearlisting, which is the slower process for approving school lands selections] has not all been approved as yet.”<sup>100</sup>

The second and related rationale concerned the physical nature of the land; many of the school lands—i.e., either section sixteen or thirty-six—were arid or otherwise uninhabitable. No resident wanted them, and definitely would not pay for them. In fact, Day reported that by 1877 the federal government had only surveyed 708 townships in Nevada, and of those townships, two-thirds of the school lands were “not fit for cultivation.” Day concluded that only 2.4 million of the estimated four million acres of school lands would be made available for sale.<sup>101</sup> F.A. Trittle, a banker in Virginia City, Nevada, further captured this rationale for adjustment in November 1879 and suggested what needed to be done:

I have been all over the State, and consider it a mining and grazing State. All agricultural land would have to be irrigated, and it is a mere incident. I would not sell the arid lands, as no man could pay taxes on such land and make a living . . . . The government should [ ] give the State an allowance of lien lands in place of the 16th and 36th sections for school purposes.<sup>102</sup>

In a meeting with Nevada Governor John H. Kinkead,<sup>103</sup> Judge Charles N. Harris of Washoe and Roop Counties<sup>104</sup> offered a similar observation and recommendation:

The present system of disposing of the public lands I regard as wholly insufficient. I am unable to say whether the State has realized anything out of the sales of lien lands which have been sold here, on some of which the purchasers have paid 20 per cent and afterwards abandoned them. It has been suggested that the general government should give to the State in lieu of the sixteenth and thirty-sixth sections a smaller amount of land, to be selected by the State giving the State scrip for such lien lands.<sup>105</sup>

Judge Harris’s recommendation in 1879 was not novel; the state legislature had been making the same plea to the Congress since 1873. As Governor Kinkead responded to Judge Harris, “[t]he last legislature petitioned Congress to give to the State two millions of acres instead of the grant of sixteenth and thirty-sixth

<sup>100</sup> JOHN DAY, BIENNIAL REP. SURVEYOR GENERAL & STATE LAND REGISTER, 1877-1880 11 (Carson City, Nev. 1881) (on file at Nev. State Archives).

<sup>101</sup> *Id.*

<sup>102</sup> U.S. PUB. LANDS COMM’N, REPORT OF THE PUBLIC LANDS COMMISSION CREATED BY THE ACT OF MARCH 3, 1879 RELATING TO PUBLIC LANDS IN THE WESTERN PORTION OF THE UNITED STATES AND TO THE OPERATION OF EXISTING LAND LAWS 428 (Arno Press 1972) (1880).

<sup>103</sup> John H. Kinkead was the third elected Governor of Nevada and served one term from 1879-83. See HELLER, *supra* note 56, at 106. This was the period during which Congress and the Nevada Legislature passed the two-million-acre grant.

<sup>104</sup> Charles N. Harris served as a state trial judge from 1867-71 in the Washoe and Roop Counties. *Id.* at 225. Harris was no longer a state judge when he made these comments to Governor Kinkead.

<sup>105</sup> U.S. PUB. LANDS COMM’N, *supra* note 102, at 618. The U.S. Public Lands Commission reports that these remarks were “[s]uggestions of the Honorable C.N. Harris and others, at a meeting held in the governor’s office, at Carson City, Nevada, relative to the best system of controlling and disposing of the public domain, and recommending such changes in legislation as may be beneficial to the people of the State.” *Id.* at 615.

sections, which amounts to upward of four million of acres, allowing the State to select such lien lands."<sup>106</sup>

In 1880, Congress heeded to Nevada's pleas and approved "a grant of two million or more acres of land in lieu of the sixteenth and thirty-sixth sections therein."<sup>107</sup> Congress indicated that the state would select the lands and that the Nevada Legislature would set the terms for disposing of the land.<sup>108</sup> Thompson and West's HISTORY OF NEVADA, as of its original publication in 1881, provides an excellent snapshot of the development of the two-million-acre grant:

The General Government has been liberal in her donations of land to Nevada for school purposes. The first grant was of the Sixteenth and Thirty-sixth Sections, of which 61,967 acres have been sold. A great deal of land included in this donation is barren, and could not be disposed of, so that Congress has lately given the State instead 2,000,000 of acres, to be selected anywhere in the state . . . . These donations, together with an Indemnity Grant of 12,708 acres, given in lieu of land under the Sixteenth and Thirty-sixth Section Grant, "last in place," make up a total which has the seeming of a most munificent gift. The total number of acres granted is 2,574,665. Could it all be sold at the fixed price of \$1.25 per acre, there would be more than a seeming of munificence in the gift.<sup>109</sup>

This federal-state agreement marked an unprecedented (and never repeated) departure from national practices, and its driving rationale merits closer scrutiny.

The *Congressional Record* provides a clearer picture why Congress decided this departure should be made. On May 20, 1880, the U.S. House Committee Report that favored the two-million-acre grant was read to the House Committee of the Whole:

[U]nlike any other State to which similar grants have been made by the general government, the surface of Nevada is in large part marked by sparsely timbered mountain ranges and intervening stretches of valueless desert basins and dry sagebrush valleys, susceptible of irrigation only by means of artesian wells, the few small streams within the state not affording water sufficient to irrigate the valleys through which they pass.

The sixteenth and thirty-sixth sections falling alike upon mountain and desert, and the dry sagebrush lands being unsalable, except in large tracts, for cattle ranges or experimental irrigation by artesian wells, the State has been unable to dispose of more than 70,000 acres in 15 years, with the certainty of the demand growing less from year to year . . . .

<sup>106</sup> *Id.* at 618 (referring to 1879 Nev. Stat. 100, which proposed the two-million-acre grant).

<sup>107</sup> Act of June 16, 1880, ch. 245, 21 Stat. 287.

<sup>108</sup> *Id.* at 288.

<sup>109</sup> THOMPSON & WEST, *supra* note 97, at 227. The "clear lists" of the two million acres chosen when the State of Nevada was authorized to relinquish its claims on the outstanding sixteenth and thirty-sixth sections in exchange for two million acres are on file with the Nevada State Archives. The majority of such lands were found in Carson and Eureka Counties. See NEV. STATE ARCHIVES, VAULT RECORDS INVENTORY 7-8 (2003) (on file at Nev. State Archives). Additional "clear lists" were approved by the federal government over the next three decades until almost all 2,000,000 acres were selected and sold. As Part II.C explains, 30,000 acres of these lands were uninhabitable or abandoned by the purchaser, and thus exchanged back to the federal government in lieu of more usable lands.

As your committee understand it to be the purpose of the state to attempt to reclaim the desert and sagebrush lands now asked in exchange for its school grant through the inducement of special bounties for sinking of artesian wells, and as this seems to be the only method by which purchasers can ever be found for the most of these lands, your committee recognized the justice and propriety of the proposed exchange, and therefore report the bill back with the recommendation that it do pass.<sup>110</sup>

After the committee report reading, Representative Rollan Daggett of Nevada took the floor to answer questions. Representative William Andrew Jackson Sparks of Illinois, an expert on land law and management, challenged Representative Daggett's resolution:

[T]he principle involved in this bill disagrees with that of all other donations or gifts of land by the General Government to the various States for school purposes . . . . The practice of granting to the States a certain portion of the public lands for school purposes has prevailed since the organization of the Government; but no State since this policy began has ever been permitted to select these lands at discretion and thereby get the choicest lands for this purpose; and in my judgment this ought never to be allowed.

[I]f this bill should pass every acre of arable land in Nevada will be taken up by the state. . . . I am not willing that [Nevada] should come in and in this exceptional manner select all the choice lands in the State, leaving only a worthless refuse to the General Government. This is a species of favoritism in her favor and odious discrimination against the other states which can never be sanctioned by my vote.<sup>111</sup>

In response to Sparks's attack, Daggett reiterated the shortcomings of his state:

There are not today two million acres of arable lands in Nevada; not a million acres that can be cultivated without irrigation by means of artesian wells. It is not the purpose of our State to select the best lands, because there are no such lands unsold. Our purpose is simply to select large tracts, so that by means of bounties offered by legislative action we can redeem lands otherwise utterly valueless. As the report states, we have been fifteen years in selling seventy thousand acres of land; and our school fund amounts to almost nothing. The railroad companies are not taxed upon their lands which are unsold; the mining companies pay no tax upon anything except their improvement. All the burdens of taxation fall upon the little property we have there.

Our school system is one of the best in the world, and it is sustained by very heavy taxation. We want relief from that. The only mode of relief is by the sale of our school lands, to swell our school fund, our irreducible school fund. I call the particular attention of the House to the fact that the money derived from the sale of these land will go into our irreducible school fund . . . .

But I repeat, we do not want to monopolize the best lands in Nevada. We simply wish the privilege of taking land in large quantities—desert lands, sagebrush valleys—for the redemption of which by means of artesian wells we expect to offer bounties . . . . I say, Mr. Chairman, there is nothing wrong in this bill. It is inspired by the very best motives . . . .<sup>112</sup>

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<sup>110</sup> 10 CONG. REC. 3597 (1880).

<sup>111</sup> *Id.* at 3598.

<sup>112</sup> *Id.*

The House Committee of the Whole appeared convinced by Representative Daggett's argument, as it passed the bill by a margin of fifty-two to eight.<sup>113</sup> The bill became law on June 16, 1880.<sup>114</sup>

This brief interaction, as recorded in the *Congressional Record*, reveals much about the unique nature of the arid West. A uniform national policy could not satisfy the dual national objectives of providing financial support for public education and encouraging land development and private ownership; Congress had to tailor its approach to meet Nevada's unique needs and geography. The congressional debates also reveal that Congress was perhaps aware of the futility of fighting against local economic self-interest.<sup>115</sup> Adapting national policies to state-specific needs and aligning these programs with local self-interest both seem to have been at play in the enactment of the two-million-acre grant. And, the second congressional reform—the 30,000-acre exchange of 1926—reinforces both themes.

### C. (Re-) Re-Shaping Nevada's School Lands

Four decades after the two-million-acre grant the school lands initiative again received mixed reviews, this time for different reasons. In his 1925 State of the State address, Governor James Scrugham<sup>116</sup> addressed two of the problems that emerged after the passage of the two-million-acre grant. First, he argued that the two-million-acre grant was a "bad bargain" because "Nevada was the loser to the extent of nearly a million acres of land."<sup>117</sup> Thomas A. Lotz, the Nevada Surveyor General in 1928, stated that "this State is entitled to another grant of lands of at least 2,000,000 acres to place it on a par with the amount of public lands that have been given and granted [to] the other western public land States."<sup>118</sup> By relinquishing title to all remaining school lands—the unsold sixteenth and thirty-sixth sections of each township—for a direct grant of two million acres, the Silver State was actually giving up more than four million acres in exchange for two.

Second, Governor Scrugham noted that "of that land actually transferred to [Nevada's] control, repeated abandonment of contracts by purchasers has demonstrated that approximately 30,000 acres are practically worthless and will remain a 'white elephant' in the hands of the State."<sup>119</sup> It was too late to reverse the "bad bargain"—in fact, Nevada never received additional school

<sup>113</sup> *Id.*

<sup>114</sup> Act of June 16, 1880, ch. 245, 21 Stat. 287.

<sup>115</sup> To return to a now-familiar theme, "[w]here national policy was more or less consistent with the economic self-interest of local residents, the policy worked more or less well. But when policy collided with self-interest, Washington's arm was never long enough or steady enough to carry through." FRIEDMAN, *supra* note 2, at 232.

<sup>116</sup> James G. Scrugham was elected Governor of Nevada in 1923 and served one term until 1927. See HELLER, *supra* note 56, at 106. This was the period during which Congress and the Nevada Legislature passed the 30,000-acre exchange.

<sup>117</sup> JAMES G. SCRUGHAM, MESSAGE OF GOVERNOR JAMES G. SCRUGHAM TO THE LEGISLATURE OF 1925 (THIRTY-SECOND SESSION) 27 (1925) (on file at Nev. State Archives).

<sup>118</sup> T. A. LOTZ, BIENNIAL REP. SURVEYOR GENERAL & STATE LAND REGISTER, 1927-1928 18 (1929) (on file at Nev. State Archives).

<sup>119</sup> SCRUGHAM, *supra* note 117, at 26.

lands, despite repeated requests over the next century<sup>120</sup>—but Congress was willing to exchange out the unusable lands. Consequently, the Nevada Legislature sought to exchange these “white elephant” acres for more usable land within the state in 1926, and Nevada’s request was granted by Congress on June 8, 1926.<sup>121</sup>

The passage of this Act in Congress was uncontroversial—with only one amendment in the Senate<sup>122</sup> and no amendments or debate in the House.<sup>123</sup> Pursuant to the 30,000-acre exchange, Congress gave discretion to the Secretary of the Interior to effectuate the swap:

[T]he Secretary of Interior be, and hereby is, authorized, in his discretion, to accept on behalf of the United States title to not exceeding thirty thousand acres owned by the State of Nevada, and in exchange therefor may patent to said State not more than an equal area of surveyed, unreserved, and unappropriated public lands in said State.<sup>124</sup>

In other words, Nevada could choose the lands to exchange—submitting “clear lists”<sup>125</sup> to the federal government—and the Secretary of the Interior would make the final approval. On August 3, 1926, the *RENO EVENING GAZETTE* reported on the passage of the Act:

Instructions were received today by the register of the land office from D.C. Finney, first assistant secretary of the interior, to immediately make arrangements for the transfer of some thirty thousand acres of federal public lands for an equal amount of state owned lands.

The exchange of lands was arranged after the passage by the last legislature of a measure providing for such exchange in order to provide for recreational grounds and game refuges adjacent to such refuges and recreation grounds already existent in the state.<sup>126</sup>

<sup>120</sup> See, e.g., 1943 Nev. Stat. 331 (making application to Congress for 200,000 acres, “which grant shall be known as the ‘School State Grant.’ . . . all revenue shall from the sale of this land shall be deposited in the state treasury, to be used only for the benefit of state schools”). Like all other requests after 1926, Congress did not grant the 1943 request for additional lands. See Part III.C *infra* for more details.

<sup>121</sup> Act of June 8, 1926, ch. 499, 44 Stat. 708.

<sup>122</sup> 69 CONG. REC. 6799 (1926) (amending the bill to include a straight land swap without indicating to whom the patents would be issued).

<sup>123</sup> *Id.* at 10,522 (passing the bill without debate or amendments).

<sup>124</sup> Ch. 499, 44 Stat. at 708.

<sup>125</sup> More accurately, the state submitted a list of land it wanted. The Nevada General Land Office reviewed it and submitted it—with any land ineligible for any reason (e.g., mineral land) lined out—to the Secretary of the Interior. The Secretary would then review and sign it as a “clear list,” so technically the state only submitted a list, and it became a “clear list” after approved by the federal government. In practice, these lists are referred to a “clear lists” from their initial formulation.

<sup>126</sup> *State to Trade Big Land Tract*, *RENO EVENING GAZETTE*, Aug. 3, 1926, at 2. As a result of this newspaper article, many Nevada residents wrote the Nevada Surveyor General to inquire about lands available for sale. Searching through thousands of correspondence since 1925, the Surveyor General’s response was quite uniform. This response is typified in the following response to one Nevada resident:

As the law approved on the 13th of last March withdrew some 30,000 acres of State School lands from all forms of entry, so [there] is not much of such land subject to sale or entry at this time. There, are however, a few scattering tracts which can be had at this time, but if you are interested therein you must make inquiry therefor[e] by [g]iving the townships and ranges you are interested in or else give the county or particular part of the State you are desirous of obtain such

While Congress's passage of the 30,000-acre exchange was anything but controversial, its development in the Nevada State Legislature would not be without controversy.

Unlike the other aspects of school lands history in Nevada, the development of the 30,000-acre exchange does have a written history—penned by Wayne McLeod, the Nevada Surveyor General from 1939 to 1951<sup>127</sup>—based on “the few meager records available on this transaction.”<sup>128</sup> McLeod explains that the exchange originally emerged, not as a means to increase support for public schools,<sup>129</sup> but as a way to increase state lands dedicated as parks, recreation grounds, and game refuges.<sup>130</sup> In his State of the State address in 1925, for instance, Governor Scrugham first suggested this exchange of 30,000 acres with the federal government explicitly for state game and refuge lands because “[i]t will be difficult to obtain these [parklands and other game and refuge] lands as an outright gift from the National Government . . . .”<sup>131</sup> The Nevada Legislature acted on the Governor's prompting, as reflected in McLeod's history:

During the 1915 Legislative Session there were Senate Bills Nos. 37 and 38 (companion bills) introduced by Senator Friedhoff. After much consideration and the receipt of an opinion from the Attorney General they were passed as amended.

Senate Bill No. 37, in its original form, provided for the withdrawal from sale of all lands acquired under the various grants from the United States of America, and the relinquishment of such of said lands back to the United States in exchange for other lands for, “State Park and other purposes” as may be agreed upon. All of the lands referred to in this bill were granted by the United States to the State of Nevada over a period of many years for educational purposes.

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lands in, when we will supply the legal descriptions thereof if any therebe, after which if you want to know the exact kind of land, the quality of soil, adaptability, whether level or rough, etc., you must make a field investigation thereof before entering the same.

Letter from C. L. Deady, Nevada State Surveyor General and Land Register, to C.W. Patterson (Sept. 10, 1925) (on file at Nev. State Archives) (errors in original). However, all further inquiry letters reveal that this land was scarce, and the Surveyor General did not grant any requests for purchase. No requested lands were available. See CORRESPONDENCE OF NEVADA STATE SURVEYOR GENERAL, 1920-1945 (on file at Nev. State Archives) (including over 5,000 letters).

<sup>127</sup> HELLER, *supra* note 56, at 113. Wayne McLeod was elected Nevada's Surveyor General for three consecutive terms (1939-43, 1943-47, 1947-51). *Id.* He was the second-to-last Surveyor General, since the position was abolished on July 1, 1957. 1957 Nev. Stat. 646; see also *infra* Part III.B (describing the events leading up to the abolishment of the Survey General's office and subsequent reforms).

<sup>128</sup> WAYNE McLEOD, HISTORY OF THE LAND EXCHANGE BETWEEN THE UNITED STATES AND THE STATE OF NEVADA UNDER THE PROVISIONS OF THE ACT OF CONGRESS APPROVED JUNE 8, 1926 (44 Stats. 708), at 1 (1944) (on file at Nev. State Archives). On the report's title page, McLeod explains: “This paper was prepared in March, 1944 from the *few meager records* available on this transaction to enable my successor or anyone else in becoming familiar with the matter.” *Id.* (emphasis added). This report was never produced in published form.

<sup>129</sup> In many states, such as Nebraska, any school lands action by the state is reported in the media and considered both by the land users and the school advocates. No such foundation of public interest in the Permanent School Fund has ever developed in Nevada.

<sup>130</sup> McLEOD, *supra* note 128, at 1.

<sup>131</sup> SCRUGHAM, *supra* note 117, at 27.

Senate Bill No. 38, in its original form, contemplated the exchange of any lands then owned by the State of Nevada for an exchange of an equal acreage of Government land to be used, and set aside by the State, for "public park, recreation ground, or game refuge purposes."

It seems that on March 3, 1925, and during the processing or evolution of these bills, a request was made on Attorney General Diskin by Senator R. H. Cowles of Washoe, for his opinion as regards the constitutionality of the contents of them.<sup>132</sup>

As clarified by earlier court precedent,<sup>133</sup> school lands could only be sold or exchanged for educational purposes, so exchanging these lands for noneducational purposes would clearly be unconstitutional. In response to Senator Cowles's inquiry, Nevada Attorney General M. A. Diskin agreed: "[a]ll the lands involved are solemnly pledged by the Constitution for certain specific purposes, namely for purposes of education; and any Legislative Act which attempts to divert such lands, or the proceeds thereof, to any other purpose, is clearly void."<sup>134</sup>

The Nevada Legislature consequently amended Senate Bill Nos. 37 and 38 to exclude any language about noneducational purposes (though not explicitly stating that the exchanged lands had to be used for educational purposes), and the companion bills were passed on March 13, 1925.<sup>135</sup> McLeod reports that "the State Land Register withheld the sale of all State Land until March 1, 1929, and assisted the Governor in negotiating for the exchange of not to exceed 30,000 acres of land pursuant to the provisions of the above Acts."<sup>136</sup> Thomas A. Lotz, the Nevada Surveyor General from 1929 to 1935,<sup>137</sup> noted that "as of March 1, 1929, 27,003.88 acres had been exchanged,"<sup>138</sup> and that by 1932 the exchange number had reached 27,952 acres.<sup>139</sup>

The 30,000-acre exchange was Congress's last intervention on behalf of Nevada's school lands program. Over the decades, the Nevada Legislature has made various requests to Congress for additional lands, but none have succeeded.<sup>140</sup> In 1943, for instance, the Legislature applied for 200,000 acres of school lands,<sup>141</sup> but the request was not granted. The 1943 Legislature noted:

<sup>132</sup> McLEOD, *supra* note 128, at 1.

<sup>133</sup> See *supra* notes 77-85 and accompanying text (discussing the pre-1926 Nevada Supreme Court decisions and Attorney General rulings with respect to the use and sale of school lands under NEV. CONST. art. XI, § 3 (1864)).

<sup>134</sup> Op. Nev. Att'y Gen. 8, 9 (1925), reprinted in McLEOD, *supra* note 128, at 2. Michael A. Diskin served two terms as Nevada Attorney General from 1923-31. See HELLER, *supra* note 56, at 110.

<sup>135</sup> McLEOD, *supra* note 128, at 3-4.

<sup>136</sup> *Id.*

<sup>137</sup> HELLER, *supra* note 56, at 113. Thomas A. Lotz was appointed Nevada's Surveyor General on August 1, 1928 after the then-Surveyor General, George Watt, died three days earlier. Lotz was subsequently elected for two consecutive terms (1929-31, 1931-35). *Id.*

<sup>138</sup> T. A. LOTZ, BIENNIAL REPORT OF THE SURVEYOR GENERAL & STATE LAND REGISTER, 1929-1930 11 (Nev. 1931) (on file at Nev. State Archives).

<sup>139</sup> T. A. LOTZ, BIENNIAL REPORT OF THE SURVEYOR GENERAL & STATE LAND REGISTER, 1931-1932 13 (Nev. 1932) (on file at Nev. State Archives).

<sup>140</sup> The legislature has addressed school funding in Southern Nevada in recent years, which has significantly added to the Permanent School Fund. Under the Southern Nevada Public Land Management Act of 1998, Nev. Pub. L. No. 105-263, a percentage of dollars of each sale of land in Clark County by the federal government goes to the Permanent School Fund.

<sup>141</sup> 1943 Nev. Stat. 331.



The acreage granted the State of Nevada by the United States was far deficient as compared with the grants made to the other public land states, as shown by the fact that the other ten public land states received an average of 9.1 percent of the total area embraced within their boundaries, as compared to 3.8 percent granted to the State of Nevada.<sup>142</sup>

Surveyor General Wayne McLeod—the same who wrote the brief history of the 30,000-acre exchange—reported this state-by-state analysis of school lands in his 1942 Surveyor General's Biennial Report,<sup>143</sup> and his findings are reproduced in Figure 2 below. Nevada's allocation of school lands as compared to total lands in the state (3.8%) ranks far below the average of the other ten public land states (9.1%). The Legislature further noted that the state currently had "only 126,000 acres of state land subject to entry, all of which is a decided handicap to the largest public land state in the union, considering the degree of undevelopment and the fact that it is on the threshold of an unprecedented economic expansion."<sup>144</sup>

FIGURE 2. STATE-BY-STATE COMPARISON OF SCHOOL LAND GRANTS (MCLEOD, 1942)

PUBLIC LANDS STATE	% GRANTED (OF TOTAL LANDS):
Arizona	14.4%
California	8.3%
Colorado	6.6%
Idaho	5.7%
Montana	6.2%
NEVADA	3.8%
New Mexico	15.9%
Oregon	7.0%
Utah	13.6%
Washington	6.9%
Wyoming	6.6%
Average % Granted (Excluding Nevada):	9.1%

Another request by the Nevada Legislature, made over forty years later, further illustrates Nevada's disproportionately low number of school lands. In 1985, the Nevada Legislature petitioned for an "additional grant of 6,205,522 acres of public land from Congress," claiming that such grant was "required to give this state parity with the neighboring states of Arizona, New Mexico and Utah."<sup>145</sup> The Legislature further noted that "[m]ore than 120 years have

<sup>142</sup> *Id.*

<sup>143</sup> WAYNE MCLEOD, BIENNIAL REPORT OF THE SURVEYOR GENERAL & STATE LAND REGISTER, 1940-1942 13 (Nev. 1942) (on file at Nev. State Archives).

<sup>144</sup> 1943 Nev. Stat. at 332.

<sup>145</sup> 1985 Nev. Stat. 2386, 2387.

eclipsed since Nevada became a state and the United States government still retains approximately 87 percent of the land in Nevada.”<sup>146</sup> The request fell on deaf ears in Congress.

Consequently, the 30,000-acre exchange marks the last formal evolution of the school lands program in Nevada. And this exchange reinforces the common themes first typified by the two-million-acre grant: both adapting national policies to state-specific needs and aligning these programs with local self-interest played a prominent role in the program’s evolution. Further, the 30,000-acre exchange and the lack of subsequent congressional action exemplify an additional theme: Congress finally recognized—with the passage of the two-million-acre grant and 30,000-acre exchange—that the arid West created unique challenges for a national school lands program, but it still did not know how to effectively adapt the program to local needs.

In fact, as Pamela Wilcox, the current administrator of the Nevada Division of State Lands, notes some seventy years later, Congress has not implemented anything similar to either of these lands exchanges in other states: “[t]he 1926 Exchange Act became a unique exchange in U.S. land history. In the first place, only Nevada received a state selection grant (the 2 million acre grant). Secondly, only Nevada could follow up with such an exchange act. We cannot turn to other states for comparable actions.”<sup>147</sup> These innovations are unique to Nevada’s history, representing some of Congress’s only attempts to accommodate local needs and interests with respect to school trust lands, and Nevada’s pleas for further accommodation have unanswered in Congress even today.

### III. ABUSE AND MISUSE IN TWENTIETH-CENTURY NEVADA

This story is not yet complete: abuse and misuse also plagued school lands grants during the twentieth century. In this Part, the widespread abuse and corruption in the Nevada school lands program—in particular, public officials’ exploitation of the program for personal profit—will be explored first, followed by a description of the misuse or misapplication of the laws in carrying out the program. As will be shown, abuse and misuse are interrelated here, and in fact, the abuse started the chain of events leading to misuse. This finding reinforces the now-familiar local self-interest theme in the history of federal land law and policy. Historian Paul Starrs remarks:

What researchers agree on, universally, is the persistence of fraud and failure in land titles obtained under the nineteenth-century acts. Studies of the detailed history of land claims, and work in land titles generally, are endlessly labor-intensive, and the results are self-reinforcing: every case study undertaken at a county or state level establishes the problems of administering a tarnished body of legislation that at times

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<sup>146</sup> *Id.* at 2386. It should be noted that as the last states to receive school lands grants, Arizona, New Mexico, and Utah all received four sections per township—instead of the customary two—and Nevada entered the Union several years too early to receive this windfall. SOUDER & FAIRFAX, *supra* note 22, at 33.

<sup>147</sup> Memorandum from Pamela B. Wilcox, Adm’r, Div. of State Lands, to John P. Comeaux, Nev. Budget Dir., on BDR [Bill Draft Request] RE: Lands Diverted from School Trust Status, 3 (July 12, 1996) [hereinafter Wilcox 1996 Memo] (on file with author and Nev. Div. of State Lands).

directly contradicted other statutes. A corollary to this is the geographical attribute of land-law problems: the farther west, the more fraught with problems was the application of legislation.<sup>148</sup>

### A. Abuse

Starrs's observation proves true with respect to the school lands program in Nevada; many of the problems involved government corruption and exploitation by public officials. This corruption first appeared after the passage of the two-million-acre grant—with such a high level of corruption that Nevada historian Bob Stewart refers to the period “as one of ‘enlightened self-interest.’”<sup>149</sup> Stewart conducted extensive research on the state legislators who were present at the time of passage and uncovered strikingly high levels of exploitation:

Of the sixty legislators attending that session, 32 made application to purchase land under their law, 18 of them taking more than 320 acres. Sen. Henry F. Dangberg, father of the bill, amassed several thousand acres through it, having earlier purchased 160 acres from the [Government Lands Office], and other acreage through other State grants. Assembly committee chairman Hoddie Marden, in contrast, owned only a possessory interest in a town lot in the dying community of Aurora, Nevada.

Among the legislators, only 17 ever received GLO patents for federal land, seven for small mine sites and eight through cash entry purchases and scrip. Eleven of the 17 held both Federal and State patents in Nevada. One legislator, Sen. Samuel Pierce of Paradise Valley, owned land he obtained by perfecting a homestead entry. Pierce now augmented his 160 acre homestead through purchase of 880 acres from the two-million-acre grant.<sup>150</sup>

In addition to legislators' abuse of their official positions for personal gain, other public officials illegally dipped into the funds. For instance, when Nevada's first State Treasurer, Eben Rhoads, died while in office, the state discovered that “Rhoads had apparently appropriated some \$200,000 in state money for his personal use.”<sup>151</sup> Governor Henry Blasdel announced in his next message to the Legislature: “I regret to say that about \$30,000 of this sum belonged to the Irreducible [Permanent] School Fund.”<sup>152</sup> The governor then charged the Legislature with replacing the funds. Two Nevada legal scholars reflect on the impact of Rhoads's embezzlement:

On its face, the embezzlement of more than \$100,000 of state funds from a fledging state treasury is shocking enough. Considering the long-term implications of this loss, however, the event takes on much larger proportions. . . . Nevada did not repay its territorial debt until the 1920s, needlessly diverting funds from other programs as a result of the revenue lost on Rhoades's watch. And because monies intended for

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<sup>148</sup> STARRS, *supra* note 5, at 54 (internal citations omitted).

<sup>149</sup> Interview with Bob Stewart, in Carson City, Nev. (June 8, 2004). Stewart conducted this extensive research on public officials involved in the two-million-acre grant to include in his forthcoming book on Nevada land law history—perhaps the most comprehensive history of Nevada land laws to date. ROBERT E. STEWART, *NEVADA LAND LAW HISTORY* (forthcoming 2007).

<sup>150</sup> E-mail from Bob Stewart, Nev. Historian, to author (June 12, 2004) [hereinafter Stewart E-mail] (containing the summary findings of his study).

<sup>151</sup> Wilcox 1996 Memo, *supra* note 147, at 3.

<sup>152</sup> *Id.*

the “Irreducible” or Permanent School Fund were embezzled, interest generated from that fund—still used for the betterment of education today—has lagged. A 1980s estimate made by one of the authors sets the state’s loss of interest on the money that Rhoades embezzled close to \$300,000,000.<sup>153</sup>

Abuse by public officials continued throughout the history of the program, as legislators and officials at the Surveyor General’s office bought lands for personal profit and use or favored their friends and political allies over the general public. As explained in the following Part, much of this corruption was difficult to prosecute because of “missing records.” In the best tradition of the western freebooter, these politicians covered their tracks well. Notwithstanding, this abuse is perhaps best exemplified by the story of William B. Byrne. Not only does Byrne’s story illustrate this pattern of government corruption, but it also culminates in the abolishment of the Surveyor General’s Office and a dramatic reform of state land management in the Silver State. These changes, however, also led to the program’s misuse in the 1930s—with school lands being set aside for noneducational purposes. Such misuse and the failure to reimburse the Permanent Education Fund for lands appropriated for noneducational purposes are issues that the Nevada Division of State Lands is still trying to resolve today.<sup>154</sup>

### *B. Abuse Exemplified: The Story of William B. Byrne*

In 1956, a grand jury of Ormsby County uncovered an extensive scandal involving two Surveyors General and at least 600 acres of school lands.<sup>155</sup> The grand jury report alleged that state lands had been sold to favored legislators, other public officials, and their friends and relatives. Most of the land sales took place in the increasingly valuable Las Vegas area, where—due to the federal program’s fixed price of \$1.25 per acre for school lands—these sales registered far below market value. This situation was ripe for arbitrage, and legislators had difficulty resisting the temptation. The grand jury found generally that “the office of Surveyor-General ha[d] for many years been administered for the benefit of the few, with a complete disregard for the public interest and state welfare.”<sup>156</sup> While many public officials were investigated, the story of one particular state legislator merits special attention—that of William B. Byrne.

Before delving into the details of Byrne’s scandal, the administration of the school lands grants should be updated since the 30,000-acre exchange in 1926. The grand jury report aptly summarized its evolution in Nevada:

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<sup>153</sup> Patty Cafferata & Dale Erquiaga, *Special Interests Run Amuck: State Treasurer Eben Rhoades*, 48 NEV. HIST. SOC’Y Q. 464, 483 (2005). Cafferata, former Nevada State Treasurer, and Erquiaga, a former chief deputy secretary of state, provide an excellent historical account of this scandal.

<sup>154</sup> See *infra* Part III.C for more information on current efforts to fix the misuse problem.

<sup>155</sup> Grand Jury Report, Ormsby County, Nevada, June 20, 1956 (on file with author and at Nev. State Archives) [hereinafter Ormsby Grand Jury Report]; see also *Grand Jury Report on Land Sales*, CARSON NEV. APPEAL 6-8, June 20, 1956 (on file with Nev. State Archives) (containing the text of the grand jury report).

<sup>156</sup> Ormsby Grand Jury Report, *supra* note 155, at 21.

Though Nevada has been a state since 1864 the laws regarding disposition of state lands have had little, if any, change, from the time they were established in a liberal fashion to encourage a settlement of the State, to the past few years, when their very liberality has made possible the present transactions under investigation.<sup>157</sup>

This was particularly true for the school lands administration, where the only major legislative changes were the two-million-acre grant in 1880 and the 30,000-acre exchange in 1926. The administrative procedures, fixed pricing, and so forth remained the same since statehood was granted in 1864. As the grand jury noted, however, Nevada's political and economic landscape had changed considerably—especially in Southern Nevada with the emergence of Las Vegas. The Ormsby County grand jury remarked: “[i]n recent years, however, the unprecedented growth of Nevada communities has made the acquisition of State lands both necessary and profitable”—leading to “feverish activity in land transactions in Nevada in recent years particularly since 1941.”<sup>158</sup>

The grand jury found that this systemic exploitation was done in complicit fashion between the Surveyor General and other public officials. First, the public officials would “privately” (i.e., secretly) contact the Surveyor General to inform him of the lands they desired. The Surveyor General would then, “keeping only informal memoranda as to the individual,” process applications for state selection of the federal lands.<sup>159</sup> Once the federal government transferred the land for state use—either as school lands or under some other use provision—the Surveyor General would then notify the public official that the land was for sale. As the grand jury report found, “[t]hereupon the individual would be required to file a formal application to purchase.”<sup>160</sup>

This conspiracy violated federal law that state land applications be made for public use to fulfill public interest. These informal memoranda were the smoking gun to indict, and yet the grand jury reported that “[n]one of these memoranda have been found. [Surveyor General] Mr. Ferrari denies seeing any in his office. If any such memoranda existed they have been taken or removed from the office. Such memoranda, however, were not public records.”<sup>161</sup> So the dozens of public officials suspected of misconduct—including the infamous William B. Byrne—could not be prosecuted for their complicit exploitation of Nevada state land laws. Byrne, however, was not a one-time conspirator; he double-dipped with the purchase of school lands in Elko, Nevada.

### *1. The Ormsby County Grand Jury Condemns*

Byrne's exposed scandal, which eventually reached the Nevada Supreme Court, concerned 600 acres in Elko County commonly known as the “Industrial School Land.” In compliance with the 30,000-acre exchange in 1926, the Governor submitted various selection lists for lands wanted by the State of Nevada

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<sup>157</sup> *Id.* at 4.

<sup>158</sup> *Id.* at 5.

<sup>159</sup> *Id.* at 10.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 11.

on January 27, 1930.<sup>162</sup> These lands would be exchanged for the unusable school lands initially received from the federal government under the original school lands program as revised by the two-million-acre grant. Among these land selection lists was "List 3—600 acres adjoining the farm of the Nevada School of Industry in Elko County."<sup>163</sup> The grand jury report indicated that the Industrial School had used this land since the 1920s—even though the state did not acquire the land title until 1931—and had "used and improved the land to the extent of leveling and filling, tilling at least Thirty-Five (35) acres thereof, drilling and developing a well, laying a pipeline, and building a fence in part, all to the approximated value of \$18,000.00."<sup>164</sup> While the Nevada School of Industry used and improved the land, these 600 acres were never included in any inventory or report filed by the school in Elko County.

The Byrne scandal emerged during the 1955 session of the Nevada Legislature. The grand jury found that Surveyor General Louis Ferrari had called Assemblyman J. F. McElroy to advise him that this selection of 600 acres was open for application and purchase.<sup>165</sup> Apparently McElroy was not interested, but Assemblyman William Byrne was, as he and Assemblyman William Embry visited the Surveyor General's office on several occasions during the 1955 session. The grand jury found that Embry discovered that McElroy had been informed about the land availability and that Embry in turn informed Byrne.<sup>166</sup> Byrne then capitalized on this insider information. On March 25, 1955, the Surveyor-General prepared an application for Julie Joanne Byrne for the 600 acres at the standard rate of \$1.25 per acre—a total of \$750. As William Byrne's wife, she testified that she had "no independent knowledge of the transaction, acting solely and completely at the request of her husband."<sup>167</sup>

Assemblyman Embry expected compensation for setting up the deal and thus inspected the land in August 1955, leaving his contact information with Fred Fernald, a local landowner. Fernald knew the 600 acres were school lands—selected by the state in the 30,000-acre exchange—and informed Embry within weeks that the land was already possessed and used by the school. As the grand jury explained, Embry "received the letter but had destroyed it and could not produce it and Mr. Fernald did not make a copy. Mr. Embry advised Mr. Byrne of the Fernald letter but Mr. Byrne denies it."<sup>168</sup> On the surface, this mix-up at the Surveyor General's office appears to be an honest mistake; land that was being used by a school had been sold to a private party. This discovery, however, revealed a deeper conspiracy among state legislators who exploited state land laws in order to purchase extremely valuable land for \$1.25 per acre.

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<sup>162</sup> LOTZ, *supra* note 138, at 11. For more detailed information on the 30,000-acre exchange, see McLEOD, *supra* note 128, as well as the history provided in Part II.C of this Article.

<sup>163</sup> *Id.*

<sup>164</sup> Ormsby Grand Jury Report, *supra* note 155, at 15.

<sup>165</sup> *Id.* at 16.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 17.

<sup>168</sup> *Id.*

The first problematic aspect of this transaction was that it involved not just any private citizen, but the wife of a state legislator. Ethical questions about public officials exploiting their position and influence for personal gain clouded the situation—in particular, public officials making backroom deals with the Surveyor General to acquire expensive property for nominal prices. Byrne obviously had his wife file the application to purchase the land, so as to distance himself—as a public official—from the sale. Once he got caught in the scandal, he attempted to sell back the land to the state or otherwise grant the land to the Industrial School. He wanted the scandal to go away as quickly as possible. Of course, he also wanted the state to compensate him for the sale. On March 7, 1956, the Governor asked the Byrnes to relinquish the land, and Byrne replied that he would if the “Governor in some way [could] make [ ] available to them other acreage elsewhere in the state.”<sup>169</sup> Because the land was unethically (if not illegally) obtained, the Governor refused to compensate the Byrnes, and simultaneously the Ormsby County grand jury convened to investigate the Surveyor General’s office and Byrne in particular.

In response to the mounting grand jury investigation, Assemblyman Byrne wrote the Attorney General once again, this time willing to return the land back to the state for free:

As you know, a short time after I learned that certain acreage I purchased from the State of Nevada was being used—altho illegally [sic]—by the Nevada School of Industry, I voluntarily offered to Deed the land being used by the School to it. . . . As you know, the Industrial School never had any right or title to this property; in view of the improvements and the need and the fact it is the Industrial School that is concerned, and not some other department of the State, we want the School to have it. Perhaps when the exact acreage we are giving up is determined, by location, the transfer by Mrs. Byrne and the application to purchase from the State by the Industrial School could be arranged to happen simultaneously. Your usual advice and opinion will be appreciated.<sup>170</sup>

From the text of the letter, it once again appears that this was an administrative error and that the Byrnes were graciously returning the land because they cherished the Industrial School in Elko. So why give the land away for free? Apparently, because they got caught in a scandal with the public in an uproar—if not for illegal activity, at least for questionable ethics and apparent abuse of authority.

The grand jury’s only hope for indictment rested on a 1921 Nevada law that bars legislators from profiting from their own policymaking: that is, under the Nevada Revised Statutes “[i]t shall be unlawful for any . . . member of the legislature . . . to become a contractor under any contract . . . authorized by . . . the legislature . . . of which he is a member.”<sup>171</sup> In a letter to the Governor, Nevada Attorney General Harvey Dickerson indicated that the legal claim

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<sup>169</sup> *Id.* at 19.

<sup>170</sup> Letter from William B. Byrne, State Assemb. for Clark County, Nev., to Harvey C. Dickerson, Nev. Att’y Gen. (Apr. 4, 1956) (errors in original) (on file with Nev. State Archives).

<sup>171</sup> NEV. REV. STAT. § 2827 (1912) (emphasis added).

against Byrne was not persuasive.<sup>172</sup> First, Assemblyman Byrne sidetracked the law by having his wife make the purchase. While a court might not uphold this distinction, the Nevada Supreme Court over thirty years earlier, in *Berney v. Alexander*,<sup>173</sup> held that legislators were *only* responsible for legislation passed during their tenure.<sup>174</sup> As Dickerson pointed out, “[t]he situation here is anomalous [sic]. Mr. Byrne was not a member of the early Legislature which passed the act setting up the methods and procedures for contracting for State lands, and is, therefore, under the *Berney* decision, not estopped from entering into such a contract.”<sup>175</sup> Dickerson thus advised the Governor to accept Byrne’s offer as being in the best interest of the state,<sup>176</sup> and on “May 16, 1956, Governor Russell wrote Mr. Byrne, reluctantly accepting his offer.”<sup>177</sup> The Byrnes outright gifted all 600 acres to the Nevada School of Industry, without receiving any compensation.

Similarly, because of the Nevada Supreme Court’s decision in *Berney*, the Ormsby County grand jury could not indict Byrne for the Industrial School lands scandal. Nor did it have the informal memoranda needed to indict Assemblyman Byrne, other legislators, and the Surveyor General for their conspiracy to personally profit from the state’s school lands program. This did not stop the grand jury, however, from publicly condemning and censuring these legislators and the Surveyor General. The grand jury found and stated these conclusions on the public record:

Louis Ferrari, as Surveyor-General, has been and is guilty of palpable misconduct in the administration of his office; has exercised his discretion and judgment for the benefit of the few, and his actions in the administration of his office in connection with the [school] land transactions herein investigated should be, and are hereby publicly condemned and censured.<sup>178</sup>

The grand jury further found that “the Legislative activity of Assemblyman William Byrne, William Embry and George Von Tobel . . . should be and is hereby condemned.”<sup>179</sup> Furthermore, it concluded that Byrne’s “use of his wife’s name on the application was a subterfuge and not in accord with his position of public trust” and that the Byrnes “materially benefited at the

<sup>172</sup> Letter from Harvey Dickerson, Nev. Att’y Gen., to Governor Charles H. Russell (Apr. 11, 1956) (on file with Nev. State Archives). Harvey Dickerson served one term as Nevada Attorney General from 1955-59. See HELLER, *supra* note 56, at 111.

<sup>173</sup> 178 P. 978 (1919).

<sup>174</sup> *Id.* at 979 (“The statute in question, when divested of all matter save that pertaining solely to a legislator, is so clear and unambiguous that there is no room for construction. It says in plain language that no member of the Legislature shall become a contractor under any contract authorized by the Legislature ‘of which he is a member.’ . . . There is nothing in the statute prohibiting a member of one Legislature from becoming a contractor under a contract authorized by a previous Legislature, of which he was not a member, as in the instant case.”).

<sup>175</sup> Dickerson, *supra* note 172, at 3 (errors in original; emphasis added) (stating “anomalous” but clearly meaning that the cases are “analogous”).

<sup>176</sup> Letter from Harvey Dickerson, Nev. Att’y Gen., to Governor Charles H. Russell (May 3, 1956) (on file with Nev. State Archives).

<sup>177</sup> Ormsby Grand Jury Report, *supra* note 155, at 20.

<sup>178</sup> *Id.* at 21 (errors in original).

<sup>179</sup> *Id.* at 22.



expense of the State and the public interest.”<sup>180</sup> Nevertheless, while delivering a scathing public condemnation, the grand jury ultimately had to conclude that it had “no present criminal recourse in any of the transactions herein reported.”<sup>181</sup> In other words, public officials exploited the program, but no proof could be found that laws were broken and so no one could be charged with a crime.

Byrne’s story illustrates the kinds of abuses and corruption that occurred with respect to the school lands program. Not only did the program have to adapt to Nevada’s unique geographic and economic needs, but it also was infected by local self-interest. Or, as commentators concluded with respect to the Rhoades scandal, “[T]h[is] story played out here, too in the Silver State, perhaps proving that old adage correct: Trust nobody where large sums of money are concerned.”<sup>182</sup>

## 2. *The Nevada Supreme Court Weighs In*

The Byrne saga does not end with the Ormsby County grand jury report. This scandal led to several other developments, which while not at the heart of this Article’s main storyline, merit mention. First, the Ormsby County grand jury report’s public condemnation of the state legislators and Surveyor General did not sit well with the accused. So Byrne and his fellow legislators sought to expunge the portions of the report that publicly condemned them. They sought to clear their names of all wrongdoing and claimed that since the grand jury was unable to indict, it had no right to publicly issue a guilty verdict or public condemnation. District Judge Frank B. Gregory denied the petition, and the assemblymen appealed.<sup>183</sup> On appeal, the Nevada Supreme Court reversed and held that the grand jury could not publicly condemn or censure Byrne and his fellow legislators, and such statements should thus be expunged from the grand jury report.<sup>184</sup> This holding has remained a core principle of constitutional law in Nevada: grand juries have a duty to either “indict or be silent.”<sup>185</sup>

While the accused was attacking the Ormsby County grand jury report, the public was responding in a positive manner to the grand jury’s findings. The report became a driving force behind the abolishment of the Surveyor General position. Under the Nevada Constitution, the Surveyor General was a constitu-

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<sup>180</sup> *Id.* at 23.

<sup>181</sup> *Id.* at 24.

<sup>182</sup> Cafferata & Erquiaga, *supra* note 153, at 483.

<sup>183</sup> *In re Report of Ormsby County Grand Jury*, 322 P.2d 1099 (Nev. 1958). In Nevada, there is no intermediary appeals level, so all appeals go directly to the Nevada Supreme Court.

<sup>184</sup> *Id.* at 1100; *see also id.* at 1102-03 (“The principle is that a man should not be made subject to quasi-official accusation of misconduct which he cannot answer in an authoritative forum; that in making such accusation the grand jury is exceeding its reportorial function and is proceeding to impose the punishment of reprimand based upon secret ex parte proceedings in which the person punished has not been afforded the opportunity of formal open defense.”).

<sup>185</sup> *Annual Survey of Nevada Law 1999*, 1 NEV. L.J. 345, 374-375 (2001) (discussing *Barngrover v. Fourth Judicial District Court*, 979 P.2d 216 (Nev. 1999), which upheld *In re Report of Ormsby County Grand Jury*, 322 P.2d 1099).

tionally elected position.<sup>186</sup> However, the Surveyor General scandals of the 1940s and 1950s—which largely concerned the sale of school lands to friends, relatives, political allies, and public officials—mobilized the public to pass a constitutional amendment in 1954 that changed the office of Surveyor General from a constitutional office to a statutorily created office with legislative discretion as to whether the office would continue to exist.<sup>187</sup>

One year after the grand jury report in 1956, the Nevada Legislature abolished the Surveyor General position and created the Department of Conservation and Natural Resources, with the Division of State Lands as the state agency over state land management within the new department.<sup>188</sup> The public had lost all confidence in the Surveyor General, and the legislature responded by transferring power to a new department. This was not without contest. Then-fired Surveyor General Louis Ferrari challenged the constitutionality of the amendment and subsequent legislative action, but the Nevada Supreme Court upheld the abolishment of the position and ordered Ferrari to turn over his records and equipment to the Division of State Lands.<sup>189</sup> Ultimately, the Surveyor General's abuse of discretion with respect to school lands led to his dismissal and the creation of a new administrative structure to handle the remaining school lands and other state lands.

Another legislative initiative in 1957, apparently also passed in reaction to the Ormsby County grand jury report, required state school lands to be sold at public auction or through sealed bids.<sup>190</sup> Bids could not be lower than the appraised value, and they could never be less than three dollars per acre. The legislature further reformed the system in 1959 with the creation of the State Land Register Appraisal and Publication Revolving Fund and the requirement that purchasers make full payment and acquire title within twenty-five years.<sup>191</sup> The 1959 legislation also stipulated that the Land Register maintain an "Index of Deeds and Evidence of Title of Properties Owned by State Agencies."<sup>192</sup>

While the Nevada Supreme Court prohibited the grand jury from publicly condemning those involved in the school lands scandal, the grand jury was nevertheless a catalyst for change. Not only did it succeed in abolishing the office of Surveyor General, but the grand jury also spurred major reforms in the system for state land use, management, and sale. These developments, how-

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<sup>186</sup> NEV. CONST. art. V, § 19 (1953).

<sup>187</sup> NEV. CONST. art. V, § 19, *amended by* 1951 Nev. Stat. 581 (*passed in* 1951 Nev. Stat. 581; *agreed to and passed in* 1953 Nev. Stat. 715; *ratified at* 1954 General Election).

<sup>188</sup> 1957 Nev. Stat. 648; *see also* NEV. STATE LIBRARY & ARCHIVES, SURVEYOR GENERAL & STATE LAND OFFICE, <http://dmla.clan.lib.nv.us/docs/nsla/archives/archival/stlands.htm> (last visited Nov. 10, 2006) [hereinafter HISTORY OF SURVEYOR GENERAL] (providing brief history and overview of Nevada public lands administrations).

<sup>189</sup> *Shamberger v. Ferrari*, 314 P.2d 384, 389 (Nev. 1957).

<sup>190</sup> 1957 Nev. Stat. 534; *see also* HISTORY OF SURVEYOR GENERAL, *supra* note 188. Many of these provisions were later repealed in 1997. 1997 Nev. Stat. 972. Interestingly, in the 1860s the first auctioned school lands went for one penny above the lowest price, at \$2.51, so the Surveyor General quickly realized that public auctions or sealed bids would not increase revenue or guarantee less corruption or exploitation by elected officials. *See* Interview with Bob Stewart, in Carson City, Nev. (Apr. 22, 2005) [hereinafter Stewart Interview].

<sup>191</sup> 1959 Nev. Stat. 489, 489-90; *see also* HISTORY OF SURVEYOR GENERAL, *supra* note 188.

<sup>192</sup> 1959 Nev. Stat. 489 (*codified at* NEV. REV. STAT. § 321.045 (1959)), *repealed by* 1997 Nev. Stat. 972.

ever, also produced some unintended negative consequences—such as a loss of institutional memory and consequent misuse of school lands—which are explored in the next Part. As for William Byrne, if the question is whether he was re-elected to the State Assembly in 1958, the answer is no. But the story does not end there.

### 3. *Post-Script: Byrne's Political Future*

Byrne did not appear to be scared (or scarred) by the bad publicity. He was re-elected in 1956 and served in the 1957 session as an assemblyman from Clark County. In May 1957, he was elected Mayor of Henderson—so he was an assemblyman and mayor at the same time.<sup>193</sup> Although the Nevada Legislature convened in a special session in 1958 for two days, June 30 and July 1, Byrne was not present. However, his own legal problems in 1958—which involved a guilty plea to federal tax fraud charges<sup>194</sup>—did not stop him from running for re-election.<sup>195</sup> His opponents were James Gibson<sup>196</sup> and William Choate. Byrne apparently could not overcome all the controversy and lost to Gibson in the democratic primary: Gibson received 8381 votes to Byrne's 6900 and Choate's 1665.<sup>197</sup> No longer a member of the state legislature, Byrne continued as Mayor of Henderson until the mid-1960s.

Byrne's career after the Ormsby County grand jury report might be tangential to the purpose of this Article, but the rest of the colorful story is not. His involvement with the Surveyor General and the school lands in Elko typifies the type of abuse and corruption that permeated the school lands program during the early- and mid-twentieth century. Equally important, Byrne's scandal and the public exposure brought by the grand jury and Nevada Supreme Court cases directly led to the abolishment of the Surveyor General's Office

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<sup>193</sup> NEV. SEC'Y OF STATE, OFFICIAL RETURNS OF THE 1957 ELECTIONS (Carson City, Nev. 1957) (on file at Nev. State Archives); *see also* HELLER, *supra* note 56, at 195 (noting that Byrne was a member of the Assembly in 1957).

<sup>194</sup> Byrne was brought up on charges in federal court because he did not file a tax return for 1954. He pled guilty in 1958, and Harry Claiborne was his attorney. *See Byrne Enters Plea of Guilty*, RENO EVENING GAZETTE, Sept. 9, 1958, at 9; *see also* E-mail from Jeffrey M. Kintop, Nevada State Archives Manager, to author (Dec. 28, 2004) (on file with author).

<sup>195</sup> The Attorney General Harvey Dickerson ruled that Byrne could not serve as both the Mayor of Henderson and an assemblyman from Clark County. Nev. Att'y Gen. Op. No. 379, *reprinted in* BIENNIAL REPORT OF THE ATTORNEY GENERAL 1956-1958 (Carson City, Nev. 1958) (on file at Nev. State Archives) ("One holding office of mayor may not, under prohibition of Section 1 of Article III of the Constitution of Nevada, hold at the same time the office of member of the State Legislature."). But this did not stop Byrne from running in the Democratic Primary. JOHN KOONTZ, NEV. SEC'Y OF STATE, OFFICIAL RETURNS OF THE PRIMARY ELECTIONS OF 1958 (Carson City, Nev. 1958) (on file with Nev. State Archives); *see also* Interview with Christopher G. Driggs, Nevada State Archivist, to author (Dec. 22, 2004) [hereinafter Driggs Interview].

<sup>196</sup> James Gibson represented Henderson in the Nevada State Assembly from 1959 to 1966 and then in the Nevada State Senate from 1967 to 1988. HELLER, *supra* note 56, at 195. Gibson and was the first inductee into the Nevada State Senate Hall of Fame. NEV. LEGISLATIVE COUNSEL BUREAU, NEVADA LEGISLATORS 1861-2005, at 25 (rev. 2005), *available at* <http://www.leg.state.nv.us/lcb/research/leginfo.cfm>.

<sup>197</sup> NEV. SEC'Y OF STATE, OFFICIAL RETURNS OF THE PRIMARY ELECTION OF 1958 (Carson City, Nev. 1958) (on file at Nev. State Archives); *see also* Gibson Leads, LAS VEGAS SUN, Sept. 3, 1958, at 1.

and the emergence of its successor, the Division of State Lands at the Nevada Department of Conservation of Natural Resources.

### C. *Misuse*

When the Nevada Legislature transferred state land management from Surveyor General Louis Ferrari to the newly created Division of State Lands at the Department of Conservation of Natural Resources, vast institutional knowledge was lost—including a working understanding of the law and policy involved in the school lands program. Managing state school lands was not a high priority and was thus given limited resources and staffing.<sup>198</sup> Additionally, there no longer existed an administrator over state lands who had specific knowledge of the school lands program and related laws. Without this expertise, the likelihood of school lands misuse increased. While the transfer was meant to clean up corrupt state land management practices, its unintended consequences included administrative misuse that led to financial losses to the Permanent School Fund. These unintended consequences will be explored in this Part.

This misuse can be traced back to the 30,000-acre exchange in 1926. As explained in Part II.C, Governor Scroggins and the State Legislature originally intended to exchange the unusable acreage of school lands for parcels to be dedicated as parklands and game reserves.<sup>199</sup> Attorney General Diskin, however, ruled that any school lands conveyance that “attempts to divert such [school grant] lands, or the proceeds thereof, to any other [noneducational] purpose, is clearly void.”<sup>200</sup> The Nevada Legislature reluctantly amended the bill to exclude noneducational purposes. As Pamela Wilcox, the current administrator of the Nevada Division of State Lands, explains, school lands gained through the 30,000-acre grant nevertheless ended up being used for noneducational purposes:

Nonetheless, some of those [school grant] lands were later diverted for non-educational purposes. Lands acquired under the 1926 Exchange Act today form the base holdings at several state parks, including Valley of Fire, Cathedral Gorge, Beaver Dam, and Fort Churchill, and are assigned to such agencies as the Department of Human Resources, the Department of Prisons and the Division of Buildings and Grounds.<sup>201</sup>

The Surveyor General clearly knew these legal obligations, so any deviation before the abolishment of the position in 1957 would have constituted an abuse of power. Administrators at the newly created Division of State Lands, however, arguably did not understand these laws, so any improper conveyance of

<sup>198</sup> Interview with Pamela B. Wilcox, Administrator of the Nevada Division of State Lands, in Carson City, Nev., (Apr. 22, 2005) [hereinafter Wilcox Interview]. Thanks are due to Ms. Wilcox for sharing her extensive knowledge of the school lands program, the Permanent School Fund, and the unintended consequences of switching from the Surveyor General's office to the Division of State Lands. None of this information has been previously published and would never have been documented without her help, as well as the help of Nevada historian Bob Stewart and Nevada Archivists Jeff Kintop and Chris Driggs.

<sup>199</sup> See *supra* notes 128-135 and accompanying text (describing the legislative history behind the 30,000-acre exchange).

<sup>200</sup> Op. Nev. Att'y Gen. (Mar. 3, 1925), reprinted in McLEOD, *supra* note 128, at 2.

<sup>201</sup> Wilcox 1996 Memo, *supra* note 147, at 2.

school lands for parklands or game reserves would have been considered unintentional misuse, but not necessarily abuse.<sup>202</sup>

The more important question thus is not whether these transfers constituted government abuse or misuse, but how to resolve the problem. When Wilcox became the administrator of the Division of State Lands in 1983, she ran across this obscure law on school lands grants and recognized the error.<sup>203</sup> With subsequent help from Bob Stewart, a leading historian of land law in Nevada, Wilcox identified the school lands conveyed to state agencies or dedicated as state parklands or game reserves.<sup>204</sup> Wilcox and Stewart quickly realized that the Permanent School Fund had not been reimbursed for these transfers and sought to take action.<sup>205</sup>

Her first attempt to get the Permanent School Fund reimbursed by the Nevada Legislature was granted in 1987.<sup>206</sup> The Legislature approved to reimburse the Fund for “the sum of \$21,960 to compensate for state school grant lands which have been transferred to state agencies for their use.”<sup>207</sup> Figure 3 summarizes the lands for which reimbursements were granted, as well as the state agency, acreage, and estimated value. The Legislature reimbursed the Permanent School Fund from the general fund for the estimated value of the lands at the time of the transfer—a calculation that was far below current market value and did not account for the interest that would have accrued since the original transfer.

Even though the Legislature reimbursed the Fund for the estimated values requested by the Division of State Lands in 1987, Wilcox discovered six additional parcels that had not been reimbursed. Consequently, every biennium since 1987, the Division of State Lands, “in its role as trustee,” has prepared a “Bill Draft Request from Executive Agency” to ask that these lands be reimbursed by the Legislature from the general fund.<sup>208</sup> In these bill draft requests, the Division emphasizes the potential dangers that stem from a failure to act.

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<sup>202</sup> See Wilcox Interview, *supra* note 198.

<sup>203</sup> *Id.* It is important to note that in many other western states, school trust lands still play an important role because significant acreage is still held by the states and sold to generate revenue for public schools. Nevada, however, sold its school lands as quickly as possible, so that only about 3000 acres are still held by the state. Consequently, of all the laws pertaining to state land law management in Nevada, administrators at the Nevada Division of State Lands would feel little need to master this obscure and relatively used area of the law. See Memorandum from Pamela B. Wilcox, Administrator of the Nevada Division of State Lands, to Linda Eissman, Research Analyst at the Legislative Counsel Bureau, at 2-3 (Feb. 21, 2003) [hereinafter Wilcox 2003 Memo] (on file with author).

<sup>204</sup> Wilcox Interview, *supra* note 198. Parcels of school lands were also given away to private parties for quasi-public purposes—e.g., for county fairgrounds—but the acreage gifted to private parties is not significant. Consequently, Wilcox focused her efforts on school lands appropriated to other state agencies or state uses. *Id.*

<sup>205</sup> Wilcox 1996 Memo, *supra* note 147, at 2.

<sup>206</sup> 1987 Nev. Stat. 25 (“AN ACT making an appropriation to the state permanent school fund for land transferred to state agencies; and providing other matters properly related thereto.”).

<sup>207</sup> *Id.*

<sup>208</sup> See, e.g., Div. of State Lands, Bill Draft Request from Executive Agency (2001) [hereinafter 2001 Bill Draft Request] (stating that the intent of the proposed bill is to “[r]equest appropriation to compensate permanent school fund for value of certain lands”) (on file with author and at Nev. Div. of State Lands).

FIGURE 3. SCHOOL LANDS REIMBURSED BY LEGISLATURE WITH  
1987 NEV. STAT. 25\*

LAND PARCEL	STATE AGENCY	ACREAGE	ESTIMATED VALUE
Valley of Fire State Park	State Parks	8,725.47	\$10,940.59
Kershaw Ryan State Park	State Parks	200.00	\$250.00
Cathedral Gorge State Park	State Parks	1,578.66	\$1,973.33
Beaver Dam State Park	State Parks	718.62	\$898.25
Rye Patch Reservoir State Park	State Parks	1,519.13	\$3,797.83
Gravel Pit in Humboldt County	Transportation	40.00	\$100.00
Beatty Nuclear Dump Site	Human Resources	80.00	\$4,000.00
		TOTALS:	12,861.88      \$21,960.00

\* at time of transfer

In particular, “[u]ntil compensation is made, title to the land is clouded, and the state may be sued at any time by Trust beneficiaries demanding repayment.”<sup>209</sup> None of these requests has been granted. Nor has a bill been drafted or submitted to the Nevada Legislature.<sup>210</sup> Figure 4 outlines these outstanding lands, the corresponding state agencies, the acreage, and various estimations of value.<sup>211</sup>

FIGURE 4. SCHOOL LANDS YET TO BE REIMBURSED  
(AS OF OCTOBER 2, 2001)

LAND PARCEL	STATE AGENCY	YEAR OF TRANSFER	ACREAGE	VALUE AT TIME OF TRANSFER	INTEREST ACCRUED SINCE TRANSFER	CURRENT FAIR MARKET VALUE	
Fort Churchill State Park, Lyon County	State Parks	1933	200.00	\$500.00	\$11,281	\$240,000	
Mental Health and Children’s Services, Las Vegas	Human Resources	1969	78.54	\$589,350	\$2,062,607	\$26,800,000	
Buildings and Grounds, Las Vegas	DMV/DOAg	1968	20.00	\$871,200	\$3,508,284	\$7,600,000	
Bradley Building, Las Vegas	State Parks	1969	12.50	\$626,200	\$2,400,528	\$5,500,000	
Nevada State Prison I, Carson City	State Prisons	1969	78.50	n/a	n/a	\$800,560	
Nevada State Prison II, Carson City	State Prisons	1963	80.00	n/a	n/a	\$78,500	
			TOTALS:	469.54	\$2,087,250	\$7,982,700	\$41,019,060

Wilcox similarly notes that even the 1987 reimbursement was probably insufficient, since the value estimation was incorrectly calculated. She explains that there are two potentially correct ways to calculate the compensation due:

<sup>209</sup> *Id.* at 1-2.

<sup>210</sup> See Wilcox Interview, *supra* note 198.

<sup>211</sup> Figure 4 is based on the 2001 Bill Draft Request, *supra* note 208, at 1 & tbl.1.

current fair market value of the land or the value of the land at time of transfer plus any accrued interest since the transfer.<sup>212</sup> The latter was implemented by the 1987 legislation; but even then, the compensation was far too small because the Division failed to also ask for the interest that had accrued since the sale of the land.<sup>213</sup> Figure 4 provides value estimations under both calculation methods. In addition to the more fully developed value estimation methods, the Division notes in the 2001 bill draft request that “[t]hree things have changed” since the 1987 legislation:

The amounts that could be sought by beneficiaries continue to grow.

Some of the beneficiaries have become aware of this situation. During the last legislative session, the agency was visited by a representative of the state association of school boards, asking about Trust land assets.

The state had been developing plans for future state facilities in the Las Vegas valley. The two Las Vegas parcels are being considered for additional use by state agencies, and need to be cleared, or future projects will have to “buy” the land from the trust for fair market value at that time, which will be even higher than today’s values.<sup>214</sup>

These changed circumstances make reimbursement an even greater priority. However, since under either value estimation method the sums of money are in the millions, for obvious reasons the State Legislature has been reluctant to act.

With a Permanent School Fund balance of over \$189 million as of December 2004,<sup>215</sup> reimbursement at the current fair market value (\$41,019,060) would increase the Fund by twenty-two percent. Wilcox notes, however, that such levels of reimbursement are not realistic, which is why the executive branch has not requested the drafting of the legislation and the legislature would likely refuse to pass it even if drafted.<sup>216</sup> Even the lesser amount of value at transfer plus interest would be impracticable, as the reimbursement cost would exceed ten million dollars. Yet, the issue must be resolved to clear title and prevent legal action against the trust.

This reimbursement dilemma has never reached Nevada’s press, even though it is more a topic for current debate than a history lesson. This misuse of school lands, however, can be traced back to the unintended consequences of the 1957 reforms. And those reforms emerged in response to the widespread corruption that existed in the Surveyor General’s Office and the Nevada Legislature, as revealed by the trial of William Byrne. That period of “enlightened self-interest”<sup>217</sup> by public officials was directly facilitated by Congress’s attempts to adapt the 1864 school lands grants to Nevada’s unique circumstances, in the form of the two-million-acre grant in 1880 and the 30,000-acre exchange of 1926. This pattern of abuse and misuse of federal land law programs is a recurrent theme in American history.<sup>218</sup>

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<sup>212</sup> See Wilcox Interview, *supra* note 198; see also 2001 Bill Draft Request, *supra* note 208, at 2.

<sup>213</sup> See Wilcox Interview, *supra* note 198.

<sup>214</sup> 2001 Bill Draft Request, *supra* note 208, at 2.

<sup>215</sup> See 2004 PERMANENT SCHOOL FUND FINANCIAL STATEMENTS, *supra* note 32, at 1.

<sup>216</sup> See Wilcox Interview, *supra* note 198.

<sup>217</sup> See Stewart E-mail, *supra* note 150. I thank Bob Stewart for allowing me to borrow the phrase he coined for this period in Nevada history.

<sup>218</sup> FRIEDMAN, *supra* note 2, at 232.

## CONCLUSION

Five years have passed since President Bush and Congress enacted the No Child Left Behind Act (NCLB),<sup>219</sup> which advocates from both sides of the aisle have touted as the most comprehensive federal initiative ever enacted to support public education in America. It was not Congress's first attempt. As this Article has detailed, school lands grants appeared in the frontier states in the nineteenth century as a revenue-generating program for public education. Nevada's version of school lands grants appeared at statehood in 1864. During his first address to the Legislature in 1864, Nevada's first elected governor, Henry Blasdel, perhaps best summarized the importance of education and the effect of the school lands grants on public schools:

The advantages accruing to the body politic, arising from an educated, well-informed thinking population, must be obvious to those into whose hands out people have confided the law-making power. Universal education is no longer an experiment of doubtful policy. Its general diffusion has been found promotive of piety, good order and a becoming regard for the constituted authorities. It induces the citizen to respect himself, and thus command respect of others. . . .

I conjure you, therefore, to give you early and earnest attention to this subject; and by the wisdom of your enactments relating thereto, to lay broad and deep the foundation of that superstructure, on which shall rest the future moral, social and political well-being of our people. Although the General Government has made princely donations of lands which ours has appropriated to educational purposes, the experience of other States, to which the same liberality has been extended, should teach us that the children of the present generation are not likely to receive the full benefit thereof, without further Congressional legislation.<sup>220</sup>

Governor Blasdel notes that the school lands grants were not meant as an all-encompassing solution to the public education crisis. Although the Permanent Education Fund still needs to be reimbursed millions of dollars for misappropriated lands, the interest of the Fund's current balance (\$189,383,203) alone is insufficient to fully fund Nevada's public school system. Of course, this was never the program's purpose. Congress meant for the school lands grants to *help* support public schools, not fully fund them. The state bears the rest of that responsibility.

More importantly, tracing the history of the school lands grants in Nevada has revealed several recurrent themes in federal land law development and the history of the American West. First, federal land management policies seldom function as intended on paper. With respect to school lands in Nevada, this theory-practice disconnect likely occurred for two main reasons. The first involves Friedman's observation of local self-interest.<sup>221</sup> Where local public officials could take unfair or personal advantage of the school lands program, they did. And they did so liberally<sup>222</sup> and with "enlightened self-interest."<sup>223</sup>

<sup>219</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

<sup>220</sup> BLASDEL, *supra* note 57, at 24.

<sup>221</sup> FRIEDMAN, *supra* note 2, at 232 (discussing how federal land law policy is particularly prone to abuse and mutation in instances "when policy collided with self-interest . . . Washington's arm was never long enough or steady enough to carry through").

<sup>222</sup> Ormsby Grand Jury Report, *supra* note 155, at 4.



This government corruption led to lesser state revenue and the abolishment of the Surveyor General's Office, which led to the unfortunate and unintended consequences of nonreimbursement for school lands used by other agencies and even school lands gifted for quasi-public purposes. In sum, where Congress could not align the federal program with local self-interest, the program did not function as expected.

The second reason for the theory-practice disconnect is perhaps even more pervasive in Nevada's school lands story. Congress's implementation of the school lands grant program in Nevada reveals that Congress never truly understood the arid nature of the American West.<sup>224</sup> Even Congress's attempts, in the form of the two-million-acre grant and 30,000-acre exchange, to adapt the national program to the Sagebrush State's unique geography—i.e., its vast amounts of uninhabitable land—failed to meet Nevada's unique needs and interests. That Congress refused to grant any other changes to the program in Nevada and that no other western state received a similar exchange further illustrate why the program did not function as Congress intended. This observation leads to a second general, albeit obvious, theme: national programs must be adapted to the unique needs and characteristics of local and state government.

Tracing this one particular initiative has revealed much about Nevada history as part of the frontier West; one final theme stands out that is worth mentioning in conclusion. This theme parallels Nevada's experience with the No Child Left Behind Act of 2001. As one Nevada school district superintendent remarked about the NCLB initiative, oftentimes the pitfalls with a national initiative aimed at solving local problems are "with the mechanics of it, not the philosophy."<sup>225</sup> Clearly, no participant at Nevada's Constitutional Convention of 1864 objected to Section Three of Article XI, which instituted the federal school lands grant program in Nevada. The Jeffersonian philosophy behind this national initiative was innovative and aimed at generating revenue for public education, as well as promoting private land ownership and national development. As subsequent history revealed, the problems that plagued the program indeed involved the "mechanics of it, not the philosophy." Its failure to adapt to Nevada's arid landscape and its high susceptibility to local self-interest inhibited the program's success in the Silver State. Even with these flaws, however, the program was not an utter failure; after all, the Permanent Education Fund balance currently stands at \$189 million in the black.

Perhaps for these reasons we could appropriately call Nevada's school lands grants the No Child Left Behind Act of 1864.

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<sup>223</sup> Stewart E-mail, *supra* note 150.

<sup>224</sup> See Wilcox Interview, *supra* note 198.

<sup>225</sup> *Nevada Educators Grade No Child Left Behind: Washoe Superintendent Gives U.S. Law an F*, LAS VEGAS REV. J., Apr. 20, 2004, [http://www.reviewjournal.com/lvrj\\_home/2004/Apr-20-Tue-2004/news/23692747.html](http://www.reviewjournal.com/lvrj_home/2004/Apr-20-Tue-2004/news/23692747.html) (quoting Clark County School District Superintendent Carlos Garcia).