

## Preserve McCall: A Proposed Public-Private Land Exchange

Practitioner Comment

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With the Land Ordinance of 1785, the Continental Congress laid a hypothetical grid across the then-unexplored western territories, dividing the vast continent unknown to colonial settlers into square townships with six miles to a side.<sup>2</sup> Each township was then subdivided into 36 one-square-mile sections.<sup>3</sup> Uniformly numbered, the 16th section in each township was reserved for public schools.<sup>4</sup> A type of early development impact fee, the 16th section was often sold as development reached the particular spot on the surveyed grid, or in some cases retained where there was mineral wealth that could be used to fund schools.<sup>5</sup> Upon its entry into statehood, Idaho was also granted endowment lands according to this same grid formula; remnants of these allocations still dot the state in regular intervals.<sup>6</sup>

Some states have reaped enormous wealth from holding and managing these endowment lands for educational purposes. The oil- and gas-rich Texas endowment lands are probably the best-known of these.<sup>7</sup> Similarly, the Bishop's Trust,<sup>8</sup> which holds the remainder of royal lands from the time of Hawaii's statehood, also is a land endowment for the benefit of education. In most states, endowment lands have provided modest sums that have assisted public education.

The character of the land is unique in American land management because the purpose of the land is so deeply tied to providing for future generations. This characterization of endowment lands reflects the nation's longstanding commitment to education. Most wealth in the eighteenth century was real property; as a result, a land endowment for education was the highest commitment that society could imagine. Though our relationship to land today is more fungible, any policy for the development of endowment lands should retain the deep commitment to

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<sup>2</sup> *The Northwest and the Ordinances, 1783-1858*, LIBR. OF CONGRESS, <https://www.loc.gov/collections/pioneering-the-upper-midwest/articles-and-essays/history-of-the-upper-midwest-overview/northwest-and-ordinances/> (last visited May 7, 2021).

<sup>3</sup> *Land Ordinance of 1785*, IND. HIST. BUREAU, <https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/land-ordinance-of-1785/> (last visited May 7, 2021).

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

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

<sup>6</sup> Idaho Admission Bill, 26 U.S. Stat. L. Sess. 1, chap. 656, p. 215, sec. 4, <https://www.idl.idaho.gov/wp-content/uploads/sites/2/land-board/lb/documents-long-term/idaho-admission-bill.pdf>; *Endowment Lands*, IDAHO DEP'T OF LANDS, <https://www.idl.idaho.gov/wp-content/uploads/sites/2/maps-land-records/1-endowment-lands-simple-03-2016.pdf> (last visited May 7, 2021).

<sup>7</sup> U. LANDS, <http://universitylands.utsystem.edu/> (last visited May 7, 2021).

<sup>8</sup> *About the Trust*, CHARLES REED BISHOP TRUST, <http://www.charlesreedbishop.org/about/> (last visited May 7, 2021).

education that this nation’s history has imbued in such lands as a perpetual gift to the future generations.

Proposals for any such land should be unique in the development world with a long-term emphasis on continued support for the country’s public education mission that should extend beyond the turn of characterization of land from public to private. Such unique development negotiations are not bound by the unconstitutional conditions doctrine, which applies only to private lands, and there should be conditions on development that extend beyond the usual time-of-approval method used in usual development processes.

“Preserve McCall” seeks to develop a 28,000-acre parcel of endowment land on Payette Lake near McCall, Idaho. McCall, once a logging town, is now one of the state’s premier recreation areas. The proposal would take advantage of this change of industry to reposition the endowment land parcel from extractive to recreational uses. The proposal necessitates a complicated—and politically fraught—land swap, as well as a number of constitutional and logistical barriers to completion. This essay does not address any of those issues. Instead, the goal of this article is to investigate what equitable development of endowment lands might look like. I propose three such areas of interest: equitable use, equitable access, and equitable land equity.

The current development proposal retains some fluidity and conflicting data analysis; however the approach proposed is not uncommon for large parcel development in the West, such as Rancho Mission Viejo in southern California.<sup>9</sup> Like most large-parcel development in rural areas, the proposal calls for preserving most of the land in a tax-advantaged conservation management scheme, which here is phrased in this manner: “20,000–28,000 acres of land to be preserved through either public ownership or conservation easements.”<sup>10</sup> The tax advantage of the conservation easement offsets gains derived from the development, which here is slated for nine percent of the parcel, which would be approximately 2,500 acres.<sup>11</sup> Given current market conditions, that likely offers developers upwards of \$2–4 billion in home sales at build-out.<sup>12</sup> The proposal calls for a 17,200 acre park “owned and managed to provide permanent public access”;<sup>13</sup> a land dedication for a new recreation center;<sup>14</sup> lakefront land for increased public access;<sup>15</sup> and approximately 8,000 acres remaining with the Idaho Department of Lands for timber production, an approach common with multi-use management.<sup>16</sup>

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<sup>9</sup> RANCHO MISSION VIEJO, <https://www.ranchomissionviejo.com/> (last visited May 7, 2021).

<sup>10</sup> PRESERVE MCCALL, PROPOSAL OUTLINE 14 (2020), [https://static1.squarespace.com/static/5e73d0d66ab9182890fdd2d2/t/5fbd763b57b26306284643dc/1606252108842/20-033\\_McCall\\_Book\\_20201123-lowres.pdf](https://static1.squarespace.com/static/5e73d0d66ab9182890fdd2d2/t/5fbd763b57b26306284643dc/1606252108842/20-033_McCall_Book_20201123-lowres.pdf)

<sup>11</sup> *Id.* Based upon 9% of 28,000 acres. The area proposed for private development is never expressly stated in the proposal.

<sup>12</sup> Given current market conditions in McCall, these numbers are likely low. However, a simple approach would be to imagine 2,500 1-acre homes selling at \$1 million, which would yield \$2.5 billion in revenue.

<sup>13</sup> PRESERVE MCCALL, *supra* note 10, at 14.

<sup>14</sup> *Id.*

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

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

I suggest that the proposal is too much like traditional development proposals to be worthy of the special status of endowment lands. The unique character of any development on state endowment lands must be ongoing, future-oriented development patterns that continue to service the public. Here are several ways this might work.

The conservation easement and land dedication is a start, but the grant is a tax credit to the developer, which must be openly recognized, and the developer must be asked to do more with endowment lands. The land dedication for a cultural center creates a similar problem: the land is not the significant cost, it is the building and the on-going programming. One suggestion would be an ongoing assessment on the development through a reciprocal restrictive covenant with third-party beneficiaries, such as the state, the City of McCall, and perhaps a non-profit overseeing the area, that provided for ongoing conservation management of the easement, a cultural building, and ongoing programming.<sup>17</sup>

The education mission on the land itself should be continued. There are a number of examples throughout the West of outdoor education opportunities. This should be used as a way to have premier on-site educational programming for children of the State of Idaho. The programming should be free for those children, and something of similar stature to the Teton School programming provided near Jackson, Wyoming.<sup>18</sup> This could include pairing with existing education outdoor facilities to raise their level of engagement, such as the already-existing MOSS School in McCall.<sup>19</sup> The programming should be paid for in perpetuity by the development on the land with public entities, and potentially a non-profit that provides the services, able to control the fee to continue the programming.

Access should be to the entire lakeshore for all individuals in perpetuity. This is similar to the way that access to the water is preserved in Hawaii; to the extent that the lakeshore continues to be used by the public, the land remains in the public's control without regard to any subsequent effort to negotiate around it.<sup>20</sup> Access should be to the entirety of the beach with substantial shore retention along the entirety of the lake. Beach access must be secured in perpetuity, with beach access easements provided for to prevent any use of private lands to block access.

The development should have a trust or other such organization that oversees the relationship between development, access, and educational use on the land that is not limited to control by the homeowners. A model for this might be the Presidio Trust in San Francisco, which manages private development on a former military base that is also known for its scenic beauty with historic buildings located inside of it.<sup>21</sup>

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<sup>17</sup> A private version of this kind of management is evidenced by a private Chautauqua community on the northern shore of Lake Michigan. *Bay View Association*, CHAUTAUQUA TRAIL, <https://www.chautauquatrail.com/trail/bay-view-association#:~:text=A%20Chautauqua%20on%20Lake%20Michigan&text=It%20is%20situated%20on%20337,450%20cottages%20and%20two%20inns> (last visited May 7, 2021).

<sup>18</sup> TETON SCIENCE SCHOOLS, <https://www.tetonscience.org/> (last visited May 7, 2021).

<sup>19</sup> *McCall Outdoor Science School*, U. IDAHO, <https://www.uidaho.edu/cnr/mccall-outdoor-science-school> (last visited May 7, 2021).

<sup>20</sup> *Beach Access*, HAWAII.GOV, <https://dlnr.hawaii.gov/occl/beach-access/> (last visited May 7, 2021).

<sup>21</sup> *About the Presidio Trust*, PRESIDIO TR., <https://www.presidio.gov/presidio-trust/about> (last visited May 7, 2021).

Perhaps most controversially, I also suggest that any private development should be subject to land value capture where appreciation of the land itself, as well as taxes on use and sale of the land, should go to public schools. This is important because it preserves the legacy of the endowment lands while permitting private development. In such recreational areas where land for development is scarce, it is common that the land value far exceeds the improvement value of a home or other structure. This valuation recognizes the uniqueness of the place. Indeed, the ability for any private developer, or future private homeowner, to use the land is a special relationship to land that is bound to the country's tradition of using land to fund education. As such, the appreciation of the land value should not go to the private individual, but instead to public education, for which the land was originally intended. This should also include the first transfer to the developer, who otherwise would obtain a windfall profit based upon the transfer of land use alone without conferring any benefit to the state or public education. To the extent that development here proceeds on former endowment lands, it is not too much to ask that the appreciation of that land be returned to public education in the first, and all future, sales. Such a condition is unusual, but not unprecedented. Value capture is already being used around the United States where new public infrastructure confers an economic benefit to nearby private lands.<sup>22</sup> There is no reason that public education should not, similarly, be conferred an ongoing benefit when its lands reap gains for private developers.

Finally, there is increasing awareness that these state endowment funds almost always derive from cessions of tribally owned land.<sup>23</sup> To the extent that is the case with these lands, tribal recognition and education should be part of the educational experience for students onsite. Such indigenous land recognition and education is already prevalent in other colonial countries. An example is Melbourne, Australia's new Birrarung Marr park.<sup>24</sup>

The uniqueness of these proposals focus on retaining the purpose of the endowment lands even after they transfer to private development. This is not something typical of development, but then again, the lands here are not typical. To proceed with the usual development scheme already used for private lands throughout the West—conservation easement to off-set development—is insufficient. More must be done, with ongoing commitments, to ensure value for public education.

A developer willing to offer perpetual commitments to the future of public education—in access, funding, and sharing development value—should be welcomed on the shores of Payette Lake.

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<sup>22</sup> Chrissy Mancini Nichols, *Value Capture Case Studies: Denver's Historic Union Station*, METROPOLITAN PLAN. COUNCIL (Jan. 6, 2016)

<https://www.metropolplanning.org/news/6392/Value-Capture-Case-Studies-Denvers-Historic-Union-Station>.

<sup>23</sup> Robert Lee & Tristan Ahtone, *Land-Grab Universities*, HIGH COUNTRY NEWS (Mar. 30, 2020), <https://www.hcn.org/issues/52.4/indigenous-affairs-education-land-grab-universities>

<sup>24</sup> *Birrarung Marr*, CITY OF MELBOURNE,

<https://whatson.melbourne.vic.gov.au/things-to-do/birrarung-marr#:~:text=The%20park's%20name%20comes%20from%20diversity%20of%20Victoria's%20indigenous%20culture> (last visited May 7, 2021).