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# Trust but Verify: Open Government and Oklahoma Public Trusts

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*Public trusts have created opportunities for state, county, and municipal governments to disobey constitutionally established directives and shirk their duties of loyalty and care with decreased transparency and accountability.*

## Introduction

Despite innate individualism and a primal instinct for self-preservation, humankind needs community. Individual trust is essential to functioning in a community. Perhaps even more in the 21<sup>st</sup> Century than in previous eras, individuals must rely on others for survival. Individuals in modern civilization depend on others to produce even the most basic needs – food, shelter, and clothing – not to mention the complex technology upon which society has become dependent.

Generally, trust is the belief in and reliance on others' consistency and integrity. Unfortunately, experience shows that people can be inconsistent and dishonest. Recognizing the necessities of trust and protection, the Russian proverb, "Trust, but verify," succinctly describes the balancing of two contradictory needs. We must not only trust others, but do our best to be informed. Where individual or societal moral norms are insufficient to constrain deviant behavior, and where individuals lack the ability or the resources necessary to verify another's integrity, the law can step in to protect trusting individuals by imposing certain duties on trustees. These duties are called fiduciary duties. A trustee's failure to comply with these duties can result in legal liability. This paper will introduce trusts generally, and, specifically, analyze public trusts created to further public purposes and functions.

In Oklahoma, the legislature has enabled the creation of public trusts that are empowered with significant financial flexibility and vested with some of the power and authority of governmental entities. These trusts, as codified in Oklahoma's statutes, are problematic. Oklahoma's public trusts increase the risk of self-dealing, circumvent constitutional limitations, and distance the public from activities of a government created for their benefit. This paper concludes with several recommendations

for legislators to eliminate public trusts or remedy some of the problems plaguing them.

## Fiduciary Trusts in American Jurisprudence

Fiduciary relationships are relationships in which one party (the fiduciary) has "the power to act on behalf of" another (the trustor), with "an obligation to act in [the trustor's] best interest."<sup>1</sup> Today, fiduciary relationships commonly arise with doctors, lawyers, teachers, wealth managers, or any number of other professionals that are obligated to act on behalf of another.

Trusts are a specific type of regulated fiduciary relationship. In an express trust, there are four basic elements: a trustor (also called a settlor) who transfers power or property into the trust, a trustee (the fiduciary) who will administer the trust, a beneficiary which will benefit from the trust, all of which is memorialized in a document which directs the administration of the trust. Once created, a trustee owes several, defined duties to beneficiaries. Fiduciary duties protect the trustor and preserve the trust for the benefit of the beneficiaries. Among the duties a trustee owes are those of loyalty; care; abiding by the directives of entrustment; acting in good faith in performing fiduciary services; generally, not delegating fiduciary duties to others; accounting for and disclosing relevant information; and impartiality.<sup>2</sup>

Most people are familiar with trusts as a private estate planning or wealth management tool through the creation of testamentary or living trusts. We even speak disparagingly about the spoiled rich kid as a trust fund baby. However, trusts arise in the public sphere as well. Public trusts can significantly impact our daily lives.

## Public Trusts

The term "public trust" has been widely used in several contexts to support or oppose various public policies. For some,

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public trust is a doctrine that creates a public right to access and use natural resources such as navigable rivers. Defined in this way, activists have used the principle to justify environmental protection and open-access, common property.<sup>3</sup> However, for this paper, “public trust” will broadly mean a formal trust that exists to further some public function or purpose, ultimately (or ostensibly) for the benefit of the people.

Just as in private trusts, trustees of a public trust act as fiduciaries with corresponding duties adapted from the body of private fiduciary law. Among them are the following: “(1) the duty to follow instructions, (2) the duty of reasonable care, (3) the duty of loyalty, (4) the duty of impartiality, and (5) the duty to account.”<sup>4</sup> Governments in the United States have assumed greater power with far-reaching impacts on and control over individual liberty. Consequently, the fiduciary duties that governmental officers owe the people should be held sacrosanct, perhaps even more so for governmental than for private trustees.

### **Oklahoma Public Trusts**

In Oklahoma, the Legislature has authorized a specific type of public trust intended to benefit a state, county, or municipal government with its primary purpose being to secure public financing. Oklahoma public trusts have the power “to issue obligations, enter into financing arrangements ... and to provide funds for the furtherance and accomplishment of any authorized and proper public function or purpose ... in real or personal property ... in any estate or interest.”<sup>5</sup>

A public property trust can be created by a trust instrument or by a will, upon the express approval of the legislature and the governor, in the case of a trust benefitting the state, or by two-thirds of the governing body, in the case of trusts benefitting counties or municipalities.<sup>6</sup> Upon the creation of these trusts, trustees are then appointed by the county or municipal governing body.<sup>7</sup> Once the trust is formed, as long as the public trust is appropriately filing annual audits, is engaging in projects that could be performed by the governmental beneficiary, and any debt incurred has been approved by the governing body of the beneficiary government, then the trust is presumed to:

1. “exist for the public benefit,”
2. “exist as a legal entity separate and distinct from” the trustor and the governmental beneficiary, and
3. “act on behalf and in the furtherance of a public function.”<sup>8</sup>

The creation of public trusts provides state, county, and local governments with significant financial flexibility. In addition to sovereign powers such as eminent domain,<sup>9</sup> this flexibility makes public trusts an attractive, powerful tool for governmental entities to undertake projects that would have likely been financially unavailable to them due to constitutional restraints on public debt. However, within the current statutory framework, there is a significant risk of self-dealing, misaligned fiduciary duties, and decreased transparency and accountability.

### **Problems With Oklahoma Public Trusts**

Oklahoma public trusts are unnecessary and improper. The government of the State of Oklahoma already exists as an express trust. The people have entrusted the government with political power “for their protection, security, and benefit, and to promote their general welfare.”<sup>10</sup> It administers this power

“to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and happiness.”<sup>11</sup> It exists to benefit the people by preserving and protecting individuals’ rights, namely, the “right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.”<sup>12</sup>

As trustees, Oklahoma public officials are fiduciaries and must act according to the duties of obedience, reasonable care, loyalty, impartiality, and account. In Oklahoma, upon assuming public office, officers swear to obey the Constitutions of the United States and Oklahoma, to act with due care, to act in the interest of the public rather than their own self-interest, and perform their duties the best they are able.<sup>13</sup> These promises bear a remarkable resemblance to the duties a trustee owes to the beneficiaries of a trust. Additionally, accountability is essential to ensure official compliance with the other fiduciary duties.

As discussed further below, Oklahoma’s public trust law permits state, county, and municipal governments to violate their fiduciary duties by improperly delegating them to a quasi-governmental agency that is a trust in name only. The Oklahoma City Public Property Authority (OCPPA) manages a few high-profile properties. It will serve as a case study exemplifying how Oklahoma’s public trusts distance the people from the government they created for their benefit, circumvent constitutional limitations, and grow government at the expense of the people, the rightful beneficiaries.

### **Oklahoma Public Trusts Allow for Self-Dealing and Misalign Fiduciary Duties**

Underlying fiduciary law is a presumption that a trustee, absent legally imposed fiduciary duties, will act against the trust’s directives and for his own benefit and not for the designated beneficiary. Two of the most critical deficiencies of Oklahoma public trusts are the opportunity for self-dealing by misaligning fiduciary duties and allowing dual-office holding.

#### ***Misalignment of Fiduciary Duties***

Government was created by the people for the benefit of the people. As a trust, the government and its officers, acting as trustees, owe fiduciary duties to the people. However, public trusts distort this constitutional arrangement and misalign governments’ fiduciary duties. Through the creation of public trusts, government and its officers become the direct beneficiaries of governmental activity, relegating the public to the indirect, presumptive beneficiary.

While the law presumes public trusts exist for the benefit of the public, it is not necessarily the case that the public actually benefits. Given that government in the United States is a constitutionally created trust and its officers are trustees, creating a public trust is, in effect, a substantial delegation of duties that the government should be expected to perform itself and for which it should be directly accountable to the people.

The doctrine of nondelegation is historically deep-rooted in fiduciary law. Early restatements of trust law prohibited trustees from delegating those acts that the trustee could “reasonably be required to personally perform.”<sup>14</sup> While recent developments in trust law permit outsourcing some activities, such as prudently investing trust assets,<sup>15</sup> public trusts should be prohibited from delegating governmental duties.

As a general rule, governmental delegation of its duties should be approached with a great deal of skepticism. While certain functions are, and should probably be, delegated to governmental agencies, through public trusts, duties rightfully owed to the people are shifted to benefit government actors instead. The opportunity for the government to abuse its power and breach its fiduciary duties is too great and the people left with too little recourse to rely on a mere presumption that the people benefit from the government's activity. The delegation of governmental duties into a public trust diminishes the duty officers owe to the people. No longer is governmental power and authority exercised for the benefit of the people. Instead, that power and authority is wielded for the benefit of the bureaucracy. Public trustees must be loyal to the bureaucracy, even if it is at the expense of the people.

### **Risk of Self-Dealing and Conflicts of Interest**

When creating a trust, a trustor often has little ability to verify a trustee's expertise and integrity independently. Consequently, the trustor must rely on the trustee's representations that he possesses the expertise and integrity sufficient to manage the trust. Additionally, trustees enjoy more discretion and autonomy than some other fiduciaries. For this reason, while fiduciary law presumes that a trustee will act in his own self-interest, it protects the trustor by burdening the trustee with an affirmative duty to account for his activities and demonstrate ongoing loyalty and care in administering the trust for the beneficiaries.

Likewise, when people elect public officials, they often possess little information other than what was conveyed in the media and on campaign websites. By casting votes, constituents are entrusting the winning candidate with significant power, authority, and discretion. Elected officials carry a similar burden of loyalty and care and are subject to accountability and transparency laws. To help protect the public from self-dealing, the constitution and laws of Oklahoma generally prohibit public officials from holding multiple offices and from profiting or gaining special rights or privileges from their position.<sup>16</sup> While the administration of trusts falls under the purview of open meetings and records laws and trustees must swear an oath of office, by allowing trustees to hold an office with the beneficiary government (as in cases where trustees also serve as city councilors for the beneficiary city), trusts undermine many of the legal provisions designed to hold governmental officers and trustees accountable.

Throughout Oklahoma's public trust law, various provisions promote accountability and reduce the risk of self-dealing. However, these provisions become meaningless when the board of trustees and beneficiary governing bodies are identical. For example, the law requires a governing body of the beneficiary appoint trustees, that the public trust submits annual audits to the beneficiary, and that all indebtedness incurred by a municipal or county public trust be approved by the beneficiary's governing body.<sup>17</sup> By satisfying these conditions public trusts enjoy broad presumptions of legitimacy. However, when public trustees and beneficiaries are the same, these requirements provide little accountability, serve virtually no purpose, and afford no meaningful check on governmental activity because trustees are accountable to, and supposedly held in check by, themselves.

Identical governing bodies are problems elsewhere in public trust law. For example, when incurring debt, the law requires

that trustees secure approval of the beneficiary governing body.<sup>18</sup> Generally, all bonds approved by the governing body must be awarded to the "lowest and best bidder based upon an open competitive public offering." However, this requirement can be waived, allowing counties and municipalities to forego competitive bidding, if both the trustees and the governing body approve the waiver. Trustees can similarly allow bonds to be sold for less than par value, with the governing body's approval. If trustees and the governors are identical, the trust is granted plenary authority to act as it will, administering the trust without question. Furthermore, this plenary authority allows members of a governing body to accomplish things through a trust that they themselves, as representatives of a governmental entity, would have otherwise been prohibited from doing, like incurring debt without voter approval and exceeding debt ceilings.

Generally, trustees owe a duty to act in the best interest of the beneficiary. In the case of public trusts administered by the beneficiary government, the law creates a system of loyalty and accountability to oneself. Curiously, the Supreme Court of Oklahoma has somehow arrived at the conclusion that this arrangement is proper, finding no legally conflicting interests in the relationship.<sup>19</sup>

Public trust law also permits specific conflicts of interest in apparent violation of the constitution. The Oklahoma Constitution prohibits a public official from "[t]he receiving, directly or indirectly, ... of any interest, profit, or perquisites, arising from the use or loan of public funds in his hands, or moneys to be raised through his agency for State, city, town, district, or county purposes."<sup>20</sup> A public official engaging in such conflicts of interest would be guilty of a felony and disqualified from public office. However, public trust law provides for some exceptions that conflict with the Oklahoma Constitution. Under public trust law, a conflict of interest exists when a business in which the trustee or a family member serves as "an officer, partner, or principal stockholder ... directly or indirectly buy[s] or sell[s] goods or services" or secures a contract with the trust. However, the statute declaring the existence of conflicts of interest does not apply to:

1. *The making of any loan or advance of any funds to, or the purchase of any obligations issued by such public trust, in connection with the performance of any of its authorized purposes;*
2. *Any legal advertising required by law or indenture or determined necessary by trustees of such public trust;*
3. *The performance of any bond, trust company or similar entity or any services as a depository; or*
4. *The sale of any public utility services to such public trust, in which the price of said services is regulated by law.*<sup>21</sup>

This arrangement, where trustees and the beneficiary governing body are the same, is far from hypothetical. OCPPA was created by a trust indenture executed in 1961, between Greater Oklahoma City, Inc., the trustor, and the Mayor and City Council of the City of Oklahoma City, trustees.<sup>22</sup> By virtue of holding an elected office, the mayor and city council members become members of the board of trustees. Should the trustees of the OCPPA want to engage in any of the activities mentioned above, such as awarding a bond to an entity that did not submit the best and lowest bid, then they need only get approval from themselves in their capacity as members of the City Council. Should the

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## This legally permissible self-dealing has the potential to sacrifice the interests of the people for political or bureaucratic whims.

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OCPPA wish to lease 254,400 square feet in the Cox Center to a movie and television production company for one dollar, nothing prevents them from doing so.<sup>23</sup>

While elected officials are accountable to electors and both trustees and elected officials swear an oath to refrain from self-dealing and are required to abide by open record and open meeting laws, permitting trustees to hold offices in the beneficiary government and allowing for certain conflicts of interest opens opportunities for permissible self-dealing. Government should exist only for the direct benefit of the people. Yet, here we have a quasi-governmental agency created with the government's approval for the benefit of the government. This legally permissible self-dealing has the potential to sacrifice the interests of the people for political or bureaucratic whims.

### Oklahoma Public Trusts Permit Unchecked Government Growth Contrary to Constitutional Limitations

Government has continually assumed greater power and authority essentially from its founding. This growth occurred even with the people as the direct beneficiary of governmental activity. With a bureaucracy as the designated beneficiary, the result can only be accelerated growth in the size and scope of government. Public trusts created to financially benefit a bureaucracy incentivize governmental entities to acquire more, spend more, and provide more, even when the ends of those functions fall outside of the legitimate scope of government.

As previously explained, the primary purpose of public trusts is financial. Oklahoma public trusts allow governmental entities to circumvent constitutional limitations on indebtedness. A predetermined ceiling on governmental indebtedness serves several important functions. Requiring governments to maintain a balanced budget, incur moderate amounts of debt up to a predetermined ceiling, and obtain voter approval of debts, encourages governments to judiciously allocate scarce resources and provides an opportunity for the public to keep government spending in check. With limits to borrowing and expropriated revenue, governments must prioritize their spending, focusing on the core mission of protecting the natural rights to life, liberty, and property. Because a government lacks the resources to be all things to all people, the effect of financial restraint is a government of limited size and scope.

### Oklahoma Public Trust Circumvent Debt Limits

The Oklahoma Constitution, Article X, sections 23, 25, 26, and 27, impose limitations on state, county, and municipal indebtedness. For example, the Oklahoma Constitution specifically limits the debt incurred by counties, cities, towns, school districts, and other political corporations. Such political subdivisions of the state are prohibited from incurring debt in excess of annual income and revenue absent the approval of

three-fifths of that municipality's voters. The constitution further limits the aggregate amount of indebtedness to "five percent (5%) of the valuation of the taxable property therein" with an opportunity to increase that cap to 10 percent where school districts or municipalities can demonstrate "absolute need."<sup>24</sup>

In contrast, the threshold for public trusts to incur debt is much lower and the burden significantly lighter. To incur debt, a public trust needs only secure a two-thirds or three-fifths vote of the municipality's governing body (depending on the number of members) rather than a similar majority approval of the electorate. There have been a few lawsuits in which plaintiffs have attempted to apply constitutional limitations to governmental debt to public trusts. The case law is complex and somewhat contradictory but appears to exclude public trusts from the constitution's debt limitations and approval requirements.

Justice Halley, writing for the Supreme Court of Oklahoma in *Board of County Commissioners v. Warram*, provided for the separation of governmental beneficiary and trust debts. He explained that it "is clearly provided in our trust laws ... no debt created by the trustees shall ever become an obligation of the beneficiary."<sup>25</sup> Such a holding, combined with the presumption that a trust is legally distinct from the beneficiary government, seems to indicate that the debt of a trust is not a debt of a beneficiary government and is therefore subject to neither the debt ceiling nor the voter approval requirement. However, Justice Halley went on to explain that the constitution prohibits those debts "of a governmental subdivision of the State named in the Constitution, and are chargeable to general governmental funds, for the payment of which resort may be made to taxation."<sup>26</sup> Thus, determining the applicability of the constitution to trust debts seems to require some inquiry into the origin of trust funds and the means for amortizing trust debt. Nevertheless, the court subsequently affirmed that debts payable solely out of trust estate do not violate the constitutional limitation on debts.<sup>27</sup> In essence, courts have colluded with governmental authorities to circumvent constitutional debt limitations designed to protect taxpayers.

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By creating public trusts with authority to further public functions, beneficiary governments are able to indirectly accomplish desired ends by circumventing the constitutional limitations which would have prohibited them from doing so directly. OCPPA's 2020 annual financial report explicitly acknowledges its existence as a means to avoid constitutional debt protections for taxpayers, stating, "Due to restrictions of the

state constitution relating to the issuance of municipal debt, the City created public trusts to finance City services.<sup>28</sup> This policy has dire consequences ranging from growing debt to excessive expansion in the size and scope of government.

OCPA has been entrusted with the power to procure any funds necessary to accomplish its purposes through “the sale of bonds or other evidences of indebtedness by a mortgage, lien, pledge, or other encumbrance of real or personal property.”<sup>29</sup> It exists to fund “building renovations, economic development, fairground redevelopment, general purpose, golf courses, MAPS related contracts and capital, natural gas contract management, and sports facilities improvements” on behalf of the City of Oklahoma City.<sup>30</sup> By funding these activities, the city benefits from multi-year contracts and allows it to maintain desired reserves.<sup>31</sup>

Revenues come from various sources. While fund balances make up the largest revenue source for OCPA's annual budget, more than half of its revenue comes through transfers from the city's general fund, earmarked hotel taxes, and other city or trust funds. Additionally, the OCPA receives deposits directly from its business-type activities, like concessions, rentals, and fees charged at the city's golf courses. For fiscal year 2019-2020, OCPA's budget allocated nearly \$57 million in revenue.<sup>32</sup>

Over 36 percent of OCPA's 2019-2020 budget was allocated to the fairgrounds, primarily for payments on revenue bonds with the proceeds of a hotel tax.<sup>33</sup> Other budgeted expenditures include approximately 29 percent for Metropolitan Area Projects (MAPS) contracts and capital investments, 18 percent for golf courses, 6 percent for cultural and recreational activities, and 5 percent for sports facilities improvements with the remainder going to various other expenditures including economic development and business improvement.<sup>34</sup>

In total, for 2020, OCPA's long-term debt amounted to nearly \$80 million in the form of advances and revenue bonds supported by pledged fees and other charges from the city's golf courses and the fairgrounds.<sup>35</sup> Overall, between governmental activities (such as supporting parks, public events, and economic development projects) and business-type activities (consisting of golf courses, fairgrounds, and central financing services), OCPA's assets totaled \$168,582,407 with liabilities amounting to \$108,133,755.<sup>36</sup> As discussed further below, Oklahoma City has been able to use OCPA as a tool to significantly increase its financial power which has enabled governmental mission creep.

### **Oklahoma Public Trusts Permit Unchecked Governmental Growth**

Oklahoma law empowers public trusts with significant financial flexibility to further and accomplish “any *authorized and proper* public function or purpose.”<sup>37</sup> In attempting to clarify the meaning of “authorized and proper,” an attorney general opinion explained that “trustees of a public trust cannot lawfully undertake to accomplish *projects* which its municipal beneficiary could not be authorized by law to perform.”<sup>38</sup> While Oklahoma public trust law contains certain measures that appear to create checks on governmental impropriety, the combination of permissible self-dealing, extreme financial flexibility, and a broad interpretation of what may be authorized and proper has invalidated vital checks and balances and resulted in significant governmental growth and mission creep.

For example, when a public trust issues a bond, the bond is awarded to the lowest and best bidder in an open, competitive

process. However, a self-defeating statute provides an opportunity for a municipality to waive this competitive, open process if three-quarters for the trustees and three-quarters of the governing body approve the waiver.<sup>39</sup> While this loophole would be concerning in and of itself, such a requirement becomes virtually meaningless when trustees and officials of the governing body are one in the same. Additionally, to incur debt, a trust needs only secure a two-thirds or three-fifths vote of the municipality's governing body.<sup>40</sup> This standard presents a very low bar and an attractive way for governing bodies to secure funding for a project that they might otherwise be prohibited from pursuing.

Given access to additional, previously unavailable resources and a shift in fiduciary duties, trusts can, and have, accomplished functions that are outside government's original, constitutional directives. Otherwise limited to securing individuals' natural rights to life, liberty, and property and executing state police powers to provide for the people's health, safety, and welfare, trusts can be used to expand into areas such as recreation and entertainment. This expansion of governmental authority, power, and mission occurs via numerous trusts across the state. Consider, for example, OCPA's portfolio of properties.

At the time OCPA was created, Oklahoma City's mayor and city council, acting as trustees, were granted the authority to “hold, manage, invest, assign, convey, and distribute ... such property as [Greater Oklahoma City, Inc.], or others, may from time to time assign, transfer, lease, convey, give, bequeath, devise or deliver unto [OCPA].”<sup>41</sup> The purpose of the trust was to “finance and refinance the acquisition of title or other interest in, or operation and maintenance of Fairgrounds and other properties.” Furthermore, the trust was created “to acquire, construct, purchase, install, equip, maintain, repair, enlarge, remodel, and operate buildings, grand-stands, stadiums, baseball diamonds, recreational facilities,” and related parking infrastructure.<sup>42</sup> While the trust indenture initially emphasizes the fairgrounds, the broad language of the trust encompasses numerous other activities.

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## **Operating golf courses and entertainment venues fall well outside the proper scope of governmental activity.**

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Today, OCPA finances and operates “five municipal golf courses, the Oklahoma City Fairgrounds, Cox Convention Center, Chesapeake Energy Arena, Civic Center Music Hall, and other City buildings.”<sup>43</sup> Operating golf courses and entertainment venues fall well outside the proper scope of governmental activity. They are not necessary to protect life, liberty, or property or provide for the health, safety, and welfare of the people as those public functions should be narrowly understood. Were governments to remain limited in their ability to secure debts, such services and properties might be cost-prohibitive, forcing them to focus on those services and infrastructure necessary for individuals to provide for their own economic welfare and pursue their own entertainment and recreation.

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## ... many of the flaws in Oklahoma's public trust law empower discrimination among its residents.

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### Oklahoma Public Trusts Enable Unequal Treatment of Residents

Government and its officers owe the public the duty of impartiality. This duty is expressly placed upon state and local governments through the Fourteenth Amendment to the United States Constitution.<sup>44</sup> The duty of impartiality requires that all people be treated equally under the law. However, many of the flaws in Oklahoma's public trust law empower discrimination among its residents.

Governmental failure to act impartially can occur under varied circumstances. Whether it arises as nepotism, privilege, political legacies, elite entertainment, corporate welfare, or any other form of cronyistic favoritism, trusts facilitate the means to discriminate. For example, this paper has already cited provisions that allow trusts to award bonds to preferred individuals who did not win the bid in an open, competitive process and allows bonds to be sold below par value. Such policies open the door for trustees to give greater preference to individuals, businesses, or projects in line with their tastes or preferences even though it may not be the most beneficial choice for the public. As governments expand their size and scope, public trusts can be used to generate the financial wherewithal to provide unnecessary services and subsidize entertainment and recreation that will benefit only a few. Additionally, it opens the door for cronyistic programs such as corporate welfare.

For example, within a few months preceding the publication of this paper, OCPPA and two of its properties were the subject of significant news coverage. Both the Cox Center and the Chesapeake Energy Arena are properties managed by the OCPPA. The Cox Center (Center) opened as the Myriad Convention center in 1972. By 2020, it had apparently retained little useful value. Public officials opined that the Center "would have been a money sink," that they "didn't want to operate it for smaller events," and that, ultimately, "[i]t wouldn't have broken even."<sup>45</sup> Despite its diminished value, public officials attempted to find some other use for the Center.<sup>46</sup> To an overwhelming majority of OCPPA trustees, the solution was to enter a lease agreement with Prairie Surf Media (PSM). Pursuant to the agreement, PSM would lease 254,500 square feet for an annual rent of one dollar with modest increases in each of the four subsequent years.<sup>47</sup>

Attempting to dig deeper into the justification for OCPPA's valuation of the Center, the rationale for such significant concessions, and to verify the extent to which alternative, more reasonable offers were sought, in January 2021, the 1889 Institute submitted a request to inspect OCPPA's and Oklahoma City's records. While the City Clerk's Office has been in contact with the 1889 Institute and continues to work on fulfilling the request, it appears that there wasn't an open and competitive request for proposals. In this instance, OCPPA used its power to give preferential treatment to the film industry to enliven the City's arts and entertainment scene and make Oklahoma

City a television and film production hub.<sup>48</sup> OCPPA's significant concessions combined with the state's film rebate programs constitute corporate welfare, foments industrial discrimination, and distorts the market.

Similarly, the Chesapeake Energy Arena recently made news when Chesapeake Energy Corp. announced the termination of its naming rights. Like the convention center, the arena falls under the management of the OCPPA. Speaking about the Oklahoma City Thunder, a franchise of the National Basketball Association and the Chesapeake Arena's primary tenant, a city project manager stated, "In order for them to be financially sustainable over the long term, which we all want, we have to give up a lot of the revenue streams that the arena had."<sup>49</sup> In other words, the City of Oklahoma City used the financial flexibility of a public trust to operate a sports venue and subsidize an otherwise unsustainable business and entertainment for resident Thunder fans. Through a public trust, Oklahoma City can manage and operate entertainment, recreation, and sports venues that do not equally benefit all of the city's residents.

### Oklahoma Public Trusts Decrease Transparency and Afford Little Recourse for Breached Duties

Fiduciary relationships can take several forms. In a trust, the trustor relinquishes control over the assets placed into a trust, permitting the trustee broad discretion to administer the trust within the directives established in the trust instrument. Federal and state governments have been granted similarly broad discretion. Additionally, they enjoy a great deal of insulation from liability with policies and practices ranging from governmental privileges (such as executive privilege) and immunities (such as sovereign or qualified immunity) to caps on damages that can be awarded in tort claims.

To protect the trustor and preserve the trust for the beneficiaries, trustees owe beneficiaries several fiduciary duties, among them is the duty to account. Unlike most private trusts, the state and federal governments and public trusts have the potential to dramatically impact the livelihoods and welfare of thousands, hundreds of thousands, or even hundreds of millions of people. Generally, outside of the ballot box, people are left with little to no recourse for governmental breach of fiduciary duty. For that reason, transparency and accountability are extremely important in public trusts.

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### Transparency

Public trusts can have the effect of diminishing the public's access to government and reducing transparency by confusing

and conflating governmental functions and purposes. While public trusts are subject to open meetings and open records, many trusts are far from transparent. An ordinary citizen, unfamiliar with the structure of public trusts and their relationship to beneficiary governmental entities may find it difficult to gather the information they seek.

For example, OCPPA, by law, is presumed to be a separate legal entity from its beneficiary, the City of Oklahoma City. However, the only way to find out anything about OCPPA is to dig through the City's website. Information on OCPPA can be found in a couple of locations on the City's website under the "Government" section of the homepage. On the "Boards, Trusts, and Commissions" page, there is a general description of the OCPPA. One learns that the OCPPA is "a means of financing the acquisition of ... interest in or operation and maintenance of Fairgrounds and other properties for use for professional or amateur sport events, the public or individuals."<sup>50</sup> It also informs the reader that OCPPA meetings are held during Council meetings. If a citizen wants any more detail, they will need to know to look for the requisite annual financial report. This rather lengthy report, 105 pages in 2020, contains a great deal of information, some of which is readily accessible to a layman, while much of it requires a decent understanding of accounting as well as the will to sort through it.<sup>51</sup> The integration of trusts directly into the functions of the beneficiary government—such as having to attend a city council meeting to attend a trust meeting and digging through the beneficiary's website to find information on a trust—can lead to some confusion from the conflation of entities presumed to be legally distinct.

The lack of transparency contributes to misunderstanding the role of trusts and their relationship to the beneficiary. It can lead to confusion about which entity is performing which governmental function. It can distort the cost of various services and projects by dividing them among distinct but interconnected legal entities instead of a single entity under a consolidated budget. It eliminates the knowledge of and the power to check public debt. In effect, trusts increase bureaucracy and do so with little accountability.

### **Accountability and Liability**

Public trusts in Oklahoma are not sufficiently accountable. Oklahoma public trust law insulates trusts with broad presumptions of propriety. They are presumed to benefit the public.<sup>52</sup> They are presumed to be acting in line with trust directives and in furtherance of a legitimate public function.<sup>53</sup> If a trustee were to take some action against the directives of the trust, or fails to take an action he should have, the trustee's activities do not "affect the existence or validity of the entity as a public trust."<sup>54</sup> Where the governing body and the board of trustees are one in the same, there is no check on incurring additional debts or waiving open, competitive processes. Additionally, trustees are generally prohibited from engaging in activities that fall outside the scope of the trust without the approval of the beneficiary governmental entity.<sup>55</sup> Again, when trustees and governors are identical, this limitation serves virtually no purpose.

For private trusts, beneficiaries are generally able to challenge trustees for violating their fiduciary duties. However, who is going to step in to challenge the activities of a public trust?

Who has the knowledge, will, and standing to challenge the broad presumptions granted to public trusts? The beneficiary government? In the case of public trusts, especially one for which the governing body and the trustees are the same people, it seems unlikely that anything would be challenged. To challenge a trust would be against its own interest. If not the governmental beneficiary, then who?

Residents and taxpayers have challenged trusts' validity in the past<sup>56</sup> when granted public interest standing. Under the concept of public interest standing, the courts "possess discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance" where there are "competing policy considerations" and "lively conflict between antagonistic demands."<sup>57</sup> However, public interest standing is overly broad and a judge has the sole discretion to decide if the public interest is sufficient to grant a member of the public standing to challenge the administration of a trust. This judicial discretion leaves a great deal of uncertainty about the public's power to challenge trustees. With limited accountability and little recourse available to the public, public trusts are almost wholly beholden to the will of politicians and bureaucrats rather than the people.

## **Policy Recommendations**

### **Eliminate Public Trusts**

Public trusts present numerous problems that breach the trust placed in the government at the time the federal and state constitutions were ratified. They create a mechanism for unconstitutional governmental growth and overreach. They distance the people from their government. They create greater opportunities for governmental officers to engage in self-dealing and cronyistic behaviors. Public trustees must be loyal to the bureaucracy and always act for the benefit of the government. They owe no duty to the people yet the people are presumed to benefit from a trust that owes them nothing.

Governments, as trusts, and government officials, as trustees, should be required to act within the limited powers delegated to them and in accord with the directives outlined in the constitution and statutes consistent with the constitution. Governments should always maintain loyalty to the people and act in ways that directly benefit them for whose sole benefit they exist. Governments should be granted the means to accomplish those things that are necessary to its core mission without resorting to alternative, unconstitutional means for funding public functions. Public trusts in furtherance of a public function and purpose are unnecessary and improper and should be repealed.

### **Reform Public Trusts**

While repealing trusts would be the best solution for right-sizing government and preventing end-runs around constitutional limitations, some have argued for the existence of fiduciary public trusts as a means for managing public goods where privatization is politically unfeasible and government control has proven ineffective.<sup>58</sup> This argument is applied mainly in the context of managing forests and natural resources. Therefore, absent an outright repeal, the following are six recommendations for reforming public trust law to ensure that any new public trust acts more like a fiduciary trust than a governmental agency.

### **1. Prohibit Dual-Office Holding and Require that Trustees Possess Relevant Knowledge or Expertise**

Allowing dual-office holding, especially allowing an individual to serve as a trustee for a trust that benefits the governmental entity for which the trustee also serves as an officer, creates a structure that is ripe for corruption, self-dealing, and conflicting interests. The law clothes trustees with official authority and requires them to take an oath of office. As agencies of the state and governmental authorities, trustees should not be permitted to hold dual offices. By requiring trustees to be distinct individuals, the governing body of the beneficiary will function as a better check on and balance to the actions of a public trust, limit the opportunity for self-dealing, and thereby safeguard the public.

Additionally, when selecting and appointing trustees for a public trust, the law should require candidates to possess some knowledge or expertise that demonstrates a trustee is qualified to administer the trust. The property managed or the services rendered by trustees will vary from trust to trust. However, trustees should be required to show the competence necessary to properly administer the trusts within the prescribed directives. For example, suppose a trust is established for managing public properties. In that case, the trustees should have some experience in property management, real estate, or some other related field or otherwise have relevant knowledge or experience.

### **2. Ensure Trusts are Legally Distinct Entities in Fact**

In addition to prohibiting dual office holding, the law should require trusts to be legally distinct entities. A mere presumption that they are separate when they are frequently conflated with the beneficiary government is insufficient. While a governmental entity could still create a trust to manage a public good, the trust should be independently operated and accountable for its own actions. Creating trusts as genuinely independent entities reduces conflation of governmental functions and helps reduce collusion to circumvent constitutional debt limits.

As distinct legal entities, public trusts could operate more like true fiduciary trusts. As in the case of market trusts to manage natural resources,<sup>59</sup> trustees would have the mission and incentive to manage entrusted assets in a way that maximizes revenue and benefits the public as a whole. For example, land for a public park could be transferred to a trust for the purposes of conservation and recreation. Upon transfer, the trustees would not only have to act according to all the fiduciary duties, but would have to ensure that revenue earned from the property is sufficient to cover its costs. Any profits would be retained by the trust and available to further its mission. In this way, trusts have a mandate to benefit the people and an incentive to do so efficiently.

### **3. Make the Public the Direct Beneficiaries of a Public Trust**

Misaligned fiduciary duties result in perverse incentives for bureaucratic growth and loyalty to the government rather than the people. A mere presumption that a trust exists for the benefit of the public is insufficient. Whether created by a trust instrument or a will, by a private or public entity, a public trust should always have the public as its actual and direct beneficiary. The law may permit other beneficiaries in addition to the public, but never to the exclusion of the general public. By ensuring that the general public is the direct beneficiary of a public trust, the fiduciary duties owed by trustees are reallocated back to the people who

are the rightful beneficiary of a public trust. Additionally, as beneficiaries, the people would retain the ability to challenge breaches of the fiduciary duties.

### **4. Eliminate all Presumptions of Propriety**

Underlying fiduciary law is an assumption of impropriety—that a trustee will act in his own self-interest against the directives of the trustor. For this reason, trustees bear the burden of fiduciary duties. However, the law of public trusts presumes the exact opposite. It presupposes that a public trust is acting within the scope of power and authority entrusted to them. The law presumes that they are acting for the benefit of the public when they may not be. All of these presumptions need to be eliminated as fundamentally contradictory to fiduciary law. Public trusts must be required to affirmatively demonstrate that they are acting within the directives of the trust for the benefit of the people.

### **5. Require Greater Transparency**

Transparency is critical to holding governments accountable for their activities. Public trusts should be required to be more transparent. As a legally distinct entity, a public trust should be required to maintain a website, separate and apart from any other government's website. This website should, at a minimum, include the trust instrument, a list of trustees, a description of the trust structure and its beneficiary, accurate contact information for trustees and staff, conflict of interest disclosures, a calendar for upcoming meetings, a description of the properties held in trust, and the trusts checkbook.<sup>60</sup> The preceding list is not exhaustive. Trusts should be free to add any additional information that would inform citizens of the trust activities. Maintaining separate websites with significant transparency would reduce confusion among the public and allow for meaningful accountability.

### **6. Ensure the Public Continues to Have Standing to Challenge Trustees for Breach of Fiduciary Duty**

With increased transparency, the general public will be equipped with the knowledge necessary to discover when a trustee has breached his fiduciary duties. State courts have recognized a form of public interest standing to challenge governmental programs. The legislature should ensure that the members of the public who benefit from a given public trust retain standing to challenge trustees' administration of the trust.

While broad public interest standing may be a disfavored policy, the legislature could statutorily define the standing available to beneficiaries of a public trust and specify the remedies available to a plaintiff. For example, the legislature could limit public trust beneficiary standing to a class of residents falling within the geographical boundaries of the governmental entity creating and benefitting from the public trust. Furthermore, the legislature could specify a minimum number of plaintiffs to sufficiently represent the people's interests. This number should remain small. One such scheme could require that there be a plaintiff residing in each congressional district for challenges to state trust, or one a plaintiff living in each municipality or ward in challenges to county and municipal trusts, respectively. Finally, the legislature could limit the scope of those challenges and the remedies available. For example, the legislature could specify that litigants may only seek equitable remedies as opposed to



pecuniary damages, or allow money damages only for fraudulent acts. While it may not be good policy to allow broad standing in all areas of the law, narrowly defining standing to challenge public trusts would help hold public trusts accountable.

## Conclusion

Public trusts have created opportunities for state, county, and municipal governments to disobey constitutionally established directives and shirk their duties of loyalty and care with decreased transparency and accountability. The people have established governments, entrusting them with political power to govern for their benefit. However, the opportunity for self-dealing, impartiality, and disobedience that can arise from creating a public trust undermines people's trust in government.

For these reasons, Oklahoma should repeal laws that enable trusts in furtherance of a public purpose. State, local, and county governments should be required to work within the constraints placed upon them by the people in the United States and Oklahoma constitutions. Governments should be required to live within their means, provide only those services that have been delegated to them, and perform those functions that only the government can effectively do. Repealing public trust law would reduce the size and scope of government by preventing the formation of new trusts. Governments would again be limited in their debts and, with increased scarcity, be required to allocate their resources more judiciously.

However, absent outright repeal, public trusts should be

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reformed to ensure that they act more like trusts. To better ensure that trustees of public trusts perform according to properly allocated fiduciary duties, the legislature should enact six reforms. These reforms are: 1) prohibiting trustees from holding dual-offices, 2) ensuring that trusts are entirely distinct from governmental entities, 3) making the public the direct beneficiaries of the public trust, 4) eliminating all presumptions of propriety, 5) requiring greater transparency, and 6) ensuring the public continues to have standing to challenge the administration of the trust and breach of fiduciary duties. These reforms will make significant progress toward properly realigning public trustees' fiduciary duties with the people and increasing accountability.

## End Notes

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