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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| HON. LAWRENCE G. WASDEN, the Attorney General of Idaho, *ex. rel.* the STATE OF IDAHO<br><br>Petitioner,<br><br>vs.<br><br>IDAHO BOARD OF LAND COMMISSIONERS, and GEORGE BACON, in his official capacity as Director of the Idaho Department of Lands | **Supreme Court No.** 37528<br><br>**BRIEF IN SUPPORT OF PETITION FOR ISSUANCE OF A WRIT OF PROHIBITION** |

## I.

## INTRODUCTION

The Idaho Board of Land Commissioners ("Board") ignored its constitutional and statutory duty to provide for Idaho's public schoolchildren, college students, and patients of the

state hospital when, on March 16, 2010, the Board, in a 3/2 vote, implemented cottage site lease-terms that were acknowledged by a majority of its members to be below market rent. *Petition*, Exh. 42, p. 27, Ls. 808-09 (remarks of Ben Ysursa); Exh. 42, p. 35, Ls. 992-95 (remarks of Thomas Luna); Exh. 42, pp. 31-32, Ls. 887-894 (remarks of Lawrence Wasden); Exh. 42, p. 31, Ls. 876-881 (remarks of Donna Jones).

The cottage sites at issue in this case are located at Priest and Payette Lakes. The 355 cottage sites at Priest Lake are located on Public School Endowment Lands. Of the 167 cottage sites at Payette Lake, two are located on Public School Endowment Lands, 56 on Normal School Endowment Lands and 109 on State Hospital Endowment Lands.

The lease terms approved by the Board – 4% annual rental rate, with a 5 year phase-in, use of a 10 year average lot value to calculate rent and a premium rent of the greater of 10% of the gross income or 50% of the net income received by lessees when conveying leaseholds to assignees – fail the constitutional imperative to "secure the maximum long term financial return to the trust beneficiary," as well as the Board's statutory duty to "insure that each leased lot generates market rent throughout the duration of the lease." Idaho Constitution, art. IX, § 8; Idaho Code § 58-310A(3).

Because the Board acted beyond the scope of its authority by adopting cottage site lease terms that are contrary to the requirements of Idaho's Constitution, and Idaho law, and to its duty of undivided loyalty to the trust's beneficiaries, the Attorney General[1] asks this Court to grant the

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[1] The Attorney General brings this lawsuit not as a member of the Land Board, but as a representative of the sovereign, rooted in the common law power of *parens patriae*, and pursuant to his statutory duty to regulate charitable trusts under Idaho Code § 67-1401. *See also Dolan v. Johnson*, 95 Idaho 385, 509 P.2d 1306 (1973) (The Attorney General has supervisory power over charitable trusts to insure that such trusts are executed according to the settlor's intent.)

writ of prohibition and enjoin the Board and the director of the Idaho Department of Lands from executing cottage site leases until the Board adopts cottage site lease terms that fulfill its fiduciary duty under Article IX, § 8 of the Idaho Constitution.

## II.

## RELEVANT LAW

Idaho Code § 7-401 provides:

> The writ of prohibition is the counter part of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

Idaho Appellate Rule 13(g) provides that the Supreme Court:

> may also, in its discretion, enter an order staying a proposed act, a pending action or proceeding, or the enforcement of any judgment, order or decree, including but not limited to an injunction, writ of mandamus or prohibition, at any time during the pendency of an original application or petition for any extraordinary writ, or during the pendency of any appeal or a motion for certification of appeal. . .

Before this Court will issue a writ of prohibition, two contingencies must be shown: (1) the tribunal, corporation, board or person is proceeding without or in excess of the jurisdiction of such tribunal, corporation, board, or person, and (2) that there is not a plain, speedy, and adequate remedy in the ordinary course of law. *Henry v. Ysursa*, 2008 WL 4330547 (2008). As set forth below, both of these contingencies are present in this case.

## III.

## THE BOARD ACTED IN EXCESS OF ITS JURISDICTION IN FIXING UNCONSTITUTIONAL LEASE TERMS

The Board must comply with the Idaho Constitution, which requires the Board to act "in such manner as will secure the maximum long term financial return to the institution to which

granted..." Idaho Const. art. IX, § 8. In fixing lease terms that fail to secure the maximum long term financial return, the Board acted contrary to its constitutional mandate.

The Board must also comply with Idaho Code § 58-310A(3), which requires the Board to "insure that each leased lot generates market rent throughout the duration of the lease."[2] In fixing lease terms that include premium rent, the Board openly violated its statutory duty to obtain market rent throughout the duration of the lease.

### A. The Board Knew that it Was Acting Contrary to the Constitution and Idaho Law and its Duty to the Trusts' Beneficiaries

The Board was warned that the lease terms it passed - 4% annual rental rate, based on average property values of the previous decade, phased in over 5 years, with a premium rent of the greater of 10% of the gross income or 50% of the net income received by lessees when conveying leaseholds to assignees - would fail to meet the Board's constitutional obligation to maximize long term returns and its statutory duty to secure market rent. The Board had reviewed the report of two independent economists, who questioned the Board's policies of phasing in rental rate increases over time, and imposing annual caps on rent increases. *Report to Idaho Attorney General Regarding Cottage Site Leases (2010), Petition*, Exh. 30, p. 4. Economist Terry Anderson told the Board at its February 16, 2010 meeting that:

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[2] The Attorney General presumes the constitutionality of Idaho Code § 58-310A for the purpose of this Petition, notwithstanding Attorney General Opinion 09-01 (2009), which concludes that Idaho Code § 58-310A is an unconstitutional infringement on the Board's constitutional duty to employ public auctions for leases of endowment lands. If Idaho Code § 58-310A were to be declared unconstitutional, the arguments contained in this brief would not be substantially affected because as long as the cottage sites are being rented, the Board's independent constitutional duty to maximize long-term financial returns for endowment beneficiaries encompasses, at the very least, the duty to secure fair market value for the rentals of endowment lands.

> Unfortunately, the phase-in over ten years – using a ten-year average – fails to capture the current value of the asset and therefore is not prudent. Furthermore, to try and phase in a target rent over a five-year period means, again, you're missing a period of time when you're not capturing the rents.
>
> And to suggest that the Board should be charging a ten percent premium rent or a fifty percent premium rent is to say guilty of not being a prudent investor.

*February 16, 2010 Board Meeting Transcript*, *Petition*, Exh. 36, p. 80, Ls. 2296-2301.

George Bacon, the Director of the Idaho Department of Lands, also advised the Board that the cottage site subcommittee recommendation would not achieve market rent: "I do not believe the Subcommittee's recommendation insures that each leased lot generates market rent throughout the duration of the lease, but neither does the current system." *February 12, 2010 Letter to Attorney General Lawrence Wasden*, *Petition*, Exh. 29.

The Board was aware that, since premium rent arises only when substantial leasehold values accrue to the lessees, in setting any premium rent whatsoever, the Board was continuing a violation of its constitutional and statutory duty to secure rents at market rate. *Cf.* I.C. § 58-310A; IDAPA 20.03.13.10.06 (Leasehold value "accrues to a leasehold estate when the contract rent is below market rent.") Director Bacon advised the Board that "[b]ased on the numerous studies previously commissioned and conducted by the real estate experts, it appears as long as there is leasehold value, the rent charged is not at market. Even in today's 'down' market, transactions are occurring with leasehold value on some properties..." *February 12, 2010 Letter to Attorney General Wasden*, *Petition*, Exh. 29. At the March 16, 2010 meeting, before voting to approve a rental rate below market value, Board member Ysursa even admitted: "Do we acknowledge that we're not at market rent by using the term premium rent? Yes. We've done that since 1981." *March 16, 2010 Board Meeting Transcript*, *Petition*, Exh. 42, p. 29, Ls. 808-809.

The Board had information that detailed, in economic terms, why the cottage site owners have been historically successful in obtaining below market rents. The economists explained:

> Given that it is not easy to separate the contributions of the [land value and the improvements on the land] to the total value, opportunistic behavior is likely. The lessee may act opportunistically by putting political pressure on the Idaho Land Board to enact policies that favor lessees at the expense of the endowment beneficiaries. This is known as "rent seeking" because it uses politics to give the private owners a larger share of the land rents (Krueger 1974). Rent seeking is particularly prevalent when a small well organized group receives the benefit from a policy while the costs are diffused over a larger group. With the benefits concentrated, the small group can afford to exert political pressure for a policy which benefits it; with the costs diffused, however, it is not worth it for anyone in the large group to organize political opposition. In the case of cottage site leasing, the lessees are the former while the trust recipients are the latter.

*Report to Idaho Attorney General Regarding Cottage Site Leases (2010), Petition*, Exh. 30, at pp. 12-13. The report went on to explain that "[s]everal Land Board policies reflect this rent-seeking dynamic," including: (1) below market rents, (2) extended periods of flat or declining rents despite significant land appreciation, and (3) giving 90% premium rent upon transfer of the lease to the lessee, with only 10% going to the trust's beneficiaries. *Id.*, p. 13.

Because the Board was on notice that this type of "post-contractual opportunism" was taking place with respect to the cottage site leases, the Board should have redoubled its efforts to comply with its fiduciary duty as set forth in Idaho's Constitution. Indeed, economist Terry Anderson recommended that the Board not adopt the rolling average of appraised value, but that it establish a contract rental rate of 6% (with 4% being "at the very bottom end of anything that you should consider to be a prudent rate of return") and eliminate leasehold value entirely. *February 16, 2010 Board Meeting Transcript*, *Petition*, Exh. 36, p.91, Ls.2605-2604; p.92, L. 2635. Instead, the Board succumbed to the very political pressure it had been warned about – adopting lease terms that act as a windfall to cottage site lessees, to the detriment of Idaho's

public schoolchildren, college students and patients of the state hospital. The Board's actions on March 16, 2010 were consistent with its history of acting to benefit cottage site lessees, at the expense of those whom the Board is constitutionally obligated to protect.

The fact that the Board has accommodated the lessees' interests is apparent not only in the Board's actions, but it is also revealed in the way subcommittee member Secretary of State Ben Ysursa has characterized the relationship between the Board and the lessees: as a "partnership with the state and the lessees," with the Board as the senior partner (*April 22, 2008 Board Meeting Transcript*, *Petition*, Exh. 33, p. 46); and later, with the Board acting as a "gift horse" whom the lessees look in the proverbial mouth. *June 16, 2009 Board Meeting Transcript*, *Petition*, Exh. 35, p. 17. Secretary of State Ysursa summarized the relationship most succinctly as follows: "I think we have bent over pretty good for the lessees." *May 18, 2009 Board Meeting Transcript*, *Petition*, Exh. 34, p. 85.

Implicitly acknowledging the reality of post-contractual opportunism, and the effects of a Board that has been historically unwilling to stand up to the lessees' political pressure, subcommittee member Tom Luna expressed hopelessness at the situation ever improving. He stated: "... I don't think you're ever going to be able to create a situation where it's a truly market-driven system because you have this weird relationship between government and private." *May 18, 2009 Board Meeting Transcript*, *Petition*, Exh. 34, p. 40. The "weird relationship" between the government and the private is nothing more than post-contractual opportunism, and the Board has an obligation to the beneficiaries of the trusts to recognize and resist this political pressure. The Board's failure to do so is an abdication of its constitutional and statutory duties.

## B. The Board's Actions Were Consistent with Its History of Benefiting the Cottage Site Lessees to the Detriment of Idaho's Public Schoolchildren, College Students and Patients of the State Hospital

In 1986, at a time when the state was receiving a rate of return on its cottage site leases of approximately 0.67%, the Board adopted a rent of 2.5% to be implemented in 1989. Even before this modest rental increase could be implemented, however, the Board further eroded the returns to the trust beneficiaries by adopting a phase-in schedule that limited annual rent increases to no more than 25%. *Petition, paragraph 11, Exhs. 3 and 4.*

In 1992, the Board again acted to reduce perceived impacts on lessees by further limiting annual rent increases to 5.3%, despite the fact that this phase in rate would not achieve the target of 2.5% of land value "because land values – and target rentals – [were] rising faster than 5.3% annually." *Petition, paragraph 15, Exh. 7.* To keep the cottage site rental rates down, and to assuage the cottage site lessees, the Board chose to ignore the data that showed its rental cap was a dereliction of its constitutional duty.

By 1997, as predicted, the capped annual rent increases were unable to keep up with increases in property value. Because of the disparity between the rapid rise in market value and the cap on rent increases (still at 5.3%), the actual rate of return was a mere 1%. *Petition, paragraph 16, Exh. 20.* Nevertheless, in 1997, the Board rejected Department of Land staff recommendations to raise the rent to 5% and affirmed the nominal rate of 2.5% with the understanding that it could be "reopened based on incoming information." *Id., Exh. 8 at 12.*

When the new information came in, however, in the form of two appraisal reports commissioned by the Board itself, this information was also disregarded in favor of the cottage site lessees' interests. The first report commissioned by the Board recommended a 3.5% rental rate with a close monitoring of leasehold values; the second report recommended a rate of return between 4%-6%, depending on various factors. *Id.* The Board's subcommittee report

acknowledged that the recommended rental rate of 3.5% for Priest Lake cottage sites with an annual escalator of eight percent was "strongly supported by the past 21 year trend study." *Petition, paragraph 17.* Still, the Board voted to maintain the rental rate of 2.5%. *Id.*

The 2.5% annual contract rental rate, set in place in 1986, remains in effect today despite overwhelming evidence that such a low rental rate violates the Board's obligation to its trust beneficiaries. *Petition, paragraph 18.* As low as this rental rate is, the actual rate of return has often been even lower, due to freezes on cottage site valuations in the face of rising land values. *Id.*

In 2008, with the assessed value of various lots increasing, the Board rescinded all rent increases for 2009 and froze rents at 2008 levels for both Payette Lake and Priest Lake. *Petition, paragraph 23.* As in the past, the Board succumbed to political pressure from the lessees and took action that benefited the cottage site lessees to the detriment of the trust beneficiaries. The Idaho Department of Lands' staff estimated that the rent freezes would result in a 2009 revenue loss of $1,776,560 for the Payette Lake cottage sites and $583,691 for the Priest Lake cottage sites. *Id.*

In 2009, the Board froze rents at the following effective rates: 2.03% for Priest Lake, 1.7% for Payette Lake waterfront lots, and 1.33% for Payette second tier lots. *Petition, paragraph 24.* The total revenue for the trusts' beneficiaries was $2,027,222 less than would have been received at the contract rate of 2.5% of the current assessed value. *Id.*

The Board has not only permitted the cottage site lessees to exploit effective rental rates far below market value, the Board has allowed the cottage site lessees to pocket the lion's share (90%) of the proceeds from leasehold sales – proceeds that should be benefitting Idaho's schoolchildren, college students, and patients of the state hospital. *Petition, paragraph 19.* In 2006, for example, the nine lessees who conveyed leaseholds received $6,448,709 after paying

premium rent. That same year, endowment beneficiaries received only $4,022,676 from annual and premium rents on all 522 cottage site leases combined. *Petition, paragraph 20.* Since 2003, cottage site lessees have realized in excess of $25 million from the assignment of their state endowment leases while the endowments have received only $2.7 million in premium rent from leasehold assignments. *Petition, paragraph 19.*

In sum, the Board's pattern of consistent deference to lessees has created a situation where rents are so far below market value that any effort to comply with the constitutional requirement to obtain the maximum long term financial return and the statutory mandate to obtain market value will require significant rental increases. The Board's fiduciary duties to the public school children, college students and patients of the state hospital demand nothing less. Yet the Board refuses to pay more than lip service to its fiduciary obligations to the designated beneficiaries, and in fact cites its past failure to obtain market rent as a justification for its present failure to comply with its constitutional and statutory duties.

Ben Ysursa, chairman of the cottage site subcommittee, assisted in preparing the most recent cottage site rental recommendation. He described past rent freezes that had resulted in rents far below market value and explained:

> If we were in a vacuum and didn't have the – another one of my great quotes I suppose, but the millstone of history around our neck that we helped create, we'd be saying go to market rent right now. I know there's – we agree to disagree on what market rent is obviously, but you know where we are. I agree. If we were at market rent, we wouldn't need premium rent.

*Petition*, Exh. 41, pp. 55-56, Ls. 1529-1533. The Board's complicity in allowing rents to remain far below market for so many years cannot justify the current dereliction of its constitutional and statutory duties, which set a minimum and inviolable floor of obtaining market rent for cottage site leases throughout the duration of the lease. Indeed, the record demonstrates that each time

market data was presented to the Board showing that the contract rate was significantly below the market rate, the Board justified its failure to implement a market rate of return by pointing out the increased cost to current lessees, a consideration outside the Board's jurisdictional authority and constitutional duty. Under the Board's rationale there will never be a time when it can implement a market rate of return because its continuing failure to meet its fiduciary duty necessarily means that the disparity between the contract rental rate and the market rental rate will continue to grow and will require the imposition of an even greater rental rate increase on the lessees.

Given the Board's support for legislatively removing recreational cottage sites from the statutory public auction requirement in exchange for the lessees' commitment to pay market rent, the Board's failure to achieve market rent is even more inexplicable. To date, the promise of Idaho Code § 58-310A remains unfulfilled.

### C. A Writ of Prohibition Should Lie Where the Board Acted Beyond Its Constitutional Authority, in Violation of Its Constitutional Mandate, and Directly Contrary to Idaho Code § 58-310A

The Board has consistently refused to uphold its constitutional duty to the trusts' beneficiaries, as evidenced by the pattern of below-market rents, frozen rents, positive leasehold generation and willful disregard of information that runs contrary to the interests of the cottage site lessees. The Board's failure to address the cottage site lessees' post-contractual opportunism in any meaningful way, i.e. to do anything other than accommodate the cottage site lessees' demands, is an abdication of the Board's duty to maximize long term financial returns as required by Idaho's Constitution, as well as a violation of Idaho Code § 58-310A.

This Court has not hesitated to issue a writ of prohibition when it was clear that the targeted party was acting contrary to the law. As early as 1910, this Court issued a writ of

prohibition against the State Land Board when the Board was acting outside the law in attempting to "give away" school trust lands; this Court held that the "State Land Board has no power to relinquish or surrender the right or title of the state of Idaho to any of its school lands." *Balderston v. Brady*, 17 Idaho 567, 573, 107 P. 493, 499 (1910). In that same case, this Court also addressed the contention that a writ of prohibition will not lie against the Governor or against a board of which the Governor is a member. This Court squarely rejected that contention, writing:

> It is doubtful if any one would seriously contend that the process of the courts will not run against an individual or individuals, holding an executive office or offices, or comprising an executive board, simply because they occupied such official position and were assuming to act as officials, although their action was beyond the scope of their authority, and wholly unauthorized by law. We do not hold such a position tenable, and have never so held.

*Id.*, at 569, 107 P. at 495. This Court distinguished the authorities that held that a writ of prohibition would not lie against the Governor to restrain him from performing an executive act, explaining:

> The State Board of Land Commissioners is a constitutional body. It is composed of four members, each of whom has a vote on all matters coming before the board. This board is as distinct and separate from all other offices as is the office of Governor or judge of this court. It is created by the same instrument which created the office of Governor and the judicial department of the state. The individuals who compose the board and discharge its duties happen to be state officers, and it so happens that the Governor of the state by reason of being Governor is chairman of the board. When acting and voting at a meeting of the State Board of Land Commissioners, and discharging the particular and special duties devolving upon the board, he is not acting as the chief executive, but on the contrary is acting as one of four members of a board in the discharge of certain ministerial and quasi judicial duties imposed on such board by the Constitution and statutes. The writ, if issued, would run against the board, and not against the Governor.

*Id.*, at 569-570, 107 P. at 495-496.

In 1933, this Court issued a writ of prohibition to prevent the state treasurer from investing monies from "a sacred trust fund created for the express purpose of maintaining the public educational institutions of the state" in a manner contrary to law. *Parsons v. Diefendorf, State Commissioner of Public Investments*, 53 Idaho 219, 221, 23 P.2d 236, 238 (1933). Similarly, in *Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977), this Court made permanent a writ of prohibition preventing the Investment Board Expense Fund from defraying its administrative expenses with earnings from the investment of public school funds.

In 1999, this Court granted a writ of prohibition against the State Land Board of Commissioners, barring the implementation of a procedurally flawed constitutional amendment. *Idaho Watersheds Project v. State Board of Land Commissioners*, 133 Idaho 55, 982 P.2d 358 (1999). In so doing, this Court acknowledged its own "jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature." *Id.* at 57, 982 P.2d at 360. This Court reiterated that standard a year later in *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000), when it granted a writ of prohibition prohibiting the Secretary of State from carrying out statutory requirements pertaining to the placement of ballot legends on the ballot.

Other courts have employed writs of prohibition in similar circumstances to prohibit trustees of public endowment lands from leasing such lands at below-market rates. In *Oklahoma Education Ass'n v. Nigh*, 624 P.2d 230 (Okla. 1982), the Oklahoma Supreme Court assumed original jurisdiction to determine whether the commissioners of the Oklahoma Land Office should be prohibited from applying certain statutes capping rents of school endowment lands. One statute capped rents of farming and ranching lands at 3% of fair market value, and another statute limited rents to between 2% and 4% of fair market value. *Id.* at 235. An accompanying statute provided for renewal of leases "without requiring the current lessee to exceed or match

other bids." *Id.* The court agreed with the petitioners' assertion that the below-market rents, combined with the elimination of conflict auctions, "inure only to the benefit of farmers and ranchers [and] serve only one purpose, that of subsidizing farming and ranching operations," id. at 236, and issued writs of mandamus and prohibition. *Id.* at 232.

## IV.

## NO PLAIN, SPEEDY, AND ADEQUATE REMEDY EXISTS IN THE ORDINARY COURSE OF LAW

No plain, speedy and adequate remedy at law exists to cure the Board's action in setting lease terms that violate the Board's constitutional mandate and Idaho Code § 58-310A. Under the terms of Idaho Code § 58-307(8), lessees must apply to renew their leases by April 30, 2010. Any time thereafter the Board may enter into new leases that would go into effect when the current leases expire on December 31, 2010. Given the impending execution and implementation of new leases, there is simply not enough time to seek a remedy in district court.

It is imperative that a final decision be obtained and implemented by the Board prior to the new lease term to prevent further harm to endowment beneficiaries. Even if the Attorney General were able to obtain a favorable decision in district court before the end of the year, the outcome would be an injunction staying the implementation of the new leases while an appeal is sought by the lessees. Such an injunction would do little to make the beneficiaries whole, however, since it would likely leave in place not only the present lease terms, but the effects of recent Board actions that froze effective rental rates. Such freezes have reduced cottage site lease income by over $2 million per year. *Petition, Paragraphs 23-24.* Thus, any injunction pending a final appeal before this Court would result in the beneficiaries losing millions of dollars of income.

Prolonged proceedings before the district court would also harm lessees, for they would be forced to decide whether to sign new ten-year leases while litigation is pending that may require substantial alteration of the lease terms. Informed decisions are virtually impossible under such uncertain circumstances. Expedited proceedings before this Court would remove such uncertainty and allow lessees who are currently paying rental rates well below market value to make an informed decision as to whether they will, depending on the outcome of this petition, enter into new leases that meet constitutional and statutory mandates to obtain market rent.

If a district court could provide a plain, speedy and adequate remedy, the Attorney General would certainly seek a remedy in that forum; however, with respect to the Board's unconstitutional actions on the cottage site lease terms, the Attorney General has no alternative but to seek this extraordinary writ. Time is of the essence for all parties involved. A prompt resolution of this matter will provide an opportunity for the Board to take such action as this Court determines is necessary for the Board to fulfill its fiduciary duty to the endowment beneficiaries.

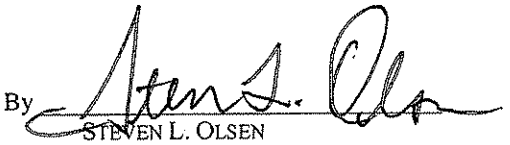
## V.

## CONCLUSION

The Board's actions on March 16, 2010 directly violated its constitutional and statutory obligations to the beneficiaries of the three trusts. Because the Board acted contrary to the Idaho Constitution and Idaho Code § 58-310A in setting lease terms that cannot secure the maximum long term financial return to the trusts' beneficiaries, the Board was without authority or jurisdiction to approve the lease terms, and the Attorney General prays this Court to grant the writ of prohibition and enjoin the implementation of the illegal lease terms.

DATED this 24th day of March 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
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