



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 85-3

TO: Mr. Stanley F. Hamilton
Director
Department of Lands

STATEHOUSE MAIL

PER REQUEST FOR ATTORNEY GENERAL'S OPINION

Regarding: Idaho Code § 58-140

QUESTION PRESENTED:

Idaho Code § 58-140 provides that up to 10% of the income from state timber sales, grazing leases, and recreation site leases upon state lands shall be paid to a special fund to be used for maintenance, management, and protection of such state owned lands. Most of such lands are endowment lands. Should proceeds from endowment lands be accounted for and invested separately from other state funds so that any interest income earned thereon benefits the endowment lands or endowment funds rather than the general fund?

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 2

CONCLUSION:

Until July 1, 1985, the special fund provided by Idaho Code § 58-140 is consolidated in the state operating fund, pursuant to Idaho Code § 57-804. Interest upon idle funds in the state operating fund is paid to the general fund. Idaho Code § 57-804 was repealed by Ch. 195, 1985 S.L., effective July 1, 1985. Thereafter, the state auditor is authorized to classify accounts within the funds established by Idaho Code § 57-803.

To avoid violation of constitutional and land grant provisions, the special fund should be consolidated in the agency asset fund so that interest will be accounted for separately for the benefit of the account.

Accordingly, we recommend that effective July 1, 1985, the state auditor transfer the special fund from the state operating fund to the agency asset fund.

ANALYSIS:

Management and control of state lands is vested in the state board of land commissioners pursuant to Idaho Const. art. 9, §§ 7 and 8. Article 9, § 7 provides:

The governor, superintendent of public instruction, secretary of state, attorney general and state auditor shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law.

Idaho Const. art. 9, § 8, provides, in pertinent part:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; ... The

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 3

legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; ...

Thus, the constitution imposes a duty upon the board of land commissioners to provide for the location, protection, sale and rental of land grants in such a manner as to secure maximum long-term financial return therefrom. The constitution imposes a duty upon the legislature to provide laws such that land grants shall be judiciously located, carefully preserved, and held in trust to further the purposes of the land grants. Also, the legislature is required to provide for the sale of lands and timber and to provide for the faithful application of the proceeds thereof in accordance with the terms of the land grants.

Idaho Code § 58-140 provides a statutory funding mechanism to carry out this constitutional mandate. The section provides, in pertinent part:

A reasonable amount not to exceed ten per centum (10%) of the moneys received from the sale of standing timber, from grazing leases and from recreation site leases shall constitute a special account, which is hereby created to be used for maintenance, management and protection of state owned timber lands, grazing lands and recreation site lands: provided, that any moneys constituting part of such account received from a sale of standing timber or from leases of lands which are a part of any endowment land grant shall be used only for the maintenance, management and protection

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 4

of lands of the same endowment grant. Provided further, that all such funds collected from timber sales shall be expended solely for the purpose of management, protection and reforestation of state lands. All such funds collected from recreation site leases shall be expended for the maintenance, protection and improvement of both new lease sites, and existing recreation areas situate on state lands. All such funds collected from grazing leases shall be expended for the maintenance, management and protection of state owned grazing lands. Control and eradication of noxious weeds is a part of the maintenance, protection and improvement programs.

The state board of land commissioners is hereby authorized to establish rules and regulations fixing a percentage of the amount received from each sale of standing timber and from each grazing and recreation site lease, not to exceed ten per centum (10%) of the total, which shall constitute the special account herein created. The account shall be deposited with the state treasurer, who shall keep a record thereof which shall show separately moneys received from each category of endowment lands. All moneys deposited in the account are hereby appropriated continually to the state board of land commissioners for the purposes hereinabove enumerated.

The statute provides a reasonable funding mechanism to carry out the state's obligation to carefully preserve and protect lands granted to the state.

However, as noted previously, the constitution also provides that the lands are held in trust and the proceeds therefrom must be faithfully applied in accordance with the terms of the grant.

In Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905), the Idaho Supreme Court considered the state's trust responsibility to apply proceeds from the sale of university grant lands only

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 5

for support and maintenance of the University of Idaho. Specifically, the court considered the constitutionality of a statute which provided for repayment of university building bonds from the income from university land grants. The court held:

I must therefore conclude that the legislature had no power or authority to appropriate or set apart for the payment of the interest or principal of the bonds referred to any part of the proceeds of the permanent fund created by the sale of the whole or any part of said seventy-two sections of land or the timber thereon.

11 Idaho at 255

Thus, the court required endowment fund proceeds to be strictly applied to the purposes enumerated in the constitution. In a number of cases since Roach, supra, the Idaho Supreme Court has carefully guarded the endowment lands and endowment funds. For example, in Pike v. State Board of Land Commissioners, 19 Idaho 268, 113 P. 447 (1911), the court upheld the board's practice of requiring an agreement to bid a given price as a condition precedent to advertising lands for sale.

In Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 P. 557 (1914), the court pointed out that the grant of lands by the federal government to the state constitutes a trust fund. Therefore, the state board of land commissioners is bound by trust principles to administer the lands to secure the greatest measure of advantage to the beneficiary.

It was held in Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932), that title to school grant lands could not be acquired by adverse possession against the state no matter how long adversely occupied. Thus, the cases reflect a consistent judicial policy of protecting the interests of the beneficiaries of endowment land grants and requiring a strict application of trust principles for the benefit of beneficiaries of endowment land grants.

The Idaho Supreme Court has further ruled that proceeds of endowment lands may only be applied by the legislature in

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 6

furtherance of the purposes of the endowment. In Evans v. VanDeusen, 31 Idaho 614, 174 P. 122 (1918), the court considered appropriations to institutions under the control of the state board of education. The appropriations provided essentially that the amount of general fund appropriations would be reduced in an amount equal to the amount of endowment fund income earned and available to the institutions. Endowment fund earnings were separately appropriated to the institutions by means of a continuing appropriation.

The court denied the application for a writ challenging the method of appropriation and the accounting practices used to implement it. The court determined that the method utilized did not divert endowment funds from endowment purposes. In discussing the nature of endowment funds and the legislature's duty not to divert them for other purposes the court said:

The funds referred to being declared by the constitution to be trust funds, are not, strictly speaking, subject to appropriation. They were appropriated or set apart for certain purposes designated by the terms of the grants which had been accepted by the state. The legislature, however, is required to provide the method by which they may be made available for such special purposes, and to that extent only are the funds subject to what may be called an appropriation. The courts are not concerned with the methods which the legislature may provide, further than that, upon proper proceedings therefor, they will prevent the diversion of the funds from the objects or purposes for which they have been granted.

31 Idaho at 620.

While the legislature is accorded some flexibility in providing the methods of making endowment funds available, both the Evans case and the Roach case discussed previously hold that the legislature may not divert those funds for purposes other than those authorized by the constitution and federal grants.

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 7

As noted previously, Idaho Code § 58-140 creates a special fund from a portion of the proceeds of timber sales and lease payments. The statute provides a reasonable funding mechanism to carry out the land board's constitutional duty to carefully preserve and protect endowment lands. However, as the cases point out, the funds cannot be diverted for purposes not authorized by the constitution and provisions of the land grants. We must, therefore, examine the statutory provisions to determine whether they result in a diversion of endowment interest earnings for unauthorized purposes.

Idaho Code § 57-804(2) provides, in pertinent part:

The following funds and money existing on June 30, 1977, are consolidated into the state operating fund:

<u>Auditor's</u> <u>Fund Number</u>	<u>Name of Fund</u>	<u>Created by</u> <u>Idaho Code Section</u>
--	---------------------	--

* * * * *

266	Ten Percent Timber and Grazing Land Lease Fund	58-140
-----	---	--------

Idaho Code § 57-803(a) provides:

The state operating fund is hereby created and established in the state treasury. The state operating fund is to be used to account for moneys which are not necessarily restricted in use or purpose, and which are generally utilized to finance the ordinary functions of state government.

The statutes above-quoted improperly classify the 10% timber and grazing land lease fund within the state operating fund. As the cases discussed previously point out, proceeds from endowment lands are trust funds constitutionally restricted in use and purpose and are not utilized to finance the ordinary functions of state government.

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 8

Also, there are no provisions in Idaho Code §§ 57-803(a), 57-804, or 58-140 providing for interest earnings to accrue to the benefit of the 10% timber and grazing land lease fund. Interest earnings upon idle funds in the state treasury are paid to the general fund pursuant to Idaho Code § 67-1210.

In our opinion, the 10% timber and grazing land lease fund should properly be placed within the agency asset fund.

The agency asset fund is created and defined by Idaho Code § 57-803(n) as follows:

The agency asset fund is hereby created and established in the state treasury. The agency asset fund is to be used to account for moneys which are restricted in use or purpose, and which must or may be, invested and accounted for as separate entities, and are not accounted for in any other fund.

Placing the 10% timber and grazing land lease fund in the agency asset fund would satisfy constitutional requirements since the fund is designed to handle accounts which are restricted in use and purpose. Accounts within the fund are accounted for as separate entities by the state treasurer. Unlike the state operating fund, the agency asset fund provides the necessary accounting mechanisms to attribute interest earnings to particular accounts.

A fundamental rule of trust law is that a trustee must separately account for trust property and funds and must not use trust property or funds in his trade, business, or private affairs or the business affairs of any other person unless authorized by the terms of the trust. Any profit or gain resulting from his own use of trust funds inures to the trust estate. See, e. g., McComb v. Frink, 149 U.S. 629, 13 S.Ct. 993, 37 L.Ed. 867 (1893); Bruun v. Hanson, 103 F.2d 685 (C.A. Idaho, 1940), cert.den. Hanson v. Bruun, 308 U.S. 571 (1939), 60 S.Ct. 86, 84 L.Ed. 479; Nampa Investment Corp. v. Demming Explor. Co., 50 Idaho 46, 293 P. 326 (1930); Restatement, Trusts, 2d § 179.

Since the existing statutes permit the use of trust funds to generate income for the general account, they appear to

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 9

violate trust principles. However, the current statutorily required classification of the account within the state operating fund is repealed by Ch. 195, 1985 S.L., effective July 1, 1985. Thereafter, the state auditor is authorized to classify accounts in the various funds enumerated in Idaho Code § 57-803. On the effective date of the Act, the state auditor should reclassify the 10% timber and grazing land lease fund in the agency asset fund to conform the state's accounting practices to those contemplated by the Idaho Constitution.

AUTHORITIES CONSIDERED:

Idaho Const. art. 9, §§ 7 and 8

Idaho Code § 58-140
Idaho Code § 57-803, (a), (n)
Idaho Code § 57-804(2)
Idaho Code § 67-1210
Idaho Code § 57-811(4)

Ch. 195, 1985 Session Laws

Restatement, Trusts, 2d § 179

Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905)

Pike v. State Board of Land Commissioners, 19 Idaho 268, 113 P. 447 (1911)

Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 P. 557 (1914)

Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932)

Evans v. VanDeusen, 31 Idaho 614, 174 P. 122 (1918)

McComb v. Frink, 149 U.S. 629, 13 S.Ct. 993, 37 L.Ed. 867, (1893)

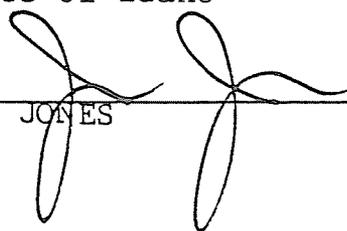
Bruun v. Hanson, 103 F.2d 685 (C.A. Idaho, 1940)

cert.den. Hanson v. Bruun, 308 U.S. 571, 60 S.Ct. 86, 84 L.Ed. 479 (1939)

Nampa Investment Corp. v. Demming Explor. Co., 50 Idaho 46, 293 P. 326 (1930)

DATED this 17th day of June, 1985.

ATTORNEY GENERAL
State of Idaho



JIM JONES

Mr. Stanley F. Hamilton
Director
Department of Lands
Page 10

ANALYSIS BY:



DAVID G. HIGH
Deputy Attorney General
Chief, Business Affairs and
State Finance Division