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April 11, 1989

Mr. Stan Hamilton
Department of Lands
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Easement for Airport

Dear Stan:

You have asked for legal guidance on two issues concerning the request for an easement for the Garden Valley Airport by the Division of Aeronautics of the Idaho Department of Transportation. These questions are:

1. What are the differences between an easement, a lease, or a land sale with respect to the authority of an individual entity to utilize state land?
2. When is the use of each of the above instruments appropriate for the commitment of use of endowment lands?

The essence of your two questions is whether the Idaho Land Board may sell or grant an interest in endowment lands by easement or by direct sale to another state agency without a public auction. Because the issue before the land board involves the Garden Valley Airport, which is located on endowment lands, this response is limited in its applicability to endowment lands.

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CONCLUSION:

In Attorney General Opinion No. 82-10 we concluded that: "the Idaho Supreme Court could reasonably permit the direct sale of trust lands to state agencies or prohibit such sales. Since there is reasonable authority to allow such sales, we conclude that the Board may in its discretion choose to do so." A logical extension of our prior opinion would be that a direct transfer of an interest in endowment land constituting less than a full sale should also be permissible. Recent case law from other land grant states, however, has required a strict construction of the state's constitutional duties and responsibilities as a trustee of school endowment land. In light of these developments, a term easement as opposed to a permanent easement should be considered by the board in this case.

ANALYSIS:

As you know, the state acquired these lands from the federal government upon admission to the union for the benefit of certain institutions. As such, the state holds title to these "endowment lands" as a trustee for the benefit of these same institutions. Therefore two legal standards must be met before a transfer is permissible; those required by the grantor of the trust land, the federal government, and those required by the Idaho Constitution, which constitutes the terms under which the state accepted these lands. I am attaching for your review a copy of Attorney General Opinion No. 82-10. That opinion addresses both the federal law requirements contained within the Idaho Admission Bill and the public auction requirement of art. 9, § 8, of the Idaho Constitution and concludes that a direct sale of endowment land to another state institution is permissible. Obviously, if the land board could permissibly make direct sales of trust lands to state agencies consistent with the Idaho Admission Bill and art. 9, § 8, of the Idaho Constitution, the transfer of a lesser interest such as an easement for the full appraised price would also be permissible.

A. Federal Law

The federal law issue, i.e. whether an easement could be issued consistent with the Idaho Admission Bill, is answered by the case of Lassen v. Arizona, 385 U.S. 458, 17 L.Ed.2d 515, 87 S.Ct. 584 (1967). In that case, the United States Supreme Court held that the direct sale of an easement over trust lands to a state highway department for the full appraised value was permissible. Thus, under the federal standard it would be permissible for the land board to issue a permanent easement to the state transportation department directly and without a public auction.

B. State Law

The state law issue is more problematic. It could be argued that a direct sale or issuance of an easement, even at full appraised value, might violate the state's constitutional trust responsibilities. As indicated above, recent state court decisions have imposed a higher standard of care upon state land boards relying upon state constitutional grounds. In Oklahoma Education Association v. Nigh, 642 P.2d 230 (1982), the Oklahoma Supreme Court held that below market statutorily set interest rates, rental rates and uneconomical re-leasing rights of state trust lands for farmers and ranchers violated that state's constitution. The court emphasized strongly the state's trustee responsibility in managing endowment lands. Similarly in County of Sakamania v. State, 102 Wash. 2d 127, 685 P.2d 576 (1984), the Washington Supreme Court held that state legislation which allowed private purchasers of timber from public trust lands to cancel or extend non-profitable purchase contracts violated the state's fiduciary duty as a trustee. The court emphasized that the state land board must manage endowment lands consistent with the responsibilities of a trustee under the "prudent man" rule.

The most recent state case is Deer Valley Unified School District v. Superior Court, 760 P.2d 537 (Ariz. 1988), and is directly contrary to our prior opinion. In Deer Valley, the Arizona Supreme Court held that the Arizona Constitution imposes a stricter standard than the federal Enabling Act discussed in Lassen, supra. (The federal Enabling Act is the Arizona equivalent of the Idaho Admission Bill.) The court held that under the Arizona Constitution, a school district could not condemn endowment land because the Arizona Constitution mandated a public auction as the constitutionally required method to obtain the highest possible return on the land being disposed.

While the language of the Idaho Constitution is not identical to that of Arizona, it is very similar. The Arizona Constitution requires that school land not be sold, leased or otherwise disposed of except to the highest and best bidder at a duly advertised public auction. The Idaho Constitution in contrast reads that the general grants of land made by Congress to the state are "subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made. . . ." See art. 9, § 8.

This section, however, must be read in conjunction with the preceding portion of art. 9, § 8, which requires that the land board provide for the location, protection, sale or rental of trust lands "in such a manner as to secure the maximum possible amount therefor." When read together, it is likely that an Idaho court, while imposing a strict standard of responsibility upon the land board when evaluating the board's actions, would permit

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a direct sale to be utilized if the goal of maximizing the long term return to the endowment was realized. In short, the Idaho court might well reject the mechanical requirement of always requiring a public auction in favor of a more flexible approach of permitting the board to exercise its discretion to determine what method of disposition would achieve the maximum long term return to the endowment. When evaluating the board's exercise of discretion in this area, the court could reasonably conclude that the direct transfer of an easement to a state agency is also permissible.

Finally, it should be noted that two state courts have approved plans to transfer state trust lands to a state entity for the appraised value without a public sale; however, these courts have not been faced directly with a challenge to the propriety of this action. See State v. Weiss, 706 P.2d 681 (Alaska 1985); State v. University of Alaska, 624 P.2d 807 (Alaska 1981); and Kanaly v. State, 368 N.W. 2d 819 (S.D. 1985).

Returning to the two questions you initially raised, the following definitions are helpful. A land sale is the direct transfer of fee simple title. An easement is the right in a landowner by reason of ownership to use the land of another for a specific purpose. Sinnett v. Werelus, 83 Idaho 514, 365 P.2d 952 (1961). Finally, a lease is a particular kind of contract wherein a leasehold interest in realty is given in return for a promise to pay rent periodically. Krasset v. Koester, 99 Idaho 124, 578 P.2d 240 (1978). It is my conclusion, therefore, that federal law would not prevent the direct sale to a state agency of a permanent easement and possibly even of a fee simple interest in endowment land at the appraised value. State law, however, would probably require more, particularly if the Idaho Supreme Court were to follow the more restrictive approach articulated by the Arizona Supreme Court. Each of these methods may be used by the land board so long as the constitutional requirements discussed above have been met.

Two possible solutions to this problem could be considered by the land board. The first would be to sell a permanent easement at a public auction. This approach could, however, diminish the price the land board could expect to receive from the auction and has many technical difficulties. The land board would have to review all of the factors that a prudent trustee would consider before considering this option and be assured that the maximum long term return to the endowment fund was realized. The second solution would be to transfer a term easement for a specified period of years for fair market value. This approach would avoid many of the constitutional problems discussed above as no permanent alienation of the land would occur.

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I hope that this letter is of assistance to you. If I can provide any further guidance, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division