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March 23, 1990

Honorable Wayne Sutton  
Chairman  
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Statehouse Mail  
Boise, Idaho 83720

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

Re: Cottage Site Leasing

Dear Representative Sutton:

In response to your request, this office has prepared the following analysis of SB 1516.

QUESTION PRESENTED:

Whether the following provision in SB 1516 violates article 9, section 8, of the Idaho Constitution: "The board shall reject any and all pending and future conflict applications filed under sections 58-307 and 58-310, Idaho Code, for single family, recreational cottage site and homesite leases."

CONCLUSION:

The quoted provision of SB 1516, which would exempt cottage sites from the conflict application and auction provisions of title 58, chapter 3, can be interpreted as not violating the constitutional requirement that revenues from endowment lands be maximized. It is also possible to interpret the bill as not violating the public auction requirements of article 9, section 8. The language of the bill, however, evinces an intent to benefit someone other than the beneficiaries of the endowment trusts, and thus could be challenged as a violation of the state's duty to act with undivided loyalty on behalf of the trust beneficiaries.

**ANALYSIS:**

Any legislation affecting state endowment lands must fulfill the requirements of article 9, section 8, of the Idaho Constitution. In making this analysis, it is presumed that the legislative act is constitutional unless it is clearly not susceptible to a valid constitutional interpretation. See State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979); Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976); and Bd. of County Comm'rs v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

Article 9, section 8, contains three provisions that could possibly be construed as limiting the legislature's discretion to exempt cottage site leases from conflict application provisions. Each of these provisions will be analyzed in turn:

**Provision 1:**

The first sentence of article 9, section 8, provides:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all 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; provided, that no state lands shall be sold for less than the appraised price.

The sentence imposes a duty upon the land board to secure "maximum long term financial return." No similar duty is imposed upon the legislature. The Idaho Supreme Court, however, has ruled that legislative enactments cannot unduly interfere with the land board's constitutional duties: "[If a statute] goes beyond the scope of regulating the action of the board in the discharge of its constitutional duties, it is void." Rogers v. Hawley, 19 Idaho 751, 760, 115 P. 687 (1911). Thus, the requirement of maximizing revenues necessarily defines the bounds of allowable legislation.

The provision requiring the maximization of long term income should be read in light of the normal standards of prudence and reasonableness imposed upon trustees. Under the common law, trustees are not required to maximize income from trust property, probably because maximization of income may entail a higher risk

of loss. Instead, a trustee normally has the discretion to make whatever lease arrangement is within the bounds of prudent and reasonable business judgment. See 3 A. Scott, The Law of Trusts, (4th ed. 1988), §§ 187, 189.1.

For instance, maximization of short-term incomes should not compromise a trustee's duty to preserve the corpus of the trust in order to maximize long-term gains. SB 1516 provides that its purpose is to maximize long-term gains by providing for stable leases at market value. Thus, even if SB 1516 requires the land board to forego competitive bids that may increase short-term gains, it can be argued that it does not violate the constitutional provision requiring maximization of long-term financial returns.

Additionally, constitutional challenges may be averted because the bill requires the land board to obtain fair market value for the leased property. In the context of endowment land trusts, courts usually use "fair market value" as the standard against which rental agreements of trust property are measured. For instance, the Nebraska Supreme Court struck down a statute providing renewal of leases without competitive bidding, but noted that the requirement of obtaining a "reasonable rental based upon fair market value of the property" could be met by competitive bidding or "by some other method to be provided by statute consonant with the rules of law applicable to trustees acting in a fiduciary capacity." State v. Bd. of Education, 154 Neb. 244, 47 N.W. 2d 520, 523, 525 (1951).

**Provision 2:**

The second sentence of article 9, section 8, provides:

No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly.

At first glance, this sentence may be construed as preventing the state from granting lessees of public lands any advantage, immunity or right that may reduce the rental income from those lands. This sentence, however, must be reviewed in its historical context. The sentence formed part of the original version of article 9, section 8, in the 1890 Idaho Constitution. At the time, settlement by homesteaders and others upon the public domain was a common practice. This provision was

apparently aimed at such settlers, not at lessees of state lands. See Balderston v. Brady, 17 Idaho 567, 107 P. 493 (1910).

**Provision 3:**

The third sentence of article 9, section 8, provides in part:

The 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 . . . (emphasis added).

"Disposal" of the state's interests in endowment lands would normally include leases, which are a transfer of interest for a limited period. The Idaho Supreme Court, however, has construed the public auction provision of article 9, section 8, to apply only where a "fee-simple title is to be conveyed." Idaho-Iowa Lateral & Reservoir Co., Ltd. v. Fisher, 27 Idaho 695, 706, 151 P. 998 (1915). Nonetheless, it is doubtful whether the court would feel itself bound by this language if it were directly presented with the question of whether "disposal at public auction" included leases. The question presented to the court in the Idaho-Iowa Lateral decision was whether the provision prevented the state from granting easements across endowment lands without complying with the constitutional requirements for "disposal" of the lands. Clearly, the court's interpretation of the provision as applying only to fee-simple conveyances was broader than was necessary to decide the question before it, and must be regarded as non-binding obiter dictum.

Another early decision of the Idaho Supreme Court held that the land board could be required, by writ of mandate, to put a lease renewal up for public auction. East Side Blaine County Livestock Assoc. v. State Bd. of Land Comm'rs, 34 Idaho 807, 198 P. 760 (1921). The court stated that the "provisions of the constitution and statutes . . . made it the duty of the state board of land commissioners, under the facts and circumstances of this case, to offer the lease of said lands at auction to the highest bidder . . . ." Id. at 815. The decision, however, centered on statutes requiring auctions whenever two or more

persons applied to lease the same land, and did not specifically apply the public auction provision of article 9, section 8, to leases. Moreover, if the decision is construed as interpreting article 9, section 8, to require public auctions for leases, it is difficult to reconcile with the court's decision in Idaho-Iowa, where the court stated that the public auction provision applied only to conveyances of fee-simple title.

In a later case, the court held that in the absence of legislation to the contrary, article 9, section 8, does not prohibit the land board from originating offers to lease, thus implying that leases need not be entered into by public auction. Allen v. Smylie, 92 Idaho 846, 452 P.2d 343 (1969). Again, however, the court did not directly address the issue. Thus, the decisions of the Idaho Supreme Court cannot properly be cited as authority for the proposition that the legislature can provide for leases by methods other than public auction.

Because the court decisions do not satisfactorily resolve the issue, it is necessary to refer to the proceedings of the Idaho Constitutional Convention. The proceedings indicate that the delegates to the convention believed "disposal" to include leases of the lands. During debates over article 9, section 8, Mr. Reid stated several times his belief that the word "disposition" included leases of such lands. 1 I. Hart, Proceedings and Debates of the Constitutional Convention 708, 755-56 (1912). This view was shared by other delegates also. See id. at 763 (remarks of Mr. Gray). Further, there was a suggestion that at the end of a lease, another person could come in and outbid the original lessee, implying that lease renewals were believed to be subject to public auction requirements. Id. at 743 (remarks of Mr. McConnel).

On the other hand, there seems to have been some sentiment among the delegates that the legislature should be granted a wide latitude of discretion in its handling of the disposition of endowment lands, in order to meet changing conditions. See id. at 663 (remarks of Judge Claggett); 712, 732 (remarks of Judge Gray). Additionally, there is at least one indication that lessees should be given a preference right of renewal at the expiration of their leases if they took good care of the land and preserved its value. Id. at 663 (remarks of Judge Claggett).

Given the wide disparity of views among the various delegates, it is impractical to conclude from the proceedings that there was any consensus on whether leases would be subject to the public auction requirement. Further indications of intent may be found in the actions of the first legislature, many of whose members were also delegates to the constitutional convention. The first act dealing with disposal of public lands was enacted in 1891. The act required that all sales of land had

to take place by public auction. 1891 Sess. Laws, p. 111. In contrast, the land board was empowered to lease lands without public auction to the first person filing a lease application. Id. at 113-14. Leases had to be entered into by public auction only if two or more persons applied to lease the same tract of land. Id. at 114. Thus, it is apparent that the early legislature did not understand leases to be subject to the strict public auction requirements that were imposed on the sale of public lands.

In conclusion, it is possible to interpret article 9, section 8, as vesting in the legislature the discretion to lease public lands by methods other than by public auction. It should be cautioned that this conclusion is somewhat tentative, given that it is supported only by ambiguous statements of the Idaho Supreme Court, the delegates to the constitutional convention, and the early legislature. In making this conclusion, ambiguities have been resolved in favor of finding SB 1516 constitutional, given the general principle that a legislative act is presumed constitutional unless it is clearly not susceptible to a valid constitutional interpretation.

#### Federal Law:

Although your letter asked this office only to address the constitutionality of SB 1516, any analysis of legislation affecting endowment lands would be incomplete without addressing whether the legislation violates the federal laws that created the endowment lands trusts, namely, the Organic Act of the Territory of Idaho and the Idaho Admission Bill. The acts impliedly impose upon the state duties analogous to those imposed upon a private trustee under the common law. See Barber Lumber Co. v. Gifford, 25 Idaho 654, 159 P. 557 (1914).

Under common law principles, the state, acting as trustee, owes a duty of "undivided loyalty" to the trust beneficiary, to the exclusion of all other interests. County of Scamping v. State, 102 Wash. 127, 685 P.2d 576, 580 (1984); State ex rel. Ebke v. Bd. of Educational Lands & Funds, 154 Neb. 244, 47 N.W. 2d 520 (1951). Paragraph (2) of the bill, which your letter asked this office to review, does not, on its face, violate the duty of undivided loyalty. If, however, paragraph (2) is read in light of the legislative findings in paragraph (1), it may be inferred that the rejection of conflict applications required in paragraph (2) is designed, at least in part, for the benefit of long term, single family lessees. For example, paragraph (1)(e) states that "the conflict application and auction procedure have caused considerable consternation and dismay to the existing lessee at the prospect of losing a long-time lease." The finding could be interpreted as implying an intent to benefit someone other than the beneficiaries of the trust, resulting in the bill

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being overturned as a breach of the state's duty of undivided loyalty to the beneficiaries of the endowment lands trusts.

A possible factor working against a finding of divided loyalty is the provision in SB 1516 requiring that leases "generate market rent throughout the duration of the lease." The state could assert that it has met its fiduciary duty because protection of cottage site lessees did not come at the expense of the beneficiaries, since the statute requires that the trust receive full market value for the leases. As previously stated, courts use market value as the standard against which disposals of trust property are measured.

I hope the above analysis provides the guidance you need concerning the constitutional issues involved in SB 1516. Please do not hesitate to contact this office if we can be of further assistance in this or other matters.

Sincerely,

Steven W. Strack  
Deputy Attorney General  
Natural Resources Division