

March 15, 2000

Harold W. Davis, President  
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: University Endowment Funds

Dear Mr. Davis:

This letter is in response to your request for an opinion of the Office of the Attorney General with regard to the appropriation of income from the University Endowment Funds. Your letter contains several questions which stem from a common factual background. We will first set forth the factual background and then each of your questions, with our answers, will be set forth in turn.

**A. Factual Background**

The State of Idaho, like all western states, received land grants from the federal government prior to or at the time of statehood. The primary purpose of these land grants was to use the proceeds of the land to support public education at the primary, secondary and postsecondary levels. As stated by the United States Supreme Court in Andrus v. Utah, 446 U.S. 500, 507, 100 S. Ct. 1803, 1807 (1980), "the United States agreed to cede some of its land to the States in exchange for a commitment by the States to use the revenues derived from the land to educate the citizenry." The historical context of such federal land grants originates in the fact that the federal government retained ownership of most of the land west of the 13 original states:

When the 13 original colonies formed the United States, each held sovereign control over the land within its borders. Those lands provided a tax base for financial governmental functions, including public education. As the United States expanded westward, additional states were created on lands which belonged to the United States as territories. The federal government retained ownership over much of the land within those states. Because land owned by the federal government was exempt from taxation by the states, the states had a smaller tax base for financing public education. To provide a source of revenue for public education, Congress granted new states federal lands to be used for the support of public schools.

National Parks and Conservation Association v. Board of State Lands, 869 P.2d 909, 917 (Utah 1993). At the time of Idaho's admission to the Union in 1890, more than 3.5 million acres of land were granted to Idaho by the federal government for the express purpose of benefiting public education. A majority of the land was dedicated to the public school system and the remainder constitutes specific grants for university and other higher education purposes. The specific grants for higher education purposes are found in Sections 8, 10 and 11 of the Idaho Admission Bill. 26 Stat. L. 215 ch. 656.

Upon Idaho's entry to the Union, Idaho received sections numbered 16 and 36 in every township of the state for the benefit of the public school system. This land formed the basis of the public school endowment for elementary and secondary education. In addition, other land was granted for higher educational purposes that formed the basis for the university endowments. The full quantity of 72 sections was granted for the maintenance of a land grant university (the University of Idaho), 90,000 acres of land pursuant to the Morrill Act for the maintenance of an agricultural college, 100,000 acres for the establishment and maintenance of a scientific school, 100,000 acres for the establishment and maintenance of state normal schools, and an additional 50,000 acres for the support and maintenance of the University of Idaho. Finally, 150,000 acres were granted for such other charitable, educational, penal and reformatory institutions as the state so selected.<sup>1</sup>

The stated purpose of the Idaho Admission Bill land grants was to fund the support and maintenance of public education in Idaho. The sanctity of the endowments, the manner and method of the investment of the proceeds from the land, and the use of the funds has been the subject of numerous court cases and official Opinions of the Office of the Idaho Attorney General throughout Idaho's history. The 1998 Idaho Legislature made significant changes to the Endowment Fund investment laws based upon a change to the Idaho Admission Bill approved by Congress and two constitutional amendments approved by the Idaho voters.<sup>2</sup> The changes to the Endowment Fund investment laws become relevant in the questions that will be addressed.

With the above background in mind, we now turn to the questions you have presented.<sup>3</sup>

**B. Question 1: “Under Black and the related cases, Attorney General’s Opinion 76-85, the provisions of the Idaho Admission Bill and Idaho Constitution, may the Legislature legally limit the spending authority for the income from such endowment funds by not appropriating that money to the colleges and universities?”**

This is a question upon which the Idaho Attorney General’s Office has already opined and upon which the Idaho Supreme Court has already ruled.

In the case of Melgard v. Eagleson, 31 Idaho 411, 172 P.655 (1918), the Idaho Supreme Court decided the question of whether funds distributed pursuant to federal endowments for the maintenance of designated colleges could be considered part of the general fund of the State of Idaho. The Idaho Supreme Court ruled that:

It is apparent that the fund in question cannot properly be placed in the general fund of the State of Idaho. The exclusive supervision of the fund is vested by the act of Congress in the trustees of the institution designated by the state legislature as the beneficiary entitled to receive the fund. Under the acts of Congress, the state treasurer . . . [has] a mere clerical or ministerial duty to perform, that is, to pay over the fund immediately to the treasurer of the board of trustees, in this case the board of regents, upon their order. The acts of the [state treasurer and state auditor], in this instance, of placing this fund in the general fund by making appropriate entries upon their books to that end were mere nullities. Under the acts of Congress in question, the state auditor has no duty whatever to perform with respect to this fund and no authority over it. It is therefore apparent that the [state treasurer] has but one duty to perform in the premises, and that is to pay over the sum in controversy immediately to the [university].

31 Idaho at 414-15, 172 P. at 656. This case settled that funds distributed pursuant to the Morrill Act are required to be paid immediately to the state board of education<sup>4</sup> without control by the state treasurer or state auditor (now state controller).

In Evans v. Van Deusen, 31 Idaho 614, 174 P.122 (1918), the issue the court decided was whether the state was required to separately account for the income of the endowments and whether such income was properly appropriated to the university. In this case, the then state auditor was holding certain endowment income because the auditor's office was concerned that there was no actual appropriation by the legislature of such funds to the university. The Idaho Supreme Court held that endowment funds required no such appropriation. The court stated that the funds were "declared by the Constitution to be trust funds, [and] are not, strictly speaking, subject to appropriation. They were appropriated or set apart for certain purposes designated by the terms of the [endowment land] grants which had been accepted by the state." 31 Idaho at 620, 174 P. at 122 (emphasis added). Thus, the income from the endowments is not subject to appropriation by the legislature as such money is already set aside to the universities based on the grants from Congress.

Finally, in the case you mentioned in your question, Black v. State Board of Education, 33 Idaho 415, 196 P.201 (1921), the Idaho Supreme Court further discussed the appropriation concern. The court stated that:

[T]he proceeds of federal land grants, direct federal appropriations and private

donations to the university, are trust funds, and are not subject to the constitutional provision that money must be appropriated before it is paid out of the state treasury. Claims against such funds need not be passed upon by the board of examiners, and the moneys in such funds may be expended by the board of regents subject only to the conditions and limitations provided for in the acts of Congress making such grants and appropriations, or the conditions imposed by the donors upon the donations.

33 Idaho at 427, 196 P. at 201 (emphasis added).

The issue was again presented in 1976 when the administrator of the division of budget (predecessor to the current division of financial management) requested an opinion of the Attorney General regarding whether the income from endowments must be “allotted” as required by law and whether the approval of the auditor (now controller) or state board of examiners was required prior to certain expenditures of such income. This office issued Opinion No. 76-65 concluding that the allotment process and expenditure approvals were not required for expenditure of funds from the endowments. The Opinion explained that while such funds were “listed in the appropriation bill to the State Board of Education, that this listing of funds in the appropriation bill is not an actual ‘appropriation.’ Rather, it is a mere listing of fund sources which the Legislature includes on the appropriation bill to determine the amount of the appropriation.” 1976 Idaho Att’y Gen. Ann. Rpt. 280 (citation omitted). In other words, while the legislature may list this money in an annual appropriation, the university Endowment Fund income is not actually appropriated by such bill because it is already “appropriated” by the acts of Congress that require such income to be distributed to the universities.

It is worthy of note that the legislature apparently has recognized this long standing conclusion with the Standard Budget Act of 1945, codified as part of chapter 36, title 67, Idaho Code. Idaho Code §§ 67-3608 and 67-3609 exempt money from the university endowments and federal land grants from the requirement that monies obtained by the universities be deposited in particular accounts and appropriated back to the institutions.<sup>5</sup>

Thus, the legislature may not limit the spending authority for the income from the university land endowments by simply not appropriating that money to the colleges and universities. The primary reason is that all income from the university endowments is already “appropriated” to the colleges and universities as required under the terms of the congressional land grants.

This conclusion follows a long history of legislative encroachment upon the university endowment funds. Throughout Idaho’s history, the education endowments have been considered inviolate trusts. The constitutional framers first coined the phrase “sacred” when they debated the constitutional provisions regarding the endowments and stated that “perhaps there is no other fund so sacred.” Idaho Constitutional Convention Proceedings, Vol. I at

647. The Idaho Supreme Court has adopted the sacred trust terminology and has called the several endowments “a trust of the most sacred and highest order.” Moon v. State Board of Examiners, 104 Idaho 640, 642, 662 P.2d 221 (1983).

In 1905, the Idaho Supreme Court called attention to legislative encroachment upon the university endowment funds. In Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905), the court stopped the legislature from appropriating endowment income for the payment of bonds by concluding that “the legislature had no power or authority to appropriate or set apart for the payment of the interest or principal of the bonds. . . .” 81 P. at 646. However, in addition to the conclusion, the court noted that “it is shown by several acts passed by the legislature of the state during the pasts several years that an effort has been made to appropriate not only the interest and income of the permanent school fund, but a part of the fund itself. . . .” *Id.* The court, in ruling such action “unconstitutional and void” stated that the legislative “tendency has been to encroach upon the public school fund, and divert it from purposes for which it was created.” *Id.*

In fact, earlier in 1897, the Idaho Supreme Court had made the inviolate nature of the endowment fund, and its income, very clear. The court, in holding the legislature was without power to pass laws that would impede the right to foreclose on loans made from the endowment funds, stated that the legislative act:

would deplete the permanent school fund, in violation of both the act admitting Idaho as a state, and . . . the constitution which declares that said public school fund shall remain inviolate and intact, and that the interest thereon only shall be expended in the maintenance of the public schools of the state. The people . . . have thus declared for what purposes all interest on the permanent fund shall be applied. . . . Any law enacted by the Legislature diverting one dollar of principal or interest of said fund to other purposes would be unconstitutional.

State v. Fitzpatrick, 5 Idaho 499, 51 P.112, 114 (1897). Following these cases came Melgard v. Eagleson, Evans v. Van Deusen, and Black v. State Board of Education, all cited above, in which the Idaho Supreme Court held that the legislature’s power did not extend to appropriating the income from the university endowments.

In 1939, the Federal District Court for Idaho, in holding a statute of limitations inapplicable to endowment loans, stated that the funds must remain forever inviolate and that any statute enacted by the legislature putting time limits on collecting endowment funds was void. United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939). The Idaho Supreme Court also struck legislative enactments regarding the investment of the permanent endowment funds as such investments could not provide the type of inviolate guarantee required in investing endowment funds. Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969).

In 1977, the Idaho Supreme Court held unconstitutional a legislative attempt to appropriate income from the endowment funds to pay the expenses of the Endowment Investment Board. The court said that “the legislation authorizing this practice, and the practice itself, is in violation of article 9, § 3 of the Constitution of the State of Idaho.” Moon v. Investment Board, 98 Idaho 200, 201, 560 P.2d 871, 872 (1977).<sup>6</sup>

Thus, long has there stood a barrier against legislative encroachment and appropriation of university endowment fund income. Nothing in the change to the Idaho Admission Bill or in the change to the Idaho Constitution alters this inviolate nature of the endowment or the income the endowment produces.

**C. Question 2: “Is the answer to Question 1 different for the three University of Idaho endowment funds than the answer for the Endowment Funds currently dedicated to Idaho State University and Lewis-Clark State College?”**

The answer to this question is no. All income from the university endowment funds derived from the federal land grants is perpetually appropriated by such federal land grants regardless of the statutory or constitutional beneficiary.

Your question addresses the issue of whether the University of Idaho’s constitutional status under article 9, section 10 of the Idaho Constitution provides a different answer than the analysis of university endowment funds dedicated to other colleges and universities created by statute. It is worthy of note that even though the other colleges and universities may be created by statute, the Idaho State Board of Education’s supervision over such institutions is still constitutional in nature pursuant to article 9, section 2 of the Idaho Constitution.

Generally speaking, the federal land grants were not made to individual colleges or universities. The grants were to the states. The states were then charged with the duty to devote such funds to the purposes named. Wyoming Agricultural College v. Irvine, 206 U.S. 278, 27 S. Ct. 613, 51 L. Ed 1063 (1907).

The State Normal School Fund originally consisted of lands under Section 11 of the Idaho Admission Bill providing for 100,000 acres for creation of state normal schools. At the time of Idaho statehood, the term “normal schools” referenced what are now commonly known as colleges of education for the training of teachers. Each of Idaho’s four-year colleges and universities currently maintains a college of education. Given that fact, it appears that under the terms of the federal grant, the legislature could designate any or all of Idaho’s four-year colleges and universities as a recipient of the income of the State Normal School Fund. The legislature has split the proceeds of the State Normal School Fund between Idaho State University (ISU) and Lewis-Clark State College (LCSC) to support their colleges of education. Idaho Code §§ 33-3302 and 33-3304. Once that income is so designated by the legislature, however, such income from the endowment is already

perpetually appropriated by the act of Congress and requires no further legislative action for the spending authority for such funds.

The Charitable Institution Fund also originates from Section 11 of the Idaho Admission Bill granting 150,000 acres for “other state, charitable, education, penal and reformatory institutions.” Again, the legislature may designate the beneficiary of the income from such fund and has done so by granting four-fifteenths (4/15) of the income of such fund to ISU. Idaho Code § 66-1106. The legislature is free to either grant that four-fifteenths (or any other portion) to ISU, to one of Idaho’s other colleges and universities, to other education sources, or to any other purpose defined in Section 11 of the Idaho Admission Bill, i.e., penal or reformatory institutions or other charitable institutions. However, once the legislature has designated the beneficiary, no further appropriation is required, for the same reasons as set forth above.

Thus, in answer to your second question, the result is not different for the university endowment funds dedicated to ISU and LCSC. The income from the university endowment funds in which ISU and LCSC are the stated beneficiaries is already appropriated and requires no further act of the legislature. The legislature may not limit the spending authority of the income from such endowments.<sup>7</sup>

**D. Question 3: “Does the Division of Financial Management have the authority to restrict the spending authority on the income from the Endowment Funds?”**

No. While the Division of Financial Management (DFM) has the authority to regulate certain spending by state agencies under chapter 35, title 67, Idaho Code, such authority does not extend to the income from the university endowments.

his question was also answered in Attorney General’s Opinion 76-65. In addition, it is clear that the Idaho Supreme Court has held that the spending authority over such income from the endowments is vested in the board of trustees of the designated institution and not in the State of Idaho in general. (The state has the mere clerical or ministerial duties to pay such funds over to the board of trustees. Melgard v. Eagleson, 31 Idaho 411 (1918).)

If the income from the endowments is beyond the authority of the legislature to appropriate, then it follows that it would necessarily be beyond the authority of DFM to regulate such spending. The Idaho Legislature is the only constitutional entity charged with the appropriation of all public funds as allowed by law. If it is beyond the legislature’s authority to appropriate the university endowment fund income, then it would clearly be beyond the authority of DFM, as a statutory agency granted authority by the legislature, to limit the spending authority of the colleges and universities for the income from the endowment funds.

**E. Question 4: “Do the 1998 HB 643 changes to the University Endowment Fund, the Scientific Endowment Fund, and the Agricultural Endowment Fund legally give the Legislature power over the appropriation of the income from such funds? In other words, are such changes constitutionally appropriate?”**

**Question 5: “Do the 1998 HB 643 changes to the Normal School Endowment Fund and the Charitable Institutions Endowment Fund legally give the Legislature power over the income from such funds? In other words, are such changes constitutionally appropriate?”**

Given our answer to Question 2 above, Questions 4 and 5 are being considered together.

1. Background

The 1998 legislature requested by HJM 9 that Congress change Section 5 of the Idaho Admission Bill in order to effect changes to the Public School Endowment investment laws. Following that request, Congress passed House Resolution 4166 as Public Law 105-296 on October 27, 1998. This measure amended the Idaho Admission Act by amending Section 5 to read as follows:

**SEC. 5 SALE, LEASE, OR EXCHANGE OF SCHOOL LAND.**

**(a) SALE-**

**(1) IN GENERAL -** Except as provided in subsection (c), all land granted, under this Act for educational purposes shall be sold only at public sale.

**(2) USE OF PROCEEDS-**

**(A) IN GENERAL -** Proceeds of the sale of school land-

**(i)** except as provided in clause (ii), shall be deposited in the public school permanent endowment fund and expended only for the purpose of public schools; and

**(ii)(I)** may be deposited in a land bank to be used to acquire, in accordance with State law, other land in the State for the benefit of the beneficiaries of the public school permanent endowment fund; or

(II) if the proceeds are not used to acquire other land in the State within a period specified by State law, shall be transferred to the public school permanent endowment fund.

(B) EARNINGS RESERVE FUND - Earnings on amounts in the public school permanent endowment fund shall be deposited in an earnings reserve fund to be used for the support of public schools of the State in accordance with State law.

(b) LEASE - Land granted under this Act for educational purposes may be leased in accordance with State law.

(c) EXCHANGE-

(1) IN GENERAL - Land granted for educational purposes under this Act may be exchanged for other public or private land.

(2) VALUATION - The values of exchanged lands shall be approximately equal, or, if the values are not approximately equal, the values shall be by the payment of funds by the appropriate party.

(3) EXCHANGES WITH THE UNITED STATES-

(A) IN GENERAL - A land exchange with the United States shall be limited to Federal land within the State that is subject to exchange under the law governing the administration of the Federal land.

(B) PREVIOUS EXCHANGES - All land exchanges made with the United States before the date of the enactment of this paragraph are approved.

(d) RESERVATION FOR SCHOOL PURPOSES - Land granted for purposes, whether surveyed or unsurveyed, shall not be subject to preemption, homestead entry, or any other form of entry under the land laws of the United States, but shall be reserved for school purposes only.

In addition to HJM 9, the 1998 Idaho Legislature passed HJR 6 and HJR 8 which amended article 9, sections 3, 4, 8, and 11 of the Idaho Constitution with respect to the public school endowment land and fund. Following the amendments to the Idaho Admission Bill and to the Idaho Constitution, the legislature passed 1998 HB 643. House Bill 643 provided a comprehensive Idaho Code revision relating to all state endowment lands and funds. The

amendments were designed to bring Idaho Code into line with the Idaho Admission Bill changes and constitutional amendments for the public school Endowment Fund investment reform.

The subject of your questions 4 and 5 speaks specifically to Sections 14, 19, 24, 28 and 59 of 1998 HB 643. Each of these sections applies, respectively, to the income funds created for the University Endowment Fund,<sup>8</sup> Scientific School Endowment Fund, Agricultural College Endowment Fund, State Normal School Endowment Fund and Charitable Institutions Endowment Fund. Although there are a few minor differences among the various sections, they all primarily provide that money in the “income fund shall be used for the benefit of the beneficiaries of the endowment and distributed to current beneficiaries of the [endowment name] pursuant to legislative appropriation.” (Emphasis added.) Your query is whether the language “pursuant to legislative appropriation” in effect “legally give[s] the legislature power over the appropriation of the income from such funds?”

As noted above, this question has been answered under current law by both the Idaho State Supreme Court and this office. The Idaho Supreme Court has stated that “the proceeds of federal land grants . . . are not subject to the constitutional provision that money must be appropriated before it is paid out of the state treasury.” Black v. State Board of Education, at 33 Idaho at 427, and Evans v. Van Deusen, 31 Idaho at 619 (1918), and this office has opined that although the endowment fund sources are listed in the appropriation bill to the State Board of Education, that this listing of funds in the appropriation bill is not an actual ‘appropriation.’” 1976 Atty. Gen. Ann. Rpt. 280. Given that this was clearly the state of law prior to the enactments of HJR 6, HJR 8, the amendment to the Idaho Admission Bill and 1998 HB 643, the operative question is whether these enactments change that conclusion.<sup>9</sup>

## 2. Changes to the Idaho Admission Bill

Section 5 of the Idaho Admission Bill, as amended in 1998, makes no express reference to whether the expenditure of university endowment income is subject to state legislative appropriation. There are, however, three notations in the section that refer to the expenditure of endowment fund income generally. Section 5(a)(2) is entitled “Use of Proceeds.” Subsection (A)(i) provides that proceeds “shall be . . . expended only for the support of public schools. . . .” Subsection (B) provides that money from the earnings reserve fund shall be “used for the support of public schools of the state in accordance with state law.”

There are several references in the congressional record as to the intent of the amendment to the Idaho Admission Bill. In the “Background and Need for Legislation” section of the House of Representatives Report, the report states that the purpose of the legislation is “to generate additional income from the endowment lands for public schools and other beneficiaries . . . to provide a more predictable income stream to the beneficiaries, provide increased and stable funding for public education and other beneficiaries. . . .” In

addition to the stated purpose of the legislation, each of the four members of Idaho's congressional delegation commented in the Congressional Record as to the purpose of the legislation. Representative Michael Crapo, the bill's sponsor, stated that "this is an opportunity for us to generate increased revenues for Idaho's public schools, with no tax increase and with simply a reformed management of our public lands. . . . HR 4166 is going to provide the state of Idaho the ability to increase funding for public education by at least \$20 million, if not much more, annually by restructuring the management of our endowment lands." Congressional Record for September 15, 1998, page H7760. Representative Helen Chenoweth stated that the reason Governor Batt pursued the endowment fund investment reform was a "vision on how to gain more money for Idaho's schools without raising taxes on the state's taxpayers. . . ." *Id* at H7761.

In the United States Senate, the identical version of HR 4166 was S2226. Although introduced by Idaho Senator Larry Craig, S2226 was withdrawn in favor of HR 4166. In speaking to S2226, Senator Craig stated that the purpose of this "identical legislation" was to "bring about the better management of state lands to the financial benefit of our public schools." Congressional Record for June 25, 1998, page S7188. Senator Craig further noted that the bill was providing for "increased and stable funding for public education. . . ." *Id*. In particular, Senator Craig noted that only four changes were to occur based upon the amendment to the Idaho Admission Bill:

First, it allows the Board of Land Commissioners to exercise its fiduciary responsibility as managers of the state endowments by treating both land and fiscal assets as one trust.

Second, the proposal creates an earnings reserve account that will serve as a "shock absorber" to allow the endowments to provide a more predictable income stream.

Third, it provides increased and stable funding for public education by allowing investments in assets that will provide higher rates of return. The state committee projected that through this single change, public education in our state could receive up to \$20 million or more annually without raising taxes.

Fourth, it establishes a land bank account for proceeds from the sale of endowment lands. The account gives the Board of Land Commissioners the flexibility to re-invest in other real property for the land trust.

*Id.*

Finally, Idaho Senator Dirk Kempthorne stated that the legislation "will provide the ability to increase Idaho public education funding at least \$20 million and possibly \$30

million annually. And it will do so without raising taxes, cutting services or asking the federal government for one thin dime.” *Id.* at S7189. Senator Kempthorne further stated that the legislation “will substantially increase funds available for Idaho schoolchildren . . . the bottom line is that the bill provides more money for educating our kids. . . .” *Id.* Finally, Senator Kempthorne noted that the solution to funding issues was that this legislation was designed “to allow the fund to be invested in a broader array of investments. . . .” *Id.*

In addition to Idaho’s congressional delegation, two other members of the U.S. House of Representatives spoke in favor of HR 4166. Representative Hansen of Utah stated that the purpose of the changes was to produce “a stream of income for the schools.” Congressional Record for September 15, 1998, at page H7760. Also, Representative Faleomavaega from American Samoa stated that “the purpose of the changes, as I understand them, is to generate additional income for Idaho’s permanent endowment fund.” *Id.*

Thus, it appears clear that the congressional intent was to increase the income funded to Idaho’s public education system. This was to be accomplished through a new method of investing and managing the endowment funds. However, there is no mention of making the income from such funds, once earned, subject to any type of appropriation or other limitation.

In summary, nothing in the 1998 changes to the Idaho Admission Bill changes the conclusion that the income from the several university endowments are dedicated, pursuant to federal law and congressional enactment, to the universities. Thus, even given the 1998 amendment to the Idaho Admission Bill, the Idaho Legislature has no appropriation authority over the income from the university endowments.

### 3. Changes to the Idaho Constitution

Only one section of the Idaho Constitution amended by 1998 HJR 6 and 1998 HJR 8 speaks to legislative appropriations. In HJR 8, article 9, section 3 of the Idaho Constitution speaks to the creation of the “Earnings Reserve Fund.” Article 9, section 3, as amended by 1998 HJR 8, states that “funds shall not be appropriated by the legislature from the public school earnings reserve fund, except as follows: the legislature may appropriate from the public school earnings reserve fund administrative costs incurred in managing the assets of the public school endowments including, but not limited to, the real property and monetary assets.” This amendment appears to be in line with the amendment to the Idaho Admission Bill and in line with prior decisions of the Idaho Supreme Court. The Idaho Supreme Court has held that the use of endowment fund earnings to pay for the expenses incurred in managing endowment lands is permitted under the Idaho Admission Bill. Moon v. State Board of Land Commissioners, 111 Idaho 389, 724 P.2d 125 (1986).<sup>10</sup>

Thus it appears that it is proper for the legislature to appropriate funds from the newly created Earnings Reserve Fund to pay certain administrative costs in managing the assets of the university endowment funds. However, no language in the amended article 9, section 3

of the Idaho Constitution authorizes legislative appropriation of the income, once earned and distributed by the Land Board, from the university endowments. In fact, the express terms of article 9, section 3 limit the legislature's appropriation authority to paying the administrative costs. No other legislative appropriation is constitutionally authorized. Thus, there appears to be no intent by the people of the State of Idaho, in amending their Constitution, to provide for anything other than the dedication of such university endowment fund income perpetually to the university endowment beneficiaries.<sup>11</sup>

## F. Conclusion

Under current law, it is well settled that the income from the university endowments is distributed to, and used by, the colleges and universities outside the appropriation process. After July 1, 2000, since neither Congress nor the people of the State of Idaho expressed any intent in changing the perpetual dedication of such funds, it appears that all income from the university endowments will still be outside the constitutional appropriation process.

We hope this letter satisfactorily answers your inquiry. If we can be of any further assistance, please do not hesitate to contact us.

Sincerely,

TERRY E. COFFIN  
Chief, Contracts & Administrative Law Division

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<sup>1</sup> Other grants of land were made for purposes such as an insane asylum or a state penitentiary. However, such land grants are beyond the scope of this advisory.

<sup>2</sup> One of the Idaho constitutional amendments, 1998 HJR 6, has, at the time of the drafting of this opinion, been stricken by the Idaho State Supreme Court.

<sup>3</sup> In answering your inquiry, this opinion is limiting the scope of the response to the scope of your question, i.e., the university related endowments. We do not direct our response to any issue related to the public school endowment or any other endowment. Thus, as used herein, the term "university endowments" includes the University Fund, the Scientific School Fund, the Agricultural College Fund, the State Normal School Fund and that portion of the Charitable Institutions Fund currently dedicated by statute to Idaho State University.

<sup>4</sup> The State Board of Education serves as the Board of Regents and the Board of Trustees of all of Idaho's public institutions of higher education. See Idaho Constitution art. 9, § 2, and art. 9, § 10, and Idaho Code §§ 33-101, 33-2802, 33-3003, 33-3102 and 33-4002.

<sup>5</sup> This is not to say that the repeal or amendment of the Standard Budget Act would change the result. It only points to legislative recognition of the congressional and constitutional requirements.

<sup>6</sup> The court later held that using income to pay the costs of maintenance and management of endowment land, not the fund, was constitutionally appropriate. Moon v. State Board of Land Commissioners, 111 Idaho 798, 724 P.2d 125 (1986).

<sup>7</sup> It is worthy of note that the legislature clearly may change the beneficiary of the State Normal

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School Endowment and the Charitable Institutions Endowment within the requirements of the Idaho Admission Bill. However, under the holding in Black v. State Board of Education, the income from the University Fund, the Scientific School Fund and the Agricultural College Fund appear to be vested in the Board of Regents of the University of Idaho by article 9, § 10 of the Idaho Constitution. Thus, barring any change to article 9, section 10 of the Idaho Constitution, the legislature may not be free to alter the dedication of the income from those endowments.

<sup>8</sup> In addition to the 72 sections of land provided for in Section 8 of the Idaho Admission Bill, the University of Idaho was also granted 50,000 acres of land under Section 11 of the Idaho Admission Bill. While this later 50,000 acres does not appear in 1998 HB 643 at Section 11 establishing a new Idaho Code § 33-2909 creating the University Endowment Fund, it was likely the intent of the legislature to include such 50,000 acres in the University Endowment Fund. However, since this was not expressly done, the status of those 50,000 acres (and their proceeds) is unclear.

<sup>9</sup> Again, in answering your inquiry, this opinion is limiting the scope of the response to the university related endowments.

<sup>10</sup> However, in the Moon case, there appears to be no specific discussion of the Morrill Act lands. The Morrill Act (codified as 7 U.S.C. §§ 301-308) is the federal law under which the agricultural endowment lands were granted to the states. Section 10 of the Idaho Admission Bill clarified that Idaho received 90,000 acres for an agricultural college under the Morrill Act land grants. Section 3 of the Morrill Act (7 U.S.C. § 303), as that provision has remained unchanged since 1862, provides:

All the expenses of management, superintendence, and taxes (of the land) . . . and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the states to which they may belong, out of the treasury of said states, so that the entire proceeds of the sale of said lands shall be applied without diminution to the purposes hereinafter mentioned.

(Emphasis added.) Thus, under the terms of the Morrill Act grant, the states cannot pay any expenses out of the agricultural college endowment fund income.

<sup>11</sup> In fact, article 9, § 11 of the Idaho Constitution clearly notes that the investment of university endowment funds is different from the other endowment funds.