

ATTORNEY GENERAL OPINION NO. 02-1

To: Winston A. Wiggins, Director
Idaho Department of Lands
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

INTRODUCTION

In 2001, the Idaho Department of Lands ("Department") requested a formal opinion from this office regarding aspects of the newly created land bank fund. On December 18, 2001, this office issued Attorney General Opinion No. 01-4. Section D.2. of that Opinion conflicts with three provisions of the Idaho Code. Accordingly, to the extent Attorney General Opinion No. 01-4 conflicts with this Opinion, it is hereby superseded.

QUESTIONS PRESENTED

You ask the following questions:

- A. For which endowments may the State Board of Land Commissioners ("Land Board") utilize the land bank fund created by Idaho Code § 58-133;
- B. Is use of the land bank fund mandatory; and
- C. What "expenses" of property sale/acquisition, if any, can be paid for out of the proceeds from the sale of endowment lands that are invested in the land bank fund?

CONCLUSIONS

A. Pursuant to various provisions of the Idaho Code, the Land Board may deposit into the land bank fund proceeds from the sale of lands belonging to the penitentiary endowment; public school endowment; university endowment; scientific school endowment; agricultural college endowment; normal school endowment; mental hospital endowment; and charitable institutions endowment. The proceeds from the sale of lands belonging to the capitol permanent endowment, however, may not be placed into the land bank fund.

B. Based on the plain language of Idaho Code § 58-133, which states, "[t]he proceeds from the sale of state endowment land *may* be deposited into a fund which shall be known as the 'land bank fund'" (emphasis added), the Land Board retains discretion in deciding whether to deposit proceeds from the sale of various parcels of endowment

lands into the land bank fund. In the event the Land Board chooses not to deposit the proceeds from the sale of eligible endowment lands into the land bank fund, Idaho Code § 57-716 requires those proceeds to be placed in the appropriate permanent endowment fund.

C. The trusts created by the grants of endowment lands by the federal government are governed by basic trust principles. One such principle is that reasonable costs incurred acquiring trust property may be deducted from the principal of the trust. Accordingly, proceeds deposited in the land bank fund may be used to pay reasonable and necessary costs incidental to the acquisition or purchase of new endowment property. Although these same basic trust principles apply to payment of the costs associated with the sale of trust property, Idaho Code § 58-316 requires “[a]ll purchase moneys arising from the sale of state land” be paid by the Department to the state treasurer. Thus the Department is specifically precluded from deducting any costs whatsoever from the purchase moneys received in exchange for endowment lands.

ANALYSIS

A. Introduction

There are nine permanent endowments in Idaho—penitentiary; public school; university; scientific school; agricultural college; normal school; mental hospital; charitable institutions; and capitol building. Each endowment originated from various grants of lands to the state from the federal government upon Idaho’s admission to the Union. *See* Idaho Admission Act, Act of July 3, 1890, §§ 4, 6, 8 and 11, 26 Stat. 215, 215-17. Pursuant to Idaho Const. art. 9, §§ 7 and 8, and Idaho Code §§ 58-101 and 58-104, the State Board of Land Commissioners is charged with the management of these endowment lands.

In the past, the Land Board did not have authority to use the proceeds from the sale of endowment lands to purchase “new” endowment land. Prior to its amendment in 1998, for example, the Idaho Admission Act provided that the proceeds from the sale of school endowment land “constitute[d] a permanent school fund, the interest on which only shall be expended” Act of July 3, 1890, § 5, 26 Stat. 215 (amended 1998 Pub. L. No. 105-296). Accordingly, if the Land Board desired to acquire a new, more valuable, parcel of land for an endowment, it was required to perform complicated land exchanges.

In 1998, the Idaho Legislature enacted comprehensive endowment reform. *See* 1998 Idaho Sess. Laws 825. This reform ultimately entailed a change to the Idaho Admission Act, changes to portions of the Idaho Constitution, and the amendment or creation of a myriad of statutes. One of the purposes of the endowment reform was to eliminate the necessity of complicated “land swaps” by permitting the Land Board to

purchase new endowment land with the proceeds from the sale of previously owned endowment land. Minutes of the Endowment Fund Inv. Reform Comm., July 10, 1997, at 17. The endowment reform required congressional action, and, thus, the effective date of the endowment reform legislation was July 1, 2000, following Congress's amendment of the Idaho Admission Act.

B. Use of the Land Bank Fund

The question of which endowments may utilize the land bank process is an issue of statutory interpretation. The rules governing interpretation of a statute have recently been reiterated by the Idaho Supreme Court:

Where statutory language is unambiguous, the clearly expressed intent of the legislature must be given effect and there is no occasion for a court to consider the rules of statutory construction. Where . . . there is an ambiguity in the statute, the Court should construe the statute to give effect to the legislative intent. The interpretation should begin with an examination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning.

In re Williamson v. City of McCall, 135 Idaho 452, 455, 19 P.3d 766, 769 (2001) (citations omitted).

Idaho Code § 58-133(2), enacted in 1998 and effective in 2000, addresses the acquisition, sale, lease, exchange or donation of public lands, and creates a land bank fund. It states, in relevant part:

The proceeds from the sale of state endowment land may be deposited into a fund which shall be known as the "land bank fund," which is hereby created in the state treasury for the purpose of temporarily holding proceeds from land sales pending the purchase of other land for the benefit of the beneficiaries of the endowment. A record shall be maintained showing separately from each of the respective endowments the moneys received from the sale of endowment lands. Moneys from the sale of lands which are a part of an endowment land grant shall be used only to purchase land for the same endowment.

Idaho Code § 58-133(2). Money not deposited into the land bank fund for the purpose of purchasing other lands must, upon the sale of state endowment lands, be deposited into the appropriate permanent endowment fund. Idaho Code § 57-716.

As part of the endowment reform in 1998, statutes governing the management of state endowments were also enacted. The following statutes were enacted creating

permanent endowment funds: Idaho Code § 20-102 (penitentiary endowment); Idaho Code § 33-902 (public school endowment); Idaho Code § 33-2909 (university endowment); Idaho Code § 33-2911 (scientific school endowment); Idaho Code § 33-2913 (agricultural college endowment); Idaho Code § 33-3301 (normal school endowment); Idaho Code § 66-1101 (mental hospital endowment); Idaho Code § 66-1103 (charitable institutions endowment).¹ *See generally* 1998 Idaho Sess. Laws 825. Each of these statutes has specific language allowing the proceeds from the sale of a parcel of endowment land to be placed into the land bank fund. For example, Idaho Code § 20-102 (penitentiary endowment) states, in relevant part:

Proceeds from the sale of penitentiary endowment lands may first be deposited into the land bank fund established in section 58-133, Idaho Code, to be used to acquire other lands within the state for the benefit of the beneficiaries of the penitentiary endowment. If the land sale proceeds are not used to acquire other lands in accordance with section 58-133, Idaho Code, the land sale proceeds shall be deposited into the penitentiary permanent endowment fund along with any earnings on the proceeds.

Idaho Code § 20-102(2). Seven other permanent endowment funds contain similar language expressly permitting proceeds from the sale of endowment lands to be placed into the land bank fund. *See* Idaho Code § 33-902(2) (proceeds from the sale of public school endowment land “may be deposited into the land bank fund”); Idaho Code § 33-2909(2) (same for the proceeds from the sale of university endowment land); Idaho Code § 33-2911(2) (same for the proceeds from the sale of scientific school endowment land); Idaho Code § 33-2913(2) (same for the proceeds from the sale of agricultural college endowment land); Idaho Code § 33-3301(2) (same for the proceeds from the sale of normal school endowment land); Idaho Code § 66-1101(2) (same for the proceeds from the sale of mental hospital endowment land); Idaho Code § 66-1103(2) (same for the proceeds from the sale of charitable institutions endowment land).

Accordingly, based both on the plain language of Idaho Code § 58-133, as well as the statutory language establishing each of the respective “permanent endowment” funds, the Land Board may deposit, in the land bank fund, proceeds from the sale of endowment lands of the following endowments: (1) penitentiary; (2) public school; (3) university; (4) scientific school; (5) agricultural college; (6) normal school; (7) mental hospital; and (8) charitable institutions. The remaining endowment, the capitol endowment fund, must be addressed separately because of the unique circumstances surrounding its creation.

The federal government, in the Idaho Admission Act, granted the state 50 sections—approximately 32,000 acres—of the unappropriated public lands “for the purpose of erecting public buildings at the capital . . . for legislative, executive, and judicial purposes” Act of July 3, 1890, § 6, 26 Stat. 215, 216. In 1998, the

legislature created two competing and inconsistent statutes that addressed this endowment.

As part of the “endowment reform package” the legislature enacted Idaho Code §§ 67-5779 through 67-5781, addressing the “the public buildings” endowment. 1998 Idaho Sess. Laws 848-50. Idaho Code § 67-5779 established a “public buildings permanent endowment fund,” and, as with all of the other permanent endowment fund statutes, expressly permitted the deposit of proceeds from the sale of public building endowment lands into the land bank fund. 1998 Idaho Sess. Laws 848-49. The corpus of this permanent endowment fund was to be the “[p]roceeds of the sale of lands granted to the state of Idaho by the United States government in the Idaho Admission Bill, 26 Stat. L. 215, ch. 656, known as public buildings endowment lands, and lands granted in lieu thereof.” 1998 Idaho Sess. Laws 849. Also in 1998, the legislature enacted Idaho Code §§ 67-1601 through 67-1612, concerning the “Capitol Building And Grounds.” 1998 Idaho Sess. Laws 1007-11. Idaho Code § 67-1610 created the “capitol permanent endowment fund,” which consists, in part, of “the proceeds of the sale of lands granted to the state of Idaho for the purpose of facilitating the construction, repair, furnishing and improvement of public buildings at its capitol by an Act of Congress . . . entitled ‘An Act to Provide for the Admission of the State of Idaho into the Union’” Thus, there were two endowments with the same corpus. In 2000, recognizing that the statutes creating the “public buildings permanent endowment fund” and the “capitol permanent endowment fund” contained “similar and conflicting provisions,” the legislature repealed the statutes establishing the “public building endowment.” 2000 Idaho Sess. Laws 644. Accordingly, only the remaining statute, Idaho Code § 67-1610, must be analyzed in order to determine whether proceeds from the sale of lands governed by the “capitol permanent endowment fund” may be placed in the land bank fund.

Unlike the above-mentioned eight other permanent endowment statutes, Idaho Code § 67-1610, which created the capitol permanent endowment fund, does not expressly authorize proceeds from the sale of capitol endowment lands to be deposited into the land bank fund. Idaho Code § 67-1610 states:

There is hereby created a permanent fund within the state treasury to be known as the capitol permanent endowment fund, consisting of, from this point forward: (a) the proceeds of the sale of lands granted to the state of Idaho for the purpose of facilitating the construction, repair, furnishing and improvement of public buildings at its capitol by an Act of Congress (26 Stat. L. 214, ch. 656 (1890) (as amended)) entitled “An Act to Provide for the Admission of the State of Idaho into the Union,” comprising thirty-two thousand (32,000) acres, or any portion thereof, or mineral therein; (b) all unappropriated and unencumbered moneys in the public building fund shown on the state controller's chart of accounts as Fund No. 0481-09; (c) retained earnings to compensate for the effects of inflation; and (d)

legislative appropriations. The fund shall be managed by the endowment fund investment board in accordance with chapter 5, title 68, Idaho Code. All realized earnings shall be credited to the capitol endowment income fund creation [sic] in section 67-1611, Idaho Code.

As stated above, Idaho Code § 67-1610 was enacted in the same legislative session as the statutes for the eight other permanent endowments. Statutes passed at the same session and having to do with the same subject matter are to be considered *in pari materia* (of the same matter or subject) and construed together as though parts of one act. State v. Casselman, 69 Idaho 237, 244, 205 P.2d 1131, 1134 (1949). Courts construe statutes that are *in pari materia* together as one system to effect legislative intent. Shay v. Cesler, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999). Accordingly, although Idaho Code § 67-1610 was not part of the above-referenced “endowment reform act,” 1998 Idaho Sess. Laws 825, it is *in pari materia* with that act, and it must be construed as though it is part of the endowment reform act in order to determine the legislature’s intent.

“[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.” SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (5th ed. 1992). Reading all the endowment statutes together, the legislature’s failure to specifically provide for utilization of the land bank in Idaho Code § 67-1610 can only be interpreted as purposeful and is an indication the legislature did not intend the proceeds from the sale of capitol permanent endowment land to be deposited into the land bank.

Additionally, when a statute designates the things to which it refers, a court will typically infer that all omissions should be understood as exclusions. SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992) (describing the doctrine of *expressio unius est exclusio alterius*). Idaho Code § 67-1610 specifically designates the components which make up the capitol permanent endowment. The statute makes no mention of the land bank process with respect to the capitol endowment fund. Finally, it is well established that a specific statute controls over a more general one when there is any conflict between the two or when the general statute is vague or ambiguous. Tuttle v. Wayment Farms, Inc., 131 Idaho 105, 108, 952 P.2d 1241, 1244 (1998). “Where two statutes appear to apply to the same case, the specific should control over the general.” V-1 Oil Co. v. Idaho Transp. Dept., 131 Idaho 482, 483, 959 P.2d 463, 464 (1998). Here, although the general statutes—Idaho Code §§ 57-716 and 58-133—apparently permit *all* endowments to utilize the land bank, the more specific statute concerning the capitol permanent endowment—Idaho Code § 67-1610—does not. Accordingly, when compared with the language of the other endowment statutes, Idaho Code § 67-1610 does not permit the deposit of proceeds from the sale of the lands comprising the capitol permanent endowment into the land bank.

C. The Land Board is not Required to Deposit the Proceeds From the Sale of Endowment Lands in the Land Bank

In 2000, Idaho Code § 58-133 became effective. It states in relevant part: “The proceeds from the sale of state endowment land *may* be deposited into a fund which shall be known as the ‘land bank fund’” (Emphasis added.)

Ordinarily, in construing a statute, the language of a statute is to be given its plain, obvious and rational meaning. In re Williamson, 135 Idaho at 455, 19 P.3d at 769; Thomas v. Worthington, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999). The Idaho Supreme Court has interpreted the word “may” to mean or express the right to exercise discretion. Rife v. Long, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). When used in a statute, the word “may” is permissive rather than imperative or mandatory. *Id.* Accordingly, a court would interpret the plain language of Idaho Code § 58-133 as permitting the Land Board to exercise its discretion to choose whether to utilize the land bank fund.

Furthermore, Idaho Code § 57-716 provides for the disposition of proceeds from the sale of endowment lands *not* placed into the land bank. Pursuant to Idaho Code § 57-716, proceeds from the sale of state endowment lands, “if not deposited into the land bank fund established in section 58-133, Idaho Code, and used to purchase other lands, shall be deposited into the appropriate permanent endowment funds.” Thus, the legislature specifically recognized that the Land Board has the discretion to choose whether to deposit proceeds from the sale of endowment lands into the land bank fund.

The plain language of Idaho Code § 58-133, as well as the express language of Idaho Code § 57-716, grant the Land Board discretion in choosing to use the land bank. Therefore, that portion of Idaho Code § 58-133 which permits the deposit of proceeds from the sale of endowment land into the land bank is not mandatory; the Land Board has the discretion on a case-by-case basis to determine whether it is appropriate to place any eligible funds into the account.

D. “Transaction Costs” Associated With the Purchase of Endowment Property May Be Paid From the Land Bank Fund, Those Costs Associated With the Sale of Endowment Property May Not Be Deducted From the Proceeds Of Sale

You asked whether the funds constituting the land bank fund may be used to pay for costs associated with property sale and/or acquisition, *i.e.*, appraisals, Level 1 environmental site assessments, timber cruises, and realtor commissions, as well as architecture, engineering and closing costs. Because of the express language contained in Idaho Code § 58-133, as well as other provisions of the Idaho Code, it is necessary to

address the costs associated with sale of property separately from those associated with the acquisition of property.

Initially, it must be noted that trustees are required to obtain independent appraisals of trust assets before selling or acquiring them. National Parks and Conservation Assoc. v. Board of State Lands, 898 P.2d 909, 922 (Utah 1993). Because a seller or purchaser “has the opportunity to shop for favorable appraisals,” if the Land Board were to rely on an appraisal submitted by the seller or purchaser, the trust would be “subject to sharp dealing on the part” of that individual or entity. *Id.* Accordingly, pursuant to basic trust law, the Land Board, as trustee, must contract for its own appraisal. *Id.* In addition to its own appraisal, to the extent any of the costs you inquire about are subject to the same potential for sharp dealing, the Land Board must obtain the necessary inspections. These basic trust law principles provide the foundation for the answer to your question.

1. Purchase Costs Are Payable Out of the Land Bank Fund

Following the 1998 endowment reform, there are three separate trusts for each endowment except the capitol permanent endowment. One trust consists of the funds that constitute the land bank fund. A second trust consists of the permanent endowment fund created for each endowment. The third trust is made up of the lands that comprise each of the endowments. Your question concerns the land bank trust.

Trust *res* is the property of which the trust consists. BLACK’S LAW DICTIONARY 1054 (abridged 6th ed. 1991). Upon the sale of a parcel of endowment land, the *res* is transformed—from the land itself, to the proceeds from the sale of the land. If such proceeds are placed into the land bank fund they can earn interest. By statute, both the proceeds and the interest that accumulates on the proceeds deposited in the land bank fund are deposited into the permanent endowment fund of the respective endowment if not used to acquire new lands for the endowment. Idaho Code § 58-133.²

The specific question regarding the use of endowment *res*—in the form of the proceeds from the sale of endowment land or interest thereon—to pay the costs associated with the acquisition of endowment property has not been addressed by any court of this state. The Idaho Supreme Court has, however, in another context, noted that the principles of basic trust law apply to the state’s administration of the endowment trusts. See Moon v. State Bd. of Land Comm’rs, 111 Idaho 389, 393, 724 P.2d 125, 129 (1986) (finding a statute concerning public school endowment constitutional because it was “in accord with the principles of basic trust law”). The committee responsible for drafting the 1998 comprehensive endowment reform was advised that management of the endowment trusts must be in accordance with private trust principles. Minutes of the Endowment Fund Inv. Reform Comm., July 10, 1997, at 19. Furthermore, the Joint Memorial transmitted by Idaho to the United States Congress, requesting amendment of

the Idaho Admission Act to permit proceeds from the sale of public school endowment lands to be placed into the land bank fund, stated that the restrictions then placed on the endowment were “inconsistent with modern concepts of prudent investment,” and stated that the restrictions should be modified “to reflect modern business practices.” 1998 Idaho Sess. Laws 1372.

Idaho Code § 58-133 permits the Land Board to utilize the proceeds from the sale of endowment land for the “*purchase* of other land for the benefit of the beneficiaries of the endowment.” (Emphasis added.) Under basic trust law, “the cost of effecting . . . acquisitions of any part of the [trust] principal, are payable out of principal.” RESTATEMENT (SECOND) OF TRUSTS § 233, cmt. f (1959). *See also In re Estate of Campbell*, 382 P.2d 920, 966 (Haw. 1963), *quoting* the RESTATEMENT (SECOND) OF TRUSTS; BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 803, at 151 (1981) (court decisions and statutes generally require payment of the costs of buying trust investments from trust principal). Accordingly, Idaho Code § 58-133 is consistent with basic trust principles. Appraisals, Level 1 environmental site assessments, timber cruises, realtor commissions, as well as architecture, engineering and closing costs can be considered costs affecting the acquisition of trust principal (real property).

The Moon court also noted that, absent an express prohibition, “expenses incurred in maintaining and protecting the trust *res* are reasonable deductions.” *Id.* Idaho Code § 58-133 does not contain an express prohibition forbidding the use of the moneys therein from being used to pay the costs associated with property acquisition. Furthermore, nothing in Idaho Const. art. 9, § 4—concerning the public school permanent endowment fund—nor any of the statutes creating the seven other applicable permanent endowment funds expressly prohibits the use of the funds deposited in the land bank from being utilized to pay the transaction costs associated with the purchase of trust property.

Additionally, the language of a statute is to be given its plain, obvious and rational meaning. In re Williamson, 135 Idaho at 455, 19 P.3d at 769; Thomas, 132 Idaho at 829, 979 P.2d at 1187. If statutory language is clear and unambiguous, a court need only apply the statute without engaging in statutory construction. As set forth above, Idaho Code § 58-133 states: “Moneys from the sale of lands which are a part of an endowment land grant shall be used only to purchase land for the same endowment.” In order to “purchase land for the same endowment,” the costs associated with such a purchase must be paid. Accordingly, the costs associated with purchasing lands with proceeds deposited in the land bank fund may be paid out of that fund.

However, in view of the fact that no Idaho court has yet to consider this issue, it must be noted that a review of the legislative history reveals that the specific question of whether land bank funds could be used to pay the costs associated with property acquisition was not discussed. Moreover, an argument may be made that because Idaho Code § 57-723A permits the legislature to appropriate the funds from each endowment’s

earnings reserve fund “to pay for administrative costs incurred managing the assets of the endowments including, but not limited to, real property and monetary assets,” the deduction of the costs of property acquisition from the trust *res* is improper. However, given the language of Moon, 111 Idaho at 393, 724 P.2d at 129, regarding the applicability of basic trust law to the state’s endowment trusts, such arguments are likely to fail.

It is the opinion of this office that the costs associated with the acquisition of endowment property may be paid for out of the trust *res* contained in the land bank. The payments of such costs are in agreement with basic trust principles and are necessary costs associated with property purchase. Without the payment of such costs, the Land Board could not ensure that beneficiaries of the subject trust receive the maximum possible benefit when new endowment lands are acquired.

2. Costs Associated With the Sale of Endowment Land May Not Be Deducted From the Proceeds, But Instead Must Be Paid For in Another Manner³

The costs associated with the sale of endowment property must be addressed separately because Idaho Code § 58-133, by its express terms, addresses only the “*purchase* of other land for the benefit of the beneficiaries of the endowment.” (Emphasis added.) The statutes establishing the land bank fund do not govern the payment of costs associated with the sale of endowment land and, thus, this section is applicable to the sale of land constituting all nine endowments, including the capitol permanent endowment.

No fewer than three specific provisions of the Idaho Code address this issue.

Idaho Code § 58-116 states:

The gross amount of money received by the department, from whatever source, belonging to or for the use of the state, shall be paid into the state treasury, without delay, without any deduction on account of salaries, fees, costs, charges, expenses or claim of any description whatever and shall be credited to such fund or funds as are now or may hereafter be designated by law for the deposit thereof. No money belonging to, or for the use of, the state shall be expended or applied by the department except in consequence of an appropriation made by law and upon the warrant of the state controller.

The term “gross” means, among other things, “before or without diminution or deduction.” BLACK’S LAW DICTIONARY 485 (abridged 6th ed. 1991). Although there may be some question regarding when money is “received” by the department following the sale of endowment land, other portions of Idaho Code § 58-116 clearly prohibit the

payment of costs associated with the sale of such lands directly from the proceeds received by the Department. Section 58-116 requires that all of the money received by the Department be deposited with the treasury, “without any deductions on account of . . . fees, costs, charges or expenses.” Additionally, the final clause of section 58-116 requires the use of money belonging to the state be made “upon the warrant of the state controller.”

Idaho Code § 58-128 governs the Land Board’s duty to deposit money received by it and requires that money to be deposited “daily” with the state treasurer. Finally, Idaho Code § 58-316 states, in relevant part:

All purchase moneys arising from the sale of state land shall without delay be paid by the director of the department of lands to the treasurer who shall receipt for the same, and the same shall be credited by the treasurer to the land bank fund to which the land sold belonged.

(Emphasis added.) “Purchase money” is defined as: “The actual money paid in cash or check initially for the property while the balance may be secured by a mortgage and not calling for periodic payments.” BLACK’S LAW DICTIONARY 861 (abridged 6th ed. 1991). It is apparent from the plain language of Idaho Code § 58-316 that *all* of the money paid to the state for endowment land (or any other state land) must be deposited with the state treasurer. Accordingly, deduction of the costs associated with the sale of endowment property from the money paid to the state for that property is prohibited.

CONCLUSION

The Land Board may deposit the proceeds from the sale of the following eight endowments into the land bank fund created by Idaho Code § 58-133: (1) penitentiary; (2) public school; (3) university; (4) scientific school; (5) agricultural college; (6) normal school; (7) mental hospital; and (8) charitable institutions. The statutes relating to eight endowments specifically permit the proceeds from the sale of endowment lands to be placed in the land bank. The capitol building permanent endowment, however, contains no such express permission. Idaho Code § 67-1610. This omission by the legislature can only be interpreted as purposeful. Thus, proceeds from the sale of the lands granted to the state by § 6 of the Idaho Admission Act, Act of July 3, 1890, 26 Stat. 215, 216, may not utilize the land bank process.

Idaho Code § 58-133 states that the Land Board “may” deposit proceeds from the sale of endowment land into the land bank. The term “may” has been interpreted by the Idaho courts as permissive. Additionally, Idaho Code § 57-716 expressly directs that proceeds from the sale of endowment land not placed into the land bank “shall be deposited into the appropriate permanent endowment funds.” Accordingly, the Land

Board is not required to utilize the land bank process, but may place the proceeds from the sale of endowment land directly into the appropriate permanent endowment fund.

Finally, basic trust principles apply to the management of state endowment funds. One such basic trust principle is that the cost of effecting acquisitions of any part of trust principal are payable out of that principal. Accordingly, although there may be arguments to the contrary, moneys deposited in the land bank fund, which expressly permits the funds therein to be used for the “purchase” of new endowment land, may be used to pay reasonable and ordinary costs associated with the acquisition of endowment real property—such as appraisal, Level 1 environmental site assessments, timber cruises, realtor commissions, as well as architecture, engineering and closing costs. Although basic trust principles likewise apply to the costs associated with the sale of trust lands, Idaho Code § 58-316 requires that “[a]ll purchase moneys arising from the sale of state land” be paid to the state treasurer “without delay.” Accordingly, costs associated with the sale of endowment lands may not be deducted from the purchase moneys received by the Department.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article 9.
Article 9, § 7.
Article 9, § 8.

2. Idaho Code:

Idaho Code § 20-102.
Idaho Code § 33-902.
Idaho Code § 33-902A.
Idaho Code § 33-903.
Idaho Code § 33-2909.
Idaho Code § 33-2911.
Idaho Code § 33-2913.
Idaho Code § 33-3301.
Idaho Code § 57-716.
Idaho Code § 57-723A.
Idaho Code § 58-101.
Idaho Code § 58-104.
Idaho Code § 58-116.
Idaho Code § 58-128.
Idaho Code § 58-133.
Idaho Code § 58-361.

Idaho Code § 66-1101.
Idaho Code § 66-1103.
Idaho Code §§ 67-1601 through 67-1612.
Idaho Code §§ 67-5779 through 67-5781.
Idaho Code §§ 68-10-101 through 68-10-605.

3. Idaho Session Laws:

1998 Idaho Sess. Laws 825.
1998 Idaho Sess. Laws 848-50.
1998 Idaho Sess. Laws 1007-11.
1998 Idaho Sess. Laws 1372.
2000 Idaho Sess. Laws 644.

4. Cases:

In re Estate of Campbell, 382 P.2d 920 (Haw. 1963).
In re Williamson v. City of McCall, 135 Idaho 452, 19 P.3d 766 (2001).
Moon v. State Bd. of Land Comm'rs, 111 Idaho 389, 724 P.2d 125 (1986).
National Parks and Conservation Assoc. v. Board of State Lands, 898 P.2d 909 (Utah 1993).
Rife v. Long, 127 Idaho 841, 908 P.2d 143 (1995).
Shay v. Cesler, 132 Idaho 585, 977 P.2d 199 (1999).
State v. Casselman, 69 Idaho 237, 205 P.2d 1131 (1949).
Thomas v. Worthington, 132 Idaho 825, 979 P.2d 1183 (1999).
Tuttle v. Wayment Farms, Inc., 131 Idaho 105, 952 P.2d 1241 (1998).
V-1 Oil Co. v. Idaho Transp. Dept., 131 Idaho 482, 959 P.2d 463 (1998).

5. Other Authorities:

BLACK'S LAW DICTIONARY 485 (abridged 6th ed. 1991).
BLACK'S LAW DICTIONARY 861 (abridged 6th ed. 1991).
BLACK'S LAW DICTIONARY 1054 (abridged 6th ed. 1991).
BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 803 (1981).
Idaho Admission Act, Act of July 3, 1890, 26 Stat. 215.
Minutes of the Endowment Fund Inv. Reform Comm., July 10, 1997.
RESTATEMENT (SECOND) OF TRUSTS § 233, cmt. f (1959).
SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992).
SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (5th ed. 1992).

DATED this 5th day of June, 2002.

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Analysis by:

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Natural Resources Division

¹ Statutes creating a “permanent building endowment” were also enacted. However, as will be set forth more fully below, those statutes were repealed and are no longer in effect.

² The interest that accumulates in the land bank fund becomes part of the trust *res* because it is deposited into the appropriate permanent endowment fund. Idaho Code § 58-133. This differs significantly from the earnings on the endowment funds themselves, which do not constitute part of the trust *res*; they become part of the appropriate earnings reserve fund which can be distributed to the beneficiaries. *See, e.g.*, Idaho Code §§ 33-902A and 33-903.

³ This section of the Opinion supersedes and withdraws that expressed in Section D.2 of Att’y Gen. Op. No. 01-4.