



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION 15-2

To: Director Thomas Schultz
Idaho Department of Lands
300 N. 6th St. #103
Boise, ID 83702
Via Statehouse Mail

Per Request for Attorney General's Opinion

You requested this office provide an opinion concerning the following question.

QUESTION PRESENTED

Are the lands occupied by the old state penitentiary subject to Article IX, §§ 7 and 8, which require the State Board of Land Commissioners to conduct a public auction to sell or lease lands granted to the State by the general government?

CONCLUSION

There are no constitutional restraints on the sale or disposition of penitentiary reserve lands. Such lands are not subject to the Idaho Constitution art. IX, sections 7 and 8, and may be sold or leased in accordance with the legislative directive in Idaho Code § 58-337.

FACTUAL BACKGROUND

In 1869, the Territory of Idaho began construction of a penitentiary on 280 acres of land east of Boise that is now the site of the old penitentiary and a complex of other state buildings. House Concurrent Resolution No. 8, *Laws and Resolutions of the 5th Legislative Assembly of the Terr. of Idaho* 176-77 (1869). Prior to Statehood, with the purchase of adjoining property, land occupied by the penitentiary grew to approximately 550 acres.

When Idaho was admitted to the Union in 1890, the United States made a number of land grants to Idaho for various purposes. Pursuant to Section 4 of the Idaho

Admission Act, sections 16 and 36 in every township were granted to Idaho “for the support of common schools.” 26 Stat. L. 215, ch. 656 (1890). Pursuant to Section 6 of the Admission Act, 50 sections of land were granted for “the purpose of erecting public buildings.” *Id.* at 216. Pursuant to Section 8, 72 sections of land were granted with the income from the lands to be deposited in a permanent fund to be used for “university purposes.” *Id.* Pursuant to Section 10, 90,000 acres of land were donated for the support of an agricultural college. *Id.* Pursuant to Section 11, 500,000 acres were granted for the support and maintenance of various state institutions, including 50,000 acres of land “for the support and maintenance of the penitentiary, located at Boise City” *Id.* at 216-17.

Finally, pursuant to Section 9 of the Idaho Admission Bill, the United States granted the territorial penitentiary and its associated 550 acres of land to the State:

That the penitentiary at Boise City, Idaho, and all lands connected therewith and set apart and reserved therefor, and unexpended appropriations of money therefor, and the personal property of the United States now being in the Territory of Idaho which has been in use in the said Territory in the administration of the Territorial government, including books and records and the property used at the constitutional convention which convened at Boise City in the month of July, eighteen hundred and eighty-nine, are hereby granted and donated to the State of Idaho.

26 Stat. L. at 216. For convenience in this Opinion, the 550 acres of lands originally occupied by the territorial penitentiary, and granted to the State in Section 9 of the Admission Act, are referred to as the “penitentiary reserve lands.”

In 1902, Idaho selected lands for support of the penitentiary pursuant to Section 11 of the Idaho Admission Bill. The selected lands included 267.27 acres adjoining the penitentiary reserve lands on the east boundary. After a land sale in 1949, there remains 80 acres in Section 13, T3N, R2E and 107.21 acres in Section 18, T3N, R3E, a total of 187.27 acres, adjoining the penitentiary reserve lands. Those 187.27 acres are referred to herein as “penitentiary endowment lands.”

ANALYSIS

The “penitentiary . . . and all lands connected therewith” were granted to the State in Section 9 of the Admission Act. While the grants of endowment land in Sections 4, 6, 8, 10, and 11 of the Admission Act required the granted lands to be used for the support and maintenance of the endowed institutions, the grant in Section 9 does not specify a purpose for the penitentiary reserve lands. Rather, it is an unconditional grant and donation of the penitentiary and connected lands to the State of Idaho.¹ Unlike the other

¹ The granting language in Section 9 applies not only to the penitentiary, but also to the personal property used in the administration of the Idaho Territory, and the “books and records and the property

land grants, there is no requirement that earnings from the sale or lease of penitentiary reserve lands be used for the support of state prisons or other institutions. Thus, the general provision in Section 12 of the Admission Act that lands granted to the state “shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned” does not, by its terms, apply to the penitentiary reserve lands.

Because the Admission Act does not restrict the disposition of the penitentiary reserve lands, the remaining question is whether the drafters of the Idaho Constitution nonetheless intended for the penitentiary reserve lands to be subject to the same restrictions on disposition as were placed on endowment lands.

Art. IX, sec. 7 of the Idaho Constitution provides:

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

This general provision gave the Board of Land Commissioners (Land Board), authority over all “public lands of the state.” The term “public lands” also appears in art. IX, sec. 8 of the Idaho Constitution, which provides that the Land Board shall “provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government.” These references to “public lands” must be read in conjunction with Section 14 of the Admission Act, which provided that “[a]ll lands granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of interior, from the surveyed, unreserved, and unappropriated public lands of the United States.” 26 Stat. L. at 217. Upon conveyance, the selected federal public lands became “public lands of the state” and were placed under the authority of the Land Board pursuant to art. IX, sec. 7 of the Idaho Constitution. The Admission Act provisions addressing the selection and conveyance of “public lands,” along with the constitutional provisions in art. IX vesting the Land Board with control and disposition of “public lands,” establish that the drafters of the Idaho Constitution used the term “public lands” to refer to those lands granted to the state by the general government for the support of specific state institutions, including the penitentiary endowment lands granted to the State under Section 11 of the Admission Bill.

The lands constituting the territorial penitentiary, however, were not unappropriated public lands available for selection to support public schools or other endowed institutions. The lands for the territorial penitentiary were acquired from the

used at the constitutional convention.” All properties identified in Section 9 were granted to the State unconditionally.

United States by the Territory of Idaho in 1869,² and thereafter were not public lands, as such term is used in the Admission Act and the Constitution. Rather, as noted in Section 9 of the Admission Act, the penitentiary lands had been set apart and reserved.” 26 Stat. L. at 216. Recognizing that the penitentiary was not public land to be managed by the Land Board, the drafters of the Idaho Constitution created another constitutional board to manage the penitentiary. Art. X, sec. 5 of the Idaho Constitution originally provided, in part:

The governor, secretary of state and attorney general shall constitute a board to be known as the state prison commissioners, and shall have the control, direction and management of the penitentiaries of the states.

This more specific provision established a distinct category of property known as the “penitentiaries of the state,” and placed management of such property in the board of state prison commissioners. When Art. X, sec. 5 was amended in 1941, the management of “penitentiaries . . . [and] their . . . properties” was transferred to the Board of Correction:

State prisons — Control over. — The state legislature shall establish a nonpartisan board to be known as the state board of correction, and to consist of three (3) members appointed by the governor, This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties

Idaho Const. art. X, § 5 (emphasis added).

The Board of Correction’s authority over “penitentiaries . . . [and] their . . . properties” included, by its terms, the land occupied by, and immediately surrounding, the state penitentiaries, but does not include lands granted to the State for the financial support of the state penitentiaries. Such lands retain their unique constitutional characterization as “public lands” under the management of the Land Board, and such characterization distinguishes them from penitentiary “properties” under the authority of the Board of Correction. Because the categories of land remain distinct, the Board of Correction’s authority over penitentiary “properties” does not conflict with the Land Board’s general authority over “public lands” set aside for the support and maintenance of state penitentiaries.³

² See House Concurrent Resolution No. 8, *Laws and Resolutions of the 5th Legislative Assembly of the Terr. of Idaho 176-77* (1869) (directing governor to apply to General Land Office to acquire title to certain lands in sections 12 and 13, T3N, R2E, for use as territorial penitentiary).

³ Notably, the 1941 Joint Resolution confirms that the authority of the Board of Correction would apply only to properties actually occupied by penitentiaries, and would not extend to penitentiary endowment lands, because the question presented to the voters made no mention of lands, but rather asked: “Shall section 5 of Article 10 of the Constitution be amended as to provide that the state legislature shall establish a non-partisan state board of correction to have the control, direction and management of the penitentiaries of the state . . .” 1941 Idaho Sess. Laws 486.

Moreover, even if the term “public lands” in art. IX, sec. 7 were interpreted to include “properties” occupied by the old state penitentiary, the Constitution’s vesting of land management authority in the Board of Correction over such a subset of “public lands” would not create an unconstitutional interference with the Land Board’s general authority over “public lands,” because the two boards are constitutionally created and of equal stature. *See State v. State Bd. of Education*, 33 Idaho 415, 429, 196 P. 201, 205 (1921) (a constitutional board “while functioning within the scope of its authority, is not subject to the control or supervision of any other branch, board or department of the state government”); *see also id.* at 434, 196 P. at 207 (Dunn, J., dissenting) (the powers of two boards created by the constitution “are certainly equal in rank . . . though not so in extent).

Given the equal stature of the Land Board and the Board of Correction, the specific provision granting the Board of Correction authority over management of penitentiary properties takes precedence over the more general provision granting the Land Board authority over all “public lands.” “A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general.” *Mulder v. Liberty Nw. Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000); *Lewis v. Woodall*, 72 Idaho 16, 18, 236 P.2d 91, 93 (1951) (affirming “general principle that statutory rules of construction apply to the interpretation of constitutional provisions”).

Thus, under the plain terms of the Idaho Constitution, the penitentiary reserve lands are not subject to the requirement in art. IX, sec. 8 of the Idaho Constitution that the Land Board manage “public lands” to “secure the maximum long term financial return to the institution to which granted.” Penitentiary reserve lands are not “public lands” but are a separate category of property, placed originally under the control of the Board of Correction.

In the absence of constitutional directives restricting the disposition of the penitentiary reserve lands, the Legislature directed their disposition by enacting Idaho Code § 58-337:

Lease of old penitentiary site. — To preserve and enhance the cultural, educational, recreational and scenic values of the old penitentiary site at Boise, the state board of land commissioners or any other state agency having jurisdiction and control over the site is authorized to lease any part of the site to private persons, firms, or corporations for a term not to exceed fifty (50) years. The board is also authorized to relinquish control and custody over any part of the old penitentiary site to other state agencies for use as building or office space. Unless otherwise prohibited by law, proceeds from the rental of the old penitentiary site beyond cost of maintenance and historic interpretation shall be credited to the permanent building fund. For purposes of this act [section], the old penitentiary site at Boise includes all penitentiary reserve and acquired lands owned by the state of Idaho in:

Sections 12 and 13, Township 3 North, Range 2 East, Boise Meridian, and the west half of Section 18, Township 3 North, Range 3 East, Boise Meridian.

Idaho Code § 58-337. Section 58-337 was enacted in 1974, shortly after closure of the old penitentiary in December 1973. It replaced an earlier provision enacted in 1969 declaring that the old prison site “shall be declared surplus as the new facilities become available at the new prison site south of Gowen Field.”⁴ 1969 Sess. Laws 772. The 1969 statute also authorized the Department of Lands to “dispose of the described property by sale or lease according to their prescribed procedures under the direction of the state land board.” The 1974 legislation, by substituting specific disposition terms for the general reference in the 1969 legislation to land board disposition procedures, is further evidence of legislative intent to not subject penitentiary reserved lands to the disposition requirements of art. IX, sec. 8.

Because the penitentiary reserve lands are not “public lands” subject to the requirements of art. IX, sec. 8 of the Idaho Constitution, the disposition of the penitentiary reserve lands pursuant to Idaho Code § 58-337 does not conflict with the constitutional restrictions on disposition of “public lands” by the Land Board.

AUTHORITIES CONSIDERED

1. Idaho Constitution

Art. IX, § 7.
Art. IX, § 8.
Art. X, § 5.

2. Idaho Code

§ 58-337.

3. Session Laws

1941 Idaho Sess. Laws 486.
1969 Idaho Sess. Laws 772.

⁴ This Opinion assumes the constitutionality of the legislation declaring the penitentiary reserve lands to be surplus, and assumes that the Board of Correction took the steps necessary to relinquish its authority over such lands vested in it by Idaho Constitution art. X, sec. 5. Department of Lands’ records document earlier transfers of portions of the penitentiary reserve lands to the control of the Land Board by agreement dated April 3, 1964, and amended by agreement dated March 8, 1971, for the use and benefit of the Department of Agriculture and the State Board of Health. Those lands are now occupied by the State Health Laboratory.

4. Idaho Cases

Lewis v. Woodall, 72 Idaho 16, 236 P.2d 91 (1951).
Mulder v. Liberty Nw. Ins. Co., 135 Idaho 52, 14 P.3d 372 (2000).
State v. State Bd. of Education, 33 Idaho 415, 196 P. 201 (1921).

5. Other Authorities

House Concurrent Resolution No. 8, *Laws and Resolutions of the 5th Legislative Assembly of the Terr. of Idaho 176-77* (1869).

Idaho Admission Act, 26 Stat. L. 215, ch. 656 (1890).

Idaho Admission Act, § 4.
Idaho Admission Act, § 6.
Idaho Admission Act, § 8.
Idaho Admission Act, § 9.
Idaho Admission Act, § 10.
Idaho Admission Act, § 11.
Idaho Admission Act, § 12.
Idaho Admission Act, § 14.

Dated this 13 day of November, 2015.



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