STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL OPINION NO. 10-1

To: Mr. M. Dean Buffington, Chairman
Endowment Fund Investment Board
816 W. Bannock Street, Suite 301
Boise, ID 83702

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding the fiduciary responsibilities of the Endowment Fund Investment Board ("EFIB") in its roles as trustee of the financial assets of the Public School Endowment and as the administrator of the Credit Enhancement Program for School District Bonds established by Idaho Code Section 57-728 ("Credit Enhancement Program").

EXECUTIVE SUMMARY

The EFIB is the day-to-day trustee of the financial assets of the Public School Endowment. In all investment decisions entrusted to the EFIB concerning the endowments' assets, the EFIB is bound by the fiduciary duties established by the Idaho Admission Bill, the Idaho Constitution, and the statutory and common law of Idaho. Both the pledging of the financial assets of the Public School Endowment to guarantee a school bond and the purchase of notes under the Credit Enhancement Program to provide funds for a school bond debt service payment are investment decisions.

The EFIB's fiduciary duties require it to determine that the investments represented by the Credit Enhancement Program satisfy the Public School Endowment terms. To satisfy the terms of the trust, an investment must secure the maximum long-term return to the Public School Endowment when considered in conjunction with the trust's investment portfolio and investment strategies. In addition, the current and future beneficiaries of the Public School Endowment must be treated with impartiality in investment decisions.

The EFIB thoroughly reviewed the investment aspects of the initial pledge of endowment assets under the Credit Enhancement Program. The information it reviewed established that the initial pledge narrowed the future investment options for the Public

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School Endowment. The information also identified that this narrowing could produce a lower return to the trust and that fees could offset this lower return. In light of this information, the EFIB's fiduciary duties to the Public School Endowment required that it either establish fees to offset the projected loss of return to the trust or that it decline to invest under the Credit Enhancement Program. Rather than decline to invest, the EFIB decided to establish fees to comply with its statutory and fiduciary duties.

QUESTIONS PRESENTED

1. Do the EFIB's fiduciary duties to the Public School Endowment extend to its decision to pledge the endowment fund to guarantee school bonds issued under the Credit Enhancement Program?

2. If the EFIB's fiduciary duties extend to decisions by the Board to pledge the endowment fund to guarantee school bonds under the Credit Enhancement Program, what must the Board do to fulfill its fiduciary duties?

3. If the EFIB's fiduciary duties extend to decisions by the Board to pledge the endowment fund to guarantee school bonds under the Credit Enhancement Program, may the Board provide a guarantee based upon the benefit to a single Idaho public school district?

BACKGROUND

A. Establishment and Management of the Public School Endowment

The original corpus of the Public School Endowment was established by Sections 4, 5 and 7 of the Idaho Admission Bill. 26 Stat. L. 215, ch. 656; am. 1998, P.L. 105-296; am. 2007, P.L. 110-77. The Idaho Constitution sets forth additional terms of the Public School Endowment trust and specifies that the State Board of Land Commissioners ("Land Board") is its trustee. *See* Idaho Constitution art. IX, §§ 3, 4, 7 and 11; *see also*, Pike v. State Bd. of Land Com'rs, 19 Idaho 268 (1911). The management of the Public School Endowment is split between two agencies: the land and natural resource assets of the trust are managed by the Department of Lands and the financial assets of the trust are managed by the Endowment Fund Investment Board ("EFIB"). *See* Idaho Code § 57-718 (establishing the EFIB); Idaho Code § 58-101 (establishing the Department of Lands). Both agencies are under the direction of the Land Board in its role as the trustee of the Public School Endowment. *See* Idaho Code § 57-718 (establishing the EFIB in the Land Board); Idaho Code § 58-101 (Land Board exercises its constitutional functions through the Department of Lands); *see also*, Idaho Code § 58-104(11) (Land Board has the power to direct and oversee the EFIB and the Department of Lands).

Delegates to the Idaho Constitutional Convention declared that the Public School Endowment is a sacred trust. The framers of the Idaho Constitution imposed restrictive trust provisions on the management of the trust to ensure that it would continue in perpetuity. Idaho Const. art. IX, §§ 3, 4, and 8; *see* I. W. Hart, Proceedings and Debates of the Constitutional Convention of Idaho 1889 647 (1912). The Idaho Legislature recognized these trust obligations when it declared that each of the endowments established by the Idaho Admission Bill are "trust funds of the highest and most sacred order" and directed that the management and investment of the endowment must be "in accordance with the highest standard . . . ." Idaho Code § 57-715.

The Idaho Constitution establishes that the objective of the endowment trusts is to secure the maximum long-term return to the beneficiaries of the particular trust. Idaho Constitution art. IX, § 8. In the late 1990s, the State of Idaho reviewed methods to manage the land and financial assets of the endowments to determine which methods would secure the maximum long term return to the endowment beneficiaries. The review culminated in amendments to the Idaho Constitution often referred to as "Endowment Reform." One of the amendments during Endowment Reform granted broader investment authority to the endowment trustees. *See* Idaho Endowment Fund Investment Board v. Crane, 135 Idaho 667 (2001) (summarizing the 1998 legislative activities and voter approved amendments relating to the endowments). Idaho Constitution article IX, section 11, now provides:

> The permanent endowment funds other than funds arising from the disposition of university lands belonging to the state, may be invested in United States, state, county, city, village, or school district bonds or state warrants or other investments in which a trustee is authorized to invest pursuant to state law.

B. Investment of the Endowments

Prior to Endowment Reform, the investment of the financial assets of the endowments was limited by statute to certain investment types based upon then existing constitutional constraints in Idaho Constitution article IX, section 11. These assets primarily consisted of fixed income investments such as bonds and certain guaranteed loans. Investment in stocks was not permitted. *See* Engelking v. Investment Bd., 93 Idaho 217 (1969).

The Endowment Reform revision to Idaho Constitution article IX, section 11, expanded the types of authorized investments in which the endowment funds could be invested. The primary restriction upon the investment options available to the EFIB under Endowment Reform is the "Prudent Investor Rule." The Prudent Investor Rule requires in pertinent part:

> (1) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.
>
> (2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

Idaho Code § 68-502; *see also,* 1982 Op. Idaho Att'y Gen. 7 (Prudent Investor Rule applies to the investment of all assets held by the state in a fiduciary capacity); Restatement (Third) of Trusts § 90 (2007) (general standard of prudent investment applicable to trustees). In addition to its application under the law generally applicable to a trustee, the Idaho Legislature specifically applied the Prudent Investor Rule to the investment of the endowments. Idaho Code § 57-723.

Under the Prudent Investor Rule as set forth in Idaho Code, the trustee is required to consider a list of circumstances, including:

> (d) The role that each investment or course of action plays within the overall trust portfolio . . . ;
>
> (e) The expected total return from income and the appreciation of capital; [and],
>
> . . . .
>
> (g) Needs for liquidity, regularity of income and preservation or appreciation of capital . . . .

Idaho Code § 68-502(3). In the context of the Public School Endowment, the Prudent Investor Rule requires that the EFIB consider how each individual investment interacts with the other investments and assets held by the endowment. The overall portfolio must support the objective of securing the maximum long term return to the beneficiaries in furtherance of the purpose of providing a perpetual source of support and maintenance of Idaho's public schools. An investment that does not support the risk and return objectives of the Public School Endowment is not a prudent investment.

C. Guaranty of School Bonds by the Public School Endowment

1. The Guaranty Program and the Credit Enhancement Program

In 1999 the Idaho Legislature enacted the Idaho School Bond Guaranty Act ("Guaranty Program") and the Credit Enhancement Program. Idaho Code title 33, ch. 53; Idaho Code § 57-728. Under the Guaranty Program, the sales tax of the State of Idaho is pledged to guarantee the debt service payments of bonds issued by Idaho public school districts under the program. *See* Idaho Code § 33-5303. The pledge of the State's sales tax revenue provides bondholders with a second source of payment should a school district default on its bonds. The State's guaranty results in the award of a higher credit rating to the bonds by rating agencies. This higher credit rating in turn allows the school district to pay a lower interest rate on its bonds. The Guaranty Program is administered by the Office of the Treasurer ("Treasurer").

The Credit Enhancement Program is available to certain Idaho public school districts that have qualified for the Guaranty Program. *See* Idaho Code § 57-728(8) (limiting eligibility based upon the balance of outstanding guaranties to the district). The Credit Enhancement Program is administered by the EFIB and is "intended to benefit school districts by authorizing the board to purchase notes issued by the state of Idaho for the purpose of making debt service payments under the [Guaranty Program]." Idaho Code § 57-728(1).

When the EFIB issues a guaranty under the Credit Enhancement Program, it pledges the Public School Endowment's assets as a third source of payment should a school district default on its bonds. In the event of a school district default, the EFIB does not directly make the school district's bond payment. Instead, the EFIB loans funds from the Public School Endowment to the State of Idaho in exchange for a promissory note issued by the Treasurer on behalf of the State of Idaho. The promissory note is held by the EFIB as an investment for the Public School Endowment until the Treasurer is able to repay the loan. The terms of the loan are set forth in statute, including the interest paid to the Public School Endowment. Idaho Code § 57-728. Bonds issued with a guaranty under the Credit Enhancement Program generally receive a higher credit rating than those guaranteed only by the Guaranty Program. This higher credit rating lowers interest paid to bond holders, reducing the costs to the school district and its taxpayers.

2. Idaho Endowment Fund Investment Board v. Crane and Implementation of the Credit Enhancement Program

The Credit Enhancement Program was challenged in a suit filed shortly after its approval. Crane, 135 Idaho 667. In Crane, the Idaho Supreme Court considered several legal issues, including whether the Credit Enhancement Program complied with the terms of the Idaho Constitution governing the preservation and investment of the Public School Endowment. The court concluded that the Credit Enhancement Program complied with the Idaho Constitution because "the purchase of notes is not a transfer or use of endowment funds but fits squarely within the definition of an investment to be held as an asset of the fund, which in turn will produce income for the fund." *Id.* at 673.

Following the Crane decision, the Treasurer and the EFIB implemented the Guaranty Program and the Credit Enhancement Program. Under the original provisions of the Credit Enhancement Program a guaranty was issued unless the EFIB objected to an application. Idaho Code § 57-728(2) (2002). All guaranties issued by the EFIB under the Credit Enhancement Program prior to 2009 were issued without formal consideration by the EFIB. No Idaho school district has defaulted on its bond obligations and neither the Guaranty Program nor the Credit Enhancement Program has been called upon to pay the debt service payments under its guaranties.

Revisions enacted in 2009 allow the Guaranty Program to operate separately from the Credit Enhancement Program and redress administrative and technical issues that had arisen in the decade since the enactment of the two programs. *See* 2009 Senate Bill 1154. The 2009 revisions required that the EFIB draft administrative rules to implement the Credit Enhancement Program. *See* Idaho Code § 57-728(2).

3. The EFIB Rules

As directed by the legislature, the EFIB engaged in rules promulgation. As part of the rulemaking process, the Board considered the nature of the credit enhancement process, the costs incurred by the EFIB to issue a guaranty and the nature of the investment the EFIB was making as the trustee of the Public School Endowment. The Board's deliberation related to the EFIB Rules included testimony by representatives of public schools asserting that fees for the pledge of Public School Endowment assets were not justified because of the limited risk that the EFIB would purchase promissory notes under the program and because of the interest provided in statute should the EFIB purchase promissory notes. *See*, Final Minutes, Endowment Fund Investment Board Special Board Meeting, August 27, 2009; Final Minutes, Endowment Fund Investment Board Meeting, August 12, 2009; Draft Minutes, Endowment Fund Investment Board Special Executive Committee Meeting, June 30, 2009 (collectively, the "EFIB Meeting Minutes").

At public meetings on the issue, EFIB staff and EFIB members provided information concerning the opportunity cost and other investment considerations related to the initial pledge of the Public School Endowment assets under the Credit Enhancement Program. *Id.* The information reviewed by the EFIB concerning the investment costs of pledging the Public School Endowment included a discussion of the impact of the guaranties on the liquidity of the fund and the impact on investment options available to the fund. *See* EFIB Meeting Minutes.

The EFIB approved temporary and proposed rules governing the administration of the program effective April 30, 2009. The EFIB subsequently revised the temporary and proposed rules (collectively, the "EFIB Rules"). Aug. 5, 2009, Idaho Administrative Bulletin, Vol. 09-8, pp. 125 through 128; Oct. 7, 2009, Idaho Administrative Bulletin, Vol. 2, Vol. 09-10, pp. 303 through 305. The EFIB Rules impose fees both for the review of applications and for the issuance of a guaranty. Aug. 5, 2009, Idaho Administrative Bulletin, Vol. 09-8, pp. 125 through 128; Oct. 7, 2009, Idaho Administrative Bulletin, Vol. 2, Vol. 09-10, pp. 303 through 305. Because the Land Board is the constitutional trustee of the Public School Endowment, the EFIB presented its decision concerning fees for the Credit Enhancement Program to the Land Board at its July and August 2009 meetings. *See,* Final Minutes, Regular Land Board Meeting, August 18, 2009; Final Minutes, Regular Land Board Meeting, July 21, 2009. The Land Board ratified the EFIB's decisions on the EFIB Rules by taking no action on the rules.

ANALYSIS

A. The EFIB is Acting as a Trustee of the Public School Endowment When Administering the Credit Enhancement Program

The only Idaho case considering the Credit Enhancement Program is Crane. The Crane court did not specifically consider the EFIB's role in administering the Credit Enhancement Program. The discussion in Crane and other decisions by Idaho courts, however, clarify the fiduciary responsibilities of the Public School Endowment's trustees and the role of the legislature in the management of the endowments.

The Idaho Constitution grants to the legislature the authority to prescribe the framework for the management of the land and financial assets of the Public School Endowment. Idaho Const. art. IX, §§ 3 and 8. The framework established by the legislature, however, must be consistent with the terms of the Idaho Constitution and the Idaho Admission Bill. *See* United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939) (fiduciary duty to recover endowment funds cannot be limited by state law); Idaho Watersheds Project v. State Bd. of Land Com'rs, 133 Idaho 64, at 67 (1999) (statute cannot direct the Land Board to consider the benefit to parties other than the trust when assessing a lease application); Engelking, 93 Idaho 217 (investments are limited by the Idaho Constitution and cannot be expanded by the legislature); State v. Peterson, 61 Idaho 50 (1939) (endowment lands cannot be impaired by law allowing adverse possession); State v. Fitzpatrick, 5 Idaho 499 (1897) (legislature cannot enact legislation resulting in a diversion of Public School Endowment funds from the support of the public schools).

In Crane, the court recognized that the purchase of a promissory note to be held as an asset of the Public School Endowment is within the investments permitted by Idaho Constitution article IX, section 11. Crane, 135 Idaho at 673. Critical to the court's analysis was the finding that the Credit Enhancement Program involved an "investment." An investment is defined as "an expenditure to acquire property or assets to produce revenue . . . ." Black's Law Dictionary 825 (6th ed. 1990). Thus, for the Board to accept the risk of guaranteeing a school bond it must be compensated. Accepting the risk without a corresponding return would not meet the definition of an investment. The court did not discuss but appears to accept that the EFIB could reasonably determine that the purchase of promissory notes is a prudent investment for the Public School Endowment.

The Crane court also did not consider whether the initial pledge of trust assets represented by the issuance of a guaranty is a permitted investment for the Public School Endowment. As the EFIB recognized in its deliberations concerning the EFIB Rules, guaranties providing the benefits conferred by the Credit Enhancement Program are offered by private companies and institutional investors. Such guaranties are not offered without cost and have produced revenue to the guarantor. These guaranties are made for the purpose of producing such revenue. *See* Minutes, Endowment Fund Investment Board Special Meeting, August 27, 2009. The issuance of a guaranty is thus also an investment. To the extent that it represents a permitted investment by a trustee, it is within the investments authorized by Idaho Constitution article IX, section 11.

Even though the investment is permitted, the legislature cannot require action by the EFIB that is contrary to its constitutional duties as trustees. *See* Idaho Watersheds, 133 Idaho at 67; Restatement (Third) of Trusts § 78 (trustee has the duty to administer the trust solely in the interest of the beneficiaries). The EFIB is acting as a trustee to the Public School Endowment when considering the initial investment represented by the issuance of a guaranty under the Credit Enhancement Program and the pledge to purchase notes under the terms set forth in statute. The EFIB must satisfy its fiduciary duties when electing to invest under the Credit Enhancement Program.

B. The EFIB's Duties to the Public School Endowment are to Consider the Investment Represented by the Issuance of a Guaranty in the Context of the EFIB's Investment Strategy and Investment Portfolio

The EFIB's duties to the Public School Endowment arise from the terms of the Idaho Admission Bill, the Idaho Constitution and the common and statutory law applicable to trustees. A primary investment objective of the trustees of the endowments is to manage the assets of the trust to secure the maximum long term return to the beneficiaries. Idaho Const. art. IX, § 8. As trustees, the Prudent Investor Rule requires that the consideration of the investment be made in the context of the whole of the trust's investments and the investment objectives of the trust. Idaho Code § 68-502; Restatement (Third) of Trusts § 90 (2007).

The interest on notes purchased by the Public School Endowment under the Credit Enhancement Program is set forth in statute. At the time of the issuance of a guaranty, the EFIB must consider whether these terms represent an investment that, within the current and projected structure of the Public School Endowment portfolio as a whole, is reasonably projected to produce the maximum long term return to the trust.

In addition, the EFIB must consider whether the guaranty itself presents an investment meeting the constitutionally established investment objective of producing the maximum long term return to the Public School Endowment. The issuance of a guaranty represents a potential cost to the Public School Endowment not addressed by the interest on notes that may be issued under the guaranty. Whenever funds are used to acquire an investment other investments are foregone. This is true even where the investment is a guaranty and the pledged funds remain available to the EFIB for other investments. The funds must be placed in investments the EFIB can quickly liquidate to purchase promissory notes from the Treasurer on as little as ten days' notice. *See* Idaho Code § 33-5305(2); *See also,* Minutes, Endowment Fund Investment Board Special Meeting, August 27, 2009 (discussing need for liquidity in investments to the extent necessary to purchase promissory notes under the Credit Enhancement Program).

The fiduciary considerations related to the issuance of the guaranty are the same as the considerations for the purchase of the notes issued by the Treasurer in the event of a school district default: do the terms of the pledge represent an investment that, within the current and projected structure of the Public School Endowment Portfolio as a whole, is reasonably projected to produce the maximum long term return to the trust. Once the pledge is made, the EFIB must consider the outstanding guaranties and the obligations they impose when developing the investment strategy for the trust and designing its investment portfolio. Adjustments to the strategy and portfolio to account for the guaranty may produce a lower return to the Public School Endowment. As the EFIB recognized in its discussions, the lower return can be offset if school districts pay fees designed to provide the present value of the lower return for deposit in the trust. *See* Minutes, Endowment Fund Investment Board Special Meeting, August 27, 2009.

The offset represented by the fee is critical to the EFIB's exercise of its fiduciary duties. A trustee may determine that an investment with a likely risk of loss is a prudent investment because it satisfies investment purposes other than return. Other investment purposes include preservation of capital or investments in a sector that counterbalance or "hedge" other investments in the portfolio. *See* Idaho Code § 68-502(3) (trustee may consider the need for preservation of capital and the expected return of the portfolio as a whole when considering an investment). The pledge under the Credit Enhancement

Program does not satisfy any investment purpose for the portfolio of the Public School Endowment. Instead, the EFIB has determined that the pledge likely produces a loss to the trust if the lower return is not offset by fees. Investment through the pledge without the fees is thus a breach of the EFIB's fiduciary duties to the trust.

C. The EFIB may not Consider the Benefit to an Individual School or to School Districts Generally When Administering the Credit Enhancement Program

The trustees of the Public School Endowment must act in furtherance of the purposes of the trust and in compliance with the trust's terms. *See* Restatement (Third) of Trusts § 77 (Duty of Prudence); Restatement (Third) of Trusts § 78 (Duty of Loyalty). The Idaho Admission Bill and the Idaho Constitution provide that the purpose of the trust is the perpetual support and maintenance of public schools. Idaho Admission Bill §§ 4 and 5 (endowment used only for the support of schools); Idaho Const. art. IX, § 3 (endowment used only for the maintenance of schools). The terms of the trust also require that it is to be managed to secure the maximum long term return to the beneficiaries. Idaho Const. art. IX, § 8. The EFIB's duties, therefore, are to invest the financial assets of the Public School Endowment in a portfolio designed to provide the maximum financial return to the current and future beneficiaries.

The purpose of a school bond is within the duties of the Idaho Legislature but is not within the purposes and terms of the Public School Endowment. *See* Idaho Const. art. IX, § 1 (it is the duty of the Idaho Legislature to establish and maintain a system of public free common schools); Idaho Admission Bill §§ 4 and 5; Idaho Const. art. IX, § 3 (the revenue of the Public School Endowment shall be used for the support and maintenance of public schools and no other purpose). Public schools may issue bonds only for specific purposes related to the erection and equipment of school buildings. Idaho Code § 33-1102. In Roach v. Gooding, 11 Idaho 244 (1905), the Idaho Supreme Court considered a state statute allowing for the issuance of bonds for the construction of university facilities secured by the revenues from the University Endowment. The court looked to Idaho Admission Bill article 5, which provides:

> (2) Use of proceeds. –
>
> (A) In general. Proceeds of the sale of school land –
>
> (i) . . . shall be deposited in the public school permanent endowment fund and expended only for the support of public schools; . . . .

The Roach court also reviewed the decisions of other states concerning proper use of funds limited to the support of public schools. The court adopted the analysis of the other states that had considered the issue and concluded that the language in the Idaho

Admission Bill and the Idaho Constitution concerning the support and maintenance of the public schools means the continuing and regular expenses of the school and not the erection and equipment of school buildings. *Id.* at 254. Because the erection and furnishing of school buildings is not a purpose of the trust, the EFIB may consider only the investment aspects of the issuance of a guaranty under the Credit Enhancement Program and not the other public benefits arising from the guaranty. *See also*, Idaho Watersheds, 133 Idaho at 67 (Land Board may not consider benefits to the livestock industry or revenue to local jurisdictions when leasing endowment land).

The investment aspects of the guarantee are not limited to the impact on the current portfolio held by the Public School Endowment. The trustees owe a duty of impartiality when dealing with the current and the future beneficiaries of the trust. Restatement (Third) of Trusts § 79 (2007); *see also*, Restatement (Third) of Trusts § 90 (2007) comment i (discussing the requirement of impartiality between present and future beneficiaries in the context of prudent investment). The duty of impartiality requires that the trustees invest and administer the trust so that the trust estate will produce income that is reasonably appropriate for the diverse present and future interests of its beneficiaries. *Id.* This duty prohibits the trustees from using the trust corpus, including its land and financial assets, to advantage a current beneficiary in a manner which diverts or reduces income to the detriment of future beneficiaries. *See also*, 1976 Op. Idaho Att'y Gen. 1 (terms of the Agricultural College Endowment provided that the revenue from the endowment, not the corpus of the endowment, may be used for the benefit of the college; use and disposition of the trust lands are within the sound discretion of the Land Board as trustees).

The duty of impartiality is also contained within the terms of the Public School Endowment. The establishment of a perpetual trust and the investment directive of securing the maximum long term return to the beneficiaries require impartiality. If the EFIB were to consider the benefit to a single school district or the general benefit to school districts in the short term, the EFIB would be favoring the beneficiaries of the endowment at a particular period in time over the future beneficiaries of the perpetual trust. Favoring current beneficiaries is a breach of the EFIB's fiduciary duties to the future beneficiaries of the Public School Endowment.

CONCLUSION

The EFIB acts as a trustee when determining whether to invest the Public School Endowment under the Credit Enhancement Program. As a trustee, the EFIB must comply with the Prudent Investor Rule and the duties of loyalty and impartiality in the administration of the Credit Enhancement Program. These fiduciary duties require that the EFIB determine that the investments represented by the Credit Enhancement Program will secure the maximum long term return to the endowment when considered in conjunction with the trust's investment portfolio and investment strategies. The EFIB is also prohibited from selecting an investment that improperly favors either current or future beneficiaries.

Investment through the Credit Enhancement Program without fees is an investment that does not comply with the duties of loyalty, impartiality or the Prudent Investor Rule. As a condition of its investment through the Credit Enhancement Program, the EFIB decided to impose fees to offset the projected loss of return to the trust caused by the narrowing of investment opportunities. Had EFIB decided otherwise, it would have breached its fiduciary obligations. The EFIB chose instead to impose offset fees, fulfilling its duties of loyalty and impartiality as well as the requirements of the Prudent Investor Rule.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. IX, § 1.
Art. IX, § 3.
Art. IX, § 4.
Art. IX, § 7.
Art. IX, § 8.
Art. IX, § 11.

2. Idaho Code:

§ 33-1102.
§ 33-5303.
§ 33-5305.
§ 57-715.
§ 57-718.
§ 57-723.
§ 57-728.
§ 58-101.
§ 58-104.
§ 68-502.

3. Idaho Cases:

Engleking v. Investment Bd., 93 Idaho 217 (1969).

Idaho Endowment Fund Investment Board v. Crane, 135 Idaho 667 (2001).

Idaho Watersheds Project v. State Bd. of Land Com'rs, 133 Idaho 64 (1999).

Pike v. State Bd. of Land Com'rs, 19 Idaho 268 (1911).

Roach v. Gooding, 11 Idaho 244 (1905).

State v. Fitzpatrick, 5 Idaho 499 (1897).

State v. Peterson, 61 Idaho 50 (1939).

4. Other Cases:

United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939).

5. Other Authorities:

1976 Op. Idaho Att'y Gen. 1.

1982 Op. Idaho Att'y Gen. 7.

Black's Law Dictionary (6th ed. 1990).

Draft Minutes, Endowment Fund Investment Board Special Executive Committee Meeting, June 30, 2009.

Final Minutes, Regular Land Board Meeting, August 18, 2009.

Final Minutes, Regular Land Board Meeting, July 21, 2009.

I.W. Hart, Proceedings and Debates of the Constitutional Convention of Idaho 1899 (1912).

Idaho Administrative Bulletin, Vol. 09-8 (Aug. 5, 2009).

Idaho Administrative Bulletin, Vol. 2, Vol. 09-10 (Oct. 7, 2009).

Idaho Admission Bill, 26 Stat. L. 215, ch. 656.

Minutes, Endowment Fund Investment Board Special Meeting , August 12, 2009.

Minutes, Endowment Fund Investment Board Special Meeting , August 27, 2009.

Restatement (Third) of Trusts §§ 77, 78, 79, 90 (2007).

DATED this 8th day of January, 2010.

LAWRENCE G. WASDEN
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Analysis by:

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