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Memo

To: State Board of Land Commissioners – Reinvestment Subcommittee: Honorable Brad Little, Governor; Honorable Lawrence Wasden, Attorney General; Irving Littman,

From: Darrell G. Early, Deputy Attorney General

cc:

Date: Wednesday, November 13, 2019

Re:

1. Constitutional and Statutory Restrictions on Disposition of State Land;
2. Effect of 1982 Amendment to add “maximum long term financial return.”

At the conclusion of the last reinvestment Subcommittee meeting on October 10, 2019, the OAG was asked to provide additional analysis on two points. First, what are the restrictions and limitations upon the Boards’ ability to dispose of endowment land? Second, whether the 1982 Amendment to Art. IX, section 8 of the Idaho Constitution effects, or would change the analysis, regarding the case law and interpretation of the Board’s fiduciary duty? This memo covers both topics.

SUMMARY OF LAND DISPOSAL RESTRICTIONS:

Article IX, Section 8 Limitations:

1. State Board of Land Commissioners (Board) to provide for the sale or rental of all the lands:

- a. Under such regulations as may be prescribed by law¹.
- b. Sales must “secure the maximum long term financial return to the institution to which granted.”
- c. State lands cannot be sold for less than the appraised price.
- d. May only be sold at public auction.
- e. The State cannot sell more than one hundred sections of state lands (64,000 acres) in any one year,
- f. State cannot sell more than three hundred and twenty acres of land to any one individual, company or corporation.
- g. Exchanges of State land must be for equal value.

Statutory Limitations:

1. Idaho Code 58-313

- a. State cannot sell lands to anyone other than a citizen of the United States or a those who have declared an intent to become such.
- b. Must be advertised for 4 weeks in a weekly newspaper;
- c. Advertisement must state the minimum price below which no bid shall be accepted

2. Idaho Code 58-313A –

- a. Must provide notice to County Commissioners
- b. 60 days for County to object
- c. Reconsideration by the Board
- d. Judicial review of Board’s decision by any person “aggrieved”
 - i. Standard of Review: “arbitrary, erroneous or capricious.”

3. Idaho Code 58-133(1): all state-owned lands classified as chiefly valuable for forestry, reforestation, recreation and watershed protection are hereby reserved from sale and set aside as state forests.

4. Idaho Code 58-138 – Exchanges of State land

- a. Must be for equal value
- b. For the purpose of consolidating state lands or to aid in the state control and management and use of state lands
- c. Must give notice to Lessees

¹ Provisions regarding “under such regulation as may be prescribed by law” are probably limited to procedural regulation and cannot alter substantive terms of State Land Board’s duties. See *Idaho Power Co. v State*, 104 Idaho 570, 661 P.2d 736 (1983); *State v. State Board of Education*, 33 Idaho 415, 427, 196 P. 201, 204 (1921); Idaho Attorney General Opinion 91-3; Utah Attorney General Opinion 87-44.

AFFECT OF 1982 CONSTITUTIONAL AMENDMENT

Textual and Case Analysis:

As originally adopted and up to the 1982 Amendment, Art. IX, Section 8 provided in relevant part:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefore;

Idaho Const. Art. IX, Sec. 8. (Emphasis added).

The 1982 Amendment proposed by HJR 18 (1982 Idaho Sess. L. pg. 935) and adopted by the voters at the general election that same year altered this language to provide:

It shall be the duty of the state board of land commissioners to 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, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted;

Idaho Const. Art. IX, Sec. 8. as amended by 1982 Idaho Sess. L. pg. 936 (emphasis added).

On its face this language change would appear to shift the focus from getting the maximum single purchase value and allow the Board to consider other factors that address a longer term horizon of financial benefit. Indeed, as explained later, that was one motivating factors for the proposed change. However, as applied prior to the amendment, the Board appears to have had the discretion to consider more long term factors and on at least one occasion did so.

There is no Idaho case law directly interpreting the relevant phrase from either the original provision or as it was amended. The closest case addressing this issue as a matter of application appears to be Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 P. 557 (1914). In that case the Board had auctioned a timber sale but did not award the sale to the person offering the most money at the time of sale (a bid of \$101,000). Instead the Board awarded the sale to the next lowest bidder who had bid \$100,000 but also included in their proposed bid additional consideration including the building of a short line railroad to the area of the timber sale. Without addressing the specific language of the Constitution, the Idaho Supreme Court upheld the Board's decision stating:

[I]t is clear that the state board has acted in this matter only as a man of good business sense and judgment would act in regard to his own affairs. The board had two bidders at said auction sale for said timber, the state retaining the land on which said timber was situated, and it had much other land in the vicinity of said timber, and the state's land, no doubt, would be greatly enhanced in value by the construction of a railroad into the other timber lands of the state. And, too, the construction of a railroad not only will greatly enhance

the value of other state lands in the neighborhood of such railroad, but will also add greatly to the value of the taxable property of the state, and if this were a private transaction, upon that state of facts, how would any business man of good sense and judgment, occupying the position of the state, do otherwise than accept said bid of \$100,000 for said timber, when evidently such bid would result greatly more to the financial benefit of the state than \$1,000? The value of the other state lands in that region of country would be increased *562 many thousands of dollars by reason of the construction of the railroad, and the value of said railroad for taxable purposes, when completed, would amount in a single year to a great deal more than said \$1,000.

139 P. at 561-62 (emphasis added). This decision implicitly recognizes the authority of the Board to look at the longer term interests of the endowments even prior to the changed language in 1982.²

Accordingly, it can be stated that the change to the Idaho Constitution did not likely change how the Board had historically looked at the issue, nor the Court's application of the provision.

Legislative History Analysis:

The 1982 Amendment to Art. IX, Section 8 of the Idaho Constitution was born out of what is commonly referred to as the "Sagebrush Rebellion." In this context the Idaho Legislature established a Public Lands Committee. S. Con. Res. 144, 45th Leg. (1980). The committee was assigned the task of "gathering accurate information to assist the Idaho Legislature in properly addressing the issue of the management and control of the unappropriated public lands in the state of Idaho." *Id.* The 1982 amendment came about, in part, because of the committee's work and was based, in part, on the committee's report to the legislature.

The first appearance in the committee's minutes of a proposed constitutional amendment was at its October 27, 1980 meeting when Vern Ravenscroft representing a group referred to as "Carey Act Settlers" proposed an amendment offering the following explanation:

Mr. Ravenscroft stated that a constitutional amendment proposed by his organization would do the following: (1) It would bring in the concept of acquired lands over and above those granted to the state. (2) It would bring in the requirement that all lands in the state should be managed for the greatest public benefit - this would make it possible to manage fish and game lands without a concept of a profit motive and it would provide that endowment lands would still be managed for the maximum return for support of the particular institution for which it is dedicated. (3) It would require and place in the constitution the restriction that forestry land, reforestation land, watershed land and recreational land cannot be sold and that it must be retained and managed for the multiple use it would provide. (4) It would clarify the 320 acre situation so that no one can ever acquire more than 320 acres of state land from any sale or combination

² As I mentioned in my presentation on 10/10/2019 it is likely that certain aspects of the Barber Lumber decision (i.e. its reference to the tax benefits and other considerations) would not be upheld today in light of the Court's holding in Idaho Watershed's Project v State Board of Land Comm'rs., 133 Idaho 64, 982 P.3d 367 (1999). It is also pertinent to note that the Idaho Watershed case postdates the amendments in 1982 and therefore was already governed by the new language.

of sales. (5) It would clarify the common practice to make it possible to exchange properties with more than just the federal government. Mr. Ravenscroft stated that these clarifications need to be made in the constitution whether or not the Sagebrush Rebellion is successful. A copy of the proposed constitutional amendment is attached as Appendix B.

Minutes of Legislative Council Committee on Public Lands, October 27, 1980.

The Proposed Amendment provided as follows (additions/deletions reflected in underline/strikeout):

Section 8. LOCATION AND DISPOSITION OF PUBLIC LANDS. It shall be the duty of the state board of land commissioners to 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 from~~ the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount public benefit therefrom long; provided, that no ~~school-state~~ lands shall be sold for less than the appraised price and never less than ten fifty dollars (\$~~40~~50) per acre, and provided also that all endowment lands shall be manage to secure the maximum support for the intuitions to which they are dedicated. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, except that no state lands classified as forestry, reforestation, recreational, or watershed lands shall ever be so sold. ~~and t~~The legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; provided, that not to exceed one hundred sections of ~~school state~~ lands shall be sold in any one year, and ~~to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation~~ no individual, corporation, company, or combination thereof may ever purchase more than three hundred and twenty (320) acres of state land by any sale or combination of sales. The legislature shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, corporations, companies, individuals, or combinations thereof.

Minutes of Legislative Council Committee on Public Lands, October 27, 1980 (Appendix B).

These entries reflect an intention on the part of at least some participants to clarify that lands acquired from the federal government potentially as part of the Sagebrush Revolution would be managed under a different standard than typical endowment lands, but that endowment lands would continue to be manage for the financial benefit of the endowments.

However, the Committee on Public Lands took no position nor made any recommendation regarding the proposed amendment. See Final Report of Legislative Council Committee on

Public Lands, Nov. 26, 1980 pg. 15.

From this point forward the legislative history of the amendments to Art. IX, Sec. 8 become murky as I was unable to locate any additional documents discussing the amendment prior to its adoption by the legislature. However, after it was adopted and as it was presented to the voters additional information becomes available.

The Legislative Council issued a statement regarding the Effect of Adoption of the amendment, which stated:

If this amendment is adopted, the constitutional standard for managing endowment and other lands granted to or acquired by the State of Idaho from the federal government will change. At present, endowment lands are managed to "secure the maximum possible amount therefor." This amendment will change that standard and require management to secure the "maximum long term financial return." This amendment will also add a constitutional standard for sales and exchanges of state lands.

Legislative Council's Statement of Effect of Adoption of H.J.R. No. 18, pub. by Secretary of State (1982).

In addition to the above-referenced materials, the voters were provided the following Statements FOR Proposed Amendment:

1. This amendment will formally spell out in the State Constitution a management practice that the State Board of Land Commissioners uses in managing the State's endowment lands. The State Board of Land Commissioners manages the endowment lands to receive the maximum long-term financial return instead of the short-term benefit.
2. The maximum long-term financial return to the State of Idaho from the management of state-owned lands could be significantly different than the maximum possible amount received from the lands. Requiring that the State Board of Land Commissioners manage lands to receive the maximum amount of return over a period of years will promote efficient, cost-effective far-sighted management practices, and allow the State of Idaho to realize the maximum financial return possible from the sale or rental of state lands.

Legislative Council's Statements FOR Proposed Amendment, pub. by Secretary of State (1982).

Finally, the following Statements AGAINST the Proposed Amendment were provided to the voters:

1. This proposed amendment is unnecessary as the State Board of Land Commissioners now administers the State's endowment lands in a manner that will secure the maximum long-term financial return to the institution for which they are granted. It is provided by statute that the State Board of Land Commissioners shall not sell state lands under bid for less than the minimum price set by the board. This has traditionally been for at least the appraised price. It is statutorily provided that the State Board of Land Commissioners may exchange state lands on an equal basis with private and governmental entities.

2. While it is not the intent of the amendment, wording in this amendment may preclude the State of Idaho from acquiring land from the federal government and devoting it to a purpose that would not secure the maximum long-term financial return to the State. This could prevent the State of Idaho from acquiring land from the federal government and converting that land into a state park or a fish and game preserve if that use does not secure the maximum long-term financial return to the State of Idaho.

3. This amendment substitutes the phrase "maximum long-term financial return" for a phrase that has been interpreted by the courts. This substitution may eliminate nearly a century of case law regarding the State's endowment lands. Also, the phrase "maximum long-term financial return" is highly ambiguous.

4. While not the intent of the amendment, the wording of this proposed amendment could possibly endanger certain existing state parks and wildlife refuges which had been granted to the State of Idaho by the United States government. Lands containing certain state parks and wildlife refuges were granted to the State of Idaho by the United States specifically for use as parks or wildlife refuges. If a court were to find that the use of these lands as state parks or wildlife refuges is not securing the maximum long-term financial return to the State and hence in violation of the State Constitution, title to the lands could revert to the United States Government.

Legislative Council's Statements AGAINST the Proposed Amendment, pub. by Secretary of State (1982).

While the statement of effect suggests that the constitutional standard "will change," the statements for and against indicate that perhaps both the proponents and those against the amendment believed that the standard already being used by the Board was to "secure the maximum long term financial return" to the endowments and that this amendment likely just codified the existing practice. This is consistent with the Board's application as affirmed by the Court in the Barber Lumber case.

CONCLUSION:

It is my opinion that the 1982 Amendment to Art. IX, Sec. 8 of the Idaho Constitution does not likely change the outcome of the single relevant case precedent in Barber Lumber. It would appear that the amendment simply codified a practice that the Court had already tacitly approved when it affirmed the Board's exercise of discretion to award a timber sale to a person who was not the highest "cash" bidder at an auction.