

TO: The Honorable Scott Bedke, Speaker  
Idaho State House of Representatives, Boise, Idaho

FROM: Leroy Law Office, David H. Leroy and Lynn E. Thomas

RE: Request for Analysis of SB 1277

DATE: February 10, 2014

### **QUESTIONS PRESENTED**

1. Does the Idaho Legislature have the legal authority to amend Idaho Code Section 58-138 to allow the exchange of trust lands for “dissimilar” or “non-consolidated” public or private property?

2. Does the Idaho Legislature have the legal authority to amend the Code to permit an exchange of state endowment holdings for public or private lands of “greater” than equal value?

3. Does the Idaho Legislature have the legal authority to amend the Code to limit exchanges to lands with primary value buildings which will be occupied by a public purpose entity?

4. Does the Idaho Legislature have the legal authority to amend the Code to prescribe a sufficiently broad definition of “exchange” to include multiple party conveyances, even if a subsequent sale is planned by the recipient?

5. Are land exchanges made pursuant to statute constitutional, or are such transactions merely “disguised sales” and voidable for lack of a public auction?

### **SUMMARY**

The Idaho Legislature does have the authority (1) to allow the exchange of state lands, including those held in trust, for both dissimilar property and for “non-consolidated” properties; (2) to amend the Code to permit an exchange of state endowment holdings for public or private lands of greater value; (3) to amend the Code to limit exchanges to lands with their primary value in buildings which will be occupied by a public purpose entity and (4) to amend the Code to prescribe a definition of “exchange” that would include multiple party conveyances, even if a subsequent sale is planned by the recipient. Further, (5) land exchanges are specifically authorized under the Constitution in a section separate and independent from the alternative process of a sale of public land at auction. Thus, exchanges, as a matter of law, can not be characterized as merely “disguised sales”.

## ANALYSIS

### A. Introduction

The legal authority of the Legislature to enact the provisions of the proposed amendment to the Code is founded on its power and duty to manage and control public trust lands for a long term, maximum financial benefit to the beneficiaries of the endowment lands. The Land Board shares this duty, but does not have the ability to create statutes to implement and define the management of such lands.

The Idaho Admission Act, by which the state was admitted to the Union, enabled the State to sell, lease and exchange endowment lands. Article IX, Section 8 of the Idaho Constitution imposes upon the Board of Land Commissioners the obligation to provide for the protection, sale and rental of the trust lands “under such regulations as may be prescribed by law.” This latter provision is interpreted to mean that such regulations are those “prescribed by the legislature.” Howard v. Cook, 59 Idaho 391 396 83 P2d 208 (1938). The legislature has plenary power over policies affecting the management and control of public lands, subject, of course, to the provisions of the Constitution. St. Joe Improvement Co. v. Laumeirster, 19 Idaho 66 112 P. 683 (1910).

The Idaho Supreme Court has shown consistent deference to the legislators’ power to manage and control public trust lands. The relevant cases condition the validity of actions of the Board upon its adherence to both constitutional and statutory authority. See Lake Couer d’Alene Investments, LLC et al. v. Idaho Department of Lands, et al. Idaho, 233 P2d 721 (2010) (Land Board must adhere to statutory and constitutional provisions). The Supreme Court of Idaho has characterized legislative actions respecting public lands as matters of policy and control. Thus, in the absence of an invasion of constitutional directives, the courts are obliged to defer to legislative policy determinations. Idaho State AFL-CIO v. Leroy, 110 Idaho 691 718 P2d 1129 (1986); State ex rel. Kempthorne v. Blaine County, 139 Idaho 348 73 P3d 707 (2003). See also Pike v. State Board of Land Commissioners, 19 Idaho 268 113 P. 447 (1911).

B. The provisions of the proposed amendment fall within the scope of legitimate legislative policy making authority.

The questions presented are addressed to the legislative power to regulate exchanges of trust property in these particulars: (1) It is proposed to allow exchanges of trust lands for dissimilar public or private property and for properties which are not consolidated or contiguous with themselves or other public lands, (2) with a further amendment of the bill, exchanges for public or private lands of greater than equal value might be permitted, (3) limitations would be placed on exchanges of lands containing their primary value in buildings, except for those buildings which would be continuously used for public purposes by public entities so as to discourage the exchanging of state assets for rental buildings that would compete with private sector businesses, and (4) “exchanges” are defined to include multi-party conveyances, even when subsequent sales are facilitated and planned by prior agreement. Finally, (5) a discussion of whether exchanges are merely “disguised sales” for the supposed purpose of avoiding

constitutional public auction requirements is sought.

Legislative enactments affecting control over trust property must, of course, be consistent with the over-arching requirement that the property which the state receives by exchange must be of at least equal value. This arises because the legislature too is constitutionally burdened with a duty to preserve the value of the underlying trust and to maximize long term financial benefit. Article IX, Section 8, Idaho Constitution.

## **1. ELIMINATION OF “SIMILAR” AND “CONSOLIDATED” REQUIREMENTS**

Each provision addressed by the questions presented involves a matter of management and control of public trust lands. A careful study of the structure of Article IX, Section 8 is an important point of beginning. Under the title of “Location and disposition of public lands,” the legislature is given several affirmative duties by the Idaho Constitution:

1. pass laws to “judiciously” locate and carefully preserve land granted to Idaho by the congress
2. legislate to provide for the sale of lands from time to time at public auction
3. legislate to provide for the sale of timber on state lands
4. by statute, to insure the faithful application of proceeds to the intended beneficiaries, and
5. to authorize, if it elects to do so, the land board to exchange either “granted or acquired lands” on an “equal value basis for other lands”

Significantly, the fifth authority stands alone and is solely within the legislature’s power to define.

The first issue raised, strikes a requirement of similarity and would allow exchanges of trust lands for dissimilar public or private property. The validity of property exchanges does not depend on the exact nature of the property. The trust touchstone is optimizing value. The Legislature created the suggestion of similarity in Idaho Code 58-138. It is not required by the Constitution. Thus, it can be amended out by statute without limitation. Likewise, eliminating a prior legislative management suggestion that lands be “consolidated” for efficiency purposes is eliminated by this amendment. This too is not a constitutional requirement. Thus, it too can be struck, as doing so does not violate any constitutional mandate.

## **2. GREATER VALUE PROVISION**

The statute being amended provides, as it must, that exchanges be for “equal value.” That is a constitutional mandate, as noted. Adding to this the clarification that exchanges may also be for “greater” than equal value does not undermine the requirement that the land trust be

preserved. Instead, it would tend to function to further maximize long term financial gain. It also would avoid many of the appraisal problems encountered in certifying that land blocks are "equal" in market worth. The constitutional language suggesting exchanges be done on an "equal value basis," does not preclude the encouragement of trades on a "more than equal value basis" where the extra value goes to the beneficiaries. Such trades would further enhance the trust.

### **3. PRIMARY VALUE BUILDINGS PROVISION**

Likewise, the provisions aimed at discouraging exchanges of state assets for certain rental buildings reflect legislative policy judgments that do not appear to negatively impact the aim of preserving value for the benefit of the trust beneficiaries. We are not aware of any constitutional provision or case law that defines the power of the legislature so narrowly as to prohibit management limitations of this character. To the contrary, Idaho judicial decisions on the point are generally broad. "As to the wisdom of [a] policy or the advantages or benefits to the state, the courts have nothing to do as against express legislation on a given subject." *Pike supra*, 19 Idaho at 286. There appears to be no authorization in the proposed language which would dispense with the requirement for financial soundness. As Article IX, Section 8 gives the Idaho Legislature an unqualified power to authorize exchanges on such terms as it may dictate, and permits the Land Board at its option, to use the exchange vehicle only if it wishes, statutes such as this may also include other values such as non-competition with the private sector as part of the exchange criteria.

### **4. MULTIPLE PARTIES AND SUBSEQUENT SALE OPTION**

The same may be said for the allowance of multi-party conveyances. Multi-party combinations and agreements are specifically allowed by the last sentence of Article IX, Section 8. A legislative judgment allowing exchanges involving intermediaries or agents is not the same thing as creating conditions for financial loss or disadvantage. Nor is it a sale since land for land is the essence of the exchange transaction. In fact, the device of brokered transactions may well represent the only or best process by which the Land Board can effectively trade out of the hundreds of cottage sites currently in the trust lands inventory. This too is a legitimate management criterion which can be spelled out by law with no constitutional conflict.

### **5. LAND EXCHANGES ARE NOT "DISGUISED SALES"**

Nothing in the proposed language eliminates requirements for public auctions in sale transactions. There an auction is required. The legislature has plenary management authority over both sales and exchanges of public trust lands, as discussed above. Although there may be a theoretical, future circumstance where various parties attempt to mischaracterize land transfers in violation of constitutional requirements, this is not an objection to the statute. The Land Board has been entrusted to deal with such matters on a case by case basis and it can be assumed that it will discharge its responsibilities. As noted above, in Idaho, by specific constitutional dictate, land exchanges are separate and apart from land sales. Only the latter are "subject to disposal at public auction." There is no auction requirement under the Idaho Constitution applicable to an

exchange.

The Office of the Attorney General has made us aware that appellate courts in three Western states have invalidated proposed exchanges on the basis that they were in fact “disguised sales” structured to avoid notice, auction and competitive bid type requirements. Those cases have been examined and are inapplicable in Idaho where the exchange authority stands separately, distinctly and specifically apart from and in addition to the public sale option of the Idaho Constitution. Cases decided in Colorado, New Mexico and Arizona deal with distinctions between “exchanges” and “sales.” It was held in East Lake Rand, LLP v. Brotman, 998 P2d 46 (Colo. App. 1999) in essence, that a sale of school land characterized as an exchange was not allowed because it did not adhere to the procedures required under the Colorado Enabling Act and a pertinent state statute which imposed limitations not present in Idaho. As noted above, the Idaho Admission Act expressly allows for both sales and exchanges of trust property. Similarly, State v. Lyons, 248 P3d 878 (New Mexico, 2011) was decided on the basis of limitations on exchanges not present here. Both cases dealt with specific land board actions and not with questions of legislative authority. Thus, they do not stand for the proposition that this proposed amendment is outside the scope of the Idaho legislatures’ legal authority.

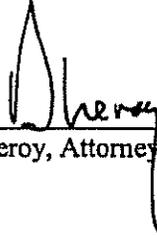
Fain Land & Cattle Company v. M.J. Hassel, 790 P2d 242 (Arizona, 1990) is of particular interest because that court’s decision underscores distinct differences between the pertinent constitutional provisions governing sales and exchanges in Idaho and those that apply in Arizona and New Mexico. The Arizona Supreme Court pointed out that the Arizona-New Mexico Enabling Act contained severe restrictions on dispositions of public lands that were not part of the admissions acts of other states receiving endowment lands at the time of their admission to the Union. In particular, sales of trust lands required that public auctions be conducted upon proper public notice and neither the Arizona Constitution nor its 1910 Enabling act mentioned or authorized private party state land exchanges. Thus, the difference between a sale and an exchange could be a determining factor in the process of assessing the validity of an Arizona public land transaction. No such restriction is part of the Idaho Constitution. The 1890 Idaho Admission Act, Section 5, specifically allows both sales and exchanges and does not require a public auction during the exchange procedure. This is precisely the same concept embraced in the Idaho Constitution, Article IX, Section 8. Thus, our legislature is unequivocally empowered to authorize both sales and exchanges of trust lands. The public auction requirement does not apply unless there are competing applicants for the same parcel of land proposed for sale. See, eg, Wasden ex rel. State of Idaho v. Idaho State Board of Land Commissioners, Dec. 23, 2010, Idaho Supreme Court Docket No. 37528, noting the conflict auction requirement and the exception for cottage sites created by Idaho Code Section 58-310A 310A. Thus, exchanges, which are specifically authorized within the Idaho Constitution, are not, and can not be characterized as “disguised sales” as a matter of Idaho law.

## CONCLUSION

All of the first four questions presented are answered in the affirmative. Fifth, an exchange is fully constitutional in Idaho and can not be negatively characterized as a sale without a public auction. The legislature has the authority to propose language and enact all of the

amending concepts contained in Senate Bill 1277. It also has the authority to amend the same to encourage exchanges for "greater" than equal value.

February 10, 2014

A handwritten signature in black ink, appearing to read "D. Leroy", is written over a horizontal line. The signature is stylized with a large, looped initial "D" and a long, vertical tail stroke extending downwards from the end of the signature.

David H. Leroy, Attorney at Law

On the Research: Lynn Thomas  
Attorney at Law