

WHAT ARE ENDOWMENT LANDS, AND WHAT ISSUES DO I NEED TO WATCH OUT FOR WHEN DEALING WITH THEM?

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The Idaho Admissions Bill, which admitted Idaho into the Union, provided that sections 16 and 36 of every township were to be given to the State to be held in trust for the benefit of the public schools and other public institutions. In order to effectively manage these endowment lands and funds, Article IX of the Idaho constitution established the State Board of Land Commissioners, consisting of Idaho's Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and the State Controller. The Land Commissioners, acting in the capacity of trustees on behalf of the beneficiary schools and other institutions, were given the responsibility under article IX, § 8 of the constitution (as amended) to manage endowment lands "...in such manner as will secure the maximum long term financial return to the institution to which granted..." The Idaho Department of Lands (the Department) administers these lands on behalf of the Land Commissioners.

In addition to this charge, the constitution also established a permanent endowment fund primarily comprised of the proceeds of prior land sales and mineral receipts. These land sales must be held at public auction. The endowment fund "...shall forever remain inviolate and intact..." and the interest from the fund must be used for the maintenance of the public beneficiaries of the State. These lands and their proceeds are given an almost sacred status in the constitution and the case law interpreting the various provisions addressing them. Consequently, our Supreme Court has recognized the high public function that these lands serve and has held that not only may endowment lands not be adversely possessed, but also statutes of limitations do not apply to actions concerning them. See *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099 (1932), and *State v. Peterson*, 61 Idaho 50, 97 P.2d 603 (1939) respectively.

Of the 3.65 million acres originally received, endowment lands currently total nearly 2.5 million acres, including 780,000 acres of commercial timberland. Timber has historically and continues to provide the vast majority of the revenue to the endowments. Approximately three million acres of mineral lands also remain in state ownership due to the required reservation of these rights under Idaho Code § 47-701(2).

Due to the dispersed nature of these lands and recognizing the need for flexibility in managing them, the legislature enacted Idaho Code § 58-138(1) which states:

The State Board of Land Commissioners may at its discretion, when in the state's best interest, exchange and do all things necessary to exchange fee simple title to include full surface and mineral rights, to any of the state lands now or hereinafter held and owned by this state for similar lands of equal value public or private, so as to consolidate state lands or aid the state in the control and management or use of state lands.

The Department has utilized the exchange concept in order to consolidate its grazing and timber lands that might otherwise be too difficult to manage effectively.

The recent growth and changing land use patterns Idaho has been experiencing have caused the Idaho Department of Lands to reevaluate its management strategies of many parcels in order to increase the return to the beneficiaries. Lands that were once used simply for grazing or agriculture are now often in the path of development or more suitable for other uses that can generate significantly higher returns. The constitution mandates that the Department constantly re-evaluate the highest and best use for such lands.

Currently, the endowment lands portfolio includes a wide variety of non-tradi-

tional income producing properties. For example, a large portion of Tamarack ski resort and a number of commercial buildings in the Boise area are owned and managed by the Idaho Department of Lands. Much of the land along Payette and Priest Lakes belongs to the endowments and is managed for cottage site leases. Attorneys representing clients with cottage site leases should be mindful of IDAPA 20.03.13.020.02, which prohibits corporations from holding leases and only permits an individual to hold a single lease at a time.

Endowment lands are often able to support mixed uses such as wind power generation, hunting, and grazing. The Department also administers a number of multi year recreational leases and issues temporary use permits for shorter term recreational events such as off road vehicle races and backcountry skiing operations. With increasing pressure and misuse of these lands, the Department will be looking for ways to provide greater protection to existing uses.

Idaho is growing and people are moving to this state to buy their little piece of "the West". Developers seek to capitalize on this desire and often view endowment lands as parks or "open space" similar to that of the Federal Bureau of Land Management. They have attempted to advertise residential communities as having exclusive access to public lands and have gone as far as attempting to zone endowment land as "open space" within their development. Endowment lands are not parks and will not remain in an undeveloped state in perpetuity if it is not in the best interest to the beneficiaries. Based on the Supreme Court's holding in *State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 79 P.3d 707 (2003) and the constitutional mandate, conflicts between local zoning ordinances and the constitutional mandates requiring endowment lands to be managed to produce income to the beneficiaries must be resolved in favor

of the constitutional mandates. If you are representing a developer or a local municipality and a proposed development is adjacent to endowment lands, please contact Kate Langford, Idaho Department of Lands Land Use Planner, at (208)334-0257.

Many western states have been aggressively managing their endowment lands and have seen significant increases in the returns to their beneficiaries. Idaho has only recently begun to embrace the true potential of these lands and therefore has the benefit of hindsight to learn from the mistakes and progress other states have

made. In the coming years, statutory changes may be required to allow for a more flexible and efficient administration of endowment lands. The Department may also seek to hire or retrain employees in order to have the skills that are necessary to manage a diverse portfolio of properties. With the proper tools in place, these lands can produce a significant revenue stream which will benefit the school children of Idaho while keeping our taxes to a minimum.

Kahle Becker is a Deputy Attorney General with the Idaho Department of Lands. His primary practice focuses on

real estate development, commercial property, navigable waterways, and litigating wildland fire cost recovery cases. He graduated from Pennsylvania State University with a degree in Biology in 2000. He received his JD from the University of Pittsburgh School of Law along with a Certificate in Environmental Law, Science, and Policy in 2004. The author's perspective expressed herein is his own; nothing herein should be interpreted as reflecting the position of the Idaho Attorney General.



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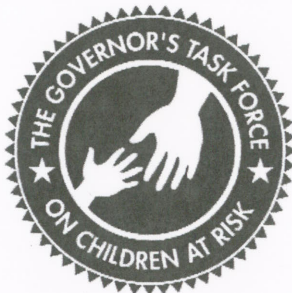
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