STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 17, 2017

The Honorable Ilana Rubel
Idaho House of Representatives
Via Email Delivery

Re: Constitutional Acreage Limitations

Dear Representative Rubel:

Your recent inquiry regarding the acreage limitations found in Article IX, §§ 8 and 10 of the Idaho Constitution has been forwarded to me for response. In order to respond to your questions it is first necessary to provide an historical overview of Article IX, § 8 and its amendments. A response to your questions follows the overview.[1]

A. Historical and Legal Background

At statehood, the United States granted the State of Idaho lands to be held in trust for specified beneficiaries. *See* Idaho Admission Bill. Section 4 of the Admission Bill granted "Sections number 16 and 36 in every township of said state. . . for the support of common schools . . .." The United States also made grants of land for the benefit of public buildings (§ 5); university (§ 8); an agricultural college (§ 10); and a scientific school, normal schools, state hospitals, "the state university, located at Moscow," penitentiary and "other state, charitable, education, penal and reformatory institutions, . . ." (all § 11).

The Idaho Constitution addresses the disposition of granted lands in two sections. Article IX, § 8 establishes limits on the disposition of the granted lands other than University lands. As originally written, Article IX, § 8 provided limitations on the disposition of school lands. Section 8, in pertinent part, read as follows:

> 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

[1] For brevity's sake, throughout this correspondence, I have used the phrase "section limitation" to refer to prohibition on selling more than 100 (originally 25) acres of land in any one year. The phrase "acreage limitation" refers to the prohibition on selling more than 320 (originally 160) acres of school land (art. IX, § 8) or 160 acres of university land (art. IX, § 10) to any individual, corporation or company.

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> the use and benefit for the respective objects for which said grants of land were made, and 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 twenty-five sections of school lands shall be sold in any one (1) year, and to be sold in subdivisions of not to exceed one hundred and sixty (160) acres to any one individual, company or corporation.*** (Emphasis added)

In 1915, the Idaho Legislature passed legislation to amend § 8. The amendment, which was ratified in the 1916 general election and took effect on December 1, 1916, increased the section and acreage limitation:

> [T]he 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 objects for which said grants of lands were made, and 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 (100) sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed Three Hundred and Twenty (320) acres of land*** to any one individual, company or corporation.

1917 Idaho Sess. Laws p. 328-29 (italics in original; brackets and bold italic emphasis added).[2]

In 1982, § 8 was amended to read as it does now. While other parts of § 8 were also amended, for purposes of your question, the significant change was as follows: "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." 1982 Idaho Sess. Laws, p. 936, HJR No. 18 (strikeout and underscore in original).

Article IX, § 10 provides that "[n]o university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation. These limitations have been in place since statehood.

The acreage limitations in sections 8 and 10 of Article IX must be considered together in addressing your questions regarding their meaning.

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[2]In 1935, the Legislature passed another amendment (ratified on November 3, 1936) to provide that "[t]he legislature shall have power to authorize the state board of land commissioners to exchange granted lands of the state for other lands under agreement with the United States." 1937 Idaho Sess. Laws, p. 497. In 1941 (ratified in 1942), Section 8 was again amended to decrease the minimum price for school lands to five dollars ($5) per acre, and to clarify the 1936 amendment. 1943 Idaho Sess. Laws p. 377. The minimum price per acre for school lands was raised back to ten dollars ($10) per acre in an amendment effective in 1952.

B. The Current Acreage Limitations in Article IX, §§ 8 and 10 are Lifetime Limitations

The acreage limitation in Sections 8 is ambiguous because it is not clear from the text whether the drafters intended the limitation to be annual or lifetime. As originally adopted, Article IX, § 8 provided in pertinent part "that not to exceed twenty five sections school lands may be sold ***in any one year***, and to be sold in subdivisions of not to exceed one hundred and sixty acres of land to any one individual, company or corporation." Idaho Const., art. IX, § 8 (emphasis added); *see also Proceedings and Debates of the Constitutional Convention of Idaho* (1889) ("*Proceedings*") p. 840. While the section limitation is qualified by the phrase "in any one year," the same is not true of the acreage limitation, which tends to indicate that the acreage limitation is something other than an annual restriction.

The Idaho Supreme Court has held that "generally, the statutory rules of construction apply to the interpretation of constitutional provisions." *State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003); *see also Wasden v. State Bd. of Land Comm'rs,* 153 Idaho 190, 196, 280 P.3d 693, 699 (2012). A court will first look at the plain language of a statute or constitutional provision, and if it is unambiguous, that language will control. *Pioneer Irr. Dist. V. City of Caldwell*, 153 Idaho 593, 597, 288 P.3d 810, 814 (2012). A statute is ambiguous if there is more than one reasonable interpretation. In that case, a court will ascertain legislative intent by reviewing the statute's context and legislative history. *Id.* If an ambiguous constitutional provision was adopted during the Idaho Constitutional Convention, a court may examine the *Proceedings* to determine the drafter's intent.

A review of the *Proceedings* shows that the drafters were concerned about striking the balance between encouraging settlers and discouraging land barons. The comments of Mr. Ainslie capture the essence of the acreage limitation debate:

> My amendment . . . provides that only twenty sections shall be sold in one year, and sold in subdivisions of not to exceed 160 acres to any one individual or corporation. People seek homesteads in this country. One hundred and sixty acres of land is a very fair farm for a person to make a living on. If you open the door, as the gentleman from Latah opens the door, you help the monied syndicates in putting around your lands a fence to keep population and settlement out. I am in favor of reserving all these lands and selling them under a restriction like the one contained in my amendment, and sell them to persons who will become permanent residents of our territory. . . .

Proceedings, p. 840. In an effort to encourage settlement while at the same time discouraging speculation or "land baron" activities, convention members approved the acreage limitation for sale of school lands.

Convention members expressed similar concerns about university lands, which are specifically addressed in Article IX, § 10. As he did during the debate for Section 8, Mr. Ainslie wanted to

prevent one person or entity from impeding settlement by purchasing large tracts of university land:

> The proposition coming from the gentleman from Latah fixes the price at ten dollars, but does not limit the quantity of land to be sold to any one person or corporation. Now large land grants always retard the development of any country. . . My object is to . . . engraft a system of land laws in this territory that will result in the rapid development of Idaho and increase of its population, but if you place no limitation on the amount of public land to be sold, that any one individual can purchase, we may sell these lands off in large tracts and retard the settlement of the country, and I believe it is to the interest of the territory and of the new state that that we should say that no more than 160 acres of these public lands should be sold to any one individual or any company or corporation, and with that object in view, the sole object I have, I offered that amendment limiting the amount that any one person shall take.

Proceedings, p. 854.

Mr. Ainslie's concerns about settlement were the same for school lands and university lands. Given that Section 10 contains the same acreage limitation as Section 8, without the phrase "in any one year," the logical conclusion is that the acreage limitation was intended to be lifetime, not annual. It appears that the convention members' concern about encouraging settlement and growth was addressed by the acreage limitation language in Sections 8 and 10.

The debate on the section limitation further supports the conclusion that the "in any one year" qualifier applies only to the section limitation. Mr. McConnell argued for rejection of the annual section limitation, and his remarks illustrate that the drafters distinguished between the annual section limitation and the acreage limitation:

> I would be willing to have engrafted in [his own amendment] the provision made by the honorable gentleman from Boise, Mr. Ainslie, that the sale of these lands should be limited to 160 acres to any one purchaser. I heartily agree with him in that, and in regard to incorporating it in my amendment. But I don't see the necessity of restricting the sale of these lands to twenty sections. . . . I cheerfully accept that amendment, so far as providing that no purchaser shall be entitled to the title of more than 160 acres. But I do not believe in limiting this board to the sale of only twenty sections in any one year, for I doubt whether it will be able to sell much more than that.

Proceedings, p. 841 (Mr. McConnell) (bracketed material added).

This interpretation is supported by the Idaho Supreme Court's decision in *Pike v. State Bd. of Land Comm'rs.*, 19 Idaho 268, 113 P. 447 (1911) The court noted that the debate over selling school lands quickly versus holding them in perpetuity was resolved via a compromise "whereby sales were limited to twenty-five sections each year and to subdivisions of not exceeding 160

acres to any one individual, company, or corporation." The *Pike* court then engaged in a comparison of Sections 8 and 10, and held:

> While [the framers] intended to limit the number of acres of university lands that might be sold to any one person, company or corporation, they did not desire to limit the number of acres that might be sold in any one year, and so they left out the limitation as to the amount of land that might be sold in any one year, in writing section 10, but repeated the limitation as to the number of acres that might be sold to any one person.

Id., 113 P. at 452.

In summary, if presented with the question, a court would most likely find that the acreage limitations in Article IX, §§ 8 and 10 of the Idaho Constitution are lifetime limitations, although that limitation is qualified, as discussed in more detail below.

C. Prior to November 3, 1982, The Acreage Limitation In Section 8 Applied Only to Public School Lands But Now Applies To Granted Lands other than University Lands).

This section includes an analysis of two of your questions: (1) whether the 320 acre limitation in Article IX, § 8 applies to all granted lands; and (2) why the other types of educational endowment beneficiaries are not encompassed within the term "school lands" as used in Article IX, § 8.

Originally, the acreage limitation applied only to "school lands," a phrase that the Idaho Supreme Court interpreted in *Pike*. In that case, the Land Board proposed to sell approximately 23,938.18 acres of endowment land, which included scientific schools, state penitentiary, normal school, charitable institution, agricultural college and state hospital lands. A citizen sought to prevent the sale, arguing that it would violate Article IX, § 8's twenty-five section annual limitation because "school lands" included all educational institutions. The Court disagreed, noting that at the time of the constitutional convention,[3] the only grants of "school lands" that had been made by the United States were the university lands (addressed in Article IX, § 10) and Sections 16 and 36 in every township and range.[4] With that in mind, the court reviewed the *Proceedings* and the entirety of Article IX, and concluded that "[i]t would therefore follow that by the words 'school lands' as here employed by the framers of the Constitution they meant sections 16 and 36, which had previously been granted to the territory for the use of the common schools." *Pike*, 113 P. at 452.

Thus, the *Pike* decision established that the lifetime limits in Section 8 and 10 only applied to the acquisition of public school and University lands and had no application to the acquisition of

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[3] The Idaho Constitutional Convention was held in 1889, and the Idaho Admission Bill (which contained the various grants of endowment lands described above in Section A) was subsequently enacted.

[4] As noted above, Sections 16 and 36 were granted to the state "for the support of common schools." Idaho Admission Bill, § 4. Those lands are referred to as "public school lands."

other granted lands. In 1982, however, Article IX, § 8 was amended to delete the reference to "school lands", which had the effect of expanding the 320 acre limitation in Section 8 to encompass all granted lands other than University lands.

There are caveats to the acreage limitation in Sections 8 and 10. First, Sections 8 and 10 provide that the pertinent lands may "be sold in subdivisions of not to exceed [320 and 160, respectively] acres ***to any one individual, company or corporation.***" (Emphasis added). Those sections do not necessarily prevent an individual, company or corporation from ***ultimately*** holding more than 320 acres of state land. In some cases, an individual might receive a land sale certificate from the state, and assign that certificate to another prior to the time that he or she completes paying for the land and receives a deed. The Idaho Supreme Court has held that:

> The sale contemplated by Const. art. 9, § 8, takes place when the original purchaser enters into a contract of purchase with the state, and that original sale cannot call for more than the acreage limited by the Constitution. The constitutional provision does not prohibit the original purchaser from selling and assigning his interest, even though it be to one who has already purchased other school lands equaling or exceeding that acreage.

Webster-Soule Farm v. Woodmansee's Adm'r., 36 Idaho 520, 211 P. 1090, 1091 (1922). However, "if the original purchase were made by the nominal purchaser not on his own behalf, but in the interest of another person, there being an agreement between them to evade the constitutional limitation, then such a transaction would be invalid." *Id.*

Second, as a matter of statutory interpretation, the phrase "individual, company or corporation" is written in the disjunctive, and "[t]he use of 'or' indicates [] alternatives, distinct from one another." *State v. Hillbroom,* 158 Idaho 789, 792, 352 P.3d 999, 1002 (2015). *See also Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 273, 255 P.3d 1152, 1159 (2011) (construing a statute providing that " '[t]he director shall also have the authority to limit a permit or license for power purposes to a specific term'" and holding that "[t]he Legislature's use of the disjunctive 'or' specifically gives the Department the authority to include a term condition at the licensing stage, not just at the permitting stage. . . ."). If faced with the question, a court could find that an individual acting in his or her individual capacity, a company that he or she owns, and a corporation in which he or she is a shareholder could each own 320 acres.

C. The Land Board Has Ultimate Responsibility for Ensuring that the Acreage Limitations Are Not Exceeded.

The Idaho Legislature has authority under Article IX, § 8 to prescribe regulations for the sale or disposition of public lands, subject to the limitation that such regulations cannot interfere with the Land Board's constitutional duty to "secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; . . .Under the Idaho Admission Act and the Idaho Constitution, the various "endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions. The Board, which manages those endowment lands, is the epitomatic public trustee." *Wasden v. State Bd. of Land*

Comm'rs., 153 Idaho 190, 195, 280 P.3d 693, 698 (2012). As the trustee, it is ultimately the Land Board's obligation to see that sales and dispositions of public lands are consistent with the Idaho Constitution.

Sincerely,

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