

Preserve McCall: A proposed public-private land exchange

Issue Summary
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PROPOSAL

In November of 2020, an Idaho company proposed a deal to the Idaho State Board of Land Commissioners (“Board”). Trident Holdings, LLC, is a private equity company that created Preserve McCall, an initiative to acquire 28,000 acres of endowment land for preservation and development.¹ Preserve McCall proposed to exchange privately owned, profitable commercial timberlands for state-owned, financially underperforming endowment lands in the Payette Lake area.²

This Payette Lake land, currently managed by the Board, is estimated to be costing the endowment roughly \$276,000 annually.³ The benefit to the endowment of acquiring the privately owned commercial timberlands is estimated to be \$2.9 million per year.⁴ If the proposed land exchange is accepted by the Board, the endowment would exceed its desired long-term return of 3.5%.⁵ According to its proposal, Preserve McCall would use profits from developing small pockets of land to fund conservation of 62% of the land acquired.⁶ The public has responded to this proposal with stiff opposition, citing concerns relating to managed growth, deteriorating municipal infrastructure, housing shortages, permanent public access, recreational uses, water quality, and habitat protection.⁷

ENDOWMENT LANDS

When Idaho became a state, Congress granted state endowment lands for the “support of common schools.”⁸ The Idaho Constitution created the Idaho State Board of Land

¹ PRESERVE MCCALL, <https://preservemccall.com/> (last visited March 18, 2020).

² SMART FOREST SOLUTIONS, TRIDENT HOLDINGS LLC PROPOSED LAND EXCHANGE: ECONOMIC BENEFITS TO IDAHO ENDOWMENT BENEFICIARIES 2 (2020), https://www.idahoconservation.org/wp-content/uploads/2020/06/SFS_EconomicReport_PayetteLands_TridentExchange060520.pdf.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ PRESERVE MCCALL, PROPOSAL OUTLINE 23 (2020), https://static1.squarespace.com/static/5e73d0d66ab9182890fdd2d2/t/5fbd763b57b26306284643dc/1606252108842/20-033_McCall_Book_20201123-lowres.pdf

⁷ Don Day, *Deep Dive: What’s the future of the Payette Lake region? Huge land swap proposal spurs action*, BOISEDEV.COM (July 22, 2020), <https://boisedev.com/news/2020/07/22/trident-holdings-mccall/>; Emily Benson, *Idaho state lands could end up in private hands*, HIGH COUNTRY NEWS (Mar. 8, 2021) <https://www.hcn.org/issues/53.4/north-growth-sustainability-when-state-owned-land-is-publicly-accessible-but-not-public-idaho-land-swap>

⁸ Idaho Admission Bill, 26 Stat. L. 215, ch. 656; am. 1998, P.L. 105–296, § 4 (1890).

Commissioners and tasked it “to provide for the location, protection, sale or rental of all the lands.”⁹ The Board is bound to provide management of endowment lands “in such a manner as will secure the maximum long term financial return to” the beneficiaries.¹⁰ This created a trust between the Board (trustee) and the beneficiaries of the endowment fund.¹¹

Some restrictions were put in place as to the transfer methods of the lands. These restrictions served to calm concerns that the land assets would be depleted upon rapid reallocation, thus failing to reach the objective of maximizing long term gains.¹² Constitutional restrictions on disposal include:

- All land must be disposed of via public auction.
- A maximum of 100 sections of state lands may be sold in any year.
- A maximum of 320 acres may be sold to any one individual, company, or corporation.
- No state lands may be sold for less than the appraised price.¹³

CHALLENGES

Under the current legal framework, the sole method of transferring timberland is by exchange. Idaho Code § 58-133 protects lands “chiefly valuable for forestry” from sale.¹⁴ However, Attorney General Lawrence Wasden has challenged the constitutionality of certain statutory limitations on the Board’s ability to maximize gains.¹⁵ In *Wasden*, the Idaho Supreme Court held that a statutory exemption on cottage site leases from conflict auction was in conflict with the Board’s constitutional duty.¹⁶ The court reasoned that the Constitution’s provision for “disposal” of the land included both sales and leases.¹⁷ The court did not mention exchanges within its definition.¹⁸ The AG could argue that the prescription of exchange as the sole method of disposal in § 58-133 makes the statute unconstitutional.

Generally, the public is concerned with the loss of access to lands that have been publicly utilized for recreation. This was the case in a private acquisition that began in 2016. When Texas billionaires Dan and Ferris Wilks purchased a large swath of land in Idaho from public ownership, they ended up cutting off public access to lands that had been hiked and hunted for

⁹ IDAHO CONST. art. IX, §§ 7, 8.

¹⁰ *Id.* t§ 8.

¹¹ Memorandum from Attorney General Lawrence Wasden to the Idaho Board of Land Commissioners (May 11, 2020), <https://www.idl.idaho.gov/wp-content/uploads/sites/116/land-board/lb/minutes-archive/2020/051920-final-materials-land-board-meeting-watermark.pdf>.

¹² DENNIS C. COLSON, IDAHO’S CONSTITUTION: THE TIE THAT BINDS 120 (1991).

¹³ IDAHO CONST. Art. IX, § 8.

¹⁴ IDAHO CODE § 58–133.

¹⁵ *Wasden v. State Bd. Of Land Comm’n*, 153 Idaho 190, 280 P.3d 693 (2012).

¹⁶ *Id.* at 196.

¹⁷ *Id.* at 199.

¹⁸ *Id.*

generations.¹⁹ This sparked public outrage.²⁰ The Wilks brothers, who purchase land for fracking, are known for purchasing land and limiting public access.²¹ Because of this history, the public's fear surrounding this exchange is that private ownership of the land around Payette Lake would cut off public access.²²

Preserve McCall has attempted to build trust by assuring the public of its intent to turn profits from development into conservation and access to the public.²³ The proposal promises 62% of the land acquired will become park land, owned and managed by a public or nonprofit entity.²⁴ Trust can be achieved in many different contractual frameworks such as contingencies and omnibus agreements.

Preserve McCall proponents maintain that the current ownership of these lands is unsustainable and that Preserve McCall and the public share a common concern: the long-term use of these endowment lands.²⁵ If the Board rejects the proposal, then it will have to use alternative methods of achieving its fiduciary duty to maximize return. One of these methods is to challenge the constitutionality of Idaho Code § 58-133. In the event that the statute is deemed unconstitutional, the Board could sell 320-acre parcels of land to private owners. Much like the results of the Wilkses' acquisition, these private owners could then limit public access and develop housing and industry with little to no responsibility to the public.

If the proposal can be trusted, it suggests several "wins" resulting from the exchange process. First, the Board will have fulfilled its fiduciary duty by maximizing the gain for its beneficiaries. It will have reallocated underperforming timberland for timberland that reaches its target benchmark. Second, the public will maintain the vast majority of its public access. If Preserve McCall sticks to its proposed allocation of public access land, it will provide for continuous enjoyment for the public and avoid further confrontation. Third, Preserve McCall will create an economic benefit to the surrounding area through development.

WHAT'S NEXT?

The Land Board is considering the proposal made by Preserve McCall, a disposition schedule ("PELS") proposed by the Idaho Department of Lands,²⁶ conservation easement

¹⁹ Julie Turkewitz, *Who Gets to Own the West?*, N.Y. Times (June 22, 2019) <https://www.nytimes.com/2019/06/22/us/wilks-brothers-fracking-business.html>.

²⁰ *Id.*

²¹ Rocky Barker, *Texas billionaires limit snowmobile access on Idaho land, reverse course on logging*, Idaho Statesman (Updated Sept. 8, 2016, 9:26 AM), <https://www.idahostatesman.com/news/local/news-columns-blogs/letters-from-the-west/article99576022.html>.

²² Steven Pfeiffer, *The 28,000 Acre Payette Lake Land Transfer: What it means for Public Lands & Payette Lake*, IDAHO RIVERS UNITED (July 31, 2020), <https://www.idahorivers.org/newsroom/2020/7/31/payette-lake-land-transfer>.

²³ Don Day, *Deep Dive: What's the future of the Payette Lake region? Huge land swap proposal spurs action*, BOISEDEV.COM (July 22, 2020), <https://boisedev.com/news/2020/07/22/trident-holdings-mccall/>.

²⁴ PRESERVE MCCALL, PROPOSAL OUTLINE 23 (Nov. 2020), <https://preservemccall.com/our-proposal>.

²⁵ See SMART FOREST SOLUTIONS, *supra* note 2 (explaining the cost to the beneficiaries of the status quo).

²⁶ Idaho Dept. of Lands, PAYETTE ENDOWMENT LAND (last visited Apr. 27, 2021) <https://www.idl.idaho.gov/payette-endowment-land/>.

application for a portion of these lands,²⁷ and the status quo of holding onto the land despite its underperformance. The Land Board has no general welfare duty and will make its decision whether to move forward solely on its fiduciary duty to the endowment. In March 2021, the Board lifted the moratorium on leases, sales, and exchanges and began taking applications again.²⁸ The Department has suggested a decision could be reached by September of 2021.²⁹

²⁷ Benson, *supra* note 7.

²⁸ *Id.*

²⁹ STATE BOARD OF LAND COMMISSIONERS, DRAFT MINUTES REGULAR MEETING 15 (Mar. 16, 2021), <https://www.idl.idaho.gov/wp-content/uploads/sites/2/land-board/lb/minutes-archive/2021/042021-materials-lb-meeting-watermark.pdf>.