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IN THE SUPREME COURT OF THE STATE OF IDAHO

GLADYS BABCOCK, as Trustee of the BABCOCK TRUST, et al.,

Plaintiffs and Cross-Appellants

vs.

IDAHO BOARD OF LAND COMMISSIONERS; and GEORGE BACON, in his official capacity as Director of the Idaho Department of Lands,

Respondents.

HON. LAWRENCE G. WASDEN, in his capacity as Attorney General of Idaho, *ex rel.* STATE ENDOWMENT LAND BENEFICIARIES,

Plaintiff and Appellant

vs.

STATE BOARD OF LAND COMMISSIONERS, and GEORGE BACON, in his official capacity as Director of the Idaho Department of Lands, *et al.*

Defendants/Intervenor Defendants and Respondents,

Supreme Court
Docket No. 39084-2011

COPY

APPELLANT LAWRENCE G.WASDEN'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley

* * * * *

Honorable Michael R. McLaughlin, District Judge, Presiding

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HON. LAWRENCE G. WASDEN
Attorney General
CLAY R. SMITH
Deputy Attorney General
Statehouse, Room 210
Boise, ID 83720
Attorneys for Appellant

PHILLIP S. OBERRECHT
LESLIE M.G. HAYES
HALL FARLEY OBERRECHT & BLANTON
702 W. Idaho, Suite 700
P.O. Box 1271
Boise, ID 83701
Attorneys for Cross-Appellant

MERLYN W. CLARK
HAWLEY TROXELL ENNIS & HAWLEY
877 Main Street
P.O. Box 1617
Boise, ID 83701-1617
Attorneys for Respondents-
Idaho Board of Land Commissioners and
George Bacon

CHARLES B. LEMPESIS
CHARLES B LEMPESIS, CHTD.
1950 W. Bellerive Lane, #110
Coeur d'Alene, ID 83816
Attorney for Respondent Priest Lake
State Lessees Association, Inc.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

Section 58-310A, Idaho Code, exempts from the conflict auction requirements in Idaho Code § 58-310 "single family, recreational cottage sites and homesites" ("cottage sites") and directs the State Board of Land Commissioners ("Land Board" or "Board") "to reject any and all pending and future conflict auction applications filed under sections 58-307 and 58-310" for the cottage sites. Idaho Code § 58-310A(2) (App. A). In lieu of the conflict auction process, the statute instructs the Land Board to "insure that each leased lot generates market rent throughout the duration of the lease." *Id.* § 58-310A(3).

The Attorney General brought suit in district court seeking a declaration that § 58-310A conflicts with the requirement in Article IX, Section 8 of the Idaho Constitution (App. B) that the Legislature ensure that "the general grants of lands made by congress . . . shall be held in trust, subject to disposal at public auction" and is therefore unconstitutional in all possible applications. The District Court for the Fourth Judicial District, Valley County, rejected the Attorney General's claim, concluding that the term "disposal" in Article IX, Section 8 "does not encompass partial conveyances of real property such as leases"—*i.e.*, "state land is only disposed of when it is no longer being preserved and held in trust." R. Addendum, p. 35, LL. 17-18, 25 & p. 36, L. 1 (App. C).

II. COURSE OF PROCEEDINGS BELOW

A. Overview

This appeal arises from a judgment in a consolidated case involving two proceedings initiated in different counties of the Fourth Judicial District. The first action, *Babcock v. Idaho State Board of Land Commissioners*, No. CV-2010-436-C (4th Jud. Dist., Valley County) ("*Babcock*"), was filed in Valley County District Court on October 22, 2010, by a large group of cottage site lessees adjacent to or near Payette Lake (collectively, "Payette Lake Lessees"). The second action, *Wasden v. State Board of Land Commissioners*, No. CV-OC-2010-23751 (Fourth Jud. Dist., Ada County) ("*Wasden*"), was commenced on December 2, 2010, in Ada County District Court by the Attorney General. The *Babcock* litigation against the Land Board and the Idaho Department of Lands Director ("Director"), as ultimately narrowed, related to the proper interpretation and application of the certain provisions in the 2001-2010 cottage site lease.[1] Neither the Lessees in their complaint nor the Board by way of defense raised the constitutionality of Idaho Code § 58-310A as an issue. The *Wasden* litigation, as ultimately narrowed, presented only the question of § 58-310A's facial constitutionality. The *Babcock* district court (McLaughlin, J., presiding) consolidated *Wasden* into the Valley County proceeding pursuant to I.R.C.P. 42(a) on March 8, 2011. R Vol. III, p. 556.

The district court resolved both proceedings under I.R.C.P. 56 in a memorandum decision and order entered on June 6, 2011. R Addendum, p. 22. Separate motions and briefs were

submitted during the summary judgment process, but the underlying motions were argued orally at the same hearing. The district court denied the Attorney General's motion directed to the facial constitutionality of § 58-310A in *Wasden* and granted the Land Board's motion for summary judgment in *Babcock*. A single final judgment in the consolidated case consistent with the summary judgment order entered on August 10, 2011 (R Addendum, p. 42), from which the Attorney General appealed as to the *Wasden*-related component (R Vol, IV, p. 718) and the Payette Lake Lessees appealed as to the *Babcock*-related component (*id.*, p. 733). A more detailed summary of the *Wasden* and *Babcock* litigation follows.

B. *Wasden*

The Attorney General's complaint for declaratory and injunctive named the Land Board and the Director in his official capacity as the sole defendants. R Vol. I, p. 30. It alleged three claims for relief: (1) Idaho Code § 58-310A violates Article IX, Section 8 by authorizing the lease of the cottage sites subject to the statute without compliance with the public auction requirement in the constitutional provision; (2) the Board violated its duty to "secure the maximum long term financial return" to endowment land beneficiaries by establishing a rental rate pursuant to the authority nominally vested in it under § 58-310A substantially below that which would generate such return; and (3) the Board violated § 58-310A's direction to set an appropriate "market rent" by, *inter alia*, "its utilization of phase-in periods for rental increases to mitigate perceived hardships on lessees." R Vol. I, pp. 46-47. The subject matter of the second

[1] When the underlying actions were filed, the Director was George Bacon who subsequently retired. The current Director is Tom Schultz. He should be substituted for Mr.

claim had been before this Court in *Wasden ex rel. State v. Idaho State Board of Land Commissioners*, 150 Idaho 547, 249 P.3d 346 (2010) ("*Wasden ex rel. State*"), in the context of a petition for writ of prohibition. The second and third claims were dismissed without prejudice pursuant to I.R.C.P. 41(a)(1)(ii) on December 23, 2011 (R Vol. II, p. 385), after the Land Board adopted a flat 4 percent rental rate for ten-year recreational cottage site leases anticipated to be issued for the 2012-2021 period.

The controversy over the validity of § 58-310A is not new but crystallized in March 2010 when the Land Board, in a three-to-two vote, instructed the Director to prepare a draft ten-year cottage-site lease template for Board review and approval that would take effect on January 1, 2011, when the then-current ten-year leases expired. R Vol. I, pp. 38-41, ¶¶ 20-22. Because that process had not been completed at the time the *Wasden* litigation began, the Attorney General filed with the complaint a motion that requested entry of a preliminary injunction under I.RC.P. 65(e) enjoining the Director from presenting to the Board for its consideration and execution 2011-2020 leases for the cottage sites or executing such leases if presented. R. Vol. I, p. 49. Prior to the December 15, 2010 hearing on the motion, the Payette Lake Lessees requested intervention as defendants. *Id.,* p 115. Their motion was granted orally at the preliminary injunction hearing (Dec. 15, 2010 Tr. 29, LL 9-12) and confirmed by written order on December 16, 2010 (R. Vol. I, p. 180).[2]

Bacon as a respondent. *See* I.A.R. 48 and I.R.C.P. 25(d).

[2] Intervention in *Wasden* as a defendant also was sought on February 22, 2011, by and granted on March 22, 2011, to the Priest Lake State Lessees Association ("Priest Lake Association" or

The Ada County district court (Bail, J., presiding) granted the Attorney General's preliminary injunction motion in an order entered on December 17, 2010. R. Vol. II, p. 224. The injunction prohibited the Director from "issuing the Template Lease for the single family, recreational cottage and homesites subject to Idaho Code § 58-310A" until further order of the Court. *Id.*, p. 226.[3] On the same date, the Payette Lake Lessees moved to consolidate *Wasden* into the earlier-filed *Babcock*. The *Wasden* parties then stipulated under I.R.C.P. 41(a)(1)(ii) to the dismissal without prejudice of the second and third claims for relief on December 23, 2010, leaving only the Attorney General's facial challenge to the constitutionality of § 58-310A at issue (R Vol. II, p. 385)—a claim as to which the Attorney General had moved for summary judgment on the previous day (*id.*, p. 375).

The Attorney General, as well as the Land Board and the Director, unsuccessfully

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"Association"). R Vol. III, p. 532. The Association was formed "for the purpose of representing holders of cottage site leases at Priest Lake." *Id.*, p. 536, ¶ 1.

[3] The "Reasons for Issuance" component included several interlineations made by the district court that concerned the order's effect on then-existing leases. R Vol. II, p. 225. Those interlineations provided the basis for the Payette Lake Lessees filing a motion for sanctions under I.R.C.P. 75 on January 27, 2011, based on the contention that the Land Board was precluded by the injunction from altering 2010 rental rates for lease year 2011. The motion was heard subsequent to the consolidation of the Ada County case with the Payette Lake Lessees' action against the Land Board related to the latter's determination to issue new ten-year leases with an increased rental rate formula. The Valley County district court deemed the Ada County district court's interlineations to be "conflicting" but concluded "that Judge Bail intended that the status quo, whether it was the rates charged for these cottage sites or the amount of rent charged for these cottage sites would remain at 2010 levels until further ruling on the multiplicity of issues that have been brought before the Court." R Vol. IV, p. 681, LL. 10-14. The court therefore denied the motion for sanctions but "order[ed] that the lease payments remain as set for 2010 and any payments by lessees in excess of that will be either refunded or be credited against any future installment payments on the leasehold estates." *Id.*, p. 682, LL. 9-11.

opposed consolidation. R Vol. III, pp. 517, 549. Subsequent to the change of venue on March 29, 2011 (*id.*, p. 570), briefing on the Attorney General's motion for summary judgment concluded, and the motion was argued on May 3, 2011.[4] The district court denied the motion on June 6, 2011, concluding in part "that public auctions are not required for leases of public lands because the term 'disposal' contained in Article IX, Section 8 of the Idaho Constitution does not

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[4] The Attorney General's motion was opposed by the Payette Lake Lessees and the Association. R Vol. III, pp. 572; R Vol. IV, p. 596. The Land Board did not participate in the summary judgment motion briefing and previously had stated in a memorandum opposing entry of a preliminary injunction that it took no position with respect to the constitutionality of § 58-310A. R Vol. I, p. 156 ("The Land Board takes no position with regard to the constitutionality of Idaho Code Section 58-310A. The Land Board is required to comply with that statute unless and until it is repealed by the legislature or is determined to be unconstitutional by the Court"); *accord* Dec. 15, 2010 Tr. 18:14-22. However, the Board requested realignment in *Wasden* as a plaintiff on May 25, 2011—*i.e.*, after the Attorney General's summary judgment motion had been briefed and argued before the district court. R Addendum, p. 5. The Board discussed the basis for its change of position in the realignment motion's supporting memorandum:

> The Land Board . . . has concluded that the mandate imposed under Article IX, Section 8 with respect to the public auction of endowment land leases is plain and that § 58-310A should be invalidated. The Board, in this regard, finds the analysis in Attorney General Opinion No. 09-01 and the Attorney General's memorandums supporting his motion for summary judgment persuasive. Indeed, two members of the Supreme Court recently observed that § 58-310A "is clearly unconstitutional—in eliminating the conflict auction procedure and instead requiring 'market rent'—the legislature encroached upon the discretion constitutionally granted to the Land Board." *Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs*, 249 P.3d 346, 357 n.10 (Idaho 2010) (Burdick, J., dissenting). Those Justices correctly added that "until declared unconstitutional, I.C. § 58-310A must still be followed by the Land Board[,]" but that obligation does not foreclose the Board from seeking such a declaration. Having failed to in its efforts to have the Legislature bring this aspect of endowment lands leasing back within the constraints of Article IX, Section 8 through repeal of § 58-310A as proposed in Senate Bill No. 1145, 61st Legis., 1st Sess. (2011), § 2, the Board believes that the time has arrived for a definitive judicial determination. Its realignment as a party plaintiff is accordingly appropriate.

Id., pp. 8-9. The district court issued its summary judgment ruling shortly after completion of the briefing on the realignment motion, and the motion was not pursued further.

include leases." R Addendum, p. 36, LL. 2-4. The court also resolved in the same memorandum decision cross-motions for summary judgment filed by the Payette Lake Lessees and the Land Board in *Babcock*, concluding that the Lessees' action was barred because they failed "to exhaust their administrative remedies before pursuing their breach of contract claims." R Addendum, p. 32, LL. 9-10. The Attorney General then requested entry of final judgment in the consolidated case (*id.*, p. 684), and the district court granted the request in a memorandum decision on July 27, 2011 (*id.*, p. 687). Final judgment was entered on August 10, 2011. R Addendum, p. 42. The Attorney General filed a notice of appeal with respect to that portion of the judgment related to *Wasden* on the same date. R Vol. IV, p. 718.

C. *Babcock*

The Payette Lake Lessees' original complaint contained six "counts"—the first two of which were based in contract against the Land Board and the Director. R Vol. I, pp. 9 - 13. They filed an amended complaint on November 10, 2011, but the contract counts remained unaffected. *Id.*, pp. 24-25. The Lessees filed a motion for partial summary judgment directed to the contract counts on December 9, 2010 (*id.*, p. 82), while the Board cross-moved for summary judgment as to those claims on January 13, 2011 (R Vol. II, p. 388).

The core dispute between the parties as to the merits turned on whether the 2001-2010 cottage site leases provided the Lessees a right to renew and thereby foreclosed the Board from imposing a different set of lease terms for the 2011-2020 period as it had determined to do at its March 16, 2010 meeting. *Compare* R Vol. I, p. 94 (Lessees' contention that "the Land Board's attempt to unilaterally impose a new lease with a new rent formula on existing lessees constitutes

a breach of the lease's renewal provisions"), *with id.*, R Vol. III, p. 512 (Board's contention that "[t]he 2001 Leases simply do not grant the Payette Lessees a right to renew the lease, much less on the same terms as the 2001 Lease"). The Lessees argued alternatively that, were the Court to reject their right-of-renewal claim, they were entitled under their 2001-2010 leases to the reasonable value of the improvements which they had made to the leased parcels. R Vol. I, 99-100. The Board raised the non-merits defense that the Lessees' contract claims challenged an "agency action and that judicial review under the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 to -5292, was the sole method for challenging the alleged contract non-compliance. R Vol. I, pp. 405-09. During the course of the summary judgment proceedings, the parties stipulated to the dismissal without prejudice of the remaining counts in the amended complaint. *Id.*, pp. 391, 455.

The district court agreed with the Land Board that the contract claims were subject to the APA and found that the Lessees had failed to exhaust their administrative remedies. R Addendum, p. 31 L. 26 – p. 32, L. 6 ("Here, the Plaintiffs have pled a cause of action that could have a potential remedy under either the APA or general contract principles. However, 'important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.'"). It therefore granted summary judgment to the Board in its June 6, 2011 decision and entered final judgment with respect to the contract counts on August 10, 2011. R Addendum,

p. 42. The Lessees filed a notice of cross-appeal on September 20, 2011. R Vol. IV, p. 733.

II. STATEMENT OF FACTS

A. *Wasden*: Litigation Background

The Idaho Constitution, Art. IX, § 8, required the Legislature, "at the earliest practicable period, [to] 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." Article IX, Section 8, although variously modified since 1890, remains unchanged as to its public auction requirement and sets the controlling limits on legislative authority with regard to endowment land "disposal."[5]

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[5] Article IX, Section 8 read as originally adopted in its entirety:

> 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 therefor: *Provided*, that no school lands shall be sold for less than ten (10) dollars per acre. 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 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 year, and to be sold in subdivisions of not to exceed one hundred and sixty (160) acres to any one individual, company or corporation.

One category of state endowment lands is land proximate to Payette and Priest Lakes. This land, in turn, has been administered over time as myriad parcels—the "cottage sites"—for leasing purposes. *See* R Clerk's Ex. 2 (Aff. of Steven W. Strack, Ex. 3 at 1).[6] Currently, 167 cottage site leases are associated with Payette Lake and 355 leases with Priest Lake. *Id.* Section 58-310, Idaho Code, provides a public auction procedure "[w]hen two (2) or more persons apply to lease the same land," but in 1990 the Legislature exempted cottage sites from that procedure. 1990 Idaho Session Laws chapter 187, codified at Idaho Code § 58-310A. The 1990 legislation remains unchanged and, in practical effect, substitutes the Land Board's determination as to the appropriate "market rent" for the cottage sites for the public auction process. *See* Idaho Code § 58-310A(3) ("[i]n the absence of the conflict application and auction

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See Balderston v. Brady, 17 Idaho 567, 574, 107 P. 493, 494-95 (1910) (quoting provision). Article IX, Section 8 has been amended subsequently, but the only modifications to its language quoted in the text in the current provision were (1) the substitution of the words "the appraised price" for "ten (10) dollars per acre" in the first sentence; (2) revising the second proviso to read "provided, that not to exceed one hundred sections of 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[;]" and (3) substituting "long term financial return to the institution to which granted or to the state if not specifically granted" for "amount possible therefor."

[6] Appended to the Affidavit of Steven W. Strack was a report entitled *Analysis of Procedures for Residential Real Estate (Cottage Site) Leases on Idaho Endowment Lands*. This analysis was prepared at Secretary of State Ysursa's request by Philip S. Cook and Jay O'Laughlin on behalf of the Policy Analysis Group, College of Natural Resources, University of Idaho, for use by the Land Board in its cottage site-related deliberations. R Clerk's Ex. 2 (Aff. of Steven W. Strack, Ex. 3). The report contains background facts related to the history and nature of cottage site leasing on or near Payette and Priest Lakes. This Court's opinion in *Wasden ex rel. State* also summarizes the history and nature of the cottage site leasing program. 150 Idaho at 549-51, 249 P.3d 348-50.

procedure in the single family, recreational cottage site and homesite lease, and lease renewal process, the board shall insure that each leased lot generates market rent throughout the duration of the lease"). The Legislature's findings left no doubt about its intent in this regard. *Id.* § 58-310A(1)(g) and (h) (finding "[t]hat section 8, article IX, of the constitution of the state of Idaho provides that the board manage state endowment lands 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" and "that maximum long-term financial returns to the institutions to which granted are best obtained through stable leases at market rent").

At the time of *Wasden*'s filing, the cottage sites were subject to ten-year leases expiring on December 31, 2010. R Clerk's Ex. 5 (Aff. of Bob Brammer, Ex. A). In anticipation of the leases' expiration, the Board adopted at its March 2010 meeting a new lease rate formula for inclusion in the successor lease for the 2011-2020 period. *See* Mar. 16, 2010 Land Board Minutes at 5, *available at* http://www.idl.idaho.gov/LandBoard/2010MinutesPDF/mar16-10finmin.pdf (last visited Nov. 17, 2011).[7] While the stated lease rate was 4 percent, the actual rental rate under the new lease rate formula was determined by the Director to be between 1.5 and 2.4 percent. *Wasden ex rel. State*, 150 Idaho at 551, 249 P.3d at 350. In response to the Land Board's action, the Attorney General sought issuance of a writ of prohibition from this Court on the basis that the Board was "acting in excess of its jurisdiction under the Idaho Constitution and statutory law in attempting to lease state endowment lands for less than market

rent." *Id.* The Court dismissed the petition on December 1, 2010, after concluding that the availability of declaratory and injunctive relief provided "a 'plain, speedy, and adequate' alternative" remedy. 150 Idaho at 553, 249 P.3d at 352; *see also id.* at 554, 249 P.3d at 353. The Attorney General's petition did not challenge the underlying validity of the statute under which the Board acted—§ 58-310A—a fact that the dissenting opinion noted:

> Although not argued by any party here, I.C. § 58–310A is clearly unconstitutional as—in eliminating the conflict auction procedure and instead requiring "market rent"—the legislature encroached upon the discretion constitutionally granted to the Land Board. Incidentally, it seems axiomatic that where the Land Board failed to obtain market rent, it was not obtaining the maximum long-term financial returns, as is mandated by the Idaho Constitution. However, until declared unconstitutional, I.C. § 58–310A must still be followed by the Land Board.

150 Idaho at 558, 249 P.3d at 357 n.10 (Burdick, J., dissenting). The Attorney General filed *Wasden* on the day after this Court's dismissal of the petition for writ of prohibition.

B. *Wasden*: Facial Character Of Constitutional Challenge And District Court's Summary Judgment Ruling

Unlike the prohibition proceeding, the Attorney General placed the constitutionality of § 58-310A, insofar as it exempted cottage site leases from the public auction requirement, at issue. This constitutional challenge became the sole subject of the *Wasden* litigation upon the dismissal on December 23, 2010, under I.R.C.P. 41(a)(1)(ii) of the two other claims in his district court complaint. The Attorney General brought the action on behalf of the cottage-site lease income beneficiaries in the discharge of his statutory responsibility to supervise "nonprofit

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[7] Section 58-307, Idaho Code, was amended in 2008 to allow certain lands, including residential cottage sites, to be leased for periods up to 35 years. 2008 Idaho Sess. L. ch. 103 (codified at Idaho Code § 58-307(3)). The Land Board nevertheless opted to maintain the ten-year period.

corporations, corporations, charitable or benevolent societies, persons or person holding property subject to any public or charitable trust" and enforce "whenever necessary any noncompliance or departure from the general purpose of such trust" (Idaho Code § 67-1401(5)) and to invalidate an impermissible statutory infringement on his duty as a Land Board member to act consistently with Article IX, Section 8. R Vol. I, p. 32 at ¶ 3; *see also Wasden ex rel. State*, 150 Idaho at 552, 249 P.3d at 351 n.8; *id.* at 558, 249 P.3d at 357 n.10.

The challenge to § 58-310A below was facial in nature; *i.e.*, because the public auction requirement in Article IX, Section 8 applies to the Land Board's rental of the cottage sites, the Legislature's direction to the Land Board to substitute a "market rent" determination for the auction process is unconstitutional and was not severable from the remainder of the statute. The district court recognized the character of the Attorney General's claim. R Addendum, p. 33, LL. 19-20 ("the Attorney General has challenged the constitutionality of I.C. § 58-310A on its face"). It also recognized that the scope of the term "disposal" in the third sentence of Article IX, Section 8 controlled the claim's resolution. *Id.*, p. 35, LL. 10-14 ("[i]f the term 'disposal' does not include leases, I.C. § 58-310A is constitutional unless the Attorney General can establish no set of circumstances exists under which the conflict auction exemption contained in I.C. § 58-310A could possibly 'secure the maximum long term financial return' on the cottage sites"). The court then stated its construction of the term:

> The Court's understanding of the term "disposal" in that context is that state land is only disposed of when it is no longer being preserved and held in trust. "A lease is a particular kind of contract wherein (generally) a leasehold interest in realty is given in return for a promise to pay rent periodically." *Krasselt v. Koester*, 99 Idaho 124, 125, 578 P.2d 240, 241 (1978). A lessee has both contract rights and a limited ownership

> interest in the real property. *Id.* Although the cottage sites at issue in this case have been leased, those lands are still being preserved and held in trust which means that they have not been disposed of. Furthermore, the plain meaning of the term "disposal" does not encompass partial conveyances of real property such as leases. Therefore, the Court will find that public auctions are not required for leases of public lands because the term "disposal" contained in Article IX, Section 8 of the Idaho Constitution does not include leases.

Id., p. 35, L. 15 – p. 36, L. 4. In reaching this construction, the court did not analyze the overall structure of Article IX, Section 8, the particular structure of the provision's third sentence, or provision's use of the terms "sale," "rent," or "sold," and "disposition."

The district court's analysis instead focused on the Attorney General's reliance on the decisions in a quartet of actions brought by the Idaho Watersheds Project ("IWP") against the Land Board: *IWP v. State Board*, 128 Idaho 761, 918 P.2d 1206 (1996) ("*IWP* I"); *IWP v. State Board*, 133 Idaho 55, 982 P.2d 358 (1999) ("*IWP* II"); *IWP v. State Board*, 133 Idaho 64, 982 P.2d 367 (1999) ("*IWP* III"); *IWP v. State Board*, 133 Idaho 68, 982 P.2d 371 (1999) ("*IWP* IV"). The court reasoned that neither *IWP* I nor the earlier decision in *East Side Blaine County Live Stock Association v. State Board*, 34 Idaho 807, 198 P. 760 (1921), established that the public auction requirement applied to leasing activity but, instead, were statutorily grounded. R Addendum, p. 37, LL. 4-8 ("This limited reference to the Idaho Constitution [in *IWP* I's concluding sentence] does not appear to have been necessary to the Court's ultimate determination in that case. The Court's holding was based primarily on I.C. § 58-310B and at no point in the decision did the Court hold that any lease of state lands must be subject to public auction in order to secure the maximum long term financial return."); *id.*, LL. 21-23 ("[t]he Court's analysis in *East Side* repeatedly refers to the statutory basis for the auction requirement,

making the constitutional references unnecessary to the holding in that case"). The court deemed *IWP* II—which invalidated a constitutional amendment that replaced "disposal" with "sale"—as only "demonstrat[ing] that the term 'disposal' is ambiguous." *Id.*, p. 39, LL. 6-7. *IWP* III, in the district court's view, lacked relevance because "[t]he key to the [Court's] holding . . . was that '[b]y attempting to promote funding for the schools and the state through the leasing of the school endowment lands, I.C. § 58-310B violates the requirements of Article IX, § 8.'" *Id.*, p. 38, LL. 18-21. The court concluded that "it is clear that the Idaho Supreme Court has never determined whether it is possible for leases of public lands to secure maximum long term financial return for the endowment lands' beneficiaries without subjecting the leases to a public auction requirement." *Id.*, p. 39, LL. 15-18.[8]

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[8] The district court also held that "nothing in I.C. § 58-310A . . . prevents the Land Board from utilizing current fair market value and determining a rate of return that secures maximum long term financial return for the designated beneficiaries." R Addendum, p. 39, LL. 18-20. The Attorney General has never argued the contrary although, as reflected in the prohibition proceeding in *Wasden ex rel. State*, he disputes that the Board has used its rent-setting authority under the statute to generate such a return. It bears mention, however, that *IWP* III is instructive concerning another constitutionally suspect feature of Idaho Code § 58-310A: The legislative findings reflecting that the 1990 Act resulted in part from the fact that, "in the case of single family, recreational cottage site and homesite leases, the conflict application and auction procedure have [*sic*] caused considerable consternation and dismay to the existing lessee at the prospect of losing a long-time lease." *Id.* § 58-310A(1)(e). This Court invalidated Idaho Code § 58-310B because it impermissibly directed the Board to consider interests other than the endowment land beneficiaries in making leasing determinations; so, too, § 58-310A suggests a legislative desire to ameliorate existing lessees' "consternation and dismay" by removing the market force mechanism implicit in a public auction and substituting the Land Board's market rent assessment. Article IX, Section 8 requires the Legislature, no less than the Board, to act with undivided loyalty to the beneficiaries in making "maximum long term financial return" assessments, but the 1990 Act plainly was motivated by a desire to confer a benefit—the elimination of lease conflictors—on existing lessees. This possible basis for § 58-310A's invalidation was not raised below because, even had the Legislature exercised undivided loyalty

ISSUE PRESENTED ON APPEAL

Whether Idaho Code § 58-310A conflicts with the requirement in Article IX, Section 8 of the Idaho Constitution that school trust lands be subject to disposal at public auction and therefore is unconstitutional in its entirety.

ARGUMENT

I. STANDARD OF REVIEW

This Court has summarized the standards governing disposition of summary judgment motions filed under I.R.C.P. 56 in many decisions. They were identified recently in *Soignier v. Fletcher*, 151 Idaho 322, 256 P.3d 730 (2011):

> Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The movant has the burden of showing that no genuine issues of material fact exist. . . . Disputed facts and reasonable inferences are construed in favor of the nonmoving party.

151 Idaho at 324, 256 P.3d at 732 (citation omitted). The Court applies the same standards as the district court on review and examines the propriety of summary judgment *de novo*. *Karr v. Bermeosolo*, 142 Idaho 444, 448, 129 P.3d 88, 92 (2010). A facial challenge to a statute's constitutionality "is 'purely a question of law'" and requires the proponent to "demonstrate that the law is unconstitutional in all of its applications." *Am. Falls Reservoir Dist. v. Idaho Dep't of Water Res.*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2006); *accord Lochsa Falls, L.L.C. v. State*,

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with respect to the endowment lands' beneficiaries, it could not ignore the public auction mandate.

147 Idaho 232, 237, 207 P.3d 963, 968 (2008). "The interpretation of a [constitutional provision]" is similarly "a question of law over which we exercise free review." *State ex rel. Wasden v. Daicel Chem. Indus., Inc.*, 141 Idaho 102, 109, 106 P.3d 428, 435 (2005). Whether an unconstitutional provision is severable from the remainder of a statute also presents a question of law subject to *de novo* determination by this Court. *See Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 498, 504-505, 50 P.3d 991, 993, 996-97 (2002).

II. THE OVERALL STRUCTURE AND TERMINOLOGY OF ARTICLE IX, SECTION 8 AND THE PARTICULAR LANGUAGE OF ITS THIRD SENTENCE, ESTABLISH UNAMBIGUOUSLY THAT THE TERM "DISPOSAL" ENCOMPASSES THE COTTAGE SITE LEASES—A CONSTRUCTION THAT THIS COURT HAS ENDORSED FOR ALMOST A CENTURY

A. Applicable Rules Of Constitutional Construction

This Court has held repeatedly that "'[t]he general rules of statutory construction apply to constitutional provisions generally.'" *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990) (quoting *Westerberg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988)); *accord City of Boise v. Frazier*, 143 Idaho 1, 10, 137 P.3d 388, 397 (2006). Those rules demand that the interpretative exercise

> begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.* Unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute.

Viking Const., Inc. v. Hayden Lake Irr. Dist., 149 Idaho 187, 192, 233 P.3d 118, 123 (2010). Consequently, "[i]n determining the ordinary meaning of the statute, 'effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.'" *BHC*

Intermountain Hosp., Inc. v. Ada County, 150 Idaho 98, 95, 244 P.3d 237, 239 (2010); *see also George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990) ("[s]tatutes must also be construed as a whole without separating one provision from another"). As the United States Supreme Court has explained, "[a]mbiguity is a creature not of definitional possibilities but of statutory context" (*Brown v. Gardner*, 513 U.S. 115, 118 (1994)), and thus a "fundamental canon of statutory construction [is] that words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (*Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). A provision's syntax therefore must be examined carefully, as exemplified by the rule of last antecedent clause under which "a referential or qualifying clause refers solely to the last antecedent, absent a showing of contrary intent." *BHC Intermountain*, 150 Idaho at 96, 244 P.3d at 240.

Where a provision is deemed "capable of more than one reasonable construction" after careful analysis of its overall constitutional or statutory context, this Court has instructed that the provision

> be construed to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.

Carrier v. Lake Pend Oreille Sch. Dist., 142 Idaho 804, 807, 134 P.3d 655, 658 (2006) (internal quotation marks omitted). Resort to these largely non-textual interpretative considerations,

however, is appropriate only if a court cannot resolve the dispute by reference to the four corners of the involved provision. Here, as discussed below, the term "disposal" in Article IX, Section 8 unambiguously includes the Land Board's issuance of the cottage site leases. Yet, even were the contrary true, the external considerations support the same result.

B. Article IX, Section 8's Text: Absence Of Ambiguity Concerning Inclusion Of Leases Within Term "Disposal"

The interpretative exercise must begin with Article IX, Section 8's text and its use of the terms "sale," "rent," "sold," "disposition" and "disposal." The provision in its original form

- Enjoined the Land Board "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 possible amount therefor: *Provided*, that no state lands shall be *sold* for less than ten (10) dollars per acre."

- Enjoined the Legislature from "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."

- Enjoined the Legislature "to 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."

- Enjoined the Legislature to "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 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 quoted text to relevant terms).[9] Several conclusions follow from the provision's quite considered use of those terms.

First, the opening sentence of Article IX, Section 8 that imposes "the maximum amount possible therefor" duty explicitly identifies two forms of real property interest transfers: sales and rentals. The same discrete treatment is accorded the term "sale" or "sold" in the third sentence with reference to providing for sale of public lands and timber on those lands. The Framers therefore clearly understood that both forms of transfer could and would take place in the administration of the trust lands and, as indicated by the "no less than ten (10) dollars per acre" requirement, referred to one form when they intended to impose a discrete limitation on its use.

Second, the Framers used the term "disposition" in the following sentence to capture transactions other than a "sale" of public lands, thereby indicating that the rental of such lands would be subject to the prohibition against granting privileges to post-survey settlers that would diminish the amount received from the involved transaction. The juxtaposition of "other" and

"disposition" reflects that "disposition" is an inclusive term capturing a range of transactions beyond sales; *i.e.*, use of the term "other disposition" effectively served to negate the canon of *expressio unius est exclusion alterius*, since in the term's absence the limitations on the Legislature's authority in the second sentence would have applied only to sales. *See Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 643, 132 P.3d 397, 400 (2006) ("the rule of construction *expressio unius est exclusio alterius* applies to provisions of the Idaho Constitution that expressly limit power"). In light of the first sentence, one such form of transfer is rental of endowment land.

Third, the next sentence brings these interpretative strains together by using a variation of the term "disposition" in subjecting public lands to "disposal at public auction" but incorporating a more specific direction to the Legislature with regard to providing for the sale of public lands, as well as timber on such lands, and limiting that authority in the concluding proviso. The Framers, in short, knew how to cabin a particular constitutional mandate in Article IX, Section 8 to sales when they so intended but, as to the public auction requirement, employed the more expansive "disposal"—a choice of terminology indicating intent to include both "sales" and "other disposition[s]." Of equal importance for present purposes, however, is the status of "disposal" as the antecedent for the preposition phrases that immediately follow and include not only "at public auction" but also "for the use and benefit of the respective objects for which said grants of land were made."

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[9] As discussed in note 5 *supra*, the text of Article IX, Section 8 has been amended in several respects since its adoption in 1891. None of those modifications, however, has relevance to the

Textual analysis of Article IX, Section 8 therefore leaves no legitimate doubt that the term "disposal" is not limited to "sales" but to other forms of "disposition" subject to the provision's restraints on legislative authority. The district court's limitation of the term to transactions where the endowment land parcel "is no longer being preserved and held in trust" (R Addendum, p. 35, L.18) instead conflates the Legislature's duty under the third sentence to "judiciously locate[] and carefully preserve[] and [hold] in trust" those lands with the separate obligation to dispose of them "at public auction for the use and benefit of the respective [beneficiaries]" of the congressional grant. The former clause imposes a general duty on the Legislature; the later clause is aimed at ensuring that the land's "disposal" by the Land Board is effected in a manner—"at public auction"—calculated by the Framers to capture market value and that the revenue so generated accrues to the beneficiaries' interest—a requirement that attaches no less to when occupation or use of the lands are conveyed to a third party as to when they are conveyed in fee simple out of state ownership.[10]

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proper construction of the term "disposal."

[10] The Payette Lake Lessees' position below with respect to "disposal" suffered from much the same difficulty as the district court's construction. They contended that the term should be measured by reference to the definition given that word by the 1990 edition of *Black's Law Dictionary—i.e.*, the "sale, pledge, giving away, use, consumption or any other disposition of a thing"—and argued that "[w]ith regard to real property, a disposal would thus involve the transfer of one's entire interest in property, otherwise known as a fee simple interest." R Vol. III, p. 581. Their reliance on a dictionary meaning of "disposal" is misplaced for an obvious reason: It isolates the term from its overall context in the constitutional provision and fails to acknowledge that a lease does "dispose" of a valuable real property interest that Article IX, Section 8 seeks to protect: the right to possession of the particular cottage-site lot. *E.g.*, *City of Lewiston v. Isaman*, 19 Idaho 653, 672, 115 P. 494, 501 (1911) (tort liability falls upon tenant because "'[u]pon the transfer of the entire interest and possession to another, as the duty runs with land, [liability] would be cast upon the grantee'"); *see generally Restatement (Second) of*

C. Relevant Decisional Authority: Leases As "Disposals"

1. The *IWP* Quartet

The application of the public auction requirement to endowment land leasing has drawn this Court's attention since the early part of the last century and leaves no legitimate doubt about the absence of ambiguity over the inclusion of leases within the term "disposal." The most recent treatment of this issue appears in the four *IWP* decisions. In *IWP* I, the Court found the Land Board to have acted *ultra vires* when it issued a lease to an applicant that had failed to bid in a conflict auction held pursuant to Idaho Code § 58-310:

> The Board must find authority in the constitution and statutes for its actions. . . . No such authority exists to support the Board's act of granting the lease to a person who did not place a bid at the conflict auction. Idaho Code § 58-310 requires an auction be held where, as in this case, there are two persons who have applied to lease the same state school land. . . . The rationale behind the requirement of conducting an "auction" is to solicit competing bids, with the lease being granted to the bid that would, in the discretion of the Board, "secure the maximum long term financial return" to Idaho's schools. . . . The Board does not have the discretion to grant a lease to an applicant who does not place a bid at an auction, based upon Idaho's constitutional and statutory mandate that the Board conduct an auction. Idaho Const. art. IX, § 8; I.C. § 58-310.

128 Idaho at 766, 918 P.2d at 1211 (some citations omitted). Although the Court held that the Land Board's leasing determination violated statutory directives, the Court also expressly relied

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Property: Landlord & Tenant § 1.2 (1977) ("[a] landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property"). Indeed, the Lessees' proposed construction of "disposal" would exclude from Article IX, Section 8's reach contracts to purchase where the State retains ownership of the affected property until the purchaser "mak[es] complete payment therefor" and no transfer of "fee simple title" either has occurred or necessarily will occur. *Hellerud v. Hauck*, 52 Idaho 226, 231-32, 13 P.2d 1099, 1102 (1932) (title to school trust land under contract to purchase could not be acquired by third party through adverse possession because State, as seller, retained ownership of legal title and is not subject to

on Article IX, Section 8's public auction mandate as a co-equal basis for its holding. It accordingly began the substantive legal analysis with the following:

> IWP contends that the Board *violated article IX, section 8 of the Idaho Constitution* by leasing the 640 acres of state public land without requiring a competitive bid for the lease of the state public land. IWP argues that a party must actually place a bid at a conflict auction, in order to be considered a qualified applicant for a lease of state public lands. *We agree.*

128 Idaho at 764, 918 P.2d at 1209 (emphasis added). Any suggestion that *IWP* I was not decided with reference to Article IX, Section 8's public auction requirement asks this Court *sub silentio* to revisit the explicit holding in the case.

The decision in *IWP* I assumed additional significance insofar as it prompted the constitutional amendment approved in the 1998 general election that, *inter alia*, substituted the term "sale" for "disposal" in Article IX, Section 8's third sentence. The modification implicitly recognized that the term "disposal" in the constitutional provision extended beyond "sale" of endowment land since, absent such a meaning, no need existed for the amendment itself. *See, e.g.*, *Idaho Press Club*, 142 Idaho at 643, 132 P.3d at 401 ("[w]e should avoid an interpretation which would render terms of a constitution surplusage"); *Keenan v. Price*, 68 Idaho 423, 457, 195 P.2d 662, 683 (1948) (constitutional "[a]mendments . . . are usually adopted by the express purpose of making changes in the existing system"). This Court concluded in *IWP* II that the referendum contained two "'incongruous and essentially unrelated'" amendments and therefore violated Article XX, Section 2. 133 Idaho at 60, 982 P.2d at 363. It reasoned that "the subject of

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defeasance of title under the adverse possession doctrine); *accord In re SRBA*, 149 Idaho 532, 541, 237 P.3d 1, 10 (2010).

how school endowment land proceeds are invested differs essentially from the subject of whether auctions should take place regarding only sales, as opposed to leases and sales, of school endowment lands"). That statement makes express what was otherwise clear: The attempted amendment to Article IX, Section 8 was directed at obviating the constitutional restriction on leasing endowment lands without a public auction enforced in *IWP* I.[11]

This Court invalidated Idaho Code § 58-310B in *IWP* III under Article IX, Section 8 because it attempted "to provide income to the schools *and* the state in general" and, in so doing, violated the constitutional mandate to "'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.*'" 133 Idaho at 67, 982 P.2d at 370 (emphasis added by Court). It then invalidated disqualification of IWP's lease application given the Land Board's reliance on

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[11] The Payette Lake Lessees argued before the district court that the Legislative Council's Statements of Meaning and Purpose for the 1998 constitutional amendment contain a concession by "Idaho's own elected officials . . . that the word 'disposal' has historically been interpreted to mean sale." R Vol. III, p. 589. However, the sentence to which they refer reads in its entirety: "Although the word 'disposal' has historically been interpreted to mean 'sale,' the definition of 'disposal' is still disputed." *IWP* II, 133 Idaho at 64, 982 P.2d at 367. The opposition argument also states that "[t]he amendment will eliminate the constitutional requirement that a lease of lands of the public school endowment must be offered at a public auction." *Id.* These statements warrant to observations. First, the "historical[]" statement was made without identifying whether the interpretation referred to was the Legislature's or this Court's. As discussed below in the text, the Court has long construed "disposal" as including both sale and rental of endowment land. Second, the opposition statement reflects the position that the proposed constitutional amendment would *modify* the scope of the public auction requirement to exclude the leasing of endowment land—a position entirely consistent with the conclusion that the amendment responded to and attempted to overrule this Court's decision in *IWP* I.

otherwise impermissible factors identified in § 58-310B. 133 Idaho at 67-68, 982 P.2d at 370-71. The Court gave similar effect to § 58-310B's invalidity in *IWP* IV where, again, the Board had disqualified IWP's lease application. 133 Idaho at 71, 982 P.2d at 374. Although, as the district court observed, *IWP* III and IV were concerned with the validity of § 58-310B, the basis for the decisions was the provision's non-compliance with a phrase—"for the use and benefit of the respective object for which said grants of land were made"—whose antecedent was the noun "disposal." The common denominator in the four *IWP* decisions, in sum, is the inclusion of endowment land leases within the scope of the term "disposal" as used in Article IX, Section 8.[12]

[12] This Court declined to award attorney's fees under Idaho Code § 12-117 in *IWP* I, apparently accepting the Board's contention that it had "acted on the basis of its long-standing interpretations of applicable constitutional and statutory provisions and administrative rules" and thus possessed "a reasonable basis in law in rejecting IWP's bid." 128 Idaho at 767, 918 P.2d at 1212. Needless to say, that reasonable basis, insofar as it was predicated on the inapplicability of the public auction requirement in Article IX, Section 8 to leasing determinations, was vitiated by *IWP* I as to future decisionmaking. The Court's disposition of the attorney's fee issue also vitiates the Payette Lake Lessees' contention that the Attorney General Opinion No. 09-01's reliance on the *IWP* litigation as a basis for distinguishing the 1990 legal guideline issued by a deputy attorney general. R Vol. III, pp. 591. The legal guideline acknowledged that its conclusion—*i.e.*, that "it is possible to interpret article 9, section 8, as vesting in the legislature the discretion to lease public lands by methods other than by public auction"—as "somewhat tentative, given that it is supported only by ambiguous statements of the Idaho Supreme Court, the delegates to the constitutional convention, and the early legislature." R Clerk's Ex. 11 (Aff. of Phillip S. Oberrecht, Ex. H at p.6). The *IWP* decisions, in short, clarified what the deputy attorney general had found uncertain. The analysis in the text concerning the pre-*IWP* decisions, moreover, revisits the inquiry undertaken in the nonbinding legal guideline and does not find ambiguity as to the controlling question of whether "disposal" includes not only sales but also leases. Attorney General Opinion No. 09-01 likewise found no ambiguity.

2. Pre-*IWP* Decisions

In so construing "disposal," this Court was not writing upon a clean slate. It instead was adhering to an understanding of Article IX, Section 8 first announced in *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 178 (1912). There, the Court considered a quiet title action involving application of a statute, now codified in Idaho Code § 58-601 without substantive amendment, that authorized the Land Board to issue a right-of-way to any person "desiring to construct over or upon any of the lands owned or controlled by the state of Idaho, any ditch, canal, reservoir or other works for carrying or distributing public waters for any beneficial use." The statute, as originally adopted in 1901 (1901 Idaho Sess. L. p. 191, § 8), required no compensation for such rights-of-way but was amended in 1907 to impose a $10 per acre minimum (1907 Idaho Sess. L. p. 527, § 1). It did not require a public auction as a condition to the right-of-way's interest. The plaintiff in *Tobey* had acquired certain lands for reservoir purposes from the Land Board in 1909 by payment of the statutory minimum and compliance with certain other requirements after being directed by the Board to comply with the statute.

This Court used the dispute to discuss the breadth of the Land Board's authority under Article IX, Section 8 and the Legislature's authority under the Idaho Constitution's eminent domain provision, Article I, Section 14. The Court criticized the Board because "an agreement and contract between [him] and [it] was made which cannot be construed as a *lease* of state land, *neither* is it the *purchase* of state land at public auction, under the provisions of the Constitution and the laws of the state, but is wholly without authority of law or legal sanction or authority, and violated specifically the inhibition as to the authority of the [Board] contained in the

Constitution and the statutes." 22 Idaho at 580, 127 P. at 183 (emphasis added).

Nonetheless, the Court found the statute itself constitutional because it, along with a companion provision now codified at Idaho Code § 58-602 providing for the withholding of lands from sale when the Land Board concludes that their highest value is reservoir use, "in no way confer upon the [Board] any power that is prohibited by the Constitution, and it was not the intention of the Legislature in enacting said sections to in any way contravene the constitutional inhibition, but it was intended to carry out the provisions found in sec. 14 of art. 1 of the constitution." 22 Idaho at 581-82, 127 P. at 183. It then quoted the predecessor provision to § 58-603 for the principle that it exemplified the same use of eminent domain authority. 22 Idaho at 582-83, 127 P. at 184. The Court continued on to reiterate that the two reservoir-related statutes

> were not intended to provide for a method or system of disposing of land belonging to the state which will have the effect of granting the right to the use or occupancy forever, or the right to enter upon state land or occupy it for the purpose of use as a reservoir or in appropriating water thereon, except that such right and use and occupancy is obtained under the provision of the Constitution and the statutory laws of the state.

22 Idaho at 583, 127 P. at 184. The Court concluded by pointing to two statutes—now codified at Idaho Code §§ 7-703 and 42-1104 which, in the first instance, identify state property as subject to taking by eminent domain and, in the other, allow the taking of state property for the purpose of constructing rights-of-way and "for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use"—as "show[ing] clearly the intent of the Legislature to grant the right to take state land for a public use, just the same as private property." 22 Idaho at 585, 127 P. at 185. The Board's

action, in other words, was not sanctioned under Article IX, Section 8 but was authorized under Article I, Section 14.

Tobey thus left no doubt that Article IX, Section 8, insofar as it relates to the disposition of endowment lands, applies to the sale or rental of school trust lands but did not restrict the Legislature's constitutionally-independent power to enact eminent domain laws. This Court returned to the same issue several years later in *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Idaho 695, 151 P. 998 (1915), another quiet title action. The plaintiff there acquired a right-of-way in 1903 for purposes of constructing a reservoir under the same statute, as codified prior to the 1907 amendment, as the plaintiff in *Tobey* and had completed construction on two of the three anticipated facilities by 1912 when the defendant acquired the same land from the State after a public auction.

Chief Justice Sullivan, the only remaining member of the *Tobey* Court, wrote the principal opinion reversing the district court's judgment in the defendant's favor. His opinion focused on the potential conflict between Article IX, Section 8 and the eminent domain provision in Article I, Section 14. The opinion sought to reconcile the two constitutional sections by restricting each provision's scope. The opinion devoted virtually all of its substantive analysis to Article I, Section 14 and the related eminent domain statute and held that "under the provisions of the Constitution which clearly contemplates the subjection of state lands to certain public uses, the title in fee does not pass to the condemnor under the eminent domain or other proceedings provided by the Legislature for the subjection of state lands to public uses." 27 Idaho at 704, 151 P. at 1001; *see also* 27 Idaho at 709, 151 P. at 1002 (under Article I, Section

14 "only the necessary use of the land for reservoir or dam purposes is taken which may result in the perpetual use of such lands for that purpose, or only a temporary use, and the title in fee to the land remains in the state"). It further reasoned that "[b]y holding that [the] provisions of [Article IX,] Section 8 are applicable when the state parts with the fee, and not where it grants an easement, the sections of the Constitution in regard to the sale of school lands and of eminent domain can be made effective and harmonious." 27 Idaho at 705, 151 P. at 1001. The principal opinion addressed *Tobey* quite briefly. It characterized the earlier decision as having "proceeded upon the theory that the fee-simple title was taken or disposed of by the state for the public use therein mentioned" but nevertheless overruled "the doctrine therein . . . that is contrary to the views expressed in this opinion." 27 Idaho at 709, 151 P. at 1002.

Justice Morgan concurred in the principal opinion but solely "upon the ground that [the involved right-of-way statute] provides only for taking an easement or right of way upon or across school lands" rather than "for the *sale or leasing* of such lands" and thus did not contravene Article IX, Section 8. 27 Idaho at 709, 151 P. 1002 (emphasis added). Justice Budge dissented, reasoning that "the Legislature is prohibited from enacting any law which provides for the disposition of lands granted to the state by an act of Congress in any manner than as expressly provided in the Act of Admission and in the Constitution; that is, by sale at public auction." 27 Idaho at 719, 151 P. at 1006. The dissenting opinion additionally disagreed with the proposition that only an easement had been granted; instead, "[t]he taking of the state land in question for reservoir purposes is, in effect and under [the eminent domain] statute, the acquiring of a fee-simple title to said lands." 27 Idaho at 720, 151 P. at 1006. Consequently, *all* Justices

participating in *Idaho-Iowa Lateral* agreed that, where the sale or leasing of endowment lands occurs and eminent domain authority has not been exercised, the public auction strictures in Article IX, Section 8 apply.

This Court returned to the public auction requirement subsequently in *East Side Blaine County Live Stock Association v. State Board*, 34 Idaho 807, 198 P.760 (1921). There, the Court affirmed issuance of mandamus relief against the Land Board for failing to hold a public auction over a lease of state lands. It reasoned in part that

> The dominant purpose of these provisions of the Constitution and of the statutes enacted thereunder is that the state shall receive the greatest possible amount for the lease of school lands for the benefit of school funds, and for this reason competitive bidding is made mandatory. . . . The provisions of the Constitution and [leasing] statutes above referred to made it the duty of the State Board of Land Commissioners, under the facts and circumstances of this case, to offer the lease of said lands at auction to the highest bidder, and the Board, in refusing to do so, failed in the performance of an act which the law enjoins as a duty resulting from its official position. In refusing to do so, its action ran counter to the provisions of the Constitution and statutes.

34 Idaho at 814-15, 198 P. at 763. The *IWP* I Court concisely summarized the issue in *East Side* as "whether school land leases had to be offered at a public auction, pursuant to Idaho's constitutional and statutory mandate[,]" and as holding "that state lands are to be 'leased at public auction to the highest bidder therefore.'" 128 Idaho at 764, 918 P.2d at 1209.

These seven opinions serve chiefly to establish what a textual analysis of Article IX, Section 8 otherwise shows: The term "disposal" encompasses not only the sale of endowment lands but also their leasing. The constitutional provision therefore requires that (1) the endowment lands be sold or rented at public auction, at least where more than one bidder exists, and that the proceeds be used for the benefit of the lands' beneficiaries. The 1990 Act, however,

foreclosed the Land Board and the IDL from conducting such auctions. The legislative proscription thereby removes the ability of, and any incentive for, a potential applicant who is not an existing lessee to submit an application. In so doing, the Act ran directly counter to the explicit language of Article IX, Section 8 and imposed on the Board a duty—*i.e.*, to make "market rent" assessments—that the Constitution's drafters committed to public auction process in the first instance. Section 58-310A's substitution of the "market rent" determination for public auction requirement exceeds the Legislature's constitutional authority.

D. Article IX, Section 8: Constitutional Convention Deliberations

No need exists to go beyond the language of Article IX, Section 8 and its construction by this Court to determine the scope of the term "disposal." Read in context, the term is not ambiguous. Even were the contrary true, the only potential source of interpretative assistance is the deliberations of the 1889 Constitutional Convention. A review of those deliberations, however, supports the same conclusion as the one arrived at through a straightforward examination of Article IX, Section 8's text.

The debate on Article IX, Section 8 took place on July 23, 1889. I.W. Hart, *Proceedings and Debates of the Constitutional Convention of Idaho 1889* 703-12, 730-65 (1910) ("I Hart"). Although extended and procedurally confused (*see id.* at 758-59), the delegates' discussions are relatively clear in several respects relevant here. A principal point of controversy was a series of amendments or substitutes to amend the proposed provision by foreclosing sale of endowment lands. *E.g.*, *id.* at 704-06 (Del. Parker), 709-11 (Del. Vineyard), 730-31 (Del. Vineyard), 733-34 (Del. Anderson). None was adopted. *E.g., id.* at 751-52 (Del. Claggett substitute); *id.* at 761-62

(Del. Parker amendment). Their non-adoption, however, says nothing about the meaning of "disposal" because, as discussed above, Section 8 expressly contemplated both the sale and rental of endowment lands.

More germane were one successful amendment and two proposed but unsuccessful amendments to the penultimate formulation of the provision. The successful amendment was offered by Delegate Gray and substituted "rental" for "other disposition" in the provision's first sentence. 1 Hart at 762-63. He deemed the term "other disposition" as "a little too uncertain" and giving the legislature the power to mortgage—a grant of authority that he opposed. *Id.* at 762. The amendment thus pared the broad term "disposition" down to one specific type of transaction. It makes no sense to contend that the same term—"disposition"—in the next sentence does not include rentals. The first unsuccessful amendment would have stricken the words "at public auction" in the third sentence and would have replaced the word "sale" with "disposition" in the clause that reads "the [legislature] shall provide for the sale of said lands from time to time." *Id.* at 763. The other unsuccessful amendment sought to replace the word "disposal" with "disposition" in the third sentence. I Hart at 764. Rejection of the first amendment removed any doubt that the Framers intended all "disposal[s]" to be subject to the public auction requirement and that the term "disposition" encompassed transactions in addition to "sales"—a conclusion implicit from the use of "disposition" in the preceding sentence and the successful amendment to the first sentence.[13] Non-adoption of the second amendment supports

[13] The "public auction" requirement like the land trust requirement reflected a conscious choice by the Constitutional Convention delegates to insulate management of endowment lands from

the conclusion that the term "disposal" was employed to capture both sales and "other disposition[s]" and thereby to avoid the confusion, given the second sentence's reference to "sale or other disposition," that simple use of "disposition" might have caused. The Convention's actions on these amendments thus underscores what Article IX, Section 8's plain text otherwise indicates: The Framers used the term "sale" when they desired to impose a specific requirement on that form of real property transaction and used the term "disposal" in the third sentence because they desired to capture not only sales but also other types of real property transactions including, at the least, the rental of endowment lands.

E. Invalidity of § 58-310A In Its Entirety: Non-Severability

The remaining issue is whether the failure of § 58-310A to comply with the public auction requirement invalidates the statute as a whole. Resolution of that issue turns on severability principles; *i.e.*, whether "'the invalid portion [of § 58-310A] may be stricken without affecting the remainder of the statute.'" *In re SRBA*, 128 Idaho 246, 263, 912 P.2d 614, 631

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the inevitable political pressure to grant favorable terms to potential purchasers or lessees of these lands. Dennis C. Colson, *Idaho Endowment Lands and the Idaho Constitution* 1-9 (2011), available at http://www.legislature.idaho.gov/sessioninfo/2011/interim/resources0829_0830_colson.pdf (last visited Nov. 1, 2011). While the Convention delegates were willing to trust the Land Board and the Legislature to manage the lands, they thought it prudent to impose limitations on their powers. "The land was to be managed according to private trust law and free from political influence and considerations." *Id.* The "public auction" requirement was viewed as one of the tools to prevent individuals from pillaging the endowment lands for their personal benefit. In modern economic terms, the phenomena of interest groups seeking special favors from government decision makers is referred to as "rent seeking." Henry E. Butler and Christopher R. Drahozal, *Economic Analysis for Lawyers* 125 (2006). Rent seeking occurs when a small group of individuals are able to obtain monopoly rights to a government resource such as endowment lands at the expense in this instance of the beneficiaries.

(1995) (quoting *Voyles v. City of Nampa,* 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976)). The answer to this question is clearly no.

Section 58-310A contains two directions to Land Board: (1) "The board shall reject any and all pending and future conflict applications filed under sections 58-307 and 58-310, Idaho Code, for single family, recreational cottage site and homesite leases (subsection 2); and (2) "[i]n the absence of the conflict application and auction procedure in the single family, recreational cottage site and homesite lease, and lease renewal process, the board shall insure that each leased lot generates market rent throughout the duration of the lease" (subsection (3)). No dispute exists, therefore, that the duty imposed on the Board to determine "market rent" is the *quid pro quo* for the "absence of the conflict application and auction procedure" provided under Idaho Code § 58-310. The market-rent determination, in other words, embodies the surrogate method for identifying what a reasonable buyer would pay.

Since the exception from the obligation to conduct a public auction when competing applications for a leasehold is invalid, "the remaining provisions of th[e] legislation [cannot function] as the legislature intended." *In re SRBA*, 128 Idaho at 264, 912 P.2d at 632. The Legislature obviously recognized the reciprocal nature of these directions by not including a severability provision in 1990 Idaho Session Laws Chapter 187. *Compare In re SRBA* at *id.* ("[w]hen determining whether the remaining provisions in a statute can be severed from the unconstitutional sections, this Court will, when possible, recognize and give effect to the intent of the Legislature as expressed through a severability clause in the statute"), *with Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 501, 50 P.3d 991, 996 (2002)

("[t]he Resort County Act does not contain a severability clause, which suggests that the legislature intended for the Act to stand or fall as a cohesive unit, rather than containing severable provisions"). The entire statute consequently must be invalidated.

CONCLUSION

Idaho Code § 58-310A violates the public auction requirement in Article IX, Section 8 of the Idaho Constitution and is invalid in its entirety. The judgment of the district court in *Wasden* should be reversed.

DATED this 22nd day of December 2011.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

BY _____
CLAY R. SMITH
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2011, I caused to be served two (2) true and correct copies of APPELLANT'S OPENING BRIEF by the following methods to:

HAWLEY TROXELL ENNIS
& HAWLEY LLP
Merlyn W. Clark
D. John Ashby
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile: (208) 954-5210
☒ Email: mclark@hawleytroxell.com

Phillip S. Oberrecht
Leslie M.G. Hayes
HALL, FARLEY, OBERRECHT &
BLANTON, P.A.
702 West Idaho, Suite 700
P.O. Box 1271
Boise, ID 83701

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile: (208) 395-8585
☒ Email: pso@hallfarley.com,
lmh@hallfarley.com

Charles B. Lempesis
CHARLES B. LEMPESIS, CHTD
1950 W. Bellerive Lane, #110
Coeur d'Alene, ID 83816

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile: (208) 765-2370
☒ Email: idaholawyer@msn.com

CLAY R. SMITH

APPENDIX A

IDAHO CODE § 58-310A

58-310A. Legislative findings and purposes - Leases of single family, recreational cottage sites and homesites not subject to conflict application and auction provisions.

(1) The legislature of the state of Idaho finds:

(a) That from time to time single family, recreational cottage site and homesite leases have been the target of conflict applications to lease said premises and property;

(b) That single family, recreational cottage sites and homesites have typically been held by the same family, sometimes for as long as fifty (50) years;

(c) That conflict applications for a lease require the state board of land commissioners to hold an auction between the applicants and award the lease to the highest bidder;

(d) That existing statutes allow the board no discretion in rejecting applications, and only limited discretion in rejecting bids, notably for collusion or similar irregularities in the bidding process;

(e) That, in the case of single family, recreational cottage site and homesite leases, the conflict application and auction procedure have caused considerable consternation and dismay to the existing lessee at the prospect of losing a long-time lease;

(f) That, although conflict applications have been filed from time to time, the board has never held a conflict auction or realized any direct revenue from such applications;

(g) That section 8, article IX, of the constitution of the state of Idaho provides that the board manage state endowment lands 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;

(h) That maximum long-term financial returns to the institutions to which granted are best obtained through stable leases at market rent.

(2) It is hereby declared that leases for single family, recreational cottage sites and homesites shall not be subject to the conflict application and auction provisions of sections 58-307 and 58-310, Idaho Code. The board shall reject any and all pending and future conflict applications filed under sections 58-307 and 58-310, Idaho Code, for single family, recreational cottage site and homesite leases.

(3) In the absence of the conflict application and auction procedure in the single family, recreational cottage site and homesite lease, and lease renewal process, the board shall insure that each leased lot generates market rent throughout the duration of the lease.

APPENDIX B

IDAHO CONSTITUTION ARTICLE IX, SECTION 8

Article IX, 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 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; provided, that no state lands shall be sold for less than the appraised price. 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, 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 sections of 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. 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, local units of government, corporations, companies, individuals, or combinations thereof.

APPENDIX C

JUNE 6, 2011 MEMORANDUM DECISION ON (1) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: CONTRACT CLAIMS; (2) DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT RE: CONTRACT CLAIMS; AND (3) ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT RE: CONSTITUTIONALITY OF I.C. § 58-310A

ARCHIE N. BANBURY, CLERK
BY [signature] DEPUTY
JUN 06 2011
Case No. _____ Inst. No. _____
Filed _____ A.M. 3:56 P.M

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

GLADYS BABCOCK, as Trustee of the Babcock Trust, et al., Plaintiff, vs. IDAHO BOARD OF LAND COMMISSIONERS; and GEORGE BACON, in his official capacity as Director of the Idaho Department of Lands, Defendant.	Case No. CV 2010-436C MEMORANDUM DECISION ON (1) PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CONTRACT CLAIMS (2) DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CONTRACT CLAIMS; AND (3) ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT RE: CONSTITUTIONALITY OF I.C. § 58-310A

APPEARANCES

For Plaintiffs: Philip Oberrecht and Colleen Zahn of Hall, Farley, Oberrecht & Blanton, P.A. and Charles Lempesis, Attorney for Priest Lake State Lessees' Association, Inc.

For Defendants: Merlyn Clark and John Ashby of Hawley Troxell Ennis & Hawley LLP and Clay Smith of the Attorney General's Office

PROCEEDINGS

This matter came before the Court on: (1) the Plaintiffs' Motion for Partial Summary Judgment Re: Contract Claims; (2) the Defendants' Cross-Motion for Partial Summary Judgment Re: Contract Claims; and (3) the Attorney General's Motion for

Summary Judgment Re: Constitutionality of I.C. § 58-310A. After hearing oral argument, the Court made a preliminary ruling on the Constitutionality of I.C. § 58-310A and the remaining matters were taken under advisement.

BACKGROUND

The Idaho Department of Lands is the executive agency established to administer State endowment lands. George Bacon is the Director of the Idaho Department of Lands. Under Article IX, Section 8 of the Idaho Constitution, the Land Board is the trustee of public schools, normal schools and state hospital endowment lands. The Land Board consists of five members: the Governor, the Secretary of State, the Attorney General, the Controller and the Superintendent of Public Instruction.

The Land Board is trustee for almost 2.5 million acres of endowment lands granted to Idaho at statehood for the purpose of supporting public schools and other public institutions. Idaho's endowment trust assets include 354 lots near Priest Lake and 168 lots near Payette Lake. The State leases the lots, and lessees are authorized to construct and own single-family residences on the sites. The lots are generally referred to as "cottage sites."

In 2001, the Payette Lessees or their predecessors in interest entered into ten-year leases for cottage sites near Payette Lake ("2001 Leases"). The 2001 Leases provide for annual rent of 2.5% of the current fee simple value of the leased premises, adjusted annually based on the values determined by Valley County. The 2001 Leases expressly provide that they terminate on December 31, 2010.

In recognition of the fact that the 2001 Leases were set to expire on December 31, 2010, the Land Board had been working for several years to determine the terms

for new leases that were to go into effect on January 1, 2011. The Land Board began this process in 2007 by establishing a Cottage Site Subcommittee ("Subcommittee"), which consisted of Secretary of State, Ben Ysursa, and Superintendent of Public Instruction, Tom Luna.

After several years of study and after consideration of comments from affected parties, the Land Board reached a decision on the terms of new leases to begin in 2011. On March 16, 2010, in a 3-2 vote, the Land Board voted to implement a 4% lease rate, effective January 1, 2011. The 4% rate was to be based on the average value of the leased land over the prior ten years and would have been phased in over five years.

On March 31, 2010, the Idaho Department of Lands mailed each cottage site lessee an Application for Use Form, which included a cottage site lease template for a term beginning January 1, 2011. This lease template incorporated the "rental rate provisions approved by the [Land Board] at their March 16, 2010 meeting." On June 30, 2010, the Idaho Department of Lands further notified each cottage site lessee of what his or her rent would be for the 2011 year under the terms of the new lease.

On December 2, 2010, the Idaho Attorney General filed a Complaint for Declaratory and Injunctive Relief, which challenged (1) the constitutionality of I.C. § 58-310A and (2) the Land Board's March 16, 2010 decision to implement the new lease rate. The primary reason for the Declaratory and Injunctive relief was to prevent the issuance of ten year leases with these provisions contained in the new leases. The Attorney General also filed a Motion for Preliminary Injunction, which was based exclusively on the constitutionality of I.C. § 58-310A.

The lawsuit filed by the Payette Lessees is one of five recent lawsuits, including the suit challenging the constitutionality of I.C. § 58-310A, which was before Judge Bail before the case was consolidated with this action. The first cause of action regarding the cottage sites was a Petition for Writ of Prohibition that the Attorney General filed with the Idaho Supreme Court contending that the lease rate adopted by the Land Board at its March 16, 2010 meeting for the 2011-2021 leases failed to secure the maximum long term financial return for the endowment lands beneficiaries as mandated under Article IX, Section 8 of the Idaho Constitution. The Land Board sought dismissal of the Petition for Writ of Prohibition. The Payette Lake Cabin Owner's Association obtained permission to participate in the Idaho Supreme Court action as amicus curiae and to submit a brief in opposition to the petition. The petition was subsequently dismissed on the basis that the Attorney General possessed another adequate remedy in the form of a declaratory judgment action. *See Wasden ex rel. State v. Idaho State Board of Land Comm'rs*, 150 Idaho 547, 249 P.3d 346, 353 (2010).

On December 2, 2010, the Idaho Attorney General filed suit against the Defendants in the District Court of the Fourth Judicial District of the State of Idaho, in Ada County Case No. CV-OC-2010-23751. In the Attorney General's Complaint for Declaratory Injunctive Relief that was filed in Ada County Case No. CV-OC-2010-23751, which was later consolidated with this case, the Attorney General asserted that Idaho Code § 58-310A violates Article IX, Section 8 of the Idaho Constitution by providing of the leasing of certain lands held in trust under the Article IX, Section 8 by the State of Idaho and described as single family, recreational cottage sites and home sites without being subject to conflict and auction provisions of Idaho Code §§ 58-307

and 310. On December 17, 2010, Judge Bail entered an injunction in that case.

Subsequent to the Injunction, the Land Board met on December 21, 2010 at a regular meeting in Boise, Idaho. At that meeting, the Land Board voted to offer existing Lessees of cottage sites a one-year lease under the terms and conditions of the existing lease, including rent calculated at the 2.5% rate. The Land Board also approved a second motion that cottage site leases be offered in 2012 for a ten-year term, at a rental rate of 4% of current market value of the leased premises. Finally, the Land Board voted to clarify that adoption of the second motion superseded the earlier decision made by the Land Board on March 16, 2010.

Plaintiff Lessees filed this lawsuit against the Idaho Board of Land Commissioners and George Bacon, in his official capacity as Director of the Idaho Department of Lands, for breaching Lessees' existing lease contracts with the Defendants and for committing statutory and constitutional violations. Lessees allege that the Defendants breached the terms of the leases when they imposed new leases with new terms on the Lessees, in violation of the renewal provisions of the existing leases. Lessees also allege that Defendants acted in violation of I.C. § 58-310A and Article IX, Section 8 of the Idaho Constitution when they imposed a new rent formula.

LEGAL STANDARD

Summary judgment will be granted only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When considering a summary judgment motion, the trial court must construe the record liberally in favor of the non-moving party and draw all

reasonable factual inferences in favor of such party. *Bear Lake West Homeowner's Ass'n. v. Bear Lake County*, 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). The motion will be denied if conflicting inferences may be drawn from the evidence or if reasonable people might reach different conclusions. *Parker v. Kokot*, 117 Idaho 963, 793 P.2d 195 (1990).

The initial burden of establishing the absence of a genuine issue of material fact rests with the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). If the moving party meets that burden, the party who resists summary judgment has the responsibility to place in the record before the court the existence of controverted material facts that require resolution at trial. *Sparks v. St. Luke's Reg'l Med. Ctr., Ltd.*, 115 Idaho 505, 508, 768 P.2d 768, 771 (1988). The resisting party may not rely on his pleadings or merely assert the existence of facts which might support his legal theory. *Id.* He must establish the existence of those facts by deposition, affidavit, or otherwise. *Id.*; I.R.C.P. 56(e). Supporting and opposing affidavits must be made on personal knowledge and must set forth such facts as would be admissible in evidence. I.R.C.P. 56(e).

A mere scintilla of evidence or a slight doubt as to the facts is not sufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Pounds v. Denison*, 120 Idaho 425, 426, 816 P.2d 982, 983 (1991).

DISCUSSION

Cross-Motions for Summary Judgment Re: Contract Claims

The Plaintiffs argue that they are entitled to summary judgment on their breach of contract claims because the Defendants have breached the renewal terms of the Plaintiffs' cottage site leases. The Plaintiffs also argue that they are entitled to partial summary judgment allowing them to elect their remedy in this matter, either: (1) granting them specific performance to continue in possession of the leased premises during the renewal period under the existing lease terms, including the rental rate formula; or (2) allowing them to surrender possession of the leased premises and directing the Defendants to pay the Plaintiffs compensation for the fair market value of any improvements on the leased premises.

More specifically, the Plaintiffs argue that the leases unambiguously provide Plaintiffs a right to renew the existing leases because although Section C.1.1 states that renewals may be granted at the Lessor's discretion, Section K.1.4.b provides that approval of a request for renewal shall not be unreasonably withheld. Furthermore, the Plaintiffs cite numerous cases from other jurisdictions indicating that where a lease covenant for renewal is general and does not state the terms of the renewal lease, the new lease is to be upon the same terms and conditions as the old lease, including any terms regarding rent. As such, it is the Plaintiffs' position that they should be allowed to continue in possession of the leased premises during the renewal period under the existing lease terms, including the rental rate formula.

The Defendants respond that the 2001 leases do not grant the Plaintiffs a right to renew the 2001 leases at all, much less at the 2.5% lease rate. Rather, the 2001

leases provide that a renewal "may be granted by the [Land Board]." According to the Defendants, Section K.1.4 deals only with the Land Board's responsibility for purchasing improvements in the event that a lessee's lease-renewal application is denied and says nothing about the Land Board's otherwise preserved discretion to formulate the terms of the lease applied for. It is the Defendants' position that the Land Board was merely trying to offer to renew the leases at a rental rate that the Land Board thought would satisfy its constitutional and statutory responsibilities.

In addition, the Defendants argue that the interpretation of the 2001 leases offered by the Plaintiffs would be contrary to Idaho law. The Defendants argue that the Land Board has no authority to contractually agree to grant the lessees an automatic right to renew at the existing rental rate because the Land Board is constitutionally bound to lease the cottage sites "in such manner as will secure the maximum long-term financial return." Idaho Const., Art. IX, § 8. The Defendants also point out the fact that the Legislature has instructed the Land Board to charge "market rent" in accordance with I.C. § 58-310A. Therefore, the Defendants are requesting summary judgment in their favor on Counts I and II of the Plaintiffs' Amended Complaint.

The Defendants are also seeking summary judgment because the Plaintiffs' exclusive remedy for reviewing the Land Board's decisions related to the cottage sites is through a petition for judicial review under the APA. The Plaintiffs' Amended Complaint alleges that "[b]ased on the last correspondence Plaintiffs received from the Department of Lands, dated March 31, 2010, which included a draft of the new lease, Plaintiffs believe the renewal leases will contain new and different terms than those contained in the current leases, including but not limited to the increased rental rate

formula of 4% of land value." The Land Board's March 16, 2010 action has been superseded by the motions approved at the December 21, 2010 meeting. Therefore, the Defendants argue that the Plaintiffs' remedy, to the extent that they are aggrieved by the Land Board's December action, lies in an APA based judicial review proceeding challenging the Land Board's December action.

The Plaintiffs respond that the Defendants are misconstruing the Plaintiffs' breach of contract claims and that their claims do not fall under the APA. The Plaintiffs argue that rather than challenging the administrative process leading to the Defendants' decisions on December 21, 2010, their breach of contract claims are instead concerned with the effect of those decisions on the Defendants' contracts with the Plaintiffs. More specifically, the Plaintiffs argue that their contract claims are not challenging the validity of the Land Board's actions and that the Land Board's December 21, 2010 decisions do not constitute orders reviewable under the APA because those decisions did not concern the lease rates that would be offered to specific individuals and therefore do not constitute a reviewable order under the IAPA.

The Idaho Supreme Court has held that the Land Board "is an 'agency' as defined by I.C. § 67-5201(2) and the Rules of Practice and Procedure Before the State Board of Land Commissioners," and that the Land Board's decisions are subject to judicial review. *Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs*, 128 Idaho 761, 764, 918 P.2d 1206, 1209 (1996). Furthermore, "[j]udicial review of agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter." I.C. § 67-5270(1).

I.C. § 67-5201(3) defines "Agency action" as:

(a) The whole or part of a rule or order;

(b) the failure to issue a rule or order; or

(c) An agency's performance of, or failure to perform, any duty placed on it by law.

As such, the Land Board's December 21, 2010 is subject to judicial review because it is an agency action that determined the rights of the cottage site Lessees. *See* I.C. § 67-5201(12) (defining "Order" as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons."). Furthermore, the December 21, 2010, decision was the Land Board's performance of, or failure to perform, any duty placed on it by law based on the mandates placed on the Land Board by Article IX, Section 8 of the Idaho Constitution and I.C. § 58-310A.

The Idaho Supreme Court has held that a party must exhaust administrative remedies "before a district court has jurisdiction to decide constitutional issues." *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 240, 207 P.3d 963, 971 (2009) (citing *American Falls Reservoir Dist. No. 2. v. Idaho Dep't of Water Resources*, 143 Idaho 862, 871, 154 P.3d 433, 442 (2007)). The Idaho Supreme Court has also held that "in employment actions tort claims must first be pursued through the administrative body." *Nation v. State, Dept. of Correction*, 144 Idaho 177, 193, 158 P.3d 953, 969 (2007) (citing *Peterson v. City of Pocatello*, 117 Idaho 234, 236-38, 786 P.2d 1136 (Ct. App. 1990)). It logically follows that the doctrine of exhaustion should also apply where a party may have both an administrative remedy under the APA and a claim for breach of contract.

Here, the Plaintiffs have pled a cause of action that could have a potential

remedy under either the APA or general contract principles. However, "important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401–02, 80 P.3d 332, 337–38 (2003).

Based on these considerations the Plaintiffs should be required to exhaust their administrative remedies before pursuing their breach of contract claims. Therefore, the Court will grant the Defendants' Cross-Motion for Partial Summary Judgment Re: Contract Claims on Counts I and II of the Plaintiffs' Amended Complaint and require the Plaintiffs to first pursue those claims under the Administrative Procedures Act.

Attorney General's Motion for Summary Judgment Re: Constitutionality of I.C. § 58-310A

The Attorney General argues that I.C. § 58-310A is unconstitutional because the statute permits the issuance of cottage site leases without resorting to conflict auctions, which they contend are required for State land leases under Article IX, Section 8, of the Idaho Constitution. The Plaintiffs respond that the Attorney General's Motion should be denied because I.C. § 58-310A is capable of a constitutional interpretation and the Attorney General has failed to overcome the very significant burden required for demonstrating that a statute is unconstitutional on its face.

"A party may challenge a statute as unconstitutional 'on its face' or 'as applied' to the party's conduct." *American Falls Reservoir Dist. No. 2. v. Idaho Dep't of Water Resources*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007) (quoting *State v. Korsen*,

138 Idaho 706, 712, 69 P.3d 126, 132 (2003)). "Generally, a facial challenge is mutually exclusive from an as applied challenge." *American Falls*, 143 Idaho at 870, 154 P.3d at 441 (citing *Korsen* 138 Idaho at 712, 69 P.3d at 132. "A facial challenge to a statute or rule is 'purely a question of law.'" *American Falls*, 143 Idaho at 870, 154 P.3d at 441 (quoting *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998)).

In order "[f]or a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in *all* of its applications." *American Falls*, 143 Idaho at 870, 154 P.3d at 441 (citing *Korsen* 138 Idaho at 712, 69 P.3d at 132) (emphasis in original). "In other words, 'the challenger must establish that no set of circumstances exists under which the [law] would be valid.'" *American Falls*, 143 Idaho at 870, 154 P.3d at 441 (quoting *Korsen* 138 Idaho at 712, 69 P.3d at 132). "In contrast, to prove a statute is unconstitutional 'as applied', the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional." *Id.* "A district court should not rule that a statute is unconstitutional 'as applied' to a particular case until administrative proceedings have concluded and a complete record has been developed." *American Falls*, 143 Idaho at 870, 154 P.3d at 441 (citing I.C. § 67-5277). Here, the Attorney General has challenged the constitutionality of I.C. § 58-310A on its face. I.C. § 58-310 provides that:

> Except as otherwise authorized in sections 58-310A and 58-310B, Idaho Code:
>
> (1) When two (2) or more persons apply to lease the same land, the director of the department of lands, or his agent, shall, at a stated time, and at such place as he may designate, auction off and lease the land to the applicant who will pay the highest premium bid therefor, the annual rental to be established by the state board of land commissioners.

I.C. § 58-310A(2) provides that:

> It is hereby declared that leases for single family, recreational cottage sites and homesites shall not be subject to the conflict application and auction provisions of sections 58-307 and 58-310, Idaho Code. The board shall reject any and all pending and future conflict applications filed under sections 58-307 and 58-310, Idaho Code, for single family, recreational cottage site and homesite leases.

The Attorney General's position is that I.C. § 58-310A is unconstitutional on its face because the statutory provision exempts the cottage sites from the public auction requirement contained in Article IX, Section 8 of the Idaho Constitution. Article IX, Section 8 of the Idaho Constitution provides that:

> 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; provided, that no state lands shall be sold for less than the appraised price. 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 . . ..

As a threshold issue, the Court must first determine whether the public auction requirement contained in Article IX, Section 8 even applies to a lease of state lands. In general, "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) (citing *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990); *Lewis v. Woodall*, 72 Idaho 16, 18, 236 P.2d 91, 93 (1951); *Higer v. Hansen*, 67 Idaho 45, 52, 170 P.2d 411, 415 (1946)). Furthermore, "[c]ourts are obligated to seek

an interpretation of a statute that upholds its constitutionality." *Ada County Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008). As such, "any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Urban Renewal Agency of City of Rexburg v. Hart*, 148 Idaho 299, 222 P.3d 467 (2009) (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990)).

The parties in this case have offered two possible interpretations of the term "disposal" contained in Article IX, Section 8. If the term "disposal" includes leases, I.C. § 58-310A is unconstitutional on its face because it exempts the cottage sites from a public auction. If the term "disposal" does not include leases, I.C. § 58-310A is constitutional unless the Attorney General can establish that no set of circumstances exists under which the conflict auction exemption contained in I.C. § 58-310A could possibly "secure the maximum long term financial return" on the cottage site leases.

As stated previously, Article IX, Section 8 provides that state endowment lands must be "carefully preserved and held in trust, subject to disposal at public auction . . .." The Courts understanding of the term "disposal" in that context is that state land is only disposed of when it is no longer being preserved and held in trust. "A lease is a particular kind of contract wherein (generally) a leasehold interest in realty is given in return for a promise to pay rent periodically." *Krasselt v. Koester*, 99 Idaho 124, 125, 578 P.2d 240, 241 (1978). A lessee has both contract rights and a limited ownership interest in the real property. *Id.* Although the cottage sites at issue in this case have been leased, those lands are still being preserved and held in trust which means that they have not been disposed of. Furthermore, the plain meaning of the term "disposal"

does not encompass partial conveyances of real property such as leases. Therefore, the Court will find that public auctions are not required for leases of public lands because the term "disposal" contained in Article IX, Section 8 of the Idaho Constitution does not include leases.

Having determined that leased public lands are not subject to the mandatory public auction requirement for the disposal of public lands under Article IX, Section 8, the Court must still address the issue of whether there is any set of circumstances under which not subjecting the cottage sites to a conflict auction could still result in securing "the maximum long term financial return" on the cottage site leases for the beneficiaries of those state endowment lands.

The Attorney General relies heavily on three cases that are referred to as the *Idaho Watershed* cases for his argument that I.C. § 58-310A is unconstitutional. *Idaho Watershed I* was decided in 1996 and addressed the issue of whether the Land Board was permitted under I.C. § 58-310B to award a grazing rights to an applicant who did not bid at the statutorily required conflict auction. *Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs ("IWP I")*, 128 Idaho 761, 766, 918 P.2d 1206, 1211 (1996). I.C. § 58-310B included an additional factor in the award of grazing leases and that was the interests of the State of Idaho in general, which went well beyond the provisions of Article IX, Section 8 provisions for specific beneficiaries. In that case, the Idaho Supreme Court held that while the Land Board had broad discretion to determine what constituted the maximum long term financial return for schools, the Board did not have the legal ability to reject the sole bid placed at a conflict auction and grant the lease to someone who appeared but did not bid. *See id.* at 765-66, 918 P.2d at 1210-11.

The Attorney General focuses on a concluding sentence in that decision that states that "[t]he Board does not have the discretion to grant a lease to an applicant who does not place a bid at an auction, based upon Idaho's constitutional and statutory mandate that the Board conduct an auction." This limited reference to the Idaho Constitution does not appear to have been necessary to the Court's ultimate determination in that case. The Court's holding was based primarily on I.C. § 58-310B and at no point in the decision did the Court hold that any lease of state lands must be subject to public auction in order to secure the maximum long term financial return.

The Attorney General also relies on *East Side Blaine County Live Stock Ass'n v. State Bd. of Land Comm'rs* for similar reasons. In *East Side*, a state statute provided that if two or more individuals applied to lease the same grazing land, a conflict auction would be held and the lease would be offered to the highest bidder. 34 Idaho 807, 813-14, 198 P. 760, 761 (1921). However, the Land Board awarded the grazing lease to a company without holding an auction.

The Attorney General relies on a general statement in *East Side* to the effect that the Idaho Constitution and statutes require the Land Board to offer leases to the highest bidder. As with *IWP I*, the statutorily created auction requirement distinguishes that case from this case, which is only dealing with the constitutionality of I.C. § 58-310A. The Court's analysis in *East Side* repeatedly refers to the statutory basis for the auction requirement, making the constitutional references unnecessary to the holding in that case.

In *IWP III*, the Idaho Supreme Court held that I.C. § 58-310B's express direction to the Land Board to consider the interests of the State in general, in addition to the

public lands beneficiaries, was in violation of Article IX, Section 8's directive to maximize long term financial returns to the beneficiaries. *Idaho Watersheds Project v. State Bd. of Land Comm'rs ("IWP III")*, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999). The Attorney General relies on *IWP III* for the proposition that the Land Board cannot take action for the benefit of anyone other than the beneficiaries of the public lands. Although that general proposition is true, it is important to note the significant differences between I.C. § 58-310A and I.C. § 58-310B.

I.C. § 58-310B dealt specifically with grazing leases instead of cottage site leases, and required grazing leases to be subject to conflict auctions, rather than exempting them. Furthermore, I.C. § 58-310B directed the Land Board to consider certain criteria before awarding a grazing lease, including directing the Land Board to make decisions that benefited the State in general. *Id.* Conversely, I.C. § 58-310A does not contain any unconstitutional provision that requires the Land Board to consider any criteria other than securing the maximum long term financial return for the beneficiaries. It is important to note that *IWP III* does not stand for the proposition that allowing for leases of public lands without public auctions cannot possibly secure maximum long term financial return. The key to the Courts holding in *IWP III* was that "[b]y attempting to promote funding for the schools *and* the state through the leasing of the school endowment lands, I.C. § 58-310B violates the requirements of Article IX, § 8." *Id.*

Finally, in *IWP II*, the Idaho Supreme Court invalidated a voter-approved ballot measure because it was impermissibly combined separate and incongruous amendments, in violation of another provision in the Idaho Constitution. *See Idaho*

Watersheds Project v. Marvel ("IWP II"), 133 Idaho 55, 59, 982 P.2d 358, 362 (1999). One of the proposed amendments sought to change the word "disposal" to "sale" in Article IX, Section 8. The Attorney General contends that the fact such a ballot measure was proposed evidences that people generally understood the word "disposal" to include leases.

However, the Appendix to *IWP II* only serves to demonstrate that the term "disposal" is ambiguous, which is an issue that this Court has already addressed. The Statements for the Proposed Amendments stated that "[c]hanging the word 'disposal' to 'sale' is necessary to clarify ambiguous terms." *Id.* at 63, 982 P.2d at 366. The Statements Against the Proposed Amendments stated that "[t]he word 'disposal' may be ambiguous, but should remain open to different interpretations as time and circumstances require."[1] *Id.* at 64, 982 P.2d at 367.

In reviewing the relevant case law on the issue of whether I.C. § 58-310A is constitutional, it is clear that the Idaho Supreme Court has never determined whether it is possible for leases of public lands to secure maximum long term financial return for the endowment lands' beneficiaries without subjecting the leases to a public auction requirement. There is nothing in I.C. § 58-310A that prevents the Land Board from utilizing current fair market value and determining a rate of return that secures maximum long term financial return for the designated beneficiaries. As such, the question that the Court returns to is whether it is possible to construe I.C. § 58-310A in a manner that will render the statute constitutional on its face.

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[1] The Statements Against the Proposed Amendments also state that "[a]lthough the word 'disposal' has historically been interpreted to mean 'sale,' the definition of 'disposal' is still disputed."

I.C. § 58-310A does not require impermissible considerations such as I.C. § 58-310B required. Furthermore, it is possible that the Land Board could secure maximum long term financial return for the endowment lands beneficiaries as mandated under Article IX, Section 8 of the Idaho Constitution without subjecting the cottage site leases to a public auction based on the unique nature of the cottage sites. Based on these considerations, the Attorney General has not demonstrated that I.C. § 58-310A is unconstitutional in all of its applications or that no set of circumstances exists under which I.C. § 58-310A would be valid. Therefore, the Court will deny the Attorney General's Motion for Summary Judgment Re: Constitutionality of I.C. § 58-310A because I.C. § 58-310A is constitutional on its face.

CONCLUSION

The Court DENIES the Plaintiffs' Motion for Partial Summary Judgment Re: Contract Claims; GRANTS the Defendants' Cross-Motion for Partial Summary Judgment Re: Contract Claims; and DENIES the Attorney General's Motion for Summary Judgment Re: Constitutionality of I.C. § 58-310A.

DATED this 6 day of June 2011.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of June 2011, I mailed (served) a true and correct copy of the within instrument to:

VALLEY COUNTY COURT
VIA EMAIL

Phillip S. Oberrecht
HALL FARLEY OBERRECHT & BLANTON, PA
702 W Idaho,Ste 700
PO Box 1271
Boise, ID 83701
Fax: (208) 395-8585

Charles B. Lempesis
ATTORNEY AT LAW
W 201 7th Ave
Post Falls, ID 83854
Fax: (208) 773-1044

Merlyn W. Clark
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 W Main St, Ste 1000
PO Box 1617
Boise, ID 83701-1617
Fax: (208) 954-5210

Clay R. Smith
IDAHO ATTORNEY GENERAL'S OFFICE
954 W Jefferson, 2nd Flr
PO Box 83720
Boise, ID 83720-0010
Fax: (208) 854-8073

ARCHIE N. BANBURY
Clerk of the District Court

By: Deborah M Perry
Deputy Clerk