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1. Outgoing state superintendent Tom Luna has pushed the state Land Board to maintain smaller balances in reserves, in order to boost payments to K-12. Do you support such an idea? Why or why not?

I do not support wholesale reduction of reserve balances because it puts payments to future beneficiaries at risk. The land board has a fiduciary duty to both current and future beneficiaries. In other words, I have a duty to the third-grader today as well as the third grade next year and every year into the future. The effort is a balancing act to give as much support as possible today without hurting the future beneficiary. If I spend the dollar today on the current beneficiary, then I do not have the dollar tomorrow to spend on the future beneficiary. This is an issue that requires detailed analysis by experts and constant Land Board review to maintain the proper balance between current and future beneficiaries.

The Land Board maintains two primary funds. The first account is called the permanent fund and as a whole consists of about $1.6 billion in financial assets and is accompanied by about $2.4 billion in land assets. By constitution, the permanent fund cannot be invaded or used to pay beneficiaries. Instead, the assets in the permanent fund and the land assets produce money that is held in the second account called the Earnings Reserve. The Earnings Reserve is *not* a rainy-day fund. Instead, it is a shock absorber account to absorb the risk of increasing and decreasing returns in the market. The current target of a five-year reserve provides a 97.5 percent level of confidence that we will be able to continue making payments at the committed level to future beneficiaries in case the market makes a downturn. Unfortunately, the only endowment not currently at its target reserve is the Public School endowment. We need to continue to add to that reserve.

Before we completed a process called Endowment Reform, the payments from the Reserve Fund would fluctuate each year in accordance with the earnings. The schools and other beneficiaries asked that we create a system that allowed the payment to be a consistent amount each year so they could count on those funds in their annual budget cycle rather than have the amount fluctuate. Steady amounts allowed them to more accurately prepare a budget and get the most from the payment rather than have the payments go toward one-time expenditures. As a result and with some very expensive analysis, the Earnings Reserve fund was altered to create the current system. That is, the Earnings Reserve was modified to maintain a five-year reserve of funds. Meaning that if the market took a significant downturn for five years we would still have a 97.5 percent probability of continuing to make a steady payment to the schools. The result is a steady and predictable stream of about $31 million per year for schools. Reducing the size of the reserve puts future beneficiaries at risk. The effort is to increase the size of that income stream to account for inflation and population growth into the future so that both current and future beneficiaries are treated fairly in comparison to each other.

2. In February, the Land Board voted to suspend the purchase of commercial properties. Do you support this move, and keeping this moratorium intact? Are there any circumstances under which you support adding commercial properties to the state's endowment portfolio?

I support the moratorium. The Land Board asked Mr. Robert Maynard to conduct a study of Land Board processes. In his report, Mr. Maynard suggested that the Land Board needed to have outside experts to examine proposed investments to determine if the proposal was in the best interest of the beneficiaries and to fulfill the Board's fiduciary duty. Essentially, the Land Board members themselves were being required to make investment determinations without the benefit of the necessary expertise. The Land Board determined that to fulfill its fiduciary duty to the beneficiaries and to make certain the Board was acting as a prudent investor, it should not go forward with transactions until the proper professional expertise is in place.

The relevant question is whether I am willing to fulfill my oath of office and do what the Idaho Constitution requires even if it is contrary to my personal views. The answer is yes. The constitution puts the Land Board in business competing in the marketplace to obtain the "maximum long-term finance return" on endowment lands to benefit Idaho's schoolchildren and other beneficiaries and neither prohibits nor requires the endowment to own commercial lands. Instead, it requires the Board to invest in those lands that make the most money. If it is commercial lands, then that is what the Board should do. If it is other lands or allowed investments, then that is what the Board should do. By law, the Board must act only in the interest of the beneficiaries and is held to the prudent investor standard. Among other things, that means the Board must diversify its assets among various investment classes including land.

My personal view is that generally government should not compete with the private sector. For the Land Board, however, that issue was directly answered by our founders in our constitution in 1890. The Idaho Constitution puts the Land Board in business. We cannot avoid competing in the private sector. For example, traditionally the Board has owned timberland. We compete with timberland owners like Potlatch exactly in the same way as we compete with commercial landowners. The same applies to cottage sites, agricultural land and grazing land. The board cannot avoid competing in the marketplace because the market is the only place the board can make money. The Board is required to do so to comply with its constitutional mandate.

3. A recent Congressional Research Service report says federal agencies spent $392 million managing federal lands in Idaho in 2011-12 — and the state would incur much of these costs if federal lands are transferred to the state. Could the transfer of federal lands prove to be a net loss to the state, and to the endowments supporting K-12 and other beneficiaries?

This question asks if the transfer of federal lands could prove to be a net loss to the state and the endowments. There is much discussion on this issue and a variety of economic reviews and opinions. Although at the request of some members of the Idaho Legislature,

Idaho Department of Lands Director, Tom Schultz, did a very informal calculation, I do not believe any definitive studies have been completed. It is possible the transfer of federal lands to the state could prove to be a net economic loss. It is also possible there could be an economic gain. What is certain, however, is that transfer of those lands to Idaho would be a dramatic change in both the economy and character of Idaho and particularly in the public access for much of the lands within Idaho.

The important questions here are whether this should be done and if so, how. The Legislature answers the question of whether this should be done because it determines public policy. The question of how it is to be done is relevant both to the Legislature and to the attorney general's office. I firmly believe that if this transfer is to occur, it can only occur by using the political processes within Congress, not by filing a lawsuit. Using the political processes within Congress is for the Legislature, the governor and Idaho voters to pursue, not for the attorney general. The attorney general is the state's chief legal officer and not a general policymaker. The concept of limited government compels the attorney general to stay within constitutional and statutory confines and not to usurp the authority of other branches of government and public officials.

Some, believing we have a "really good case," have advocated filing a lawsuit against the federal government to force them to "give us back our lands." As good as such a lawsuit might make us feel, it complicates rather than enhances any political negotiating position the state might take. More importantly, there are a number of significant issues to be considered.

For example, the Idaho Territory was created by act of Congress on March 4, 1863, and signed into law by President Abraham Lincoln during the Civil War. The Idaho Territory was created from lands that had previously been organized as both the Oregon Territory and the Washington Territory. In other words, the federal government held the lands a long time before Idaho became a state on July 4, 1890. It is quite difficult to "take back" lands that we, as a state, have never owned. Even Ken Ivory, the Utah legislator that advocates this idea, readily acknowledges that Idaho never owned these lands.

In addition, the Idaho Constitution in Article 21 section 19 provides that:

And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States ...

By this language in our constitution, we, forever, gave up any claim to the unappropriated public land within our state. The appropriated lands are those public lands that some person had used federal law such as the General Mining Act of 1872 or one of the varieties of the Homestead Act (one of which was signed into law by Abraham Lincoln in 1862) to appropriate public land within a state. The unappropriated lands are everything else. In other words, we gave up our claim to all the lands now being discussed. The

constitutional provision also provides that federal government has control of the land until the title to the land has been extinguished by the United States. The act of extinguishing title is also known as disposal. This language contemplated the federal government's disposal of the land but did not command or require disposal. It simply says that the federal government has control and title until the federal government decides to do something else. The federal government has chosen not to extinguish title or dispose of the land. The language of the Idaho Constitution does not create any ability for the state to file a lawsuit and compel disposal by the federal government.

Also in addition, Idaho was created on July 4, 1890 by an act of Congress called the Idaho Admission Bill. The Idaho Admission Bill creates the boundaries of the state and makes a variety of land grants and resolves a number of other issues that arise when creating a new state. In section 7, the Admission Bill provides for the sale of public lands as follows:

Five percent of the proceeds of the sales of public lands lying within said state which shall be sold by the United States subsequent to the admission of said state into the union, after deducting all the expenses incident to the same, shall be paid to the said state, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools with said state.

One could argue that the, "shall be sold" language is a mandatory command to the United States to sell the land. In the law, however, the word shall sometimes is mandatory (must) and sometimes is permissive (may). The context of the word gives rise to its meaning. Read in context, the "shall be sold" language here is most likely permissive but the "shall be paid" language is mandatory. The results in the most likely reading of the language to be that if the United States sells the land, then five percent is required to be put into a permanent fund for schools.

Some have proposed that this language created a trust and the unappropriated public lands are held by the United States for the benefit of Idaho. Trusts are created in two basic ways. The first is an express trust or a trust that is created by an express writing. Here, the Admission Bill does not expressly create such a trust for the sale of the unappropriated public lands. Congress knew then and knows now what language to use to create a trust and did not use that language here. As an example, Congress did create a trust for the proceeds of such a sales by providing that the proceeds would be a permanent fund. Congress could have placed the unappropriated lands in an express trust, but did not do so. A trust can also be implied. Essentially, an implied trust is an equitable remedy wherein a court determines that a person or entity has a duty and failed to perform that duty. As a matter of fairness, the court orders the person or entity to perform the duty. Here, there does not appear to be any duty by the federal government to dispose of the land. Even if there were, Idaho has a number of large obstacles to overcome. One of those obstacles is Senate Joint Memorial Number 6 passed by the Idaho Legislature in 1947. The entire memorial is enlightening, but the most relevant part provides:

NOW, THEREFORE, BE IT RESOLVED By the Senate of the Twenty-Ninth

Legislature of the State of Idaho, the House of Representatives concurring therein, that we respectfully urge the President and the Congress of the United States to preserve public lands in Idaho in their present ownership status.

One can make the argument that this either waives or does not waive the trust argument. In either event, it creates a large impediment in claiming equity. An implied trust is an equitable remedy. Here, however, the state will have a difficult time arguing that the federal government has failed to dispose of the lands in accordance with an implied trust because we, the state of Idaho, asked them not to transfer the lands. Essentially, despite the claim of some, we do not have a strong legal case to compel the federal government to dispose of the public lands.

Some have consistently said, that five Western states stand ready to file a lawsuit to compel the federal government to give public lands to the states. That is simply not truthful.

For example in 2012, the Republican governor of Arizona, Jan Brewer, vetoed a bill demanding that the federal government extinguish title to all public lands in Arizona and transfer the lands to the state. In her veto message, Governor Brewer indicated that, "the legislation does not identify an enforceable cause of action" and "appears to be in conflict or not reconcilable with (the) U.S. Constitution ... as well as the Enabling Act." She also noted a large increase in state funding that would be needed to properly manage any transferred lands.

In 2012, the Wyoming attorney general issued a memorandum discussing the Utah Transfer of Public Land Act and noted that the Wyoming and Idaho statehood acts are different from Utah and, "do not contain a more limited disclaimer that applies to federal land grants." The Wyoming attorney general went on to conclude that if Utah succeeds in its pursuit all states in the West would benefit because, "the statehood act of every Western state contains language identical to the provisions upon which Utah relies." The Wyoming attorney general continued his conclusion as follows:

"Still, Utah's attempt to take control of federal lands within its borders is highly unlikely to succeed in court because its legal theories rest on weak foundations. Utah's Enclave Clause interpretation has been rejected repeatedly, and Utah relies on an unpersuasive reading of its statehood act. Success is similarly unlikely for Wyoming because of the disclaimer contained in the Wyoming Constitution."

I also note that the Wyoming governor exercised a line-item veto to remove funds from the budget of the Wyoming attorney general intended to allow the Wyoming attorney general to continue to do legal research on this issue.

I have personally spoken to the Montana attorney general, Tim Fox, about this issue. Montana is not preparing to file a lawsuit to require the federal government to dispose of public lands.

I have also personally spoken to the Nevada attorney general, Catherine Cortez-Masto. She indicated that she would not take any action until the Nevada legislative interim committee completes its review of the matter later this year. Nevada is not preparing to file a lawsuit to require the federal government to dispose of public lands.

This year, the state of New Mexico considered three bills similar to the Utah legislation. All three bills died in committee and the New Mexico legislature is sine die for 2014.

Utah passed legislation requiring the federal government to return certain unappropriated public lands to Utah by Dec. 31, 2014. First, states do not have the constitutional authority to order the federal government to take such an action. Second, in any event, Utah could not file a lawsuit until expiration of its own statutory time for the federal government to act, that is Dec. 31, 2014. Third, I personally spoke to the Utah attorney general, Sean Reyes, who indicated that Utah was not yet prepared to file such a lawsuit and was "still studying the constitutionality" of the issue.

Not in any way can it be truthfully proposed that five Western states are ready to join Utah in any proposed lawsuit.

In summary, we do not have a strong legal case and as a result, if there is to be any disposal of federally held public lands it must be accomplished through the political processes in Congress, not through a lawsuit.

The question was whether transfer of these lands could be a net loss to the state and beneficiaries. My direct answer is it could be a net loss or it could not be. We do not yet have sufficient information to know.

4. The state is beginning the process of auctioning off lakeside cabin parcels. How do you think the state should balance the interests of leaseholders against the short- and long-term interests of endowment beneficiaries?

There is no balancing of interests among leaseholders and beneficiaries. The law requires the Land Board to have undivided loyalty to the beneficiaries. Undivided loyalty means that the Board can look only to the benefit of the beneficiaries. Leaseholders are customers of the Land Board, and are part of the marketplace demand for our product. That product is first- and second-tier lakeside parcels. The Board can enhance the value of the parcels by making consistent and understandable rules for acquiring the parcels. The Board must, however, comply with the constitutional requirement of disposal at public auction and must fulfill its fiduciary duty to the beneficiaries by having undivided loyalty to them