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M E M O R A N D U M

TO: Executive Director's Office
Department of Natural Resources

FROM: Ed Hamrick
Senior Assistant Attorney General
Natural Resources and Environment Section

RE: H.B. 09-1317; LLS: LLS 09-0957.01

I have been asked to consider and discuss whether the proposed H.B. 09-1317; LLS: LLS 09-0957.01 may create any potential constitutional conflict between the provisions concerning the state board of land commissioners (the "board") and the board's obligations and duties under the Colorado Constitution.¹ This document reflects the legal opinion of the authoring attorney and is not to be considered as an official opinion of the Attorney General.

The state board of land commissioners is a state agency created by the Colorado Constitution to "serve as trustee for the lands granted to the state in public trust by the federal government, lands acquired in lieu thereof, and additional lands held by the board in public trust." Colo. Const., art. IX, § 9(6). It is the board's constitutionally mandated fiduciary duty "to provide for the prudent management, location, protection, sale, exchange, or other disposition of all the lands . . . held by the board as trustee pursuant to section 9(6) of this article IX, in order to produce reasonable and consistent income over time." Colo. Const., art. IX, § 10.

The board has exclusive power over disposal of the lands within its control. *Sunray Mid-Continent Oil Co. v. State*, 149 Colo. 159, 368 P.2d 563, 566 (1961). The General Assembly does not have the power to place limitation or qualification upon the exercise of that power. *Id.*

¹ This memorandum does not discuss whether the proposed legislation's application to private landowners may create possible takings clause or contract clause issues. Nor does it consider whether the legislature may require the Attorney General, an elected official, to take specific substantive legal positions and set the priorities for the Attorney General.

However, the board's duty to manage, control, and dispose of the lands within its control is "subject to such terms and conditions consistent therewith as may be prescribed by law" through the General Assembly. Colo. Const. art. IX, § 9 (6). This language is a slight departure from the original language of art. IX, § 9, which stated that the board's power of disposal was subject to "such regulations as may be prescribed by law." The new language was a result of Amendment 16, passed in 1996 by initiative. Amendment 16 significantly changed many of the constitutional provisions governing the board of land commissioners. The change in the language from "regulations" to "terms and conditions" was not a focal point of the initiative. The Amendment was subject to a facial challenge and upheld, but neither the District Court nor the 10th Circuit addressed this particular language change. See *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998); *Branson School Dist. RE-82 v. Romer*, 958 F.Supp. 1501 (D. Colo. 1997). It does not appear that the plaintiffs raised any objections to the language "terms and conditions."

The General Assembly's authority to regulate the board's power to dispose of land under the Colo. Const. art. IX, § 9 prior to Amendment 16 has been held to mean "such reasonable rules as may be prescribed from time to time by the legislative department from time to time." *In re Leasing of State Lands*, 32 P. at 988. Thus, the courts have recognized the General Assembly authority to prescribe reasonable rules that apply to all board transactions and regulate the manner in which the board conducts transactions. The court in *In re Leasing of State Lands* upheld the General Assembly's authority to regulate the length of lease terms in leases issued by the board. *Id.* In *Walpole v. Bd. of Land Commissioners*, 62 Colo. 554, 163 P. 848 (1917), the court recognized the General Assembly's authority to regulate whether the board conveyed property in fee or could reserve interests in the lands it conveys. *Walpole*, 163 P. at 851.

The courts, however, have determined the legislature's authority over the board is limited. It cannot, under the guise of a regulation, take from the board all power of disposition of the state lands. *In re Leasing of State Lands*, 32 P. at 988. In the *Sunray Mid-Continent Oil Co.* case, the court held that the board has exclusive power of disposal over the lands granted to the state by the federal government. *Sunray Mid-Continent Oil Co.*, 149 P.2d at 566. "It does not lie within the power of the General Assembly to place limitation or qualification on that power." *Id.* The court in that case held that the legislature could not require that oil and gas leases issued by the board also receive consent from the board of agriculture before the leases would be valid. *Id.* The court held that the board "alone [has] the constitutionally imposed duty to provide for the sale or other disposition of the lands under its control. *Id.* The legislature cannot share that duty or designate another agency to share that duty.

There have not been any cases that address the role of the General Assembly and the board since the Amendment 16 changes. Therefore there is no guidance from the courts whether the change to "terms and conditions" alters the General Assembly's authority over the board. Arguably, the phrase "terms and conditions" suggests the legislature has less authority over the board. Rather than regulate, the legislature now may merely prescribe "terms and conditions consistent" with the board's constitutional duties.

The 1996 bluebook discussion of Amendment 16 states:

The General Assembly is currently allowed to impose reasonable legislative regulations on the management of trust lands. These regulations are permitted even if they reduce the amount of revenue from the trust lands. For example, the state legislature has enacted laws on the procedures for leases and land sales. The law also contains a process for the state to buy lands that have a unique economic or environmental value to the public, and it requires that the uses of trust lands meet governmental land use regulations. The proposal continues the ability of the General Assembly to enact laws on the management of the trust lands, as long as the laws are consistent with the new constitutional provisions.

The bluebook discussion is not binding on courts, but it seems to imply the result of Amendment 16 is either to maintain the General Assembly's ability to regulate procedures for the board to operate under or limit that authority to the extent the legislature attempts to counter the constitutional provisions. It does not suggest that the General assembly has greater authority over the board's duties than before Amendment 16.

Reading everything together, the General Assembly appears to have the authority to enact procedural and general terms and conditions upon the board's exercise of its fiduciary duties, but may not usurp the board's power to dispose of its property. Under H.B. 09-1317, the General Assembly prohibits the board from any disposition of state lands to the federal government that might be used to expand the Pinon Canyon Maneuver Site. It is possible that a reviewing court may deem this to be merely a term and condition of disposal of state lands. However, given that the legislature may not require that the board obtain its consent through the board of agriculture prior to issuing valid oil and gas lease, it seems unlikely that the General Assembly may require its consent for transactions near the Pinon Canyon Maneuver Site. Such a legislative prohibition on specific transactions involving specific parcels of property and/or specific parties is potentially in excess of a term and condition and likely creates a significant infringement upon the board's exclusive power of disposal. Therefore, the proposed legislation appears to place an impermissible limitation and qualification on board's ability to dispose of property under its control and would likely be a violation of the exclusive allocation of fiduciary duties to the board by the Colorado Constitution.

If you have any questions or concerns, please contact me.

cc: State Board of Land Commissioners

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 14th inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Yours obedient servant,

John Doe

Secretary

Government Office

Washington, D.C.