

ATTACHMENT A: E-mail from Ed Hamrick, 3/18/2009

From: Ed Hamrick [mailto:Ed.Hamrick@state.co.us]
Sent: Wednesday, March 18, 2009 1:29 PM
To: Brejcha, John
Cc: Shpali, Casey; Geoff Blue; Van Huysen, Heidi; Tim Monahan; Follenweider, Tobin
Subject: Re: FW: Pinon Canyon Bill

John,

This is in response to your question about the draft legislation regarding the board and the Pinon Canyon Maneuver Site. 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's has exclusive power of disposal over 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.*

Colorado courts have recognized that the board's power of disposal is subject to "such regulations as may be prescribed by law" by the General Assembly. *Id.*, (quoting Colo. Const. art. IX, § 9); *In re Leasing of State Lands*, 18 Colo. 359, 32 P. 986 (1893); *Evans v. Simpson*, 190 Colo. 426, 547 P.2d 931 (1976). However, the legislature 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. 986 (1893). Furthermore, the language "such regulations as may be prescribed by law" that was once contained in art. IX, § 9 has been amended to state "subject to such **terms and conditions consistent therewith** as may be prescribed by law." Colo. Const., art. IX, § 9(6) (emphasis added). The amended language would appear to further limit the General Assembly's authority over the exercise of the board's fiduciary duties. Rather than regulate, the legislature now may merely prescribe "terms and conditions consistent" with the board's constitutional duties.

For the General Assembly's authority to enact terms and conditions upon the board's exercise of its authority consistent with the board's constitutional fiduciary duties not to infringe on the board's exclusive power of disposal, such terms and conditions would seem to be limited to procedural and general terms and conditions rather than prohibitions on the board's power to disposal of the property it controls. Legislative prohibitions on specific transactions involving specific parcels of property and/or specific parties seems to exceed its authority to prescribe terms and conditions on the board's exercise of its authority.

Therefore, the proposed legislation appears to impermissibly place a 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.

Ed Hamrick

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