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IN THE SUPREME COURT OF THE STATE OF IDAHO

HON. LAWRENCE G. WASDEN, the Attorney General of Idaho, *ex rel.* the STATE OF IDAHO, Petitioner, vs. IDAHO STATE BOARD OF LAND COMMISSIONERS, and GEORGE BACON, in his official capacity as Director of the Idaho Department of Lands, Respondents.	**Supreme Court No. ~~35728~~ 37528** **PETITIONER'S RESPONSE TO MOTION TO DISMISS**

INTRODUCTION

Petitioner, Attorney General Lawrence G. Wasden, submits this memorandum in response to the motion to dismiss filed by Respondents Idaho State Board of Land Commissioners (hereinafter "Board") and Idaho Department of Lands Director George Bacon.

STANDARD

Motions to dismiss a Petition for a Writ of Prohibition under Idaho Rule of Civil Procedure 12(b)(6) are treated in the same manner as motions to dismiss any other petition or complaint. Idaho Rule of Civil Procedure 74(c). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor. *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). A motion to dismiss for failure to state a claim under Idaho Rule 12(b)(6) is "viewed with disfavor" and granted only "when it appears beyond doubt that plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Wackerli v. Martindale*, 82 Idaho 400, 404-05, 353 P.2d 782, 784-85 (1960).

ARGUMENT

A. THE LAND BOARD'S BROAD DISCRETION TO EXERCISE SOUND BUSINESS JUDGMENT IN ITS MANAGEMENT OF ENDOWMENT TRUST LANDS DOES NOT SHIELD IT FROM WRITS OF PROHIBITION WHEN THE BOARD ACTS IN EXCESS OF THE ITS CONSTITUTIONAL AND STATUTORY AUTHORITY OR ABUSES ITS DISCRETION BY ACTING CONTRARY TO ITS OBLIGATIONS AS A TRUSTEE

Idaho Code § 7-401 provides that a writ of prohibition may be issued to arrest the proceedings of a board "when such proceedings are without or in excess of the jurisdiction of such . . . board . . . ." This Court has interpreted § 7-401 to require a showing that (1) the respondent is without or in excess of its jurisdiction and (2) that there is not a plain, speedy, and

adequate remedy in the ordinary course of law. *Henry v. Ysursa*, 2008 WL 4330547 (2008). The term "jurisdiction," as used in § 7-401, refers to "the right to hear and determine a matter, and carries with it the idea of exercising judicial or quasi judicial functions." *Stein v. Morrison*, 9 Idaho 426, 456, 75 P. 246, 256 (1904). This Court has also held that "[t]he word 'jurisdiction' when used in reference to a writ of prohibition includes power or authority conferred by law." *Henry v. Ysursa*, 2008 WL 4330547, 3 (Idaho 2008).

If an agency acts contrary to the constitution or the laws of the state, it acts without jurisdiction. This Court has held that while the Board has broad discretion in questions of "policy and business expediency," such fact "should not control or guide this court in upholding and sustaining a policy, where such policy is absolutely prohibited by the provisions of the constitution and the laws of this state." *Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs,* 128 Idaho 761, 765, 918 P.2d 1206, 1210 (1996), quoting *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 178 (1912).[1] "The constitution and laws of the state should at all times be followed and upheld and sustained by the courts, and should not be ignored by public officers in the administration of public affairs of the state." *Id.,* quoting *Tobey,* 22 Idaho at 584, 127 P. 184-85. In short, despite the Board's broad discretion, "[t]he Board must find authority in the constitution and statutes for its actions." *Id.* at 766, 918 P.2d at 1211.

Likewise, the Idaho case law cited by Respondents supports the Attorney General's position that the Board can abuse its discretion such that it loses jurisdiction, and thus, is properly subject to a writ of mandamus or prohibition. For example, in *Barber Lumber Co. v.*

[1] *Tobey* was overruled on other grounds by *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Idaho 695, 151 P. 998 (1915).

Gifford, 25 Idaho 654, 139 P. 557 (1914), a case cited by Respondents, this Court acknowledged that it could review the Land Board's discretionary business decisions where fraud or ***"a clear abuse of its legal discretion is shown***." 25 Idaho 654, 658, 139 P.557, 561 (1914).

In *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969), another case cited by Respondents, this Court similarly recognized that a writ of mandate would be available to compel an action of the Board – even in an area committed to the discretionary power of the Board – when the Board acted in a manner that was "arbitrary, capricious or discriminatory." *Id.* at 850, 452 P.2d at 348.

In *Pike v. State Board of Land Com'rs*, 19 Idaho 268, 113 P. 447 (1911), a case quoted extensively by Respondents, this Court upheld a challenged business judgment of the Land Board. In so doing, the Court noted that the decision was one committed solely to the judgment and discretion of the Land Board. In *Pike*, this Court first looked to Idaho's Constitution, statutes, and even public policy, to ascertain if the Board's decision was a question of policy or a question of law to be determined by the Court. It was only because this Court found "nothing in the action of the board that is repugnant to the Constitution or statute of the state" that the Court declined to grant the writ. *Id.* at 276, 113 P. at 455. If the Court had found a public policy contrary to the Board's actions, or if the Board acted contrary to the Constitution or state statute, it is clear from the Court's opinion that a writ would have been the proper mechanism for its intervention.

Thus, the very cases cited by Respondents support the Attorney General's position that, even when an issue is one committed entirely to the Board's discretion, if the Board abuses its discretion contrary to Idaho's constitution or statutes, this Court may properly intervene via writ.

There are three primary sources of law defining the legal scope within which the Board must act in establishing rental rates for cottage sites. First, the Board is constitutionally obligated to provide for the rental of endowment lands "in such manner as will secure the maximum long term financial return to the institution to which granted." Idaho Const. art. IX, § 8. Second, the Board is directed by statute to "insure that each leased lot generates market rent throughout the duration of the lease." Idaho Code § 58-310A(3). Third, and perhaps most importantly, the "grant of lands for the various purposes by the federal government to the state constitutes a trust, and the State Board of Land Commissioners is the instrumentality created to administer that trust, and is bound upon principles that are elementary to so administer it as to secure the greatest measure of advantage to the beneficiary of it." *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 666, 139 P. 557, 561 (1914). The Board may not abuse its discretion in administering the trusts committed to its oversight.

The Petition sets forth facts demonstrating that the Board, in establishing cottage site rental rates, acted outside all three legal limits on its discretion. The Board violated the Constitution, violated Idaho's statute, and abused its discretion in administering the trusts. As

such, the Board acted in excess of its authority and therefore it is within this Court's power to issue a writ of prohibition to "point out" to the Board "the legal scope within which [its] judgment and discretion must be exercised." *Balderston v. Brady*, 17 Idaho 567, 575, 107 P. 493, 495 (1910).

B. THE FACTS, AS SET FORTH IN THE PETITION, ESTABLISH THAT THE BOARD ACTED OUTSIDE ITS AUTHORITY AND JURISDICTION BY ESTABLISHING RENTS THAT FAIL TO SECURE MAXIMUM LONG TERM FINANCIAL RETURNS AND FAIL TO SECURE MARKET RENT THROUGHOUT THE DURATION OF THE LEASE.

The Board is constitutionally obligated to provide for the rental of endowment lands "in such manner as will secure the maximum long term financial return to the institution to which granted." Idaho Const. art. IX, § 8. Additionally, the Board is directed by statute to obtain "market rent" for cottage sites "throughout the duration of the lease." Idaho Code § 58-310A.[3]

The Respondents, in their motion to dismiss, repeatedly assert that the "4% rental rate"[4] is justified by the Board's 2006 experiment in auctioning two unimproved Priest Lake cottage sites offered for lease at 5%. The auction failed to attract any bidders – a fact the Respondents cite as justification for the nominal 4% rental rate adopted by the Board. This thin reed will not bear the weight the Board seeks to place upon it. As Department of Lands Director George Bacon explained to the Board, the lack of bidders was likely attributable to the fact that comparable lots, with improvements already in place, were available for rental on the open

[3] As noted in the Petition, although Attorney General Opinion 09-01 concludes Idaho Code § 58-310A is unconstitutional due to its prohibition on the use of conflict auctions to establish market rents, for purposes of the present Petition, the Attorney General assumes the constitutionality of Idaho Code § 58-310A, including its mandate to secure market rent throughout the duration of the lease.

[4] As acknowledged by Respondents (Memorandum in Support of Motion to Dismiss, p.2, fn.1), the actual rental rate is not 4%. As explained below, the actual rental rate is closer to 2.5.%.

market at the then-contract rate of 2.5%. *Transcript, February 16, 2010 Board Meeting, Petition,* Exh. 36 at 98. Likewise, Board member Ysursa noted that there were "other factors," such as the time of year and manner of auction, that may have affected the outcome. *Id.* at 96.

Moreover, the Respondents' repeated attempts to compare the Board's nominal rental rate of 4 percent to the 5 percent rate in the failed Priest Lake auctions has been refuted by the Respondents themselves. Board member Ysursa protested lessee attempts to compare the Board's proposed 4 percent rental rate to the 5 percent rate in the failed auction, stating that they were "apples and oranges" due to the fact that "the suggested four percent of a rolling ten-year average is not talking current market value. It's talking less than four percent current market value." *Id.* at 23-24.

The "rolling average" referred to by Board member Ysura provides that the 4% rental rate is not to be applied to current market value. Rather, it is to be applied to the average market value in the ten years immediately preceding the lease term. *Recommendation of the Cottage Site Subcommittee, Petition,* Exh. 25 at 3. Additionally, the 4% rental rate will not be immediately applied, but will be used as a target rent to be achieved five years in the future. The stated purposes of these two actions was to "smooth out the impact of those rapid swings [in annual rent] and provide greater stability than is currently the case." *Id.* Because of the moderating influence of these two "rent smoothing" methods, Board member Ysursa, chairman of the cottage site subcommittee, informed the Board that the 4% rental rate, when combined with the rent smoothing method, would result in an effective rental rate of a "little bit over" the current rental rate of 2.5%. *Transcript, March 16, 2010 Land Bd. Meeting, Petition*, Exh. 42 at

28. Thus, any determination of whether the Board's adopted rental rate fulfills the statutory mandate to achieve market value must start from the premise that the effective rate is approximately 2.5%, not 4%.

Even if the Court were to determine that adoption of a 2.5% rental rate was within the Board's discretion, the facts presented in the Petition demonstrate that such a rate, minimal as it is, will not be achieved throughout the duration of the lease, as mandated by Idaho Code § 58-310A. Due to the five-year phase-in, and the use of average market values from the past decade instead of current market values, the effective rental rates will be as follows:

2011: 1.8%
2012: 2.0%
2013: 2.2%
2014: 2.4%
2015: 2.6%

Letter, IDL Director George Bacon to Lawrence Wasden, Petition, Exh. 29 at Attachment 2, p. 1. In short, the effective rental rate, in four of the first five years of the lease, would be below the current rental rate of 2.5%, a rate that Board members have admitted is below market value. *See Transcript, April 22, 2008 Cottage Site Subcommittee Meeting, Petition,* Exh. 33 at 62 ("2.5 . . . was low from every other study that was done") (remarks of Board member Ysursa).

Given the facts set forth in the Petition, it cannot be ruled, as a matter of law, that the Petition fails to make a claim that the rental schedule adopted by the Board is in excess of its constitutional and statutory authority and jurisdiction. The knowing acceptance of rental rates below 2.5% for the first four years of the lease is a facial violation of the statutory duty to

achieve market rent throughout the duration of the lease; this violation finds support in the Board's own flawed determination that the market rate is 4 percent.

Accepting rental rates around 2.5% for the first four years of the lease is also a violation of the Constitutional duty to maximize long term financial returns. If the Board truly believed the market rate is 4%, then accepting anything less during any portion of the lease term violates its constitutional duty to maximize long term financial returns, because such rent income, once foregone, can never be recovered. Money that would have been received in the first years of the lease term and invested in securities with a higher rate of return will be lost to the beneficiaries forever, reducing long term financial returns to endowment beneficiaries, in violation of Idaho Constitution article IX, § 8.

C. THE FACTS, AS SET FORTH IN THE PETITION, ESTABLISH THAT THE BOARD ACTED IN EXCESS OF ITS AUTHORITY AND JURISDICTION AND ABUSED ITS DISCRETION WHEN IT IGNORED ITS DUTY OF UNDIVIDED LOYALTY TO THE BENEFICIARIES.

The Board, as trustee for endowment lands, is bound by the principle that "the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees* § 543 (rev. 2d ed. 1993). To act contrary to this fiduciary duty is an abuse of discretion.

This Court has confirmed that the duty of undivided loyalty to trust beneficiaries is embodied in the language of article IX, § 8 requiring endowment lands to be managed "for the

use and benefit of the respective object for which said grants of land were made." *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999). There, the Court struck down a statute directing the Board, in awarding grazing leases, to consider not only the financial return to beneficiaries, but also the tax returns the state would receive from the lessees and the impact that awarding the lease to a new lessee would have on the livestock operations of the current lessee. *Id.*

The *Idaho Watersheds Project* decision held that the Board's fiduciary obligations to trust beneficiaries require it to "consider only the 'maximum long term financial return' to the schools in the leasing of school endowment . . . lands." *Id.* at 67, 982 P.2d at 370. Likewise, other courts have held that the "State's trust responsibilities sharply proscribe its discretion in determining full market value" for rental of endowment lands. *Montanans for Responsible Use of School Trust v. Darkenwald*, 119 P.3d 27, 39 (Mont. 2005). In the same case the court noted that it had previously held that the state "violated its trust obligations by charging less than full market value for a variety of activities, including . . . cabin site licenses and leases". *Id.* The Court noted that the "State's failure to obtain full market value inured to the benefit of a private third-party at the expense of trust beneficiaries." *Id.*

Here, the Petition sets forth facts demonstrating that the Board, in establishing cottage site rental rates, impermissibly considered the interest of the lessees in establishing the rental formula even to the extent that Board member Ben Ysursa declared "I think we have bent over pretty good for the lessees." *May 18, 2009 Board Meeting Transcript, Petition,* Exh. 34, p. 85. Mr. Ysursa's description was apt: the Board took a number of actions designed not to

maximize income to beneficiaries, but to avoid imposing financial hardships on current lessees, who were viewed by at least some Board members as being in a "partnership" with the state. *Transcript, April 22, 2008 Cottage Site Subcommittee Meeting, Petition*, Exh. 33 at 46.

First, as discussed above, while the nominal rental rate was set at 4 percent, the effective rental rate is actually closer to 2.5 percent. Other courts have held that similar rental rates are so patently designed to benefit lessees that they cannot be squared with the State's obligation of undivided loyalty to endowment beneficiaries. In *Oklahoma Education Ass'n v. Nigh,* 642 P.2d 230 (Okla. 1982), the court held that statutes limiting rents of endowment lands to rates between two and four percent of fair market value "inure[d] only to the benefit of farmers and ranchers," and concluded that "a State may not use school land trust assets to subsidize farming and ranching." *Id.* at 236.[5] In *Montanans for the Responsible Use of the School Trust v. Bd. of Land Comm'rs*, 989 P.2d 800 (Mont. 1999), the court held that a 3.5% rental rate for recreational cabin sites violated the Board's trust obligations. *Id.* at 806.

Thus, even if the Board had adopted an effective rental rate of 4%, to be implemented immediately and applied throughout the duration of the lease, the Board would have still ***violated its duty of undivided loyalty to trust beneficiaries***. This violation is evidenced by facts set forth in the petition, including the fact that the Board adopted the previously-described

[5] Respondents attempt to distinguish the decision in *Oklahoma Education Ass'n* by asserting that the statutes were stricken as unconstitutional restrictions on the broad discretion vested in the board of land commissioners. There is no suggestion in the decision, however, that the board would have the discretion to violate the very same trust obligation that the court held to apply to the legislature.

rent smoothing actions that forego income for the sole purpose of minimizing impacts of rental increases on current lessees.[6]

The Board, in establishing the "rent smoothing" formula, acknowledged that the formula was being implemented to benefit the lessees, not the beneficiaries. Board member Luna described the subcommittee's mission as an opportunity "to meet our obligation on the Land Board to bring some stability . . . to these cottage site leases, and, you know, for those who own the leases." *Transcript, April 22, 2008 Cottage Site Subcommittee Meeting, Petition* Exh. 33 at 5. Ysursa confirmed this in an earlier meeting of the cottage site subcommittee when he stated "If we were at market rent, we wouldn't need premium rent." *Transcript, March 1, 2010, Cottage Site Subcommittee Meeting, Petition*, Exh. 41 at 56.

Before the Land Board's final action, Board member Ysursa again explained that the cottage site subcommittee had sought to balance equally the concerns of the beneficiaries and lessees:

> I believe that immediately going to a huge increase goes against all sense of fairness to both sides. And I know we have to be fair to the beneficiaries, that's our number one mandate. We also have to be fair to the folks that we've dealt with over the last forty, fifty years, in my opinion. . . . I figure with what we've

[6] As a result of the Board's "rent smoothing" actions, lessees will not be paying 4% of the current fair market value of their cottage sites. Rather, they will be paying rent based on market values that are approximately ten years out of date. As economist Terry Anderson stated in written testimony to the Board, "using a ten year rolling average to calculate annual rent . . . will also make it virtually impossible for the Land Board to charge lessees 'market rent' [because] the state will always be earning rents based on past rather than current land values and therefore, especially during times of appreciation, will continually be below market rents." *Analysis of Subcommittee Recommendation, Petition*, Exh. 31 at 3. Likewise, using a five year phase in period "guarantees that the actual return will be less then the prudent market return." *Id.* at 4. Board member Ysursa knowingly admitted that "[i]t's not four percent of current . . . I would submit that we're still, in my opinion, quite a ways away from market rent . . . the smoothing effect that we have in there has really made the effective rate lower than the four percent." *February 16, 2010 Board Meeting Transcript, Petition*, Exh. 36, pp. 111-12. Director Bacon likewise acknowledged that the formula would not achieve market rent but rather a rental rate closer to 2.5%.

> come up with, there's something here for everybody to hate. So it might be a pretty good resolution.

Transcript, March 16, 2010 Board Meeting, Petition, Exh. 42, at 28.

When the Board takes action that it admits elevates the interests of the lessees to a level equivalent to the beneficiaries, it is abusing its discretion by not acting with undivided loyalty to the beneficiaries. Board member Ysursa described the proposed rental schedule as "balancing our constitutional mandate in article 9, section 8, prudent investor standards, whatever you want to say, with the long-term relationship we have with the lessees," and affirmed that his intent in crafting the rent smoothing formula was to avoid what he described as "unconscionable" rent increases. *Transcript, February 16, 2010 Board Meeting, Petition*, Exh. 36, pp. 3, 84.

Board member Ysursa's comments echo the argument made to this Court in *Balderston v. Brady*, where it was suggested that the Board should have the power to avoid the "unconscionable" displacement of settlers by relinquishing title to lands that had been adjudicated to belong to the public schools. 17 Idaho at 579, 107 P. at 497. The Court held, however, that "[t]he land board is not a court of equity; it is an executive board charged with duties that must be executed in conformity with law." *Id.*

Likewise, the Board, in setting cottage site rental rates, did not possess the discretion to seek an "equitable" outcome by balancing the impacts on lessees against the income to be received by beneficiaries. Its legal obligation as trustee was to make its decision solely based on the best interests of the beneficiaries. The Attorney General's petition sets forth facts

establishing that the Board acted outside the legal bounds of its authority by seeking to ameliorate perceived financial impacts on current lessees to the detriment of the beneficiaries, and therefore the motion to dismiss must be denied.

If there is any lingering doubt that the Board violated its duty of undivided loyalty to trust beneficiaries, it is erased entirely by the Board's explicit and conscious decision to establish a rental rate and schedule that continues to allow large leasehold values to accumulate, and continues to allow lessees to profit from such accumulation. This phenomenon is reflected in the continuing inclusion of "premium rent." It is a fundamental economic truth that leasehold values accumulate when contract rents are below market rents. Philip S. Cook and Jay O'Laughlin, *Analysis of Procedures for Residential Real Estate (Cottage Site) Leases on Idaho's Endowment Lands* at 1 (October 2008), *Petition,* Exh. 25, attachment 1 at 11.

It is undisputed that at the current rental rate of 2.5% of fair market value, substantial leasehold values accumulated. For the 78 leases sold between 2003 and 2009, the total leasehold value was over $27 million, of which the lessees kept over $25 million. *Recommendation of the Cottage Site Subcommittee, Petition,* Exh. 25 at 3. In many of those same years, the lessees made more money from the cottage site leases then did the beneficiaries. For example, in 2006, the nine lessees whose sold their leaseholds received $6,482,709. *Spreadsheet Comparing Annual Rents to Leasehold Sales, Petition,* Exh. 39. That same year, the beneficiaries received only $4,022,676 from the rental of all 522 cottage sites.

Id. The Board abuses its discretion as a trustee when it allows lessees to receive more money from leasehold conveyances than the amount received by the beneficiaries.

Rather than address this situation, however, the Board acted to perpetuate it. Board member Ysursa recognized in 2008, "if we really are at market rent, we shouldn't be seeing that leasehold value." *Transcript, April 22, 2008 Cottage Site Subcommittee Meeting, Petition,* Exh. 33 at 61. He also acknowledged that premium rent "was put in . . . to justify 2.5, which was low from every other study that was done. And that's why it was put in." *Transcript, April 22, 2008 Cottage Site Subcommittee Meeting, Petition,* Exh. 33 at 62.

Yet, during the recent Board action to set rental rates, Board member Ysursa observed that the 4% rental rate, when combined with the smoothing method, "at the end of a five year period, this frankly, gets them to a little bit over what they agreed to ten years ago on two point five of current." *Transcript, March 16, 2010 Land Bd. Meeting, Petition,* Exh. 42 at 28. In other words, Ysursa admitted that the effective rental rate would remain at the level that had allowed substantial leasehold values to accumulate in the past.

Because the Board realized that contract rent would remain below market rent, resulting in the accumulation of leasehold values, the Board once again extended its premium rent policy, with amendments to require lessees to pay 50% of net leasehold gains to the Board upon assignment of a lease. *Transcript, March 16, 2010 Land Bd. Meeting, Petition,* Exh. 42 at 36. But, by definition, the leasehold profits that will be realized by lessees come at the expense of the beneficiaries, since the very existence of leasehold values is dependent upon contract rent remaining below market rent.

The Board's acknowledgment that premium rent remains necessary, and its action to allow lessees to retain half of leasehold profits, is a tacit admission that the Board is acting with divided loyalty by not obtaining market rents and by allowing lessees to retain money that, by law, should go to the beneficiaries. Given these facts set forth in the Petition, it cannot be ruled, as a matter of law, that the Petition fails to make a claim that the rental schedule adopted by the Board falls outside its lawful authority and jurisdiction, where the Board has abused its discretion by acting with divided loyalty.

D. THE FACTS, AS SET FORTH IN THE PETITION, ESTABLISH THAT THERE IS NO PLAIN, ADEQUATE OR SPEEDY REMEDY AVAILABLE IN THE ORDINARY COURSE OF THE LAW.

Respondents argue that a petition for a writ of prohibition is inappropriate because an adequate remedy at law exists in the form of judicial review by a district court under the Administrative Procedures Act ("APA") or through a declaratory judgment action. The Respondents' argument, however, misunderstands the fundamental nature of the present action and the definition of the word "adequate."

The present action is being brought to ***immediately*** arrest the longstanding and ongoing harms to the trusts' beneficiaries. As the record makes clear, the challenged Board action is only the latest chapter in a sordid history that has harmed, and continues to harm, the trusts' beneficiaries in violation of constitutional and statutory obligations. The suggestion that a district court could provide an adequate alternative remedy ignores the benefits sought in petitioning this Court for a writ: finality and speed. Without both finality and speed, additional harm will accrue to beneficiaries and/or the lessees.

Under Idaho Code § 58-307(8), lessees must apply to renew their leases by April 30, 2010, and new leases will be issued a short time thereafter. The timeline for implementing the challenged action is short. Once the leases are renewed, which can happen any time after the end of April, it will be extremely difficult and costly to undo or possibly terminate the leases. Any legal disputes must be resolved quickly for new leases to be finalized and in place before the current lease term expires. With no lawful lease in place, both the beneficiaries and the lessees will be left in legal limbo, with the lessees possessing no right of continued occupation, and the beneficiaries receiving no income due to the lack of a current and enforceable lease.

To constitute an alternate remedy, the remedy must be adequate. The mere existence of another remedy, in and of itself, will not prevent a writ of prohibition from issuing. A technically available remedy, such as the alternatives suggested by Respondents, will not preclude mandamus when the other relief is uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective. *In re Davis*, 990 S.W. 2d 455 (Tex. App. Waco 1999). To determine if an alternate remedy is adequate, the question is whether the remedy is adequate under the circumstances. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St. 3d 441, 884 N.E.2d 589 (2008). Whether a remedy is adequate depends heavily on the circumstances presented and is better guided by general principles than by simple rules. *In re Prudential Ins. Co. of America*, 148 S.W. 3d 124 (Tex. 2004).

Looking at the circumstances of this case, which includes evidence that the beneficiaries are currently being deprived of approximately $2,027,222 in income every year, it becomes apparent that the alternative remedies posed by Respondents are not adequate. If this case begins in district court, there is no question that it will inevitably wind its way back to this Court, whereupon this Court will be asked to review the very same question with which it is

now presented. The only remedy available to redress the ongoing harm is a timely decision by this Court.

CONCLUSION

In this proceeding the Attorney General seeks a writ of prohibition to arrest proceedings of the Board that are in excess of the Board's constitutional and statutory authority and seeks as part of that order a ruling from this court pointing out to the Board the legal scope within which its judgment and discretion must be exercised. Such a request falls squarely within the requirements for issuance of a writ of prohibition. Moreover, the urgency for this request is apparent from the timeline set forth in the petition. Only through the issuance of the writ will the Board have sufficient time to implement a rental schedule that fulfills its constitutional and statutory duties prior to the expiration of the current leases. Respondents motion to dismiss should be denied.

DATED this 15th day of April 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
STEVEN L. OLSEN
Deputy Attorney General

By _____
MELISSA MOODY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April 2010, I caused to be served a true and correct copy of the foregoing Petition for Writ of Prohibition by the following method to:

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for

MELISSA MOODY
Deputy Attorney General