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An Agricultural Law Research Article

**Comedy of Errors or Confederacy of Dunces?
The Idaho Constitution, State Politics, and
the Idaho Watersheds Project Litigation**

by

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Originally published in IDAHO LAW REVIEW
40 IDAHO L. REV. 187 (2003)

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COMMENT

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I. INTRODUCTION

Ask any public lands rancher in Idaho to identify Public Enemy Number One, and the answer will almost certainly be Jon Marvel, a man from Sun Valley who keeps showing up at auctions held to lease state-owned grazing lands and wildly bidding the prices up to the point that traditional ranchers cannot afford to lease the lands any longer. These auctions, overseen by the Idaho State Board of Land Commissioners ("Land Board"), typically involve leases of square-mile sections of state lands for ten years or more. Marvel bids against the

ranchers, loudly proclaiming his intention to cease livestock grazing on any leases he obtains and to preserve the land for wildlife and recreational use. He insists that allowing him in the auction house is good for both the landscape and the public schools, which are the beneficiaries of all state lands proceeds. Even when Marvel does not win a state land auction, he dramatically increases the rental cost of the land for the ranchers he bids against simply by bidding on the leases. And from the ranchers' perspective, when Marvel actually wins a lease, it gets even worse, because with his land leases he is able to wrest control, they say, of important water sources from ranchers who have relied on those sources for years.

Public lands grazing is an important enough feature of the mythological and economic landscape of Idaho that a man like Marvel commands a lot of attention. He has taken on the livestock industry with what is apparently a deep pocketbook and obviously a cheerful willingness to engage his opponents in the auction house, in the press, and in public hearings. But while his battles in the press have been at best a wash, there is one arena where Jon Marvel has unquestionably prevailed: the Idaho Supreme Court. In the Idaho Supreme Court Jon Marvel has four times now fought for his right under the Idaho Constitution to bid on and win state lands leases, and four times he has returned with unanimous decisions in his favor. To date, every effort by the unabashedly rancher-friendly political establishment of Idaho to thwart Marvel's right to bid on and win these auctions has hit a brick wall when Marvel reached the Idaho Supreme Court with his constitutional challenges.

Marvel's unhesitating instinct to litigate attempts by the livestock industry to keep him from participating in state lands auctions, coupled with his evident financial ability to carry out his plans in both the auction house and the courthouse, has won him no friends in the Idaho Legislature, the Idaho State Land Board (which oversees state lands leases and their auctions), or, naturally, the livestock industry. The fact that the Idaho Constitution requires state lands to be leased at auction and provides for proceeds of those auctions to be used to fund the state's public schools puts the Marvel/Land Board dispute squarely at the intersection of a number of powerfully charged legal, political, and public controversies: the enduring mythology of the cowboy, the increasing concern in Idaho's urban populations for wildlife and recreation values on public lands, the funding of Idaho's public schools, and the use and legitimacy of free-market forces to set or accomplish public goals. The dispute also presents a case-study of so-called "new federalism" in action: the squall that Jon Marvel has created in Idaho is a striking exercise by a single man of one clause in the education article of Idaho's constitution, causing a costly and por-

tentous headache to one of Idaho's most powerful, important, and, according to Marvel and his supporters, environmentally destructive industries.

It hasn't been easy for him, however. Marvel has, in the past decade, had to assert his right to bid on these leases to the Idaho Supreme Court three times, facing three different strategies employed by state officials and legislators to thwart him. Among these strategies was a bill passed by the legislature so obviously targeted at him that the press dubbed it the "anti-Marvel Bill." A fourth time he had to persuade the same court that a constitutional amendment, which Marvel argued would have removed the obligation of the state to hold auctions for state lands leases at all, was itself constitutionally flawed.

Marvel has, to date, clobbered his opposition. He has won all four Idaho Supreme Court decisions¹ and secured his right to participate in, and, at least in principle, win state lands auctions. He successfully challenged the so-called "anti-Marvel Bill," which would have prevented him from participating in state lands auctions. His challenge to a constitutional amendment that would have relieved the Land Board from the obligation to hold auctions in the first place was also successful. And he has reaffirmed (or perhaps more precisely defined) the limits of the discretion available to the State Land Board in their administration of the state lands lease auction process.

Now Marvel faces one more—probably not the last—obstacle erected by the state legislature to thwart his ability to bid on state lands leases. The Idaho Administrative Procedure Act provisions governing state lands lease auctions, rewritten in 2001, cleverly designate lands according to their "preferred use," and require bidders on these leases either to comply with the preferred use or petition the Department of Lands to change that use. Because Marvel is only interested in grazing lands, this forces him to agree to run livestock on any lands on which he wishes to submit bids. If his previous efforts to defend his right to bid on state lands leases regardless of any intention to graze them is any indication of what the future holds, it seems practically inevitable that Marvel and his organization, Western Watersheds Project (formerly Idaho Watersheds Project²) will challenge the new administrative provisions.

1. Each decision was unanimous. See discussion *infra* Part III.C.

2. Idaho Watersheds Project changed its name in 2001 to Western Watersheds Project.

My concern is the role the Idaho Constitution has played in Marvel's efforts to secure grazing leases, and how the court's previous treatment of the relevant clauses in article IX of Idaho's constitution can be used to predict future disputes over Land Board decisions regarding state lands leases. Accordingly, Part II of this paper reviews the history of the dispute, which in some ways has taken the form of one man's own personal jihad against the State Land Board, and is an interesting tale in its own right. In Part II, I will also review the Land Board's uniformly defective attempts to protect the interests of the livestock industry by rigging the auction process to permit access to state lands auctions only to ranchers. In Part III, I will examine the constitutional analysis that has been the hallmark of the cases surrounding public lands leasing in Idaho since the early twentieth century, and show that, notwithstanding some commentators' analyses, the case law up to and through the *Idaho Watersheds Project* litigation has been entirely consistent and utterly unmoved: the outcome of all of the *Idaho Watersheds Project* cases is unsurprising to those who believe the Idaho Supreme Court can resist political pressure from powerful local industries and powerful state officials.

In Part IV, I examine the likely next chapter in the dispute, which concerns the same constitutional questions put forth in the previous litigation, but applied this time to the new Idaho Administrative Procedure Act regulations. I believe that although the new regulations signal a modest advance in sophistication by the state legislators and the Land Board, they seem headed to the same humiliating fate suffered by preceding attempts to reserve the state lands auction process for the exclusive use of ranchers; Idaho's political establishment has not, evidently, reconciled itself to strong constitutional indications that auctions for state lands leases must be open to all in order to reap the greatest possible income for Idaho's schools. I conclude in Part V by wondering why Idaho's state legislators don't stop wasting the court's time on Jon Marvel, or at least why they don't take a moment to read the cases more carefully and craft a solution that fronts up to the now very clear constitutional requirements as well as the legitimate objectives of protecting both Idaho's school fund and the environment, even if it means breaking the ranchers' traditional monopoly on state lands.

II. THE HISTORY OF THE IDAHO WATERSHEDS PROJECT DISPUTE

A. The Textual Authority: The Idaho Admissions Bill, the Idaho Constitution, and State Law

The Idaho Admissions Bill granted to Idaho, on admission to the union, sections sixteen and thirty-six in every township of the state.³ The lands were expressly granted “for the support of common schools.”⁴ The Admissions Bill authorized disposal of the lands to the public through sale or lease, but required funds from the lands to be placed in a “permanent school fund, the interest of which only shall be expended in support of said schools;”⁵ and it created a trust relationship between the state, as trustee, and the schools, as beneficiaries.⁶ Idaho retains about 2.4 million acres of these so called “school trust” lands today.⁷ Idaho’s constitution provides that management of the school trust lands is overseen by a State Board of Land Commissioners, which is made up of the governor, superintendent of public instruction, secretary of state, attorney general, and state auditor.⁸ In Idaho these are all elected officials.⁹ The Idaho Constitution at article nine, section eight, charges that the lands shall be held in trust by the Land Board, but leased at public auction for support of the schools: “[T]he 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 respec-

3. 26 Stat. 215 (1890). A township is a square, six miles on a side, with thirty-six square mile “sections,” numbered from the northwest corner, east, in zig-zag fashion down to the southwest corner.

4. *Id.* § 4 (“[S]ections numbered sixteen and thirty-six in every township of said State . . . are hereby granted to said State for the support of common schools . . .”).

5. *Id.* § 5.

6. *See id.* §§ 5–12. Section 12 states “[t]hat the State of Idaho shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned . . .” *Id.* § 12.

7. JAY O’LAUGHLIN & PHILIP S. COOK, ENDOWMENT FUND REFORM AND IDAHO’S STATE LANDS: EVALUATING FINANCIAL PERFORMANCE OF FOREST AND RANGELAND ASSETS (Idaho Forest, Wildlife and Range Policy Analysis Group, Report. No. 21. (December 2001)).

8. IDAHO CONST. art. IX, § 7.

9. IDAHO CONST. art. IV, §§ 1–2.

tive object for which said grants of land were made.”¹⁰ I will refer to this clause in section 8 as the “auction clause.”

Article IX, section 8 also directs the Land Board “to provide for the location, protection, sale or rental of all the lands . . . 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 long term financial return*”¹¹ I will refer to this clause as the “return clause.”

Just as the framers of the constitution drafted the document to implement the requirements of the Admissions Bill, the state legislature has in turn carried out the constitutional command to “provide by law” for the disposal of state lands by rent or sale at public auction.¹² Idaho Code section 58-310 establishes the general mechanism for auctions of state lands, calling for the Department of Lands to “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.”¹³ But the statute grants the Land Board a heady degree of discretion when it comes to awarding the bid: they may reject any bid, for any reason.¹⁴ Under Idaho Code section 58-310, “the state board of land commissioners shall have power to reject any and all bids made at such auction sales, when in their judgment there has been fraud or collusion, or for any other reason, which in the judgment of said state board of land commissioners justified the rejection of said bids.”¹⁵ The scope of the Land Board’s power to select the winning bidder is at the heart of much of the *Idaho Watersheds Project* litigation.

The basic statutory and constitutional architecture of the school trust lands leasing system is simple: the Land Board must achieve the “maximum long term financial return” to the school fund by leasing state lands at public auction. What calculus the Land Board uses to determine “maximum long term financial return” is, at least according to the statute, up to the Board.¹⁶ Whether an auction gets held at

10. IDAHO CONST. art. IX, § 8.

11. *Id.* (emphasis added). This section originally called for the Land Board to “secure the maximum amount therefor”; in 1982 the constitution was amended to read as it does today. The change has not made any difference that I have been able to determine.

12. *Id.*

13. IDAHO CODE § 58-310(1) (Michie 2002).

14. IDAHO CODE § 58-310(4) (Michie 2002).

15. *Id.*

16. By inference, the statute directs the Land Board to “auction off and lease the land to the applicant who will pay the highest premium bid therefor . . .” but three paragraphs later instructs the Land Board that it may “reject any and all bids made at auction sales . . . which in the judgment of said state board of land commissioners justified the rejection of said bids.” *Id.* § 58-310(1), (4). Ultimately, then, it is the “judgment” of the board that will determine who wins the auction, not the highest bid.

all, on the other hand, is not up to the Board: the statute and the constitution both require an auction to be held.¹⁷

A brief overview of the mechanics of the auction and return clauses will help the reader with the Idaho Supreme Court's analysis of the Idaho Watersheds Project litigation. The leasing scheme potentially involves two different spheres and degrees of legal inquiry. First, there is a procedural requirement: under section 8, an "auction" must be held (the lands "shall be . . . held in trust, subject to disposal at public auction.")¹⁸ Although the precise contours of what an "auction" is may be arguable, something resembling a competitive bidding activity is presumably required.¹⁹

Second, there is the possibility for inquiry into what appears to be a substantive question of "long term financial return."²⁰ But the constitution does not say the bidder of the "maximum amount" must be awarded the lease; rather, it directs the Land Board to concern itself with "maximum long term" return, or, in other words, predictions of the future.²¹ While this broad discretion granted by the statute to the Land Board to reject a high bid may at first seem to have been unjustly relinquished by Idaho's legislative branch, it seems the constitutional mandate could not have been accomplished any other way: if the constitution's words "long term financial return" do indeed charge the Land Board to peer into the future, then the Land Board must have the discretion to reject a bid that is numerically highest but realistically (or even theoretically) riskier than its counterparts. There is no other way to meet the constitutional command than to recognize a kind of business judgment rule for the Land Board—the constitution requires the trustee to have the discretion to make the choice not to accept the highest bid, upon the trustee's reasonable conclusion that

17. The texts of the constitution and the statute both leave little room for an interpretation that an auction is not required. The statute states that bids may be rejected by the Land Board, but only *after* an auction has been held.

18. IDAHO CONST. art. IX, § 8.

19. At least the Idaho Supreme Court, as I will show below, has consistently held this to be the case since the early 1900s when it defined an auction to be "a sale by public outcry to the highest bidder on the spot." *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 666, 139 P. 557, 561 (1914).

20. IDAHO CONST. art. IX, § 8.

21. Again, any possibility that the constitutional language means anything different was quickly foreclosed by the earliest cases on the clause which held (under the earlier constitutional language commanding the Land Board to "secure the maximum amount therefore," see *supra* note 11) that the Land Board was to use its "business judgment" to determine what the high bid was. See, e.g., *Balderston v. Brady*, 18 Idaho 238, 108 P. 742 (1910), discussed in detail in Part III, *infra*.

the highest bid today will not yield the highest return in the "long term."

Once the "maximum long term financial return" mandate is seen to be a target the Land Board is to aim for as trustee rather than a substantive requirement to do anything measurable by any objective calculation, it becomes clear the courts will be loathe to step in and challenge the Land Board on any given decision involving a bid award. A plaintiff protesting to the court, for example, that his rejected bid—whether high or low—is really the one that will secure the "maximum long term financial return" will have an extraordinary—perhaps unassailable—burden in overcoming the deference awarded the business judgment of the board. Even if the courts do not conclude the question of long term financial return to be a political question wholly outside their sphere, they will certainly apply a standard of review on the distant fringes of "arbitrary and capricious" decision-making. The return clause is not at all plaintiff friendly.

The auction clause, on the other hand, is another story: the auction clause mandates a procedure, and procedure is something courts have little difficulty adjudicating. Recognizing that the auction clause and the return clause have separate mandates that receive distinct kinds of attention from the court provides the key to understanding the outcomes of the cases and to predicting what the future likely holds for litigation concerning Idaho state lands leases.

While I will argue below that the return clause can be seen to give extra "bite," so to speak, to the auction clause, the historical and modern cases regarding these clauses can all be explained by the fact that the court will readily enforce the auction clause to the letter once the auction has been held, but leaves the calculation of "long term" to the discretion of the Land Board.

B. Jon Marvel's Odyssey with the Land Board

Jon Marvel began bidding on grazing leases in 1994, although his dislike of cows stems from some years earlier, when he discovered his only remedy to keep livestock off his property near Stanley was to fence his land and maintain the fence himself against his neighbor's cows.²² Indeed, if the legend is to be believed, it seems that a slightly more conciliatory approach from his ranching neighbor might have nipped the Jon Marvel problem right in the bud, robbing Idaho of both some local color and some interesting case law.²³ As the legend has it, Marvel's ranching neighbor refused to lift even a single finger to see

22. Rocky Barker, *Opponent of Public Grazing Leaves His Mark*, IDAHO STATESMAN, Apr. 3, 1999, at A5.

23. *Id.*

to it his cows didn't regularly wind up in Marvel's front yard, and intimated that Marvel's efforts to fence the cows off his property would be futile.²⁴ Indeed, according to one of Marvel's long-time supporters, "[t]his whole thing is a classic case of pissing off the wrong guy. One smart move back in the beginning and Jon Marvel would still be designing houses in Sun Valley and spending his spare time reading novels on his porch. But Marvel isn't the type to let it go."²⁵

Whatever his reasons, in January of 1994 Marvel placed a thirty-dollar bid on the Lake Creek lease at an auction in Idaho Falls.²⁶ Calling it "an initial test case,"²⁷ Marvel hoped to fence cows out of a mile of stream where Chinook salmon spawned.²⁸ One reporter correctly noted that Marvel's bid "could mark the beginning of a bitter era between Idaho ranchers and conservationists,"²⁹ an Idaho Cattle Association spokesman called Marvel's action "extremely destructive and harmful to the developing relations between agricultural and environmental groups."³⁰ Idaho's Secretary of State and sheep rancher Pete Cenarrusa urged the Land Board (of which he was a member) to postpone the auction, calling Marvel's actions "precedent setting."³¹

Will Ingram, the rancher who formerly held the lease that was up for auction, did not counter Marvel's thirty-dollar bid during the auction: instead, he refused to participate in the auction at all.³² Marvel was thus the only bidder.

But just eleven days later, the Land Board awarded the Lake Creek lease to Ingram anyway.³³ The only dissenting vote in the Land Board came from Idaho's Governor, Cecil Andrus, who underscored the political nature and volatility of the Land Board's decision by not-

24. Stephen Stuebner, *Jon Marvel vs. the Marlboro Man*, HIGH COUNTRY NEWS, Aug. 2, 1999, available at <http://www.hcn.org> ("Cows would break into our property," said Marvel, "because there was nothing left on the other side for them to eat. . . . When we asked the ranchers to move the cows or help with the fence, they'd just ignore us. I observed an arrogant, unresponsive and unneighborly attitude." For his part, the rancher interviewed in the article referred to Marvel as "an arrogant, ignorant asshole.").

25. Interview with Dr. Charles Pezeshki, IWP Board member, in Moscow, Idaho (Feb. 22, 2003).

26. *Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs*, 128 Idaho 761, 763, 918 P.2d 1206, 1208 (1996) [hereinafter IWP I]. See also *infra* note 77.

27. Dan Egan, *Idaho Group Takes over Some Public Land*, HIGH COUNTRY NEWS, Feb. 7, 1994, available at <http://www.hcn.org>.

28. IWP I, 128 Idaho at 763, 918 P.2d at 1208.

29. Egan, *supra* note 27.

30. *Id.*

31. *Id.*

32. IWP I, 128 Idaho at 763, 918 P.2d at 1208.

33. *Id.*

ing that he was "the only one who's not on the ballot this year."³⁴ Marvel accorded the Land Board's decision to disqualify his bid to "the entrenched power of the livestock industry,"³⁵ and said he thought the decision violated the state constitution—a belief he would later prove to be the case. "The Idaho Constitution," he said, "does not give an on-going birthright to public land grazing. Other valuable uses exist on these lands."³⁶

Undeterred by his failure to obtain the Lake Creek lease, Marvel continued to place bids for school trust lands,³⁷ and sued to overturn the Land Board's decision regarding his Lake Creek bid.³⁸ Ranchers, perhaps sensing that Marvel might have a case, began to take his bids more seriously than Ingram had. In 1995 Marvel was outbid by rancher Roger Ferguson for a 320 acre lease in Clark County.³⁹ When the bidding for the lease hit \$13,550, Marvel folded.⁴⁰ He told the local newspapers that he was surprised by the defeat, but happy to see so much more money going to Idaho schools than would have had he not been bidding for the land against the rancher.⁴¹ He also noted—and the range supervisor for the Department of Lands publicly agreed with him—that the parcel he had bid on was damaged by poorly managed livestock grazing.⁴²

Two months later, Marvel lost another auction.⁴³ Wearing a bright-green button that said "I support welfare ranching,"⁴⁴ he bid \$12,000 for a lease that had gone for just \$5000 a decade earlier.⁴⁵ Eldon Ward, the rancher bidding against him, reluctantly offered \$12,050, and Marvel folded.⁴⁶ Marvel proposed that his actions were affirmative, empirical proof that the state had been undervaluing its lands. "This is a free market," Marvel exclaimed, and noted that the

34. Stephen Stuebner, *Ranchers Rejoice Over Reversal by Land Board*, IDAHO FALLS POST REG., Feb. 9, 1994, at A1.

35. *Id.*

36. *Id.*

37. See, e.g., Dan Egan, *Marvel'ous Auction in Idaho*, HIGH COUNTRY NEWS, Apr. 17, 1995, available at <http://www.hcn.org>.

38. IWP I, 128 Idaho 761, 918 P.2d 1206 (1996).

39. Egan, *supra* note 37.

40. *Id.*

41. *Id.* Marvel noted he had tripled the amount of money going to the school fund for that parcel.

42. *Id.*

43. Dan Egan, *Marvel Ups the Ante*, HIGH COUNTRY NEWS, June 24, 1996, available at <http://www.hcn.org>.

44. Marvel has mocked the low grazing fees set by the state and federal government, noting that a person pays more to feed a pet hamster or tarantula than ranchers pay to graze their livestock on public lands. Stuebner, *supra* note 24.

45. *Id.*

46. *Id.*

other bidders did not have to place their bids if they thought the land was not worth the money.⁴⁷

In 1995, however, Marvel faced a bigger problem. That year the state legislature passed Idaho Code section 58-310B, a law that modified how the Land Board was to handle so-called "conflict" auctions, or auctions in which more than one person applies to bid for the same parcel.⁴⁸ Under the new rule, the Land Board not only had discretion to determine who won an auction, it also had the discretion to determine *who could bid* at an auction. Idaho Code section 58-310B gave the Land Board a list of criteria to use to determine who was a "qualified bidder," and among those criteria were requirements that the bidder be "capable of and willing to fulfill all provisions of any existing written grazing management plan."⁴⁹ This meant Marvel could not bid on grazing lands and remove livestock from them entirely, as he wished to do. He had to agree to continue grazing, or persuade the Department of Lands to write another "grazing" plan that did not involve grazing.⁵⁰

The bill was so obviously designed to prevent Marvel from forcing higher prices for lands leases simply by showing up and bidding, that the press dubbed it the "anti-Marvel bill."⁵¹ The bill was sponsored by the Idaho Wool Growers Association and the Idaho Cattle Growers Association, whose lobbyist told the *Idaho Falls Post Register* that Marvel was "putting folks in real turmoil" and that Marvel was "just going to bid on the land, and then retire to Sun Valley to plan his next caper."⁵² A spokesman for the Department of Lands summed up the new law by saying, "In the past we had to accept all applications. Now, under the new law, the Land Board has the option of rejecting an application."⁵³

Under the regime established by Idaho Code section 58-310B, Marvel's ability to participate at all in auctions for school trust lands was now in the hands of the Land Board, and the Land Board soon showed its willingness to exercise this new discretion when it refused to let him bid on a parcel even when no other bidders came forward to

47. Egan, *supra* note 37.

48. IDAHO CODE § 58-310B (Michie 2002).

49. IDAHO CODE § 58-310B(4)(b) (Michie 2002).

50. *Id.*

51. See, e.g., Rocky Barker, *Opponent of Public Grazing Leaves His Mark*, IDAHO STATESMAN, Apr. 3, 1999, at A5.

52. Stephen Stuebner, *Ag Lobby Wants Land Leases Reserved for Ranchers*, IDAHO FALLS POST REG., Feb. 14, 1995, at C1.

53. Dan Egan, *Marvel Challenges Another Rancher's Land Lease*, IDAHO FALLS POST REG., July 10, 1995, at A7.

compete for the land.⁵⁴ In other words, the Land Board preferred to take no money to let the land lie ungrazed than to take Marvel's money not to graze it. Marvel offered first \$3500 for the lease, and then voluntarily outbid *himself* and offered \$5000 to lease land that no one else wanted.⁵⁵ (The previous lessee's lease had been terminated for non-payment.)⁵⁶ Nevertheless, the Land Board voted to deny Marvel the lease. Even School Superintendent Anne Fox, who, one would presume, would have at least some personal and professional interest in seeing \$5000 go to the state school system, joined the opinion to disqualify Marvel from bidding.⁵⁷ This and other similar losses led Marvel to sue again, this time challenging the constitutionality of Idaho Code section 58-310B.⁵⁸

Meanwhile, both ranchers who had outbid Marvel in 1995 appealed their bids to the Land Board, asking the leases to be given to them for the amount they would have paid had Marvel not been permitted to bid in the auctions.⁵⁹ In a twist that probably strikes most non-Idahoans as not quite credible, State Superintendent of Schools Anne Fox was one of the outspoken voices on the Land Board supporting this—even though her own schools would lose thousands of dollars as a result.⁶⁰ The story became even more unusual when the *Idaho Falls Post Register* learned that Roger Ferguson, the rancher who bid \$13,550 to beat Marvel's bid of \$13,500, not only wanted his money back and the price reduced to about half his final bid, but he also had been leasing the land *himself* to other ranchers.⁶¹ (He declined to tell the newspaper how much he was leasing the land for.⁶²)

Ferguson's ranch operation petitioned the Land Board for return of its money, requesting "relief from the onerous consequences" of having to bid against Marvel, who Ferguson accused of causing "mali-

54. *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 64, 64, 982 P.2d 367, 367 (1999) [hereinafter IWP II]. See also Brandon Loomis, *Land Board Ponders Marvel's Lone Land Bid*, IDAHO FALLS POST REG., Jan. 10, 1997, at A8.

55. Jim Fisher, *Idaho's State Land Is Too Good for Marvel's Money*, LEWISTON MORNING TRIB., Jan. 20, 1997, at A8.

56. Loomis, *supra* note 54.

57. IWP II, 133 Idaho at 64, 982 P.2d at 367.

58. *Id.*

59. Egan, *supra* note 53.

60. Jim Fisher, *Competition Infects Idaho's State Land Management*, LEWISTON MORNING TRIB., May 14, 1996, at A10. Fox was also an outspoken opponent of Marvel's \$5000 dollar sole bid for a lease in 1996. Although no other parties bid for the land, Fox helped convince the Land Board to reject his application. See Fisher, *supra* note 55.

61. Dan Egan, *Ranch Landlord: Cattleman Leases State Land, Rents It Out*, IDAHO FALLS POST REG., April 4, 1995, at C7.

62. *Id.*

cious mischief" with his bidding.⁶³ Their petition stated that "this lease auction was legalized harassment and extortion, which had absolutely nothing to do with the fair market value of state-owned forage."⁶⁴ Marvel's use of free market principles to advance his goals had obviously struck a chord with his opponents: one rancher told the *Dallas Morning News* that "these people are a bunch of former hippies who turned to environmentalism when they grew disenchanted with socialism."⁶⁵ Marvel's quick retort was that it was the ranchers who benefited from a fixed market and enjoyed a kind of socialism, or what Idaho's *Lewiston Morning Tribune* editorial page called "a closed system of cronyism."⁶⁶ "I [want] to show the hypocrisy of people who purport to believe in free-market capitalism except when it comes to their business," Marvel said.⁶⁷ For its part, the ranching community repeatedly disclosed its fundamental antipathy to the basic premises of the auction process: "[M]ost ranchers don't bid against other ranchers," said one to a reporter for the *Chicago Tribune*. "You've got to neighbor with people."⁶⁸

Ultimately, the Land Board, in a 3-2 vote, elected not to return rancher Eldon Ward's \$12,050 bid,⁶⁹ and Ferguson subsequently voluntarily withdrew his own petition to the Land Board.⁷⁰ Superintendent of Schools Anne Fox and Secretary of State Pete Cenarussa voted to return the ranchers' money; the Governor, State Controller, and Attorney General voted to uphold the ranchers' bids.⁷¹

Marvel's lawsuit concerning his first bid for the Lake Creek parcel, meanwhile, was grinding its way through the courts during the clash with ranchers Ferguson and Ward.⁷² He lost his case in Idaho District Court,⁷³ but in June of 1996 the Idaho Supreme Court overturned the district court's decision, finding that "the Land Board did

63. Karen Brandon, *Idaho Land Battle is Fought with Grazing Leases; Ranchers of Old West vs. New West Environmentalists*, CHICAGO TRIB., May 31, 1995, at 1N.

64. *Id.*

65. Randy Lee Loftis, *The Latest Range Wars: Ranchers, Loggers Fight Environmentalists Who Seek to Lease Federal Land*, DALLAS MORNING NEWS, Apr. 22, 1996, at 1A.

66. Fisher, *supra* note 55.

67. Barker, *supra* note 22.

68. Brandon, *supra* note 63.

69. Ward had accused Marvel of bid rigging and said he was "placed under duress with no place else to go." *Land Board Refuses to Reduce Bid*, IDAHO FALLS POST REG., July 10, 1996, at A8.

70. *Id.*

71. *Id.*

72. See IWP I, 128 Idaho 761, 763, 918 P.2d 1206, 1208 (1996).

73. *Id.* at 761, 918 P.2d at 1206.

not have the discretion to grant the lease to Ingram, given Ingram failed to place a bid at the conflict auction."⁷⁴ This win didn't achieve much for Marvel, however, because by now, Idaho Code section 58-310B was his problem. Furthermore, Secretary of State Pete Cenarrusa was even making noises that the Idaho Constitution didn't necessarily have to be followed, anyway: Cenarrusa claimed the auction process itself, since it was not mandated by the Admissions Bill, could be revoked by the state legislature without a constitutional amendment.⁷⁵ "The [Admissions Bill] supersedes the Constitution or any other laws," he told the *Idaho Falls Post Register*.⁷⁶

This first Idaho Supreme Court victory did, however, give Marvel a chance to bid again for the Lake Creek parcel, because the Supreme Court remanded the case and ordered a new auction.⁷⁷ At the new auction, Marvel's old opponent Will Ingram bid ten dollars; Marvel countered with two thousand.⁷⁸ The Land Board, though, exercising its discretion under the "maximum long term return" clause, chose to award Ingram the lease despite the fact Marvel's bid was two hundred times greater than Ingram's.⁷⁹ So Idaho's schools got a ten-dollar bill.

As Marvel's challenge to Idaho Code section 58-310B was in litigation, his final challenge—at least for the purposes of this chapter of our story—came in 1998. A constitutional amendment, billed as a way to raise money for public schools, was put forth by the legislature and passed by the voters.⁸⁰ The amendment would permit the Land Board to sell state land and use the money to purchase other property. Marvel did not have a problem with that part of the amendment, but he did have a problem with another part, which would have modified the auction clause in Idaho's constitution in such a way that only lands to be sold, not leased, would be auctioned. Lands to be leased would no longer be subject to public auction, effectively implementing Cenarrusa's earlier proposal to ignore the constitutional requirement in favor of wording in the Admissions Bill.

74. *Id.* at 766, 918 P.2d at 1211.

75. Gene Fadness, *Land Board Not Alone in Its Grazing Feud*, IDAHO FALLS POST REG., April 13, 1997, at B1.

76. *Id.*

77. IWP I, 128 Idaho at 767-68, 918 P.2d at 1212-13.

78. Tom Kenworthy, *Conservationists Challenge Ranchers' Hold on State Lands*, WASHINGTON POST, Sept. 9, 1997, at A1.

79. Personal correspondence with Jon Marvel, (Feb. 23, 2003) (on file with author).

80. The amendment was H.J.R. No. 6, an amendment to Article IX, Section 4 and Section 8 of the Idaho Constitution. See *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 55, 982 P.2d 358 (1999) [hereinafter IWP IV]; see also Thomas Clouse, *Land Board Will Review Grazing Leases; Panel Must Decide How to Rebid Parcels Originally Rented to Ranchers*, IDAHO STATESMAN, April 13, 1999, at 1B.

Marvel again went to court, this time challenging the constitutionality of the new amendment.⁸¹ He argued the amendment "log-rolled" two amendments into one, thus violating article XX of the Idaho Constitution.⁸²

On a single day in 1999, Marvel received three opinions from the Idaho Supreme Court.⁸³ Each was unanimous, and each was in his favor. What I will call *IWP II* (his case involving Lake Creek being *IWP I*) was a straightforward challenge to the constitutionality of Idaho Code section 58-310B.⁸⁴ The court held that the statute was unconstitutional because it directed the Land Board to select bidders based not on the best outcome for the schools but for other interests, specifically a healthy ranching industry.⁸⁵ A second opinion, or *IWP III*, concerned Marvel's challenge to a later group of auctions for which he had been disqualified.⁸⁶ The Land Board had argued that it disqualified Marvel based not on Idaho Code section 58-310B but because he was bidding for land that was "classified" as grazing land, yet did not intend to graze the land.⁸⁷ The court had little sympathy for this argument, and stated flatly that the record showed Marvel had been denied admission to the auction because of Idaho Code section 58-310B, which the court had just found unconstitutional.⁸⁸ The third decision, which I do not review in detail here, involved Marvel's challenge to a constitutional amendment that removed the requirement to hold auctions for state leases.⁸⁹ Unfortunately for Cenarussa and others who wanted to eliminate the auction clause, the Idaho Supreme Court found that the referendum had been improperly submitted to the voters, and struck it.⁹⁰

81. *IWP IV*, 133 Idaho 55, 982 P.2d 358 (1999).

82. *Id.* at 59, 982 P.2d at 362. Article XX of the Idaho Constitution provides that "if two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately." IDAHO CONST. art. XX, § 2.

83. On April 2, 1999, the Idaho Supreme Court ruled on *IWP II*, *III*, and *IV*.

84. *IWP II*, 133 Idaho 64, 64, 982 P.2d 367, 367 (1999).

85. *Id.* at 67, 982 P.2d at 370.

86. *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 68, 982 P.2d 371 (1999) [hereinafter *IWP III*].

87. *Id.* at 70, 982 P.2d at 373.

88. *Id.* at 71, 982 P.2d at 374.

89. *IWP IV*, 133 Idaho 55, 982 P.2d 358 (1999).

90. Marvel's attorney, Laird Lucas, had this to say of the amendment: "The only thing that has required auctions is the constitution. [The amendment] would have eliminated our bedrock authority for requiring auctions." Clouse, *supra* note 80.

Altogether, the Idaho Supreme Court sent thirty-eight grazing auctions back to the Land Board with its decisions.⁹¹ At last, in 2000, the Land Board granted its first leases—ever—to Marvel, and state controller J.D. Williams, who must have been at least as tired as anyone of this fight, said to the press, “I think this is the time to put this to bed.”⁹²

Unfortunately for Marvel, Williams’ sentiment did not prevail. In 2001 the state released modifications to its Idaho Administrative Procedures Act, which accomplished through the administrative system exactly what Idaho Code section 58-310B did at the statutory level.⁹³ Marvel has said he will sue,⁹⁴ and the rest of this paper will address the question of whether he can be expected to win. To do so, I will need to examine the auction and return clause case law up to and through the *Idaho Watersheds Project* litigation.

III. THE CONSISTENCY OF THE CONSTITUTIONAL ANALYSIS

A. Understanding the Cases: The Idaho Constitution

As discussed briefly in Part I, the Idaho Constitution sets a fairly simple framework for administering state lands leases.⁹⁵ The constitution requires that leases be disposed of at public auction and establishes a State Board of Land Commissioners with the power to award the leases.⁹⁶ The Land Board is charged with awarding the leases in such a way as to ensure the “maximum long term financial return” to the public schools.⁹⁷

Case law on these constitutional provisions, while not abundant, is thorough, and, I will argue, strikingly consistent since the very first case on the auction clause in 1910.⁹⁸ The court has covered the field fairly well with regard to the auction and return clauses, and the *Idaho Watersheds Project* litigation has served to confirm that the position the court took nearly a hundred years ago concerning the auc-

91. Rocky Barker, *Court Decision Marks Turning Point; Land Board Still Can Turn Down Highest Bidder*, IDAHO STATESMAN, April 3, 1999, at 5A.

92. Rocky Barker, *Jon Marvel Wins Two Grazing Leases; State Land Board Finally Accepts Conservationist's Higher Bid*, IDAHO STATESMAN, Jan. 12, 2000, at A1.

93. IDAPA 20.03.14, Subsection 020.01 (2003): “To be eligible for a grazing . . . lease, an applicant must intend to use the land for domestic livestock grazing”

94. Personal communication with Jon Marvel (Feb. 23, 2003) (on file with author).

95. IDAHO CONST. art. IX, § 8.

96. *Id.*

97. *Id.*

98. *Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910).

tion and return clauses is the position it continues to take today; a survey of the case law on these clauses, seen properly, reveals a repeated emphasis of basic principles more than it does an unfolding of doctrine developed to reach more and more disparate problems. The *Idaho Watersheds Project* litigation is less an update of the earlier cases so much as a confirmation that these holdings from the early part of the twentieth century can still be trusted to guide us today.

I believe the central principles of the earlier cases, squarely affirmed in the *Idaho Watersheds Project* litigation, are simple: while the Land Board has wide discretion to determine who will be awarded a lease once the bids have been placed, the Land Board must nevertheless hold an auction that ensures a broad competitive contest for the leases.⁹⁹ I wrote earlier in Part I that the court is naturally more comfortable requiring an auction than it is getting tangled up in questions of what the "maximum long term financial return" would be. Although I think this observation alone may serve to explain the court's holdings, I believe that there is something more going on in both the Idaho Constitution and the court's interpretation of it than this simple issue of the discretionary return clause versus the non-discretionary auction clause. I believe the return clause, relatively impotent by itself, lends the auction clause force it would not have alone.

The auction clause assures that the widest audience possible is permitted to compete for the lease, but does not tie the hands of the Land Board once the bids are in. The underlying principle is that the "maximum return" language serves less to impose limitations on the Land Board with regard to which bid they select once the auction is over, than it does to define how the Land Board must act with regard to the auction clause. The command to achieve the "maximum return" is thus a command not to pick the high bid after the auction has commenced, but rather to run the process in such a way that the competitive contest of an auction is unimpeded. The return clause is thus a kind of comment on the auction clause, an emphasis to indicate the auction language requires something more than just a hollow process. This is important because, if the Land Board is indeed permitted to select under its business judgment any bid it likes, regardless of the disparity between the chosen bid and the technically "highest" bid, a shallow view of the process would conclude that the step of holding

99. The court has called such an auction a "sale by public outcry." *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 666, 139 P. 557, 561 (1914).

the auction is pure show.¹⁰⁰ But the court, I argue, manifestly has not seen it as pure show: the auction is no hollow process, to be enforced merely because the constitution says so, but rather serves as an initial phase to ensure that the bids the Land Board reviews are as high as possible. Under this view, the clauses together make up more than just the sum of their parts. The force of the "maximum return" language falls not on the activity of the Land Board after the auction is held, but rather on the auction clause. Seen this way, the constitution envisions a competitive bidding process as the best way to produce the population of bids from which the Land Board ultimately must choose. The "maximum return" language, in this view, takes on meaning by giving teeth to the auction clause. I make this case below.

B. Understanding the Cases: The Case Law up to the *Idaho Watersheds Project* Litigation

The first case to address the auction and return clauses was *Balderston v. Brady*, which can be considered a kind of "*Marbury v. Madison*" of Article IX of Idaho's constitution, because it establishes in plain language where the power of the court, and where the power of the Land Board, lie in regard to Article IX.¹⁰¹ The case involved a dispute that arose when settlers claimed lands that turned out, upon survey, to belong to the state. The settlers unsuccessfully appealed a Land Board decision to eject them.¹⁰² The court put it thus:

In the meanwhile, according to statements made in the briefs by counsel for the board, the matter crept into the political considerations in this state, and it seems that during the campaign preceding the general election of 1908 the two leading political parties made some promises or declarations that, if successful in the election, they would relinquish some of these lands to the settlers who had been unsuccessful in their contests before the department.¹⁰³

The legislature appointed a commission to investigate the settlers' claims, and ultimately recommended to the Land Board that some of the disputed lands be given to the settlers.¹⁰⁴ A taxpayer brought suit, charging the action was unconstitutional, and the court

100. This is a view the Land Board has taken repeatedly. IWP I, for example, (in which the rancher failed to bid, but was awarded the lease anyway) is a classic example of the Land Board considering the auction itself to be so unimportant as to have no meaning at all.

101. *Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910).

102. *Id.*

103. *Id.* at 572, 107 P. at 494.

104. *Id.* at 572-73, 107 P. at 494.

agreed.¹⁰⁵ Citing article IX, section 7 of the Idaho Constitution, which charges the Land Board to act "under such regulations as may be prescribed by the law" and section 8, which contains both the return and auction clauses, the court concluded that "[t]he legislature is prohibited . . . from passing any law that would authorize a sale of school lands . . . other than 'at public auction.'"¹⁰⁶ Perhaps anticipating a source of future misunderstandings, the court immediately appended to the holding its interpretation of the Land Board's discretion to act once an auction is held:

In many of the matters coming before the board in reference to state lands they must exercise their judgment and discretion, and it is a well-settled principle of law that in such cases the courts will not attempt to control or supervise the discretion vested in the officers of a coordinate branch of the government.¹⁰⁷

The court held that, in this case, the legislature was not instructing the Land Board to act within this discretionary sphere, but rather, was directing them to act in a way that circumvented the auction requirement, and hence was unconstitutional.¹⁰⁸ "[T]he legislature cannot authorize the land board or anyone else to do any act with reference to state lands that is forbidden by the constitution. Any gift of school or other state lands or relinquishment of the state's title is in violation of the fundamental laws of the state, and would be void."¹⁰⁹ The court concluded that the legislature had no authority in the constitution to direct the Land Board to give land away in this manner and that the Land Board had no discretionary authority to do so on its own.¹¹⁰

In this particular case, the legislature had not affirmatively directed, through law, that the Land Board relinquish the state's land, but the court made clear that had the legislature passed legislation requiring the Land Board to do so, the problem would not be remedied: "If this were a legislative enactment in the form of a law, it would still be a serious question if the legislative department of the state could either authorize or direct the land board to part with the state's title and right to school or other lands for less than the consti-

105. *Id.* at 570, 107 P. at 493.

106. *Id.* at 574-75, 107 P. at 494-95.

107. *Id.* at 575, 107 P. at 495.

108. *Id.* at 585, 107 P. at 499.

109. *Id.* at 579, 107 P. at 496.

110. *Id.* at 585, 107 P. at 499.

tutional minimum price or without a sale 'at public auction.'"¹¹¹ Thus from the very first case involving state lands leases, the court emphasized that the auction requirement is not a hollow or general command, but a specific requirement the court will enforce.

The *Balderston* case, decided nearly eighty-five years before the *Idaho Watersheds Project* litigation began, provided at least the framework, and, arguably, all the tools the modern court needed to resolve the *Idaho Watersheds Project* problem. *Balderston* laid out in plain terms the dividing line between the Land Board's discretion to act and the constitutional requirements that limit that discretion. The case repeatedly emphasized the importance of the constitutional command to hold auctions whenever state lands are leased or sold. After *Balderston*, it became clear that neither the legislature nor the Land Board has the power, absent a constitutional amendment, to dispose of the school lands in any other way. As I will show, all future cases involving the disposal of state lands would be analyzed strictly in *Balderston's* terms.

Just five months after the *Balderston* opinion, the court was asked by the plaintiffs to clarify its holding.¹¹² Apparently the *Balderston* opinion was being cited for the proposition that the Land Board "has no power to apply for or take title to any lands in lieu of sections 16 and 36."¹¹³ The court made short work of the question: "The opinion certainly needs no modification, for the simple and conclusive reason that the court has never so held."¹¹⁴ In the first of what would be many instances in the next three quarters of a century, the court found itself repeating and clarifying a holding involving the auction clause in increasingly straightforward terms:

The question the court was dealing with was not the power of the board to *acquire* title to lands for the use of the state, but rather the board's power of *disposition* of state lands. . . . [T]he power and authority of the board, acting as the agent of the state, to acquire and take title to grants or gifts of land for the use of any of the institutions or instrumentalities of the state is beyond question or doubt. It is the power of the board to dispose of and convey away the lands of the state that has been guarded and hedged about by the people in the constitution itself.¹¹⁵

111. *Id.* at 577, 107 P. at 496.

112. *Balderston v. Brady*, 18 Idaho 238, 108 P. 742 (1910).

113. *Id.* at 239, 108 P. at 742.

114. *Id.* at 239-40, 108 P. at 742.

115. *Id.* at 240, 108 P. at 742.

The message seems clear enough: the Land Board's power to dispose of school trust lands is not plenary, but has been "hedged about." In other words, the school trust lands are not the sole domain of the Land Board. There are constitutional commands the Land Board must follow, and, under *Balderston*, the command to hold an auction is a firm requirement.

Perhaps the message would have been easier for future litigants to understand had the court in the next case not found cause to hold in favor of the Land Board's discretion to act. The case, *Pike v. State Board of Land Commissioners*, involved a challenge to the Land Board's decision to sell a large parcel of land to a timber company, which already held a lease to log the trees off the land.¹¹⁶ Pike, the plaintiff, argued that the auction was beyond the authority of the Land Board to offer for two reasons: the land would soon be stripped of trees and it consisted of such a large parcel that few could afford to bid for the land. The Land Board had followed all the required procedures and was preparing to hold an auction, but the plaintiff, calling it a "pretend auction," alleged the timber company was getting what amounted to an exclusive deal.¹¹⁷

The court took the opportunity first to reaffirm what it had said in *Balderston* regarding the trust relationship of the Land Board and the school lands:

[T]he constitution vests the control, management and disposition of state lands in the state board of land commissioners. They are, as it were, the trustees or business managers for the state in handling these lands, and on matters of policy, expediency and the business interest of the state, they are the sole and exclusive judges so long as they do not run counter to the provisions of the constitution or statute.¹¹⁸

As for the wisdom of auctioning land that is already under lease, the court said the Land Board has discretion to make this judgment:

It may be considered by some as questionable or doubtful business policy to lease lands for a long period of time, and then undertake to sell the lands a great number of years prior to the expiration of the lease, but however doubtful or questionable the business policy or expediency of so doing may be, it does not affect the power and authority of the board to

116. *Pike v. State Bd. of Land Comm'rs*, 19 Idaho 268, 113 P. 447 (1911).

117. *Id.* at 275, 113 P. at 449.

118. *Id.* at 286, 113 P. at 453 (citation omitted).

sell. . . [T]here being no prohibition in either the constitution or statute, and the power of rental, sale and disposition of state lands being vested in the state board of land commissioners, the courts are without the authority to prohibit a sale, although the land may be at the time leased for a long period of years. This is purely a matter of policy to be determined by the state board of land commissioners, and if they act unwisely, they must account to the electors of the state, but their judgment and discretion in such matters cannot be controlled by the courts.¹¹⁹

Expanding on the question of what discretionary powers the Land Board has, the court continued:

The question as to the most advantageous time to sell timber or lands or lease lands is always one of uncertainty and requires good business judgment to determine it wisely and for the best interest of the state, and however exercised may prove unwise and a positive loss to the state as viewed in the light of subsequent events.¹²⁰

Whether others will bid at the auction, or whether it is a "pretend auction" as the plaintiff alleged, simply was not, according to the court, a question for the judicial branch to resolve:

As to what would be the result under these circumstances, we have no way of knowing, and it is a matter of no consequence to the court in determining the legal questions presented in this case. These are matters of policy and business wisdom which should appeal to the judgment of the land board, and are not questions of law to be determined by the court.¹²¹

Pike represents to this day the most thorough statement from the court regarding the discretionary powers of the Land Board, but it does not represent a high-water mark in those powers: *Pike* did not expand the powers of the Land Board beyond those already articulated in *Balderston*. Rather, the court simply took the opportunity of *Pike* to define in more detail the contours of the Land Board's power in terms of the example at hand. The court held merely that so long as the Land Board follows the constitutional requirement to hold an auction, the power to determine what is sold and when it is sold is up to the Land Board, under trust principles and a kind of business judgment rule. This is in no way inconsistent with or expansive of any-

119. *Id.* at 287-88, 113 P. at 454.

120. *Id.* at 288, 113 P. at 454.

121. *Id.* at 290, 113 P. at 455.

thing the court had earlier said in *Balderston*. The only arguable erosion of the auction clause, or the sphere in which the Land Board does not have discretion, is the court's holding that the Land Board may determine for itself what gets auctioned: the court is not going to intervene in a Land Board decision about the size of the parcel simply to accommodate a larger pool of bidders.¹²²

Just one year after its decision in *Pike*, the court in *Tobey v. Bridgewood* was called upon to address the landscape that lay beyond, rather than within (as in *Pike*) the Land Board's powers.¹²³ The Land Board had granted a citizen a permanent easement to state land without holding an auction.¹²⁴ The court gave the same lengthy attention to drawing the contours of the constitutional power as it had given in *Pike* to drawing the contours of the Land Board's power.

First, the court turned to the Idaho Constitution:

This is a very serious and important question, and the court realizes fully the effect that may result from the conclusion of the court in the determination of the power and authority of the state land board.

....

These constitutional provisions provide who shall constitute the state board of land commissioners, and the power and authority vested in said board, in granting such board the direction, control and disposition of the public lands of the state, *under such regulations as may be prescribed by law*; it is also provided in said section 8 that the legislature shall [provide the lands be held in trust]. . . *subject to disposal at public auction*.¹²⁵

The court next drew the obvious conclusion that the Idaho Constitution places limits on the Land Board's authority. As articulated in *Balderston*, one such limit is the requirement to hold an auction: "It would appear, therefore, that an inhibition is placed upon the legislature in enacting a law which provides for the disposition of lands

122. The Land Board may thus choose the geographic scope of the sale and the time of sale under *Pike*.

123. *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 178 (1912).

124. *Id.* at 569-70, 127 P. at 179.

125. *Id.* at 576-77, 127 P. at 181-82.

granted to the state by an act of Congress, in that such disposal shall be at public auction."¹²⁶

The court concluded that the grant of a permanent easement over state school lands was not an action the Land Board could take under the Idaho Constitution.¹²⁷ Because the grant was neither a lease nor a sale at public auction, it was not within the discretionary authority of the Land Board to grant it.¹²⁸

If the *Balderston* case did not adequately set forth the approach the court would take to adjudicating state lands disposal issues, the cases of *Pike* and *Tobey* should have together done the job. In *Pike*, the authority of the Land Board is squarely defined, and in *Tobey* it is just as squarely defined, but from the other side of the line: *Tobey* describes the law from the position of what lies outside the Land Board's authority, and *Pike* from what lies within that authority.

But evidently *Pike* and *Tobey* did not suffice to do the job of clarifying the two spheres, for the court was not spared more attention to the issue. In the next case, just two years after *Tobey*, the court faced another disagreement about what the Land Board could do. The case *Barber Lumber Co. v. Gifford*¹²⁹ confronted the question of whether the Land Board had the authority to reject a high bidder for a timber lease. Barber Lumber Company had bid \$100,000 for the right to log land outside of Boise; a surprise bidder, however, turned up at the auction and bid \$101,000, and argued that he should be awarded the lease.¹³⁰ The Land Board met and concluded that, as Barber Lumber intended to construct a railroad to gain access to the lands in question, it should be awarded the lease, because the railroad would increase the value of adjoining lands.¹³¹ The railroad would add value to the land, the Land Board said, "far in excess" of the extra \$1000 offered by the high bidder.¹³² The Land Board, at least, was responding to the court's several articulations, by now, of the Land Board's business judgment discretion. The plaintiff, though, evidently felt he had a case.

The court first took the opportunity to define "auction": "An auction sale is a sale by public outcry to the highest bidder on the spot."¹³³ But the court quickly pointed out that the ambiguous term in this definition is not "auction" but "highest."¹³⁴ The determination of

126. *Id.* at 578, 127 P. at 182.

127. *Id.* at 580, 127 P. at 183.

128. *Id.*

129. 25 Idaho 654, 139 P. 557 (1914).

130. *Id.* at 663, 139 P. at 559.

131. *Id.* at 663, 139 P. at 560.

132. *Id.*

133. *Id.* at 666, 139 P. at 561.

134. *Id.*

“highest,” said the court, was to be left to the discretion of the Land Board:

[The Land Board] is a constitutional agency charged with the administration of a public trust and is vested with certain discretionary power in that behalf, and its discretion is invoked whenever it is called upon to “confirm or reject a sale or determine what bid for land is the highest,” and so long as the board is faithfully performing its duties under the law in the exercise of its discretion, this court has no authority to interfere and adjudge a sale of timber or land illegal or void, unless fraud appears in the sale or a clear abuse of its legal discretion is shown. . . . [I]n the absence of manifest abuse of that discretion the courts will not interfere.¹³⁵

The court reasoned, for the third time in four years, that the Land Board is a trust, and thus must have the power to reject or accept bids based on its projections of values other than the mere monetary value of the bid:

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. To that end, and of necessity, the board must have a large discretionary power over the subject of the trust.¹³⁶

And further: “[T]he financial interest of the state ought to be considered in a way at least that an ordinarily prudent business man would consider and conduct his own private affairs.”¹³⁷

From these premises, of course, the court’s conclusion is obvious: “Now, if we apply the rules of law above enunciated to the facts of this case, it is clear that the state board has acted in this matter only as a man of good business sense and judgment would act in regard to his own affairs.”¹³⁸

The court affirmed the decision of the Land Board,¹³⁹ this time leaving no room for mistake about the trust principles that underlay

135. *Id.* at 667, 139 P. at 561.

136. *Id.* at 666, 139 P. at 561.

137. *Id.* at 669–70, 139 P. at 562.

138. *Id.* at 668, 139 P. at 561.

139. *Id.* at 671, 139 P. at 563.

the court's analysis of the Land Board's discretion. As *Pike* had shown the need to follow the constitutional command of an auction, *Barber* shows the need to leave selection of the "high" bidder up to the discretion of the Land Board.

At this point in the case law, the demarcation of the Land Board's discretion could hardly be more clear. The court explicitly requires the Land Board to conduct "an auction,"¹⁴⁰ and has defined an auction as "sale by public outcry to the highest bidder on the spot."¹⁴¹ However, the court leaves the Land Board, under familiar trust and "business judgment" principles, to determine what exactly the "highest" bid turns out to be.¹⁴² The Land Board is free to consider all factors involved in the sale, including who the bidders are and what they can be expected to bring to their lease, so long as an auction is held first.¹⁴³ Further, risks that the lessee may commit waste can be calculated and thrown into the decision of what constitutes the high bid.¹⁴⁴ Lastly, the court makes clear the only way successfully to challenge a Land Board decision after an auction has been held is to show a "manifest abuse of . . . discretion."¹⁴⁵ This construction of the architecture of the clauses supports a particular kind of conception of what the constitution is trying to achieve: the mechanics of the system the court is mandating creates the largest pool of bidders possible, each of which has competed in a bidding contest with one another. Although the highest bid is not necessarily going to be the one selected, the amount of the bids will obviously play a role in the decision the Land Board ultimately makes, and the contest at the auction stage ensures that those bids are as high as possible.

But the court was still not done with assisting the Land Board in understanding what the Land Board could and could not do under the constitution, for just a few years later, in the case *Hammond v. Alexander*, there arose a dispute over what, exactly, constituted an "auction."¹⁴⁶

This time the Land Board had indeed sold land by auction, as charged in *Balderston* and *Tobey*, and the auction was indeed a "public outcry" to the highest bidder on the spot, as required by *Barber*. This time, however, the "auction" had been rigged: the public had selected names from a hat, and only the person whose name had been

140. *Id.* at 666, 139 P. at 561.

141. *Id.*

142. *Id.* at 669-70, 139 P. at 562.

143. *Id.*

144. *Id.* at 666, 139 P. at 561.

145. *Id.* at 667, 139 P. at 561.

146. *Hammond v. Alexander*, 31 Idaho 791, 177 P. 400 (1918).

drawn was permitted (by agreement) to bid.¹⁴⁷ In other words, there were high bidders, but the crowd had determined before hand whose bid would be “highest” and had seen to it that the “highest” bid would be as low as possible.

One can almost hear the court let loose an exasperated sigh, as it writes:

In an auction, competition is a necessary element, and the bidders fix, *by competition*, the price at which the offered property is sold. Competition is an element of each offer and bid, and while all agreements among prospective bidders do not operate to vitiate a sale, if the purpose in so agreeing is to stifle competition and if it causes the property offered to be awarded to a bidder, or bidders, for less than would have otherwise been offered, the vendor may avoid the sale.

The testimony taken in this case makes it clear that the purpose of plaintiffs, and the others who participated in the drawing, was that each of those whose names were drawn out of the box was to have a preference right, in the order in which his name was drawn, to bid upon a quarter-section of land if his number was reached before all the land was sold.

....

It follows that the land was not sold in the manner required by the constitution, and that it was the duty of the state board of land commissioners to set aside the sale and to refuse to issue the certificates sought to be procured by this proceeding.¹⁴⁸

Surely there must have been one or two justices on the court that day who wondered if they would ever be done clarifying to the folks at the Land Board what an “auction” is. For us, however, the case provides a useful articulation of the fundamental framework the court envisions—a competitive process must be used to assemble the bidders, after which the Land Board may sort out the bidder it prefers. The important thing is that “the property offered” must not be awarded “for less than would have otherwise been offered.”¹⁴⁹ This

147. *Id.* at 793, 177 P. at 400.

148. *Id.* at 795, 177 P. at 401 (citations omitted).

149. *Id.*

holding prohibits any bidding limitations that result in a lease being awarded to a bidder for less than would have been awarded had the auction been open to all, and affirms the kind of thing Marvel was doing when he was legitimately bidding up the costs of the lands leases for his opponents. It is a holding that affirms the basic free-market principles that underlie the reason for holding an auction.

At last we come to the final chapter in the line of cases leading up to the *Idaho Watersheds Project* litigation, though we are only, now, in the year 1921.¹⁵⁰ The case, *East Side Blaine County Livestock Ass'n v. State Board of Land Commissioners*,¹⁵¹ falls squarely in the framework already described, though it has fooled at least one commentator, who believed it could not be reconciled with *Barber*.¹⁵² The case is a simple one involving a dispute between two applicants for a parcel of land. The Land Board gave the lease to the low bidder, and the court reversed.¹⁵³ Stephen Bloch, in his commentary on the *Idaho Watersheds Project* litigation, wonders how such a result can be harmonized with *Barber*, where the Land Board was clearly granted discretion to award land to a low bidder.¹⁵⁴ How, he asks, can the Land Board rule in *East Side Blaine County* that a similar award is unconstitutional? But Bloch is looking at the wrong features of the case. The problem the court found in *East Side Blaine County* was not that the Land Board abused its discretion by accepting a low bid—the problem was the Land Board did so without first holding an auction.¹⁵⁵ The court makes abundantly clear the reason for its holding, when it says that it will:

compel obedience to a plain provision of the law, which requires these lands to be leased at public auction to the highest bidder therefor. 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

150. *E. Side Blaine County Livestock Ass'n v. State Bd. of Land Comm'rs*, 34 Idaho 807, 198 P. 760 (1921).

151. *Id.*

152. Stephen Bloch, *Idaho Watersheds Project v. State Board of Land Commissioners: The Fight for Sustainable Resource Management in Idaho*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 351 (1996).

153. *E. Side Blaine County*, 34 Idaho at 810, 198 P. at 761.

154. Bloch writes: "The *Barber Lumber* decision appeared to establish the Land Board's broad range of discussion. However, in *East Side Blaine County Livestock Ass'n v. State Board of Land Commissioners*, the Idaho Supreme Court pointedly ignored its previous *Barber Lumber* decision and granted a writ of mandamus against the Land Board to issue a grazing lease to the highest bidder." Bloch, *supra* note 152, at 357.

155. *E. Side Blaine County*, 34 Idaho at 814, 198 P. at 762.

this reason competitive bidding is made mandatory.¹⁵⁶

Once again, competitive bidding provides the key to the court's insistence upon a strict application of the auction requirement. I have called the return clause a "comment upon" the auction clause; here the court says the "dominant purpose" of the auction clause is to be found in the return clause: the dominant purpose of the requirement to hold an auction is to ensure the maximum financial return to the state. The court concludes:

The provisions of the constitution and 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.¹⁵⁷

After *East Side Blaine County*, the court at last got a respite—for about seventy years—from scolding the Land Board about its duties and responsibilities under the auction and return clauses; evidently, the Land Board and potential plaintiffs finally came to grasp what the Land Board had the power to do, and what it did not have the power to do, regarding state lands leasing. There was little litigation of substance involving either of the clauses until Jon Marvel's first suit in 1994.

C. Understanding the Case Law: The *Idaho Watersheds Project* Litigation

1. *Idaho Watersheds Project I*

As noted above, in 1994 Jon Marvel placed a thirty-dollar bid for the Lake Creek lease, hoping to fence cattle out of the stream and protect fish habitat; the former lessee of the land, Will Ingram, refused to bid against him, saying he could not afford to bid against Marvel. The Land Board awarded the lease to Ingram anyway.

156. *Id.* at 814, 198 P. at 763.

157. *Id.* at 815, 198 P. at 763.

The Department of Lands, which takes applications for lands leases prior to the auction, discovered no problem with Marvel's application to bid for the Lake Creek parcel, and, as always when two or more parties apply for the same parcel, recommended to the Land Board to proceed with an auction under Idaho Code section 58-310 (1).¹⁵⁸ Ingram appealed the decision to hold an auction, but the Land Board, over the protest of Secretary of State Pete Cenarrussa, elected to proceed with the auction.¹⁵⁹

At the auction Marvel opened the bidding with a bid of thirty dollars, and Ingram, saying that though the 640-acre parcel was "a valued part of [his] ranching operation . . . the economic reality was that [he] could not justify paying an increased fee for the grazing lease."¹⁶⁰ The Land Board awarded the lease to Ingram anyway, and Marvel sued.

The Idaho Supreme Court reviewed the constitutional provisions in article IX and surveyed the case law through *East Side Blaine County*. Starting with *Balderston*, the court noted that there must be authority for the Land Board's decision in the constitution; the court then moved through *Tobey*, *Barber*, and *East Side Blaine County*. The court concluded by noting the discretion the Land Board has to determine high bids, but it held, unsurprisingly, that this discretion does not extend to granting leases to parties who fail to participate in the auction at all: "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."¹⁶¹ While the court did not say as much, the reasoning appears to be that there is little point in conducting an auction if the Land Board is free to ignore the results. Conducting an auction means abiding by the results of the auction.

The Land Board had adopted what I have called a "shallow" view of the constitutional provision: noting that they had every right to reject the high bidder in the auction, the Land Board concluded (or appears to have concluded) that the auction was a mere formality that need not be abided. If the Land Board may reject the high bid at the auction, why require the winning bidder to participate at all? But this

158. Idaho Code section 58-310(1) states:

When two 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.

IDAHO CODE § 58-310B(1) (Michie 2002).

159. IWP I, 128 Idaho 761-762, 918 P.2d 1206-07 (1996).

160. *Id.*

161. *Id.* at 766, 918 P.2d at 1211.

view neglects the "gate-keeping" function of the auction, which forces all participants to enter a contest at the outset and either bid what they are willing to pay, or risk losing the lease for placing a bid that is enough lower than their competitors that the Land Board elects to award the bid to another. As *East Side Blaine County* held, the "dominant purpose" of the auction clause is to ensure the maximum returns to the states. Auctions are thus held for a real reason, not just as show.

After remand, another auction was held, and at this auction Ingram bid ten dollars and Marvel bid two-thousand dollars. The Land Board again awarded the lease to Ingram. Marvel sued again, but the Land Board, while the case was in Idaho District court, settled with Marvel, agreeing to pay his attorney's fees and grant him the lease.¹⁶² It took several years and an Idaho Supreme Court decision, but the Lake Creek lease finally became Marvel's first successful lease.

2. *Idaho Watersheds Project II*

By the time *IWP I* was decided in 1996, Marvel had other problems. First, ranchers were now bidding against him, so the holding in *IWP I*, that a party had at least to bid to win a conflict auction, was of little immediate practical use to him. Further, in 1995, the legislature had passed Idaho Code section 58-310B, the so-called "anti-Marvel" bill, which made it functionally impossible to bid on a lease without promising to graze the land, something Marvel did not have any intention of doing.

Marvel's case against Idaho Code section 58-310B, or what I have called *IWP II*, concerned the constitutionality of requiring such a promise from bidders. Under the new statute, Marvel's applications were repeatedly rejected as "unqualified," and he never made it to auction.¹⁶³ Marvel argued that placing limitations on applicants to the bidding process disrupted the competitive nature of the auction and limited the discretion of the Land Board, by forcing the Land Board to accept only one class of applicants in the auction.¹⁶⁴

The court traced the authority of the legislature with regard to the auction clause through the Admissions Bill, and made particular note of the requirement that the Land Board secure the maximum

162. E-mail from Laird Lucas, attorney for Jon Marvel, to author. (March 3, 2003) (on file with author).

163. See *IWP II*, 133 Idaho 64, 65-66, 982 P.2d 367, 368 (1999).

164. Appellant's Opening Brief at 27-29, *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 64, 983 P.2d 367 (1998) (No. 24239).

long-term financial return from the lands. The court ended up ruling on trust principles, finding that the statute limits the discretion of the Land Board by forcing the Land Board to reject whole classes of bidders:

Section 58-310B removes much of the Board's broad discretion . . . by impermissibly directing the Board to focus on the schools, the state, and the Idaho livestock industry in assessing lease applications, all to the detriment of other potential bidders like IWP, which might provide "maximum long term financial return" to the schools, but not to the state and the Idaho livestock industry.¹⁶⁵

Ultimately, the ruling rested on the same principle that competitive bidding is a required component of the process. The "return" clause is invoked by the court to show that maximum returns can only be achieved if the Land Board has the largest possible population of bids to select from. If the Land Board's selection is narrowed to bids that were placed by those who can make it through the Idaho Code section 58-310B requirements, the maximum return can only be adversely affected. Again, the maximum return clause is not invoked to insist the Land Board select the high bidder, but rather to emphasize the reach and purpose of the auction clause. Merely holding an "auction" is not enough to ensure maximum returns: the auction must be open to all who may wish to bid. While the court did not explicitly invoke *Hammond*, its holding is an echo of *Hammond's* background conception of the competitive auction as a way to ensure that the property is offered for the maximum possible amount.

3. *Idaho Watersheds Project III*

Idaho Watersheds Project III was a companion case to *IWP II*: Marvel's application to bid for state lands leases had been disqualified under, he said, the same provisions of Idaho Code section 58-310B that had disqualified him in the auctions under consideration in *IWP II*.¹⁶⁶ The state argued that *Idaho Watersheds Project* had been disqualified from bidding not under Idaho Code section 58-310B, but based on "general land classification."¹⁶⁷ Without considering whether such an action would be constitutional, the court found that the Land Board had, contrary to the Board's assertions, in fact applied Idaho Code section 58-310B in disqualifying *Idaho Watersheds Project* from

165. *IWP II*, 133 Idaho at 67-68, 982 P.2d at 370.

166. *IWP III*, 133 Idaho 68, 69, 982 P.2d 371, 372 (1999).

167. *Id.* at 70-71, 982 P.2d at 374.

bidding on the leases.¹⁶⁸ The court quickly held that, because Idaho Code section 58-310B was unconstitutional, these leases as well must be auctioned again.¹⁶⁹

The case is interesting—and perhaps alarming for Marvel—for the reason it did not rule on the land classification issue, because this is precisely what Marvel now faces with the new Idaho Administrative Procedure Act regulations. The legislature has directed the Idaho Department of Lands to establish these “land classifications” and require bidders to abide by them. Thus, if the land to be bid on is classified as “grazing” land, the bidder will need to offer a grazing plan.

4. Afterthoughts on the Case Law

The results of the Idaho Supreme Court decisions, as I have argued, are not surprising. All of the decisions involving the auction clause, once the problem is seen clearly, are of a piece: the Land Board’s authority does indeed extend to determining what the “highest” bid is in a conflict auction, but it does not extend so far as to disturb the basic constitutional requirement that an auction be held. Marvel and his organization have been successful in this litigation because they have challenged the Land Board where it has altered or removed the competitive nature of the auction itself, either by limiting the class of people who may participate or by ignoring the entire proceeding. Seen this way, there is little substantive difference between what happened in *IWP I*, where the result of the auction was disregarded and the lease awarded to Ingram, and *East Side Blaine County*, where the Land Board elected not to hold a conflict auction and simply give the lease to the former leaseholder for his (lower) bid.

Similarly, there is little substantive difference between the results of the *IWP* cases surrounding Idaho Code section 58-310B and *Hammond*, where the bidders drew their names from a hat and bid in turn. As in *Hammond*, the competitive nature of the auction was poisoned when the class of participants was artificially limited. The Land Board has all the discretion in the world to discard bids from those bidders it sees as unfit, once the auction has taken place, but the simple *participation* in the auction process of even “unfit” bidders will necessarily drive up the bids of the other parties who, of course, do not know how the Land Board will ultimately rule.

It seems unlikely the court will abandon these basic principles—that an auction must occur, that its pool of potential bidders may not

168. *Id.*

169. *Id.*

be artificially narrowed—in what is almost certain to be the next chapter in the Idaho Watersheds Project litigation: a challenge to the Idaho Administrative Procedures Act regulations, which achieve in practice the identical result Idaho Code section 58-310B had sought to achieve.

IV. THE 2002 IDAHO ADMINISTRATIVE PROCEDURES ACT REGULATIONS

A. The Regulations

In March 2001 the State of Idaho adopted new administrative rules governing grazing and cropland leases.¹⁷⁰ The Department of Lands ("Department"), as before, oversees the details of applications and administration of the leases pursuant to Idaho Administrative Procedures Act ("IDAPA") 20.03.14.¹⁷¹ Subsection 020.01 of the new rules concerns applications and processing. It reads as follows:

Eligible Applicant. Any person may submit an application to lease state owned endowment land provided he has reached his eighteenth birthday, or if not eighteen (18) is married, is a citizen of the United States or has declared his intentions to become such, and is not indebted to the state of Idaho or delinquent on any payments to the state of Idaho. *To be eligible for a grazing or cropland lease, an applicant must intend to use the land for domestic livestock grazing or for cropping purposes, and must certify such.*¹⁷²

The section further requires applicants to submit a "grazing management proposal."¹⁷³

Should an applicant wish to lease designated grazing lands but use them for some other purpose, he must petition the Department of Lands to change the classification of the lease under section 030:

Petition. Any party may petition the Department to change the designated primary use of the endowment land. The petition shall detail the reasons such a change would be in the best long-term interest of the endowed institution and shall include an accurate legal description of the petitioned lands. The Department will consider such petition, along with sup-

170. IDAPA 20 (2003).

171. *Id.* at 20.03.14.

172. *Id.* at 20.03.14, Subsection 020.01 (emphasis added).

173. *Id.* at 20.03.14, Paragraph 020.01.d.

plementary information the Department deems appropriate, and revise the designation, if it believes such redesignation is in the best interest of the beneficiary institution. During the period a petition for redesignation is under consideration, the designated uses of the endowment land will continue.¹⁷⁴

What distinguishes the current regime from what the court struck down in *IWP II* is that here an applicant has an opportunity to make a case before the Department that he should be permitted to bid, despite his intentions not to graze the land; Idaho Code section 58-310B, by contrast, per se disqualified non-ranching bidders.¹⁷⁵ The new regulations are similar to the old, unconstitutional Idaho Code provisions, on the other hand, in that the new regulations work to limit the field of competitive bidders prior to the auction, something the court has never permitted when reviewing the auction or return clauses.

Scrutinized wholly from the perspective of the language the court used to strike down Idaho Code section 58-310B, the March 2002 regulations appear to satisfy the court's concerns. The problem, however, is that they still offend the constitutional regime in two ways. First, they limit the field of bidders, as mentioned, which adversely affects the competitive nature of the process, and is nearly guaranteed to result in lower returns for the schools. But more important, they also force the Department to make decisions *on incomplete information*. Because the applicant must petition the Department before he bids, the Department must make a determination about the "best use" of the land without knowing how much money the applicant is willing, likely, or going to pay for the land.

This is where the return clause begins to show its bite. The "best use" of the land, under the constitution, is by definition the use that will generate the "maximum long-term financial return." As I have shown, calculating the details of that long-term financial return is almost wholly left to the discretion of the Land Board. But as the court in *IWP II* explained, the Land Board must have the power to exercise this discretion unhampered by legislative limits. The problem in *IWP II* was that the Land Board was not permitted to consider bids by non-ranchers, even though it may have, theoretically, believed such a bid would yield a higher long term return. The key is the word "return." What matters under the constitution is the return. The current regulations force the Department of Lands (and the Land Board,

174. *Id.* at 20.03.14, Subsection 030.02.

175. IDAHO CODE § 58-310B(3)(b) (Michie 2002).

on administrative appeal) to make a decision about the qualifications of a bidder before they know what the "return" might be should the applicant be permitted to bid. The applicant may petition for another use, but the Land Board has no way to know, when he does so, what his bid may be. Thus *any* decision not to change the use and permit the applicant to bid *necessarily* implicates the "maximum long term financial return" clause—and does so in a way the court will not likely feel obliged to remain silent over.

Thus, while the Land Board may legitimately believe that grazing is the highest use for the land, their minds could certainly change if a non-ranching bidder offered, for example, two hundred times the amount of money the rancher was prepared to pay.

The new regulations are thus, I believe, unconstitutional for two reasons: they narrow the competitive field, which both *Hammond* and *East Side Blaine County* indicated is unconstitutional, and they restrict the ability of the Land Board to use its discretionary power, held unconstitutional in *IWP II*. While the regulations are a clever attempt to get around the *IWP II* court's concerns and still make life difficult for Jon Marvel, I predict he will prevail once again at the Idaho Supreme Court.

V. AFTERTHOUGHTS

The story of Jon Marvel's efforts to bid on school trust lands leases is a story of one man's crusade against a powerful and entrenched industry. Marvel would have joined the battle regardless what the Idaho Constitution said, but the constitution enabled him to win it. I find it sad that Idaho's elected officials have been so willing to support a system that permits ranchers to lease these public lands for what is literally pocket change, even when another bidder is willing to pay thousands for the same land. That the money goes to Idaho's schools, which, like all public schools, can use it, is sadder still. And that Idaho's former Superintendent of Schools was one of the most outspoken supporters of the ranching monopoly on these lands is saddest of all.

That Marvel has had to fight so hard and so long for such a little thing is not a positive commentary on Idaho's political system, either. Idaho's constitution, particularly as interpreted by the first case I examined, *Balderston v. Brady*, set the stage for every one of Marvel's auction clause victories, and the remaining case law only solidified his position. The fact the Land Board elected to fight Marvel so hard and so often suggests they hoped the Idaho Supreme Court would share its favoritism for Idaho's powerful and rewrite the law to protect the ranching monopoly forever.

As it is, the Idaho Supreme Court elected to stand by its century-old analysis of the auction and return clauses, and Idaho's legislature still hasn't gotten the message. The legislature persists in mucking about with the auction, this time by writing administrative rules that limit who may bid, even though the auction clause is the one part of this whole story that seems the least likely to budge. I have never figured out why the Land Board doesn't simply let Marvel place his bids and then deny him the lease based on their "maximum long term financial return" authority. Perhaps it is because they fear Marvel will always be outbidding the ranchers two-hundred to one, and their instincts tell them they can deny those numbers only so long. More likely it is because they know Marvel *will not* outbid the ranchers two-hundred to one, because his simple presence in the auction will force the ranchers to raise their bids to realistic levels, rather than the ten and twenty and thirty dollar bids they are accustomed to placing. The auction clause, they seem to believe, has to go because, thanks to Marvel, it is finally accomplishing exactly what the framers intended it to do—it is achieving the maximum long-term financial return on Idaho's school trust lands.

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* J.D. Expected May 2004, University of Idaho College of Law, B.A. English, History 1983, University of Rochester. I would like to thank Laurene McLane. Mistakes herein are mine, but any successes I can claim are owed very much to her.