



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 8, 2009

TO Members, Management Council, Joint Appropriations Committee and Capital Finance and Investment Committee

FROM Dave Gruver, LSO

SUBJECT Treatment of capital gains and losses

Treasurer Meyer provided you and the elected state officials with a memo addressing how his office would be handling capital gains and losses for Wyoming investments in the future. The treatment is pursuant to an interpretative policy adopted by the Treasurer on April 29, 2009. While not adopted as a rule, the issue is of enough significance that it deserved comment from LSO in our view. The body of the following is written without great detail or citation to legal authority; additional detail explaining the conclusions and containing legal authority is contained in endnotes.

The Treasurer raised the issue of treatment of capital gains and losses at the Capital Finance and Investment Committee meeting on April 9. At that time LSO advised the Committee the issue is fairly complex and that whatever decision the Treasurer made would be subject to review by the Committee over the interim and the Legislature at the next session. LSO's role is to inform the Committee regarding the background, ramifications of the implementation of the decision and options the Committee and Legislature have to change the statutes should they wish, either to confirm a decision with more specific statutory language or to modify the decision. Subsequent to that meeting the Treasurer provided LSO an opportunity to comment on the adoption of the policy prior to it being announced. Comment was provided to the Treasurer, although as noted in the reply to the Treasurer's email it was more of an outline of LSO's comments for the Committee.¹

1. Interpretative rule or policy

The first issue is what is the legal effect of the internal policy or "interpretative rule."² Interpretative rules are not the equivalent of a duly promulgated rule or regulation having the force of law. They are statements issued to advise the public of the agency's construction of the law it administers. Barring legislative action or subsequent change by the Treasurer's Office this policy will apply to the current fiscal year and future fiscal years.

2. Underlying Constitutional and Statutory Authority

The next issue is whether the policy is supported by statutes and underlying constitutional provisions. Although not involved when the previous policy was first initiated, I had spoken with Treasurer Lummis regarding the issue and my conclusion under the statutes then existing, was that a total netting of all income on an annual basis made sense; with income being all realized gains and losses, interest and dividends. Different legislative committees touched on the issue at various times, but never requested a bill draft taking a contrary position on the issue. In providing comment to Treasurer Meyer my conclusion was that the current statutes are not prescriptive enough to support a statement that either the past approach or the forthcoming approach is unsupportable. The change does provide an opportunity for legislative consideration and a determination of whether this is the result the Legislature wishes. The following provides an outline of issues raised.

a. Inviolable -meaning

The permanent mineral trust fund is "inviolable" under the Constitution: "The fund, including all monies deposited in the fund from whatever source, shall remain inviolable."³ The issue of what "inviolable" means is pertinent because the new policy will net capital losses only against capital gains and not against all income generated by the fund. While under either policy there is the potential for the "principal" to be diminished, under the new policy interest and dividend income will not be used to "offset" realized capital losses, thus an increased potential for the "corpus" to be viewed as diminished, at least for that fiscal year.⁴

"Inviolable" is used but undefined by the Constitution and not explicitly defined by statute, although used in the establishment of nine different "inviolable" funds or accounts.⁵ No Wyoming case has been found which specifically defines "inviolable" in the context of permanent state trust funds. Most speak of the term in light of the right to a jury trial being inviolable or a jury's award of damages being inviolable. Those cases use words such as not disturbed, not hampered, or not interfered with, in discussing inviolable. The interpretations are consistent with the general dictionary definitions of inviolable.⁶

One case does reference the use of "inviolable" in the Permanent Wyoming Mineral Trust Fund. In addressing whether the record retention requirements of a state agency effectuated a statute of limitation for collection of certain taxes, and holding it did not, the Court stated: "A portion of the severance tax is constitutionally directed to a permanent fund account to be saved in perpetuity for the citizens of the state. ...What is inviolable from expenditure surely cannot be considered administratively available to be forgiven if undisclosed and unpaid for a limited period."⁷ While certainly not definitive of the issue, the use of the phrase, "inviolable from expenditure" at least calls for pause.

The Constitution also previously used "inviolable" in describing the Permanent Common School Land Fund. Article 7 § 6 of the Constitution provided:

"All funds belonging to the state for public school purposes, the interest and income of which only are to be used, shall be deemed trust funds in the care of the state, which shall keep them for the exclusive benefit of the public schools, and shall make good any losses that may in any manner occur, so that the same shall remain forever inviolate and undiminished. None of such funds shall ever be invested or loaned except on the bonds issued by school districts, or county bonds of the state, or state securities of this state, or of the United States, or on first mortgages on farm lands or such other securities as may be authorized by law.

The provision has been amended to now read:

All funds belonging to the state for public school purposes, the interest and income of which only are to be used, shall be deemed trust funds in the care of the state, which shall keep them for the exclusive benefit of the public schools. The legislature shall provide by law for the investment of such trust funds.

Under the earlier "inviolate and undiminished" language, in determining whether general tax lien statutes provided for a lien of taxes superior to a lien of the state resulting from the use of school permanent land funds to purchase of bonds of the taxpayer, the Court held the tax lien was inferior based upon the statutes in existence when the state purchased the bonds. In speaking of the inviolate nature of the CSPLF, the Court stated it was hard to conceive of stronger language providing for the preservation of school funds than that used in Article 7, § 6 of the Constitution, when it states that the funds "shall remain forever inviolate and undiminished."⁸ Note the provision also at that time required the state to make good any losses sustained by the CSPPLF.⁹

b. Inviolate and sales at a loss

The Treasurer noted in the memo provided to the Capital Finance Committee that a 1982 Attorney General opinion states that "inviolate" does not mean that investment losses have to be made whole. That opinion addressed the direct question of whether the State Treasurer had inherent authority to sell investments made from certain permanent funds at a loss. The Attorney General opined there was no such authority except in two limited cases, the first being if necessary to avoid further permanent loss of principal. The Opinion noted that the proposed constitutional amendment and enactment of legislation providing for investment in common stocks "might implicitly (if not explicitly) confer the authority to sell at a gain or loss of principal because of the different nature of the investments." At the same time, that opinion implied at one point that "inviolate" might mean more than "cannot be appropriated." For example, in speaking of the CSPLF and the Act of Admission, it states "neither is there any requirement in that Act that these funds remain inviolate, except the references to using interest only." The Opinion drew upon the change in the Constitutional language for the CSPLF and concluded: "For purposes of this analysis one of the changes intended was to allow recognition of the interests of both the income beneficiaries and remainderman. And recognition of both interests may involve sales of investments at a gain or loss of principal."¹⁰ The opinion stated that the Agricultural

College Permanent Land Fund was subject to different rules. It required pre-existing statutory authority and an appropriation sufficient to replenish the lost capital.¹¹

Thus the opinion does support the Treasurer's conclusion that the word "inviolable" standing alone does not mean that selling investments at a loss requires the corpus to be made whole.

On the other hand, a 1978 Attorney General Opinion, in addressing the PWMTF in the context of loans from the fund took a different view of "inviolable." Speaking of the need to retain the "capital asset status of the fund," the Opinion stated if less than the full faith and credit of the political subdivision borrower were pledged to repayment, the Legislature then has a moral obligation to replace monies in the "inviolable" trust fund. Either the State or the school district had to support repayment of the loans from the PWMTF with its general obligation to repay the PWMTF (and the State could not do so under prior case law).¹²

The 1978 opinion was not mentioned in the 1982 opinion. From that and the differing conclusions, one can infer that there is a difference between bad loans which lead to loss of corpus and bad investments which lead to at least a lower valued corpus for some period of time. But that inference is tempered somewhat by the recognition that the ability to invest permanent funds in stocks did not come into existence until after both formal opinions were written.¹³

Loan loss reserves have been enacted by statute for joint powers loans, water projects and farm and irrigation loans from permanent funds.¹⁴ No such reserves have been established explicitly for investment losses in buying and selling stocks.

In the case of investments, statutes have been enacted regarding sales at a loss, but the explicit requirement to make any losses whole from other income was amended and later repealed over the years.

The first sales at loss statute was enacted in 1986.¹⁵ While it is not clear from the introduced and enacted legislation whether the goal was to limit or authorize sales at a loss, the statute certainly limited the conditions under which investments could be sold at a loss.¹⁶ They were authorized only:

1. In the case of a loss of principal - the loss from the sale must be offset by corresponding gain in same year; or
2. In the case where the amount paid as principal or premium exceeded the amount realized, then all of the following had to be met:
 - a. Income from new investment must exceed what would have been realized from old;
 - b. The principal must be recovered out of income;
 - c. The recovery must be within the shorter term of the original or exchanged investment; and
 - d. Recoveries must be recorded on a systematic basis applied consistently from year to year.

The 1986 law also required reporting of total results and individual sales at losses. In the same law "income" was defined (which is discussed below).

Thus the 1986 law was very restrictive and contained a clear requirement for protection of corpus, if selling at a loss.

In 1989 the sale at a loss law was amended:

1. The requirement to recover in the shorter term as noted in 2(c) above was repealed;
2. The requirement to offset by a corresponding gain was amended to allow the sale or exchange if it "tends to maximize total return on the funds invested".¹⁷

The provision was changed again in 2000.¹⁸ That Act repealed completely the requirements for a specific offsetting gain, that principal be recovered out of income, and that the recoveries be recorded on a systematic basis applied consistently from year to year. It also repealed the requirement to have individual sales at a loss transactions reported annually. The law today reads basically as it did after the 2000 Act. Currently the law reads:

The state treasurer directly, or investment managers of state funds, may effect sales or exchanges of investments of state funds, whenever the sale or exchange will result in a loss of principal, if the sale or exchange tends to maximize the total return on the funds invested and is otherwise consistent with implementation of the state investment policy established by the board under W.S. 9-4-716.¹⁹

Thus it appears there were intentional changes moving from a transaction by transaction, very limited and prescriptive authority for selling at a loss, to a more general authority conferred on the Treasurer, based upon a total return concept, and clearly allowing individual sales at a loss of principal. There were no new corresponding provisions for making up sales of losses to principal by income gains with this transition.

This statutory metamorphosis supports the conclusion that at least the Legislature did not view the word "inviolate" standing alone, as meaning that investment losses must be made whole. However, the definition of "income" discussed below is pertinent to this statement.

c. Inviolate - conclusion

The best conclusion seems to be that "inviolate" standing alone does not mean that investment losses suffered by the corpus must be made whole. One of the more compelling arguments supporting this conclusion, at least for the PWMTF, is the prior language of Article 7, section 6 relating to the common school permanent land fund and the Act of Admission and other federal law language relating to the Agricultural College Permanent Land Fund. The first originally contained the phrases "inviolate and undiminished" and "shall make good any losses that may in

any manner occur." If "inviolable" were read as requiring the making good of any losses, the additional language would be mere surplusage. Further, having this language in the Constitution when the PWMTF amendment was proposed and adopted clearly gave the Legislature a template to use had it intended that investment losses to be PWMTF were required to be made whole.²⁰ Like the CSPLF language, the Agricultural College Act of Admission and related federal legislation also contained language that the state shall make good on any losses that may occur so the fund shall remain "forever undiminished." This conclusion must be read with a number of caveats. The controlling language of each permanent fund must be reviewed, including Constitutional provisions, the Act of Admission and other federal legislation. Additionally, the legislative history surrounding the establishment of the funds should be reviewed. Finally, authority such as the 1978 Attorney General Opinion regarding obligations, legal or moral, to make whole "inviolable" funds from loan losses must be reconciled with the conclusion.

d. Income

The permanent mineral trust fund constitutional provision requires that:

The monies in the fund shall be invested as prescribed by the Legislature and all income from fund investments shall be deposited by the State Treasurer in the general fund on an annual basis.

Under the prior policy all additions to a fund, whether from interest earnings, dividends or realized capital gains were "netted" against all realized reductions to the fund. Under the new policy realized capital losses will only be netted against realized capital gains, when those losses exceed gains in any fiscal year a debit will be carried forward to be taken against future year's earnings. This at least raises the question of whether "all income" from fund investments is being deposited to the general fund on an annual basis. The answer might well be as much of an accounting issue as a legal one.

"Income" is not defined by the Constitution. It is defined a number of times in statute, but not in the public funds statutes and only in one instance, the Wyoming Uniform Principal and Income Act, which might have relevance in this situation.²¹

When the sales at a loss statute was initially enacted in 1986, "income from state investments" was defined:

(i) "Income from state investments" means interest increased by discount earned and gain realized on sale and reduced by premium and loss on sale, except those losses restored as provided in this section;²²

Although the exact phrase was not used in the 1986 Act, when the full Act is read with this definition, it appears to support the entire netting of realized losses against all income. Further it did not allow a sale at loss of principal unless there was income from some investment to make principal loss whole. Even with the 1989 change to "tends to maximize total return" in the sales

at a loss statute, this definition of income was retained. It was retained again in the 2000 revisions to state investment statutes, even while phrases referencing "income" were repealed. The provision was repealed with the rewrite of the state investment statutes in 2008.²³

Without statutory definition, one can turn to case law for guidance. A case addressing the CSPLF provides some insight, if not binding precedent.²⁴ The issue presented was whether royalties from mineral leases on previously unopened mines on school trust lands were to be considered income to the income fund or proceeds to be deposited to the permanent fund. The Court drew a fine distinction between "rent," which under Article 7, section 7 was specifically designated to flow to the income fund, and "proceeds," which were to flow to the permanent fund. In holding that "rent" meant only "ordinary rent" and did not include royalties received from such leases, the Court determined "income" and "rent" were closely related, as were "sale" and "lease". The former resulting from general, ordinary use and accruing annually; the latter used for effecting a similar purpose, namely, the disposal of part of the corpus of the land. The Court noted the broad intention is manifest in that the permanent fund shall remain inviolate, and it should not give too narrow a construction to the methods and means by which that is designed to be accomplished. The Court specifically rejected an argument that royalties are income since they are income within the meaning of income tax laws. It noted that those laws are intended to tax profits, which may arise from the disposal of principal. Oil and gas while in situ are part of the realty, part of the corpus of the land. When a portion of it is taken away, the proceeds necessarily arise out of the corpus. Once the mineral is taken and disposed of it is gone, never to return. The income fund had the right to have the royalties invested and to receive the interest thereon, but the principal belongs to the permanent fund.

The above analysis seems somewhat applicable to permanent funds consisting of assets converted into cash from prior land sales or from a severance tax imposed when the mineral is removed; i.e., the PWMTF being an attempt to preserve at least part of the capital asset status of the State's minerals.²⁵ To the extent assets purchased with corpus funds reflect the corpus, those assets, including at least increased value of those assets, arguably belong to the permanent fund. The case also appears to provide support for the argument that realized capital losses should be netted only against realized gains; with dividends and interest being the annual "ordinary" rent or "annual" return from investment of "royalties" in the analogy. Again this conclusion must be tempered a bit with the recognition of other Wyoming case law drawing a distinction between the constitutional trust duties imposed on proceeds from the sales of school lands and no such constitutional (although a statutory) duty being imposed on the lands themselves; i.e., proceeds from sales of a corpus asset are not always necessarily subject to the same treatment as the original asset.²⁶

The repeal of the statute defining income from state investments appears to have provided less legislative direction to the Treasurer's Office in determining what is income. The statute existed for over twenty years unchallenged, thus there is some question as to whether the CSPLF case discussed above is applicable to act as a limitation on what the Legislature may do in defining income for purposes of the various permanent funds. Again, additional research is required.

WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*

e. Spending policy statutes

The spending policy statutes also need to be considered. The Legislature has enacted a spending policy for the PWMTF, CSPLF and the higher education endowments. Overly simplified, "earnings" in excess of the spending policy amount (5% of the previous five (5) year average market value of the fund) are deposited to a reserve account for each of the funds. Once the reserve accounts reach a certain amount (75% of the applicable spending policy) excess funds "spill over" to the corpus. The spending policy statute provides:

- (a) The purpose of this section is to establish a spending policy for earnings on permanent fund investments to provide, in descending order of importance:
 - (i) Consistent, sustainable flow of earnings for expenditure over time;
 - (ii) Protection of the corpus of the permanent funds against inflation; and
 - (iii) To the extent practicable, increases in earnings available for expenditure to offset the effects of inflation.

To the extent the provision goes beyond the spending policy developed in the section (and it is not clear the language does) it raises the issue of which policy best supports the highest priority stated: consistent, sustainable flow of earnings for expenditure over time.²⁷

Conclusion

The new policy actually provides the Legislature and its Committees with additional flexibility this upcoming session. Under the new policy there will be additional income, with less being retained in the permanent funds; thus the Legislature can simply redeposit that additional income to the corpus if that is determined most prudent.

At this point, and perhaps ultimately, Treasurer Meyer's comments to the Capital Finance Committee might be as accurate as anything that can be provided – the statutes appear to "dance around" the issue. Further review of the state and federal laws and state Constitution creating the various funds is required and each fund must be analyzed separately.²⁸ Research will be conducted in coordination with the State Treasurer's Office as requested by the Capital Finance Committee. The results of that research will be sent when available.

Cc: Treasurer Meyer
Dan Pauli

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¹ When this policy was raised before the Capital Finance Committee in April, LSO staff informed the Committee the issues underlying the decision involved some fine distinctions, were complex and would require considerable research. The Committee set its next meeting for late summer to accommodate that research need. Some quick, but fairly in depth, research was done prior to providing comment to the Treasurer and in preparation of this memo. But complete research has still not been undertaken. While the overall conclusions of this memo are unlikely to change, further research will certainly lead to refinement of some of the views expressed. The importance of the issues and change of policy were significant enough to call for this preliminary, if not completely researched, memo in my view.

² The Treasurer's memo states he has adopted the attached "interpretative rule or policy as permitted by the Wyoming Administrative Procedures Act." The attachment heading designates it as "interpretative policy". The LSO is treating this as an internal policy. The Wyoming Administrative Procedure Act (WAPA) provides:

"Rule" means each agency statement of general applicability that implements, interprets and prescribes law, policy or ordinances of cities and towns, or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(A) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;...W.S. 16-3-101(b)(ix)

The statute also uses, but does not define, the term "interpretative rule" when setting forth the procedural requirements of the WAPA:

Prior to an agency's adoption, amendment or repeal of all rules other than interpretative rules or statements of general policy, the agency shall:... W.S. 16-3-103(a).

While undefined by statute, Wyoming case law does address the issue of interpretative rules. The demarcation between a "substantive rule" and an "interpretative rule" is not absolutely clear. For example, the Wyoming Supreme Court has held "...rulemaking in accordance with the Wyoming Administrative Procedure Act is necessary when a proposed action of an agency is substantive or legislative, as opposed to interpretive. ...A substantive/legislative rule is one affecting individual rights and obligations...[a] ...legislative rule ...[is] defined as [t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." In re Bessmer Mtn., 856 P.2d 450, 453 (Wyo. 1993)(in part quoting Mountain States Legal Foundation v. Hodel, 668 F. Supp. 1466 (D. Wyo. 1987)(citations omitted). From the second part of this statement one might conclude that a rule "interpreting" law and proposing to do so for the future is a substantive or legislative rule. Yet other Wyoming cases make clear that not all "interpretations" of law rise to the level of a substantive rule. "Administrative pronouncements such as interpretive rules and general statements of policy do not require the same public participation in their formulation as do substantive rules. This is so because interpretive rules and general statements of policy do not establish binding norms which are finally determinative of anyone's rights. At most, they merely repeat or emphasize an obligation already existing in a statute." Wyoming Mining Ass'n v. State, 748 P.2d 718, 724(Wyo. 1988).

WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*

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Perhaps a better explanation of the difference is found in the quotation from Battlefield, Inc v. Neely, 656 P.2d 1154, 1159 (Wyo. 1983): "A substantive rule is the administrative equivalent of a statute, compelling compliance with its terms on the part of those within the agency ambit. Substantive rules are issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations. An interpretative rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. Interpretative rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers." (Footnotes omitted.) (Quoting Schwartz, Administrative Law, § 58, p. 154). Interpretative rules are not the equivalent of a duly promulgated rule or regulation having the force of law. In re Parental Rights of GP, 679 P.2d 976 (Wyo. 1984).

While the LSO form for rule reviews, (apparently since the genesis of LSO), includes "legislative," "procedural" and "interpretative" as types of rules being reviewed, the provisions of title 28 addressing the LSO rule review process, defines "rule" by cross referencing the definition found in the APA and quoted above. That excludes from the definition of rule "statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public." This announcement of the Treasurer's intent does not appear to affect the rights or procedures available to the public and can be viewed as a statement of policy, not as a rule, and thus is not subject to the public notice and hearing process or the LSO/Management Council rule review process under title 28.

³ Wyoming Constitution, Article 15, Section 19. Note, the phrase "including all monies deposited in the fund from whatever source" was added by Constitutional amendment in 2006, following an Attorney General's opinion that only the Constitutionally required 1.5% severance tax was "inviolable".

⁴ The Treasurer noted in reply to LSO comments that capital losses could be viewed as a diminution of corpus at least during a fiscal year, but a debit from capital losses during the year might also be viewed as an accounts receivable so long as there is a source of replacing the loss in future years in this case from capital gains such that over time the books would balance.

⁵ The term is used three times in the Constitution. In addition to the Permanent Wyoming Mineral Trust Fund in Article 15, § 19, *see* Article 15, § 20: The legislature may from time to time place monies into endowment funds for higher education scholarships and for improving the quality of higher education, which funds shall remain inviolate. *See also*, Article 1, § 19: The right of trial by jury shall remain inviolate in criminal cases.

"Inviolable" is used in connection with various funds established by law. *See:*

W.S. 9-2-2304(b) The monies deposited into the **Wyoming cultural resources trust fund** established pursuant to this section are inviolate and constitute a permanent or perpetual trust fund.

W.S. 9-4-1203(b) Funds deposited into the **Wyoming tobacco settlement trust fund** established pursuant to subsection (a) of this section are intended to be inviolate and constitute a permanent or perpetual trust fund which shall be invested by the state treasurer as authorized by law and in a manner to obtain the highest return possible consistent with preservation of the corpus.

W.S. 9-15-103(a) Funds deposited within the **[wildlife and natural resource] trust account** are intended to be inviolate and constitute a perpetual trust account which shall be invested by the state treasurer as authorized under W.S. 9-4-715(a), (d) and (e) and in a manner to obtain the highest return possible consistent with preservation of the account corpus.

W.S. 18-7-204(b) Each **public library** shall enter into an agreement with its foundation under which the foundation shall manage the **matching funds** received under subsection (a) of this section and under W.S.

WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*

18-7-205 in the same manner as other permanent endowment funds are managed by its foundation, including the permanent investment of funds, maintenance of the fund corpus as inviolate and the expenditure of fund earnings for endowment purposes only.

W.S. 19-7-401(b) The monies deposited into the [**military assistance**] trust fund established pursuant to this section are inviolate and constitute a permanent or perpetual trust fund. The monies shall be transmitted to the state treasurer for credit to the trust fund and shall be invested by the state treasurer as authorized under W.S. 9-4-715(a), (d) and (e) in a manner to obtain the highest return possible consistent with the preservation of the corpus.

W.S. 21-16-1104(b) Each **community college district** shall enter into an agreement with its foundation under which the foundation shall manage the **matching funds** received under subsection (a) of this section in the same manner as other permanent endowment funds are managed by its foundation, including the permanent investment of funds, maintenance of the fund corpus as inviolate and the expenditure of fund earnings for endowment purposes only.

W.S. 21-22-101(b) Funds deposited into the **Wyoming education trust fund** established pursuant to subsection (a) of this section are intended to be inviolate and constitute a permanent or perpetual trust fund which shall be invested by the state treasurer as authorized under W.S. 9-4-715(a), (d) and (e) and in a manner to obtain the highest return possible consistent with preservation of the corpus. Any interest earned from investment of the corpus of the trust fund shall be credited by the state treasurer into a separate account and distributed in accordance with W.S. 21-22-102.

W.S. 23-1-501(f) A trust account separate and apart from the trust **account** established under subsection (d) of this section is created **within the Wyoming game and fish fund**. The account shall consist of those funds appropriated or designated to the account by law or by gift from whatever source. Funds deposited within the account are intended to be inviolate and constitute a permanent or perpetual trust account which shall be invested by the state treasurer as authorized under W.S. 9-4-715(a), (d) and (e) and in a manner to obtain the highest return possible consistent with preservation of the account corpus.

W.S. 35-1-1004(b) Each **critical access hospital** shall enter into an agreement with its foundation under which the foundation shall manage the **matching funds** received under subsection (a) of this section in the same manner as other permanent endowment funds are managed by its foundation, including the permanent investment of funds, maintenance of the fund corpus as inviolate and the expenditure of fund earnings for endowment purposes only.

⁶ Webster's new World College Dictionary, 2005, defines "inviolate" as not violated; kept sacred or unbroken.

⁷ Union Pac. Resources Co. v. State, 839 P.2d 356 (Wyo. 1992).

⁸ Alamo Drainage District v. Board of County Commissioners, 60 Wyo. 177, 191 (Wyo. 1944).

⁹ The Court subsequently drew a distinction between the trust owed duty for the proceeds from land sales and the duty owed as to the lands. "Although Wyoming's Constitution contains a declaration of trust as to the proceeds from the sale of the lands, Wyo. Const. Art. 7, §§ 2, 6, there is no similar declaration as to the land itself as in the states listed above. The delegates would have had available to them the specific trust language of constitutions such as Colorado's, Oklahoma's, Idaho's and Washington's. It is also significant to note in this regard that the Wyoming Constitution, drafted in September 1889 and adopted by vote of the territorial citizenry in November 1889, was available for review by Congress when it passed the Wyoming Act of Admission in July of 1890. Just as it was significant to the *Branson* court that Colorado, immediately after passage of the Colorado Enabling Act, declared in its constitution that the lands were held in trust, so it is significant that Congress passed the Wyoming Enabling Act knowing that

the new Wyoming Constitution limited the declaration of trust to proceeds from the sale of the lands." Riedel v. Anderson, 70 P.3d 223, 232 (Wyo. 2003).

¹⁰ Wyo. Atty. Gen'l Opinion 82-18 at 13. Even with the change to the CSPLF language, the Opinion noted: "Despite the deletion of the underscored language, any attempt to invade the corpus of the Common School Permanent Land Fund, e.g., by direct appropriation of principal for current expenses of the common school, would violate Section 7 of the Act of Admission."

¹¹ . Id. at 14-15. "By virtue of the interplay between this Act of Congress, the Act of Admission, and the State Constitution, securities purchased with funds [Agriculture College Permanent Land Funds] created from the sale of lands granted by Section 10 of the enabling act may not be sold at a loss unless there is (1) pre-existing State statutory authority to sell at a loss, (2) pre-existing statutory authority to replenish the lost capital, and (3) a pre-existing appropriation sufficient in amount to replace the lost capital."

¹² Wyo. Atty. Gen'l Opinion 78-28 at 12.

¹³ The ballot proposal allowing such investments was coming before the voters when the 1982 Opinion was rendered, but it did not pass until 1984 and then only for retirement funds. Permanent funds were authorized to be invested in stocks by Constitutional amendment in 1996.

¹⁴ *See*, W.S. 11-34-202 and W.S. 16-1-110.

¹⁵ 1986 Wyo. Sess. Laws, Chpt. 46. The title of the Act provided in part "allowing state investments to be sold at less than acquisition cost within certain limitations".

¹⁶ Forming part of the background for the 1986 Act was the 1982 Attorney General Opinion that the State Treasurer had no inherent authority to sell at a loss, unless within one of the exceptions. Treasurer Meyer noted in reply to LSO comments that the 1986 statute was probably enacted as a result of his work for LSO when then state treasurer Witzemberger sold bonds at a discount and planned on replacing the loss over several years from future gains. Based upon the language of the enactment, that well could have been the impetus, but further review would be necessary to confirm the legislative intent.

¹⁷ 1989 Wyo. Sess. Laws, Chpt. 186. The title of the Act provided in part "modifying the conditions under which the treasurer can sell or exchange securities at a loss".

¹⁸ 2000 Wyo. Sess. Laws, Chpt. 28.

¹⁹ W.S. 9-4-717(c).

²⁰ This exact reasoning was used by the Wyoming Supreme Court in the school lands trust case. *See Riedel v. Anderson*, 70 P.3d 223 (Wyo. 2003), endnote 9, *infra*.

²¹ W.S. 2-3-801 through 2-3-834.

²² 1986 Wyo. Sess. Laws, Chpt. 46; codified at W.S. 9-4-707(a)(i).

²³ The accompanying Treasurer's comment was that the term was not used in the draft legislation. The comment was correct, the phrase was not used. *See*, 08 LSO 145.W3.

WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*

²⁴ State v. Snyder, 29 Wyo. 163 (Wyo. 1923).

²⁵ See Wyo. Atty. Gen'l Opinion 78-28 at 11-12.

²⁶ Riedel v. Anderson, 70 P.3d 223 (Wyo. 2003), endnote 9, *infra*.

²⁷ To the extent any funds are recognized as "income" and flow to general fund, whether those funds end up back in the PWMTF corpus through the spending policy mechanism or some other legislative appropriation, they are then inviolate trust funds not prior capital gains, interest or dividends. See, Article 15, § 19 "...including all monies deposited in the fund from whatever source, shall remain inviolate". The underline phrase was added by 2006 amendment.

²⁸ In addition to the applicability of the Wyoming Uniform Principal and Income Act and other statutes cited above, there is some question of the application of the Uniform Prudent Management of Institutional Funds Act enacted in the 2009 session. No research has been conducted by the LSO to date on this last issue, but it has been raised as another item to review.