

May 9, 2003

No. 8279

This opinion is issued in response to a question from Ann Hanus, Director of the Oregon Division of State Lands, concerning the payment of expenses of managing state lands from moneys constitutionally dedicated to the Common School Fund.

QUESTION PRESENTED

To what extent may the State Land Board (Board), and the Division of State Lands (DSL or Division) acting pursuant to the Board's authorization, pay the expenses of managing state lands from moneys constitutionally dedicated to the Common School Fund (CSF or Fund)? Specifically, to what extent may they use such moneys to pay the expenses of managing state forest lands dedicated to the Fund by the Oregon Constitution, Article VIII, section 2(1)?

ANSWER GIVEN

Article VIII, section 2(2) distinguishes between "management" expenses and the specific subset of "operating" expenses. The Board, and DSL as authorized by the Board, may use constitutional principal in the Fund to pay for all the expenses, including operating expenses, of managing Article VIII, section 2(1) forest lands. They also may use income earned from investing the Fund's constitutional principal to pay the operating expenses associated with managing those lands.

DISCUSSION

To identify the extent of the authority of the Board and DSL to expend constitutionally dedicated CSF moneys to manage Article VIII, section 2(1) forest lands requires understanding the terms used in Article VIII, section 2 as it currently appears in the Oregon Constitution. Because the people have amended section 2 through the referendum process, we first set out the method of analysis used by the Oregon Supreme

Court for interpreting referred constitutional measures. We then explain the distinction between the two constitutional authorizations to pay expenses, one from principal and the other from income derived from the investment of that principal.

I. Interpreting Constitutional Provisions Approved Via Referendum

In interpreting a constitutional provision approved through the referendum process, we apply the method of analysis outlined by the court in *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). We first look at the text and context of the provision to determine the intent of the people, giving words of common usage their plain, natural and ordinary meaning. *Id.* at 611. An analysis of the text of the referred provision includes relevant case law interpreting that text. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 61, 11 P3d 228 (2000). The context of a constitutional provision approved by ballot measure includes related ballot measures before the people at the same election and related constitutional provisions that were in place when the provision at issue was approved. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994); *Stranahan*, 331 Or at 62 n15. If the people's intent is clear from the text and context, the search ends there. The Oregon Supreme Court, however, is unlikely to conclude analysis of a referred measure at the first level of review. *Stranahan*, 331 Or at 64.

The second level of review is an examination of the history of the referred provision. The history of a referred constitutional provision includes information available to the people at the time the measure was approved that discloses their understanding of the measure. *Ecumenical Ministries*, 318 Or at 560 n 8. Sources of such information include the ballot title, explanatory statement and arguments for and against the measure included in the Voters' Pamphlet as well as contemporaneous news reports and editorials on the measure. *Id.* at 560 n 8. The extent to which a court will consider these sources of information may depend on their objectivity, as well as their disclosure of the people's understanding. *Stranahan*, 331 Or at 65, *citing LaGrande/Astoria v. PERB*, 284 Or 173, 184 n 8, 586 P2d 765 (1978).

II. Constitutionally Dedicated Moneys in the Fund: Principal and Income

Article VIII, section 2(2) refers to the constitutionally dedicated moneys in the Fund and states the uses for which the Board may expend them:

All revenues derived from the sources mentioned in subsection (1) of this section shall become a part of the Common School Fund. The State Land Board may expend moneys in the Common School Fund to carry out its powers and duties under subsection (2) of section 5 of this Article. Unexpended moneys in the Common School Fund shall be invested as the Legislative Assembly shall provide by law and shall not be subject to the limitations of section 6, Article XI of this Constitution. The State Land Board may apply, as it considers appropriate, income derived from the investment of the Common School Fund to the operating expenses of the State Land Board in exercising its powers and duties under subsection (2) of section 5 of this Article. The remainder of the income derived from the investment of the Common School Fund shall be applied to the support of primary and secondary education as prescribed by law.

Moneys constitutionally dedicated to the Fund originate from the sources listed in Article VIII, section 2(1).^{1/} Article VIII, section 2(1) dedicates the proceeds from these sources to the Fund and section 2(2) likewise dedicates the revenue. Once the proceeds and revenue from the section 2(1) sources are deposited in the Fund, they are part of the constitutional principal of the Fund.^{2/} The income derived from the investment of this principal, if reinvested in the Fund as provided by ORS 273.105, also becomes part of the Fund's constitutional principal. The portion of income that is not reinvested in the Fund may be distributed for the support of the common schools or used to pay operating expenses as described below. The extent to which the Board and DSL may expend constitutional principal and income on the expenses of managing Article VIII, section 2(1) forest lands is controlled by the terms of Article VIII, section 2(2).

III. The Board's Authority to Pay *Management* Expenses with CSF Constitutional Moneys

Two provisions in Article VIII, section 2(2), address the Board's authority to pay certain expenses. The first of the two provisions was added in 1968. It states:

The State Land Board may expend *moneys in the Common School Fund* to carry out its powers and duties under subsection (2) of section 5 of this Article (emphasis added).

Because this statement of authority in section 2(2) precedes the statement authorizing the Board to invest unexpended moneys, we conclude that the reference to "moneys in the Common School Fund" is to Fund principal, exclusive of the income earned from investing that portion of the moneys that remains unexpended. Thus, the Board's authority discussed in this portion of our analysis applies only to expenditure of constitutional principal in the Fund.

The statement of the Board's "powers and duties" under section 5(2) was also added to Article VIII in 1968. These powers and duties are to "manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management." Article VIII, section 2(1) forest lands are lands under the Board's jurisdiction.^{3/} The Oregon Supreme Court has concluded that "[t]he purpose of the 1968 constitutional amendment to Article VIII was to authorize the State Land Board to expend moneys in the common school fund to carry out its land management activities." *Johnson v. Dept. of Revenue*, 292 Or 373, 381, 639 P2d 128 (1982). Relying on legislative history for the measure referred to the people, the Court cited improving range lands in eastern Oregon, establishing leases and receiving rental moneys as examples of activities that the 1968 amendments were intended to let the Board fund with CSF principal. *Id.* at 381.

Reading Article VIII, sections 2(2) and 5 together, they authorize the Board to expend constitutional principal in the CSF to manage lands under its jurisdiction,

including Article VIII, section 2(1) forest lands. “Land management activities” under section 5(2) include “land improvements.” 46 Op Atty Gen 208, 211 (1989). A “land improvement” is “more than mere repairs or replacement; it requires the expenditure of labor and/or capital, and is intended to enhance the land’s value, beauty or utility or to adapt it for new or further purposes.” 46 Op Atty Gen 209, 212 (1989) *citing* BLACK’S LAW DICTIONARY 682 (5th ed 1979).). “Land management activities” also include day-to-day activities involved in managing lands. See, *Johnson* at 381-382

IV. The Board’s Authority to Pay *Operating Expenses* with CSF Constitutional Moneys

In 1988 the people approved a measure that amended Article VIII, section 2(2) to authorize an additional source of funding for the payment of expenses -- income derived from investing Fund principal. This amendment is the second of the two provisions in section 2(2) that addresses the Board’s authority to expend constitutional moneys to manage Article VIII, section 2(1) forest lands. It states:

The State Land Board may apply, as it considers appropriate, income derived from the investment of the Common School Fund to the *operating expenses* of the State Land Board in exercising its power and duties under subsection (2) of section 5 of this Article (emphasis added).

In 46 Op Atty Gen 267 (1989) we relied on the definition in BLACK’S LAW DICTIONARY to conclude that the ordinary meaning of “operating expenses” as used in section 2(2) is “[t]he cost of operating an income producing property, such as rent, wages, utilities, and similar day to day expenses, as well as taxes, insurance, and a reserve for depreciation.” 46 Op Atty Gen at 269. We continue to adhere to that definition.^{4/} “Operating expenses” are a component of the expenses incurred in the broader category of “land management activities,” a phrase used in *Johnson*, 292 Or 373, to explain that the 1968 amendments to Article VIII, sections 2(2) and 5(2) authorize the Board to expend CSF principal on land management activities such as improving range land, establishing leases and receiving rental moneys. We believe that the phrases “land management expenses” and “operating expenses” are not coterminous, but that instead “operating” expenses are one type of expense incurred in managing land. Therefore, we reaffirm the statement in 46 Op Atty Gen 267 that the cost of acquiring an “income producing property” is not an operating expense. 46 Op Atty Gen at 269. Similarly, making long-term improvements to land, while a land management activity, would not normally be understood as a day-to-day operating expense.

Article VIII, section 2(2), as amended in 1988, clearly authorizes the Board to expend income from the investment of constitutional principal on operating expenses incurred in the management of Article VIII, section 2(1) forest lands. However, the formal 1989 Attorney General opinion discussed above concludes that the intent behind the 1988 amendment “was to make fund income, not principal, the *sole* funding source for operating expenses.” 46 Op Atty Gen at 270 (emphasis added). The analysis in the 1989 opinion was not done using the framework for interpreting referred measures set out in *PGE*, 317 Or 606, because that case had not yet been decided. We believe that applying the *PGE* methodology would result in a different conclusion about the intended meaning of Article VIII, section 2(2) with regard to the Board’s payment of operating expenses. Therefore, we reconsider the conclusion that the Board may not expend CSF principal to pay operating expenses in carrying out Article VIII, section 5(2).

Article VIII, section 2(2) states that the Board “may expend [CSF] moneys * * * to carry out its powers and duties” under section 5(2) and that it “may apply, as it considers appropriate, income derived from the investment of the Common School Fund” to “operating expenses” incurred in implementing section 5(2). Both of these statements are *permissive*: the Board *may* expend CSF principal on land management activities and *may* expend, *as it considers appropriate*, investment income to pay for operating expenses. Prior to the 1988 amendments, the authority to expend “moneys in the CSF,” *i.e.*, Fund principal, was the *only* authorization by which the Board could pay “operating expenses.” From this analysis of text and context, we find it contrary to the permissive language used in Article VIII, section 2(2) as amended in 1988 to conclude that the people’s intent was not only to authorize the Board to pay operating expenses with investment income but also to rescind the Board’s authority to use CSF principal for that purpose.^{5/}

The history of the 1988 ballot measure provides support for this conclusion based on an analysis of the text and context of section 2(2). The explanatory statement appearing in the 1988 Voters’ Pamphlet states that the then-existing Constitution required the Board’s “operating expenses” be paid only from CSF principal. The statement goes on to explain that the ballot measure would permit the Board to “apply the income from the fund to meet operating expenses of the board in managing state lands.” In addition, the statement prepared by the Joint Legislative Committee states:

The Oregon Constitution currently requires that the operating costs of the State Land Board be paid from the Common School Fund principal. This reduces the amount of the Fund and reduces any interest that can be earned from investing the Fund.

* * * * *

A vote in favor of Ballot Measure 2 will * * * [*a*]*llow* the operating costs of the State Land Board to be paid from earnings and not the principal of the Common School Fund (emphasis added).

In sum, the information provided in the Voters' Pamphlet told the people that approving the ballot measure would permit the Board to use CSF investment income to pay for the same operating expenses which, at that time, could only be paid with CSF principal. Nothing in the Voters' Pamphlet, however, stated that the Board would hence be prohibited from expending CSF principal for that purpose.

In concluding that the people, by approving the 1988 amendments to Article VIII, section 2(2), intended to limit the Board to using investment income to pay operating expenses, 46 Op Atty Gen 267 relies on statements taken from a written analysis of the amendments prepared by DSL and presented to the legislature during its consideration of the referred measure. 46 Op Atty Gen at 270-271. To the extent that the DSL analysis is contrary to the information contained in Explanatory and Joint Legislative Committee statements in the 1988 Voters' Pamphlet, we believe that a court, following case law decided subsequent to 1989, would give little or no weight to DSL's analysis of the effect of the 1988 amendments.^{6/}

Based on analysis of the text, context and history of Article VIII, section 2(2) we conclude that the Board, exercising its discretion, may expend either CSF constitutional principal or income resulting from investment of that principal to pay the operating expenses of managing Article VIII, section 2(1) forest lands.^{7/}

V. Summary

Constitutionally dedicated principal in the Fund includes proceeds and revenue from the sources listed in Article VIII, section 2(1) deposited into the Fund and that portion of income derived from investment of these monies that is reinvested in the Fund. The Board may expend constitutionally dedicated principal in the Fund to pay for managing Article VIII, section 2(1) forest lands. Such management expenses encompass those for day-to-day operations as well as land improvements. In addition, when income is derived from investment of constitutionally dedicated principal, the Board may expend this income to pay the operating expenses of managing these same forest lands. Income, however, may not be used to pay for land improvements or other management expenses that do not qualify as "operating expenses."^{8/}

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^{1/} Article VIII, section 2(1), of the Oregon Constitution provides:

(1) The sources of the Common School Fund are:

(a) The proceeds of all lands granted to this state for educational purposes, except the lands granted to aid in the establishment of institutions of

higher education under the Acts of February 14, 1859 (11 Stat. 383) and July 2, 1862 (12 Stat. 503).

(b) All the moneys and clear proceeds of all property which may accrue to the state by escheat.

(c) The proceeds of all gifts, devises and bequests, made by any person to the state for common school purposes.

(d) The proceeds of all property granted to the state, when the purposes of such grant shall not be stated.

(e) The proceeds of the five hundred thousand acres of land to which this state is entitled under the Act of September 4, 1841 (5 Stat. 455).

(f) The five percent of the net proceeds of the sales of public lands to which this state becomes entitled on her admission into the union.

(g) After providing for the cost of administration and any refunds or credits authorized by law, the proceeds from any tax or excise levied on, with respect to or measured by the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas and the proceeds from any tax or excise levied on the ownership of oil or natural gas. However, the rate of such taxes shall not be greater than six percent of the market value of all oil and natural gas produced or salvaged from the earth or waters of this state as and when owned or produced. This paragraph does not include proceeds from any tax or excise as described in section 3, Article IX of this Constitution.

^{2/} As originally adopted by the constitutional convention of 1857, Article VIII, section 2 identified the sources of the CSF to include “proceeds” from land and stated that “the interest of [the constitutional principal] together with all other revenues derived from the school lands mentioned in this section shall be exclusively applied to the support * * * of common schools.” It appears that the framers likely intended to distinguish between the moneys derived from the sale of lands comprising sources of the Fund (proceeds) and moneys made from using and managing those lands, *e.g.*, through leases (revenue). The current version of Article VIII, section 2, no longer distinguishes between the locus of proceeds and revenue resulting directly from the constitutional sources of the CSF; each is to be treated as part of the principal of the Fund.

^{3/} Article VIII, section 5(1) gives the Board responsibility for “the disposition and management of *lands described in section 2 of this Article*, and other lands owned by this state that are placed under their [the Board members’] jurisdiction by law” (emphasis added).

^{4/} WEBSTER’S definition is similar to that offered by Black’s except that it is specific to business instead of real property: “arising out of or concerned with the current operations of a concern engaged in transportation or manufacturing as distinct from its financial transactions and its permanent improvements.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1581 (unabridged ed 1993).

^{5/} 46 Op Atty Gen 267 supports its conclusion that the amendments to Article VIII, section 2(2) prohibit the Board from expending CSF principal on operating expenses by pointing to statutory amendments that took effect when the people approved the amendments to section 2(2). 46 Op Atty Gen at 269-270. However, nothing in the amendments made to ORS 273.115 prohibit the Board from continuing to use CSF principal to pay operating expenses. The statute as amended provides for DSL to use “so much of the Common School Fund as is necessary for * * * [i]mprovement, operation, and maintenance of property* * *.” 46 Op Atty Gen at 270.

^{6/} See *Shilo Inn v. Multnomah County*, 333 Or 101, 129-130, 36 P3d 954 (2001) (“Contrary to *amici*’s suggestion, * * * the history that we consider does not include early drafts of the legislative bill that later was referred to the people, nor does it include statements made by legislators in hearings on that matter. Those materials may be indicative of the legislature’s intent in crafting Measure 50 but, as we stated most recently in *Stranahan*, 331 Or at 57, “it is the *people*’s understanding and intended meaning of the provision in question — as to which the text and context are the most important clue — that is critical to our analysis” (emphasis added).

^{7/} To the extent that 46 Op Atty Gen 267 (1989) states that the Board may not expend Fund principal to pay operating expenses, it is hereby modified.

^{8/} In recognizing this authority that Article VIII, section 2(2) provides to the Board, we caution that the Board’s expenditure of constitutionally dedicated moneys in the CSF is governed and limited by trust principles. The ways in which the Board’s role as a trustee of these moneys affects its expenditure decisions are addressed in several Attorney General Opinions. See 43 Op Atty Gen 140 (1983), 46 Op Atty Gen 208 (1989), and 46 Op Atty Gen 468 (1992).