UPDATE ON COEDUCATION LEGAL ISSUES Number Six, September 2, 2012 From TDS Chair, Dave Hitz

Subject: Legal Update on Coeducation at Deep Springs

The legal process for taking Deep Springs coed has gotten complicated, and people have raised questions and concerns. David Neidorf's note addressed many of them, but I thought it would also be useful to give a high-level overview of the current legal situation.

First of all, I'm happy to report that we have been able to speed things up with the cooperation of the Judge and the opposition. Both sides have agreed with the judge to have a hearing in late October. We expect to have an initial ruling by December, and possibly as soon as November. The result should determine whether Deep Springs can go coed next year.

The details are painfully intricate, and I'm struggling with how much to explain. I want to go deep enough to help people understand what's happening, but I don't want to reargue the case or restate dozens of pages of court filings. (People who are *really* curious can read the legal documents, which are online at deepsprings.edu. Go to "News and Events" and then "Coeducation".)

Trusts and Corporations

To understand the legal process, one must understand that Deep Springs is partly a trust and partly a corporation. In 1923, Nunn created the *L.L. Nunn Trust* to run the college. In 1967 the trustees created the *Deep Springs Corporation*, in part because it is easier to make tax-free donations to a non-profit corporation than to a trust. At first the corporation was used mostly for fundraising, but in 1995 the trustees transferred all college operations to the corporation. Since then, the trust has been mostly dormant. It still owns some land in the valley, but the corporation runs the college. Finally, there is Jim Withrow's bequest to the college. It was a gift to the corporation, but with language taken from the trust. I won't say much about the Withrow fund because nobody argues that it affects whether the college can go coed. The question is whether we can keep the Withrow money after going coed.

Today, most of Deep Spring's assets are in the corporation. This is because Deep Springs, operating as the trust, almost went bankrupt in the 1990s. The physical plant was badly decayed and the endowment was dangerously low. Some predicted that the college would be gone within 10 years. There was a coed debate raging at the time, but the trustees called an uneasy truce and focused on saving the college. Trustees on both sides of coeducation gave *unrestricted* gifts to the college. They didn't want to tie the hands of future trustees. Since then, we have rebuilt the college's buildings and endowment, and we've done it with donations that had no coed strings attached. All of these gifts were to the corporation.

To put it in perspective, Deep Spring's total assets are about \$25 million. Of that, about \$17 million are investment assets. The rest is land, buildings, ranch equipment, and the like. The trust has assets worth about \$1.5 million, and the Withrow Fund about \$1.2 million, for a total of \$2.7

million in potentially restricted assets – about 10% of the college's total assets. At this point, Deep Springs is mostly a corporation. We don't want to lose the potentially restricted assets, but we can operate without them.

It's also important to understand a bit about the differences between trust law and corporate law.

With trust law, you can ask the court to let you do something. In essence, our initial petition asked for permission to accept women. If there is no opposition, you can get an answer pretty quickly. But if there *is* opposition, with hearings and appeals, it can take many years to get an answer.

Corporate law works differently, including for non-profits like Deep Springs. There is no way to ask for permission. Instead, the corporation moves forward with its plans, and if someone objects they may request an injunction. Hearings for injunctions usually happen quickly because the corporation is allowed to move forward until an injunction is granted. It does sound strange, but that's how the system works.

Enough background. Let's examine the legal issues.

Summary of Current Legal Status

At this point, there are three different legal paths by which Deep Springs may become coeducational. I'll describe them one at a time. (Let me apologize in advance for oversimplifying the arguments. As I said above, my goal is just to give people a basic sense of what's happening.)

- (1) The court may rule that Nunn's deed of trust gives trustees the authority to accept women if they decide that's best for the college. In the legal documents, this is called *interpretation*, because the judge interprets what the deed of trust allows.
 - The trustees (those in the majority, I mean) argue that the deed grants very broad powers to operate the college as the trustees in "the exercise of their best judgment may determine." The opposition (the dissenting trustees) argues that the powers may be broad, but not *that* broad.
- (2) The court may modify the trust language to allow women. Courts can do this if they determine that the world has changed in ways that a trust's creator did not anticipate. This is called *modification* because the judge modifies the trust. This point only matters if the judge rules against *interpretation*. If the deed already lets the college accept women, then there is no need to modify it.
 - The trustees argue that in today's world the college can best achieve its mission of preparing leaders for lives of service by including women along with men. The opposition argues that the reference to "young men" in the deed should outweigh the trustees' interpretation of the mission.

(3) The court may rule that Deep Springs Corporation can act independently from the L.L. Nunn trust. The corporation can take Deep Springs coed even if the trust would not be allowed to. To bring this question before the court, the opposition must bring a motion and convince the judge to *join* the corporation into the Deep Springs petition to interpret or modify the trust. As a result, this is called the *joinder* action in the legal documents.

The trustees argue that the trust restrictions do not apply to the corporation, although we do acknowledge that the corporation may be unable to spend certain funds. The opposition argues that the corporation is subject to the trust restrictions.

These are independent legal arguments, so if we win *any* of them, then Deep Springs is allowed to go coed. To block coeducation, the opposition must win all three. In addition, there are other legal options for going coed that we have not yet raised with the court.

In the September hearing, the judge will rule on *interpretation* and *joinder* – points (1) and (3). It turns out that modifying the trust – point (2)– is more complex, so both sides have agreed to postpone it. This approach makes good sense. If we win on *interpretation*, then *modification* doesn't matter.

We expect an initial ruling by December, but that isn't necessarily the final answer. If the losing side appeals, that would probably take at least a year or two. If Deep Springs loses on *interpretation*, then we will need to schedule an additional hearing to address *modification*. And of course, that ruling is also subject to appeal. You can see how the years add up. (As I said, Deep Springs may go coed if we win any of these three arguments. However, to spend Trust and Withrow assets on coeducation, we must win one of the first two. So if we win on *joinder* (3) but lose on *interpretation*(1), we will still move on to *modification*(2).)

The trustees have decided that rather than waiting for all appeals to finish, it is best to move forward. We had two "no" votes for this decision, same as for the initial decision. We believe that we have a strong case, and we have decided to accept the risk of having to undo coeducation.

The opposition has filed for an injunction, which means that the judge will get to decide – in his ruling after the October hearing – whether Deep Springs is allowed to go coed in 2013.

More Details

This section is a catch all for additional issues. I want to be transparent, but I recognize that some people may have reached information overload. Feel free to skip to the next (and last) section if you like.

The Ethics of Going Coed Before a Final Ruling

It is possible that Deep Springs will become coeducational before we have a final ruling. (Whether that happens depends largely on whether we win any of the three points in the upcoming hearing, and on whether the loser decides to appeal.)

The biggest moral risk I see is that we accept a woman, she turns down an acceptance from another college, and then an injunction comes in. She'd be stuck without a school. It would be awful for us to put a woman in that position. Fortunately, the timing of the upcoming hearing should prevent that. We accept students in April, and we hope to have a ruling on interpretation and the injunction by December, at the latest.

A smaller moral risk is that an injunction might come in after women apply, but before we accept them. Their work writing the application would be wasted. Then again, many students apply to colleges and don't get in. As long as we are forthright about the risk, I see some potential for wasted effort, but little moral hazard. Applications are due in November, so with an early ruling we might mitigate even this risk.

Selling Trust Land to the Corporation

One detail of operating the college without trust assets is that the trust owns real estate in the valley. None of the upper ranch is on trust land, but education occurs everywhere at Deep Springs, and we want to be squeaky clean. Our solution is to sell the trust property to the corporation at fair market value. An independent appraiser valued the land, water rights, and grazing rights at \$915 thousand. Our audited financials show an additional \$441 thousand in property improvements. We rounded up to \$1.5 million.

We can do this because Nunn's deed gives the trustees complete power to manage the trust's assets. Nunn wrote that the trustees may sell trust property "without the intervention of any court or any limitation or restriction on the trustees." The only limitation is that the proceeds need to be used for the Trust purposes. The Trustees plan to hold those proceeds in the Trust until the Court determines how they can properly be used.

The Hitz Pledge

In our deliberations, I wanted the trustees to focus on how best to fulfill the purpose of Deep Springs, rather than worrying about what we could afford. That's why I pledged "to underwrite the incremental costs of going coed so as to make this decision financially neutral for the college." This quote is from my first message to the community on coeducation. That pledge still stands, even if it means covering the loss of the trust assets and Withrow funds.

As I said at the time, I was concerned about making the pledge because we have a long history of rejecting gifts with coed strings attached. I didn't want people to think I was trying to improperly influence the outcome. So I made a second pledge as well, "to love, support and nurture Deep Springs, whichever way the coed decision turns out." At that time, I hadn't yet made up my mind on coeducation, but I knew for sure that I would keep supporting Deep Springs even if I was on the losing side. Since then, all of the trustees, as well as many alumni and friends, have made

similar commitments.

Personal Reflections

I suspect that some are surprised that there are so many different arguments that could allow Deep Springs to become coeducational. They thought that we would make our case to the court, and whatever the judge decided – that would be the outcome.

Let me share my personal view. I believe that solving legal problems is like climbing a mountain. If one path to the top is blocked, you seek another. You must always obey the law, but nothing says you can't try a new strategy if the first one doesn't work or is too slow.

When we started the coed deliberation process, my goal was to be as open-minded as possible. If we had a fair and inclusive process, then I was prepared to accept the outcome no matter what it was. I feel differently now that the trustees have decided. We voted that Deep Springs can best fulfill its mission by accepting both women and men. Ten to two is an enormous majority. Now I believe that we should fight for that decision. We should act legally, and we should act ethically, but we should keep fighting until we succeed or run out of options.

We can all have our own opinions about these legal issues. I certainly have mine! But in the end, the court decides. I think that is how it should be.

Dave Hitz DS'80 Chairman, Trustees of Deep Springs