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L. L. Nunn Trust, acting on behalf of the Board of Trustees

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF INYO
14

15 In re the Matter of
16
17 L. L. Nunn Trust for the benefit of
Deep Springs College under the Deed
of Trust dated November 5, 1923

18
19
20
21
22 Deceased.

CASE No. SICVPB1253232
**DECLARATION OF L. JACKSON
NEWELL IN SUPPORT OF
PETITIONER'S OPPOSITION TO:

RESPONDENTS' MOTION FOR A
PRELIMINARY INJUNCTION; AND

RESPONDENTS' MOTION TO JOIN
DEEP SPRINGS CORPORATION AS A
PARTY**

[Probate Code §§ 17200 and 15409]

23 **DATE: June 22, 2012**
24 **TIME: 9:00 A.M.**
25 **DEPT: 1**
JUDGE: Dean T. Stout

26 **Action Filed: February 6, 2012**
27
28

1 I, L. JACKSON NEWELL, declare as follows:

2 1. I am a senior professor of the history and administration of higher education
3 in the United States. My formal preparation included an M.A. degree in American History from
4 Duke University, a Ph.D. in the history and administration of American colleges and universities
5 from The Ohio State University, and a post-doctoral fellowship for two years with the University
6 Council for Educational Administration (an association of leading American and Canadian
7 universities). In addition to serving twenty-five years as professor of educational leadership at the
8 University of Utah, I served there as dean of Liberal Education for sixteen years, and was awarded
9 the distinguished faculty rank of University Professor in 1991. I served as president of Deep
10 Springs College from 1995 to 2004, and then returned to the University of Utah where I continue
11 to teach a year-long course designed for the top twenty-five first-year students in the Honors
12 College. This experience deepens my understanding of the differences between a coeducational
13 cohort of this type and an all-male cohort.

14 2. I attended Deep Springs College as a student from 1956 to 1959.

15 3. I taught history and economics at Deep Springs College from 1965 to 1967.

16 4. I served on the Deep Springs College Board of Trustees from 1987 to 1994,
17 and as its elected Chair for the final year of that period.

18 5. I served as President of Deep Springs College from July 1995 through June
19 2004. While I was president I also taught two courses almost every year: "The History and
20 Philosophy of Higher Education" and "Personal Values and Social Ethics."

21 6. I am finishing, this month, a seven year project to write a biography of L. L.
22 Nunn and history of Deep Springs College, under contract with the University of Utah Press.

23 7. By 1994, I had been a Trustee of Deep Springs for seven years and was
24 serving as chair of the board. The college teetered on the abyss, having just received Trustee
25 Charles Christenson's January 20, 1994 "Doomsday is Sooner than you Think" memorandum
26 forecasting bankruptcy by the end of the year 2000. A copy of that Memorandum is attached as
27 Exhibit A. Christenson was then a senior professor at the Harvard Business School. To turn the
28 situation around we knew we needed to raise a minimum of \$10 million very quickly in order to

1 provide emergency operating funds, quadruple the endowment (to at least \$5,000,000) and rebuild
2 the dilapidated and unsafe physical plant. Our most ambitious fund raising effort before that time,
3 the 75th Anniversary Campaign that ended in 1992, had netted slightly more than its target of
4 \$750,000 when it ended in 1992. Our minimum goal was thirteen-times that amount. Skepticism
5 abounded.

6 8. Two factors loomed as barriers to any effort we might make: The Student
7 Body had become notoriously surly and the coeducation issue was dividing alumni, students,
8 faculty, staff, and trustees into bitterly warring factions. Trust within and among these groups had
9 plummeted almost to absolute zero. The deciding vote on coeducation came at the autumn 1994
10 trustees meeting. Amidst bitter cries of betrayal on all sides, the tally was four in favor, four
11 against. The tie vote came as a result of the withdrawal of the newest member of the board who
12 was so offended by the bitterness and profane language of the debate leading up to the vote that
13 she chose to recuse herself and resigned as a trustee. Even though a super majority had been
14 agreed upon by all parties in advance (as necessary to assure effective implementation of the
15 change), the deadlock left no one with even a moral victory for solace.

16 9. My second and final term as a trustee ended at the conclusion of that
17 meeting. The vice-chair/chair-elect, Richard Cornelison (DS'43), and I held opposite positions on
18 coeducation. He felt passionately about the single-sex policy going back to L.L. Nunn, and I
19 entertained equally strong feelings in favor of coeducation based on Nunn's emphasis on
20 preparing "trustees of the nation" as the mission of the college. The afternoon before the final
21 session at which I would pass the gavel to Cornelison, the two of us took a long hike on
22 Bitterbrush Flat across the valley from the ranch. Dick and I forged what we called our
23 "clamshell" strategy, by which we would appeal to our respective constituencies. I would give a
24 short speech appealing to those trustees and community members who favored coeducation to set
25 their emotions aside and rally together with the single-sex advocates in a Herculean effort to save
26 the college. That evening I did just that and then handed Cornelison the gavel. He responded in
27 kind, imploring the single-sex half of the board and community to forgive and forget in the interest
28 of raising \$10 million together. Our mutual respect helped carry our twin messages and we both

1 hoped for the best when we turned to planning the huge campaign. In a little over six months, the
2 board had selected me to lead the renaissance effort as the new president of the college.
3 Cornelison and I were destined to work creatively together as chair and president for the next six
4 years in jointly leading the effort to save Deep Springs.

5 10. By autumn 1995, we had assembled an able team of alumni, trustees and
6 other volunteers to launch the Campaign for Deep Springs. Our goal was to raise \$10 million in
7 five years. Our professional fund raising advisor, Chuck Thompson, had conducted a feasibility
8 study of alumni and reported that with a concerted effort we could probably raise \$5 million, but
9 \$10 million was on the outside edge of reality. The trustees concluded, however, that anything less
10 that the latter figure would fall short of saving the institution. We had no choice but to shoot for
11 the latter goal. Having made that decision, Trustee Jim Olin (DS'38), a former vice president of
12 General Electric and recently retired Member of Congress from Virginia, addressed the board and
13 Deep Springs community at a crucial moment when we unveiled the campaign. A bulldog in
14 defending Deep Springs' all-male admissions policy, he began to speak: "Phyllis and I are
15 prepared to commit \$500,000 to this campaign tonight, but we do so with one condition." We all
16 thought we knew what was next. But Jim continued: "This board must first commit itself to one
17 principle: that it will not accept a single dollar from any donor who wishes to dictate to the board
18 what its policy should be on coeducation or any other issue for which it bears fiduciary
19 responsibility. Even if they wished to do so," he continued, "no board has the power to make such
20 a pledge because it has no authority to control what future trustees may decide is in the best
21 interest of Deep Springs." The hall stood silent momentarily, then burst into applause. The board
22 agreed immediately to Olin's principle, setting a lofty tone for the campaign. I have never
23 witnessed an example of moral leadership the equal of that one.

24 11. As the Campaign for Deep Springs unfolded, "Olin's principle" became our
25 mantra and those of us who solicited all major donors, Cornelison, Olin and myself, told every
26 prospect about our commitment to accept only gifts that came with no strings attached regarding
27 coeducation. Olin's idea was the heart and spirit of the campaign and it enabled us to reach our
28 \$10 million goal two years ahead of schedule. At the end of the prescribed five years we had gifts

1 and pledges totaling \$18.2 million, nearly half of which the trustees invested in rebuilding the
2 physical plant from underground and overhead utilities to nearly every building on the campus
3 and ranch. So successful was our non-partisan approach that left the coeducation question in the
4 hands of future trustees that I recall only one modest gift we lost because the donor insisted on a
5 promise regarding coeducation. We succeeded partly because we had a chair that had opposed
6 coeducation and a president who had championed it. Together we generated a level of trust that
7 opened checkbooks by inspiring confidence that future trustees would dispatch their fiduciary
8 responsibilities in the best interest of the college. No donor could have reasonably believed that
9 his or her gift came with any assurance that a future board was bound either to oppose or to brace
10 coeducation. Such an expectation would have flown in the face of the very spirit that made the
11 campaign successful.

12 12. A clear case in point involved a million dollar gift to build a modern new
13 student residence. Robert (DS'35) and Mary Sproull tendered the offer. He vigorously opposed
14 coeducation and, as the former president of the University of Rochester, he knew campaign
15 principles and how to get his way. I was not privy to the conversation, but Jim Olin (who was our
16 major gifts coordinator, now deceased) told me that he took the Sproulls to dinner and explained
17 the importance of following his own example and honoring the trustee's pledge to place no
18 restrictions on future boards. Within weeks, the Sproull's gift came without strings, except for
19 establishing the principle that a portion of their gift (and they hoped all future gifts for building
20 projects) be set aside in a permanent endowment for the building maintenance.

21 13. Another large gift prospect evolved into a low-interest loan from Deep
22 Springs' sister institution, Telluride Association. Strongly critical of Deep Springs for not
23 embracing coeducation, its members still joined the Trustees of Deep Springs in establishing an
24 L.L. Nunn, L.L.C by which the Deep Springs Corporation became the majority partner in a
25 venture based on securing a \$1.8 million loan to rebuild the flagship building (administration,
26 library, classrooms and meeting hall) with a property of greater value at the campus. With interest
27 pegged at the CPI each year, Telluride reserved the right to require repayment of the principle and
28 interest if, after twenty years (that is, by 2019), the college had not converted to

1 coeducation. Confident that they would be in a position to repay the loan when it came due
2 (which they now are), the Board of Directors of the Corporation entered the LLC. With this large
3 part of our funding secured, we proceeded to gain additional gifts to rebuild the Main Building
4 from the ground up. A portion of the Corporation endowment (referred to as the Simon and
5 Eunice Whitney Fund) was raised specifically to provide additional collateral to the Telluride
6 Association to repay the loan. That portion of the Corporation's funds is now held at a separate
7 brokerage and pledged to the Telluride Association. The college has never wished to let anyone or
8 any other party dictate its policies--one reason it has continued to eschew Federal aid.

9 14. Finally, comes the matter of the Trust Deed versus the Deep Springs
10 Corporation. To streamline its affairs, specifically board member succession and fund raising, the
11 Trustees formed the Corporation in the 1960s. In the midst of the fiscal crisis of the mid-1990s,
12 however, (and effective July 1, 1995) the Trustees of the Trust transferred the liquid assets of the
13 Trust (excluding the real property) and all responsibilities for governance and fundraising for the
14 college into the Corporation. They took this action to accommodate their major new
15 responsibilities for the Campaign for Deep Springs and the ambitious building program. Corporate
16 directors then amended the Corporation bylaws to increase board membership by nearly half (to
17 13 members, including a second student representative). With that change approved, we moved
18 aggressively to recruit vitally needed new board members who could be particularly helpful in
19 fund raising.

20 15. Because alumni were still hypersensitive about everything when we
21 launched the Campaign for Deep Springs, board chair Cornelison and I agreed (with the full
22 board's support) that we would accept checks made out either to the Trustees of Deep Springs or
23 to Deep Springs College, whichever a donor preferred. We made it clear, however, that all
24 donations went to the Corporation account. Some alumni may have been confused as to the
25 difference between the governing entities, but no one made an issue of the matter. Every member
26 of the board, however, had to have been fully cognizant of the difference between the two
27 organizations because of the fanfare that surrounded our convening of the officers of the
28 Corporation at the end of every fall Trustees meeting and, after July 1, 1995, convening the

1 Trustees of the Trust at each autumn Corporation meeting. These formal sessions were initially
2 necessary to meet legal requirements associated with the Corporation. Following the 1998
3 creation of the L. L. Nunn LLC, the Trust had very little if any activity, and there is no legal
4 requirement for annual Trust meetings so the annual tradition of Trust meetings was simply a
5 traditional formality. Toward the end of my term as President even those ceased as the Board saw
6 no utility in them. In the meantime, writing checks to "TDS" was a tradition at Deep Springs
7 going all the way back to the student experience of every alumnus since the days of L.L. Nunn. As
8 an alumnus myself, keenly aware of Nunnian traditions, I perpetuated that practice personally and
9 as president. There was absolutely nothing clandestine or cagy about this nod to nostalgia in our
10 fund raising effort.

11 16. The interplay between L.L. Nunn's thought and traditions with
12 contemporary thought and board authority has always been an important matter. We have tended
13 to hallow our charismatic founder's words and his way of doing things. Significantly, however, his
14 most important educational principle, which he expressed clearly and in multiple ways, was that
15 those educated by him--the students and alumni of Deep Springs College and Telluride
16 Association--should study every practical problem, social issue and institutional policy as open-
17 mindedly as possible, arrive at their own conclusions (not necessarily his own), and then act with
18 the courage of their convictions. This Nunnian principle has been tested repeatedly by trustees and
19 presidents of lesser vision or courage throughout nearly ten decades of the college's history
20 (having survived serious bouts with racism, McCarthyism and corruption), but it continues to
21 anchor the institution. This long-running battle to defend freedom of thought and action is the saga
22 of Deep Springs College.

23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct and that this declaration was executed on October 15, 2012, at Salt
25 Lake City, Utah.

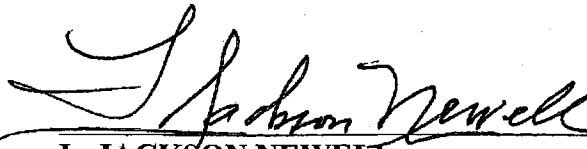
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27
28

L. JACKSON NEWELL

Exhibit A

MEMORANDUM
DOOMSDAY IS CLOSER THAN YOU THINK

MEMORANDUM

January 20, 1994

TO: Trustees of Deep Springs
and other attending the Salt Lake City meeting

FROM: Chuck Christenson

SUBJECT: Doomsday is closer than you think

You may recall that mention was made at the October meeting of the Trustees that the Financial Accounting Standards Board (FASB) has promulgated new standards for the form of financial statements of not-for-profit organizations. FASB requires that a distinction be made between three types of what it calls "net assets" (earlier terminology, which has been used in the Deep Springs statements, is "fund balances," and an alternative terminology permitted by FASB, which is closer to business terminology, is "equity").

The three types of net assets are (1) "permanently restricted", (2) "temporarily restricted", and (3) "unrestricted." In terms of our own situation, "permanently restricted" net assets consist primarily of funds designated by the donor as "endowment." Almost all of our permanently restricted net assets, in this sense, are comprised of the three Withrow funds: the Withrow Chair in Government Fund, the Withrow Lectureship in Social Sciences Fund, and the Withrow General Fund.

Last summer I started investigating what would be involved in adapting the Deep Springs financial statements to the new FASB requirements. My led me to suspect that the balances in the three Withrow funds that have been reported in our financial statements for the past several years have been understated. I will now telegraph the punch line of this story: If the balances in the Withrow funds have been understated, something else must have been overstated. That "something else" is the balance of quasi-endowment, which is the amount of our total endowment which has been so designated by action of the Trustees. Since the designation as "endowment" has been made by the Trustees and not by donors, the Trustees are always free to change the designation. Therefore, quasi-endowment is the part of the total endowment the Trustees are free to invade to finance operating deficits. To invoke the subject of this memorandum, the size of the quasi-endowment determines how long we can continue to operate at a deficit before we run out of money.

Based on my suspicion, I asked Don Porter to prepare an analysis of activity in the two Withrow restricted funds (Chair and Lectureship) since the settlement of Withrow's estate. This analysis was provided to the Planning, Finance and Operations Committee at its October 1993

meeting and was, I believe, included in the report of that committee which you all received. This analysis showed that the two funds had been (1) augmented by 5% of a three-year moving average of their fund balances; and (2) decremented by the amount actually spent for the purposes specified in Withrow's will.

This treatment, particularly (1), was incorrect. The Withrow funds *should* have been augmented by a pro rata share of the *total return* on our endowment investments, including both income and capital gains, as if the Withrow funds had been separately invested in the same asset mix as the rest of our endowment instead of being pooled with them. Total return in recent years has been much more than 5%. Therefore, the Withrow funds have indeed been augmented by less than they should have been, and the difference has been used to augment quasi-endowment.

The attached spreadsheet is my attempt to reconstruct the history of our endowment funds as it should have been recorded. There's a column for each major component of our endowment (except for the Scandling Fund, which is separately invested). Following is a brief explanation of the rows:

Balance, 6/30/yy. For 1989, taken from the audited financial statements. For subsequent years, calculated by adding or subtracting the changes described below.

Share of income. The "Total" column is the amount of Common Fund income reported in the financial statements. This is allocated to the five funds in proportion to the opening balances.

Share of gain (loss). The "Total" column is the gain (loss) on Common Fund investments reported in the financial statements. This is allocated to the five funds in proportion to the opening balances.

Less return transferred. This is the amount considered available for expenditure, calculated at 5% of a three-year moving average of the fund balance.

Less operating loss. This is the deficit reported in the "Statement of Revenues, Expenditures, and Other Changes." It is charged against Quasi-Endowment.

Balance adjustment. This is a "plug" to make the total of the five funds equal to the total reported in the financial statements. It's charged or credited to quasi-endowment, which is the "residual" fund.

The bottom line of the spreadsheet shows the fund balances as reported in our last audited financial statements. Note that quasi-endowment has been reduced by approximately \$715,000 with the amount distributed to the other four accounts.

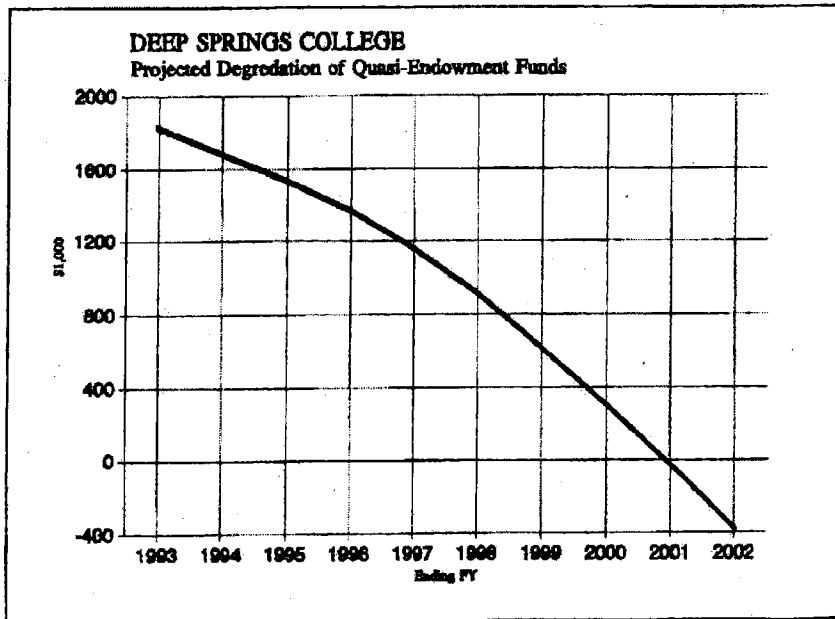
How did this happen? I'm not sure. I think that there was a miscommunication between me and Don Porter when the procedures for dealing with the endowment funds on a pooled basis were established, but I haven't been able to locate our correspondence on the subject.

WITHROW.XLS

	Withrow Chair	Withrow Lecture	Withrow General	Undes Endow	Quasi Endow	Total
Balance, 6/30/89	630,000	313,110	1,029,568	350,008	1,960,797	4,283,483
Share of income	28,061	13,946	45,858	15,590	87,336	190,792
Share of gain (loss)	25,007	12,429	40,868	13,893	77,833	170,030
Less return transferred	-7,858	-2,445	-51,478	-17,500	-131,206	-210,488
Less operating loss					-299,995	-299,995
Balance adjustment					-714	-714
Balance, 6/30/90	675,210	337,040	1,064,816	361,991	1,694,051	4,133,108
Share of income	32,857	16,401	51,815	17,615	82,435	201,122
Share of gain (loss)	17,508	8,740	27,611	9,387	43,927	107,173
Less return transferred	-32,630	-16,254	-52,360	-17,800	-91,371	-210,415
Less operating loss					-313,615	-313,615
Balance adjustment					-19,978	-19,978
Balance, 6/30/91	692,945	345,927	1,091,889	371,192	1,395,448	3,897,395
Share of income	26,194	13,077	41,275	14,032	52,750	147,327
Share of gain (loss)	84,640	42,253	133,368	45,339	170,448	476,049
Less return transferred	-33,303	-16,601	-53,104	-18,330	-77,237	-198,575
Less operating loss					-211,324	-211,324
Balance adjustment					15,296	15,296
Balance, 6/30/92	770,477	384,655	1,213,421	412,234	1,345,381	4,126,168
Share of income	24,234	12,098	38,165	12,966	42,316	129,779
Share of gain (loss)	96,931	48,392	152,655	51,861	169,257	519,096
Less return transferred	-35,644	-17,794	-56,169	-19,586	-68,521	-197,713
Less operating loss					-210,045	-210,045
Balance adjustment					7,468	7,468
Balance, 6/30/93	855,997	427,352	1,348,074	457,475	1,285,855	4,374,753
Balance as reported, 6/30/93	664,821	317,073	1,051,568	350,058	2,001,233	4,374,753

FOR DISCUSSION

LONG RANGE PLANNING DOCUMENT 1



The graph above is based on the following premises:

1. No increase in the current level of annual giving.
2. Modest market increases (2.5% book value per year)
3. Expenditure increases as as presented in the provisional budget approved by the trustees in October.

Actual degradation may occur at a faster or slower rate depending on a many variables. What I think this graph does show is the urgency of some change in course.

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF FRESNO**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Fresno, State of California. My business address is 5260 North Palm
Avenue, Fourth Floor, Fresno, CA 93704.

5 On October 15, 2012, I served the original of the following document(s) described as
6 **DECLARATION OF L. JACKSON NEWELL IN SUPPORT OF PETITIONER'S**
7 **OPPOSITION TO: RESPONDENTS' MOTION FOR A PRELIMINARY INJUNCTION;**
8 **AND RESPONDENTS' MOTION TO JOIN DEEP SPRINGS CORPORATION AS A**
9 **PARTY** on the interested parties in this action as follows:


10 JOE LIBURT
11 ORRICK HERRINGTON & SUTCLIFFE LLP
12 1000 MARSH ROAD
13 MENLO PARK CA 94025-1015

14 TANIA M. IBANEZ
15 SUPERVISING DEPUTY ATTORNEY GENERAL
16 CHARITABLE TRUSTS SECTION
17 300 S. SPRING STREET, SUITE 1702
18 LOS ANGELES, CA 90013

19 **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or
20 package provided by the overnight service carrier and addressed to the persons at the addresses
21 listed in the Service List. I placed the envelope or package for collection and overnight delivery at
22 an office or a regularly utilized drop box of the overnight service carrier or delivered such
23 document(s) to a courier or driver authorized by the overnight service carrier to receive
24 documents.

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct.

27 Executed on October 15, 2012, at Fresno, California.

28 
Tina L. Webb